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Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio: States' Rights v. The First Amendment

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ZAUDERER V. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO: STATES' RIGHTS V. THE FIRST AMENDMENT

Attorney Phillip Q. Zauderer ran the following newspaper advertisement.

DID YOU USE THIS IUD?

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

An eye catching drawing of the Dalkon Shield Intrauterine Device (IUD) formed the left border of the advertisement, which concluded with a number to call for free information, and the name and address of Zauderer's firm.[1]

This advertisement attracted over two hundred inquiries and led to the filing of one hundred and six lawsuits. Subsequently, the Disciplinary Counsel of the Supreme Court of Ohio (Disciplinary Counsel) filed a complaint against Zauderer alleging several violations of the Ohio Disciplinary Rules. The Supreme Court of Ohio, which ultimately accepted the recommendation of the Board of Commissioners on Grievances and Discipline,[2] publicly reprimanded Zauderer for violating five disciplinary rules,[3] and he appealed to the United States Supreme Court. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S.Ct. 2265 (1985).

Justice White, writing for the majority, framed the major issues as whether the State could discipline an attorney for violating any of the

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1. Appellant's Brief, Fiche 70, Docket No. 83-2166, 1985 term.

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

3. Zauderer v. Supreme Court of Ohio, 105 S. Ct. 2265, 2284 (1985).

"three separate forms of regulation Ohio has imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingency fees."[4]

This note will examine the holdings of *Zauderer* in light of other United States Supreme Court commercial speech decisions,[5] define the remaining authority of the states to regulate attorney advertising, and identify the resulting parameters of the attorney's right to advertise.

Background

The American Bar Association adopted a formal ban on attorney advertising and solicitation for the first time in 1908. The justifications for the prohibition were two-fold: preventing the breakdown of the family unit by banning divorce solicitation, and the absence of a real need for such advertising at a time when one's reputation and family ties were known to all in the community.[6]

In the 1942 case of *Valentine v. Chrestensen*,[7] the Supreme Court first held that commercial speech was not protected by the First Amendment. However, a gradual weakening of this holding followed, and in 1976, the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, concluded that commercial speech does not lack all protection of the First Amendment.[8] The Supreme Court first addressed the issue of attorney advertising as commercial speech a year later in *Bates v. State Bar of Arizona*,[9] where it stated that the ban on advertising by attorneys "originated as a rule of etiquette and not as a rule of ethics."[10]

Bates had advertised routine services offered by his legal clinic at "very reasonable fees."[11] The Court rejected all arguments supporting a complete ban of attorney advertising but said that states are permitted to regulate the content of attorney advertising which is false, deceptive, misleading, or which concerns an illegal transaction, and are permitted to place reasonable restrictions on the time, place, and manner of these advertisements.[12]

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4. Id. at 2275.

5. The United States Supreme Court first characterized attorney advertising as commercial speech in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691 (1977).

6. L. Andrews, Birth of a Salesman: Lawyer Advertising and Solicitation 1 (1980). Abraham Lincoln advertised his law firm in the Sangamo Journal in 1838. Id.

7. Valentine v. Chrestensen, 316 U.S. 52, 62 S. Ct. 920 (1942).

8. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817 (1976).

9. Bates v. State Bar of Ariz., 433 U.S. 350, 97 S. Ct. 2691 (1977).

10. Id. at 71, 97 S. Ct. at 2702.

11. Id. at 385, 97 S. Ct. at 2710.

12. Id. at 383-84, 97 S. Ct. at 2709.

In 1978 companion cases, the Court further defined the parameters of the attorney's right to advertise. In *Ohralik v. Ohio State Bar Association*,[13] an attorney's in-person solicitation of an accident victim in traction was characterized as "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment."[14] The Court found the prophylactic rule forbidding in-person solicitation justified insofar as it furthered the state's interest in protecting the public from fraud, undue influence, intimidation, and other forms of "vexatious conduct."[15] In doing so, the Court drew a sharp distinction between in-person solicitation and printed advertising, which allows time for reflection and comparison without any pressure to make an immediate decision.[16]

The second case, *In re Primus*,[17] concerned solicitation by direct mail. A letter was sent by an attorney, a member of the American Civil Liberties Union (ACLU), advising a victim of free representation offered by the ACLU. The Court held that direct mail to a known victim was protected by the First Amendment, when its purpose was not monetary gain. Since the potential of overreaching was decreased when the attorney was not meeting the potential client face to face and was not motivated by monetary gain, the Court rejected the need for a prophylactic rule and limited the power of the state to regulate to that prescribed in Bates.[18] The Court did not, however, completely dismiss the issue of direct mail solicitation. In distinguishing *Primus* from *Ohralik*, the Court emphasized the lack of monetary gain as a motive for the mailing, leaving open the issue of direct mailing to known victims for monetary gain.[19]

The issue of direct mail solicitation was again addressed in *In re R.M.J.*,[20] where a newly admitted member of the bar mailed professional announcement cards. Though monetary gain was obviously the impetus for mailing the announcements, the mailing was not to known potential plaintiffs. Finding no asserted state interest, the Supreme Court struck down the state law restricting the mailing of announcement cards to "lawyers, clients, former clients, personal friends and relatives."[21] A second issue in *R.M.J.* was the attorney's inclusion of information in his announcement that was not specifically authorized by the state statute.

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13. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S. Ct. 1912 (1978).
14. Id. at 468, 98 S. Ct. at 1925.
15. Id. at 462, 98 S. Ct. at 1921.
16. Id. at 457, 98 S. Ct. at 1919.
17. In re Primus, 436 U.S. 412, 98 S. Ct. 1893 (1978).
18. Id. at 438, 98 S. Ct. at 1908.
19. Id. at 422, 98 S. Ct. at 1899.
20. In re R.M.J., 455 U.S. 191, 192 S. Ct. 929 (1982).
21. Id. at 206, 102 S. Ct. at 939.

Because none of the information was misleading and no state interest was furthered by the restriction, the Court held the restriction unconstitutional under the First Amendment.[22]

Though not an attorney advertising case, the case offering the most guidance on handling commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[23] Justice Powell, writing for the majority, set forth the following analysis for commercial speech cases:

> 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 the 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.[24]

With this background established, an analysis of the Court's handling of the issues in *Zauderer* can begin.

Solicitation

Zauderer's advertisement was attacked as a violation of Ohio Disciplinary Rule 2-103(A), prohibiting an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to non-lawyer who has not sought his advice regarding employment of a lawyer,"[25] and Rule 2-104(A), providing that a lawyer "who has given unsolicited advice to a layman that he should obtain counsel to take legal action shall not accept employment resulting from that advice."[26] Zauderer claimed that this content regulation exceeded Ohio's authority to regulate commercial speech under the First Amendment.

Adopting the Disciplinary Counsel's findings that the advertisement was neither false nor deceptive, the *Zauderer* Court, consistent with

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22. Id. at 205, 102 S. Ct. at 938.

23. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 100 S. Ct. 2343 (1980).

24. Id. at 564, 100 S. Ct. at 2350.

25. *Zauderer*, 105 S. Ct. at 2272-73.

26. Id. at 2273.

Central Hudson, stated, "our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest."[27] No such state interest was apparent in the state supreme court's opinion; therefore, the United States Supreme Court read the state court's reliance on *Ohralik* as a finding that the same state interests involved in-person solicitation were also involved with newspaper advertisements. The Court, however, did not agree that the interests were the same and found that the dangers associated with in-person solicitation were not present when dealing with printed advertising. In-person solicitation involves a face-to-face meeting between an attorney trained in the art of persuasion and the "unsophisticated, injured or distressed lay person."[28] As a result, the lay person may feel pressured for an immediate response to a one-sided presentation without the opportunity for a comparison of the terms offered or for reflection to determine his own best interests. With no written transcript of the conversation, the possibilities for overreaching abound since the exact communication is not subject to review. In addition, a personal confrontation may invade the privacy of the receiver because unlike printed advertising, he cannot avoid further contact by simply "averting his eyes."[29]

Printed advertising eliminates many if not all of these dangers. For purposes of review and regulation, the exact words are preserved. No pressure to respond immediately is exerted. Arguably, allowing attorneys to advertise will invite readers to compare and to make relaxed, well-informed decisions on whether to consult an attorney in person. Furthermore, when a printed advertisement is involved, an invasion of privacy is much less likely since the individual can choose not to read it. Additionally, the Court stated, "[a]lthough some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it."[30] In effect, when the dangers of overreaching and invasion of privacy are not present, the attorney's right to advertise is likely to outweigh any non-substantial state interest.

Recognizing that the interests present in *Ohralik* were absent, the *Zauderer* Court searched for other possible state interests. After dismissing the traditionally asserted interest of avoiding the encouragement of litigation,[31] the Court pointed out that a state would be on shaky

27. Id. at 2277.
28. *Ohralik*, 436 U.S. at 465, 98 S. Ct. at 1923.
29. Id. at 465 n.25, 98 S. Ct. at 1923.
30. *Zauderer*, 105 S. Ct. at 2277.
31. *Bates*, 433 U.S. at 375-76, 97 S. Ct. at 2705.

ground in asserting that litigation is an evil that must be kept to a minimum:

> 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.[32]

Additionally, Zauderer pointed out that the state's argument holds little weight when contingency fee advertisements are in question, since an attorney is not likely to file a suit that has little chance of being won.[33]

The court also rejected Ohio's argument that its interest in avoiding regulatory difficulties inherent in attorney advertising which are not present in other forms of advertising outweighed any constitutional freedoms of the appellant. Ohio asserted that a prophylactic rule was required to ensure that attorneys are using only truthful, nondeceptive advertising and argued that, unlike consumer products which are easily verified as to being of the price and quality advertised, attorneys advertise services which are rarely quantifiable before rendered.[34] The Court, however, noting that the information in Zauderer's advertisement was easily verifiable, refused to recognize the state's distinction between attorney advertising and other forms of commercial advertising, since there was no evidence that assessing the accuracy of information in attorney advertisements was as complex as the state claimed. Likewise, there was no reason to believe that assessing the truth of other forms of advertising was as simple as Ohio claimed. Additionally, the Court accused the state of wanting to be spared the trouble of reviewing advertisements at the expense of the free flow of commercial speech. The Court found the burden of reviewing attorney advertisements comparable to that borne by the Federal Trade Commission(FTC) is reviewing other forms of advertising, implying that the burden is less than insurmountable.[35]

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32. *Zauderer*, 105 S. Ct. at 2278. The *Bates* Court suggested a more direct sanction for this problem, noting: "The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity." *Bates* at 375 n.31, 97 S. Ct. at 2705 n.31. The *Zauderer* Court expanded this idea by stating that, "if the State's concern is with abuse of process, it can best achieve its aim by enforcing sanctions against vexatious litigation." Additionally, the Court has indicated that nuisance suits, which a client has no right to knowingly file, may be prohibited by states as advertisements proposing an illegal transaction. *Zauderer*, 105 S. Ct. at 2279 n.12.

33. Official Transcript of Proceedings Before the Supreme Court of the United States, Docket No. 83-2166, Zauderer v. Supreme Court of Ohio (Jan. 7, 1985).

34. *Zauderer*, 105 S. Ct. at 2278.

35. Id. at 2279. The Court, noting that the American Bar Association does not find weeding out misleading advertisements by attorneys to be unduly burdensome, stated,

Finding no viable state interest, the Court, reversing the decision of the Ohio Supreme Court,[36] concluded that: "An 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."[37]

Justice O'Connor dissented,[38] asserting three reasons in support of a complete ban on attorney advertising: the enhanced possibility for confusion and deception in dealing with professional services (the same argument made by Ohio and rejected by the majority); the breakdown of the dignity of the legal profession; and the attorney's personal interest in making the advertisement as optimistic as possible rather than representing the reality of the situation.[39]

Justice O'Connor argued that attorneys are professionals and have an obligation to place professional responsibility above pecuniary gain. She advocated the imposition of prophylactic rules if the state desires to enforce this ethical duty. She stated further that attorneys will present the advice most likely to bring a client into the office, advice that is not disinterested and therefore likely to be misleading. In so stating, however, she apparently disregarded the Court's earlier dismissal of this argument in *Bates,* where the majority stated:

"the ABA's new Model Rules of Professional Conduct eschew all regulation of the content of advertising that is not 'false or misleading.'" Id. at 2279 n.13 (citing ABA Model Rule of Professional Conduct 7.2 (1983)). In addition, the FTC has concluded that, "application of a 'false or deceptive' standard to attorney advertising would not pose problems distinct from those presented by the regulation of advertising generally." Id. at 2279 n.13 (citing Federal Trade Commission Staff Report, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising 149-55 (1984)).

36. Though the *Zauderer* Court did not restate them, the findings of the *Bates* Court, rejecting other reasons for a total ban on attorney advertising, clearly underlie the decision in *Zauderer.* A few of the most important findings were: "the tendency of advertising to enhance competition might be expected to produce pressures on attorneys to reduce fees," *Bates* at 371 n.35, 97 S. Ct. at 2706 n.35; "[u]nethical lawyers and dishonest laymen are likely to meet even though restrictions on advertising exist." Id. at 375 n.31, 97 S. Ct. at 2705 n.31; and "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services 2 (1972). "Among the reasons for this underutilization is fear of the cost and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem. . . ." *Bates* at 376, 97 S. Ct. at 2705 (footnotes omitted). This last finding is bolstered by a national survey conducted jointly be the ABA and the American Bar Foundation. Eighty-three percent of people questioned agreed with the statement that, "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem." B. Curran, The Legal needs of the Public 228 (1977). Sixty-eight percent of people questioned agreed with the statement that, "[m]ost lawyers charge more for their services than they are worth." Id. at 231.

37. *Zaunderer,* 105 S. Ct. at 2280.

38. Joined by Chief Justice Burger and Justice Rehnquist.

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

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.[40]

Additionally, Justice O'Connor asserted that there is little difference between in-person and newspaper solicitation because the newspaper advertisement is the first step to get the potential client into the office where overreaching, fraud, and deception may occur. However, this argument fails to recognize that when a person reads an advertisement, there is no personal pressure forcing him into the attorney's office. He must consciously decide to go there. If he does make that decision and goes to the attorney's office, he still is not subject to the in-person solicitation dangers feared in *Ohralik*. In *Ohralik*, the attorney knew what the case entailed, knew that he had a very good chance of winning, and sought out specific victims to persuade them to employ him. When a person reads a newspaper advertisement and decides to follow through with an office visit, the attorney usually knows nothing of this person or his case. The attorney therefore will exercise the same discretion and honesty he normally employs when accepting cases referred to him by more traditional means.

Justice O'Connor advocated prohibiting attorneys by law from doing what she claims they ideally refrain from doing by choice. If she is correct and attorneys would abuse the right to advertise to such an extent that the state, through its regulations, and the bar, by reporting offenses, could not adequately control these violations, perhaps it is time the illusion of the attorney as a dignified professional is dissolved. As the Bates Court said so well, "we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."[41] Thus, "[s]ince the belief that lawyers

40. *Bates*, 433 U.S. at 379, 97 S. Ct. at 2707.
41. Id. at 368, 97 S. Ct. at 2701.

are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled."[42]

Illustrations In Advertisements

Zauderer's advertisement directly violated an Ohio Disciplinary Rule which prohibited the use of illustrations in publications by lawyers.[43] Zauderer argued that the rule violated the First Amendment by authorizing the state to discipline him for conveying protected information without a sufficient state interest to justify the ban.

Ohio did not contend that the illustration of the Dalkon Shield intrauterine device (IUD) was likely to mislead or confuse readers. The illustration in question was an accurate representation of the IUD's that were sold by other manufacturers, and hence the picture was "a particularly important element in the ad."[44] A woman who did not ordinarily read such advertisements testified that she would have overlooked it entirely except for her recognition for the Dalkon Shield.[45] It is likely that other women who were unsure as to the brand they were using would recognize the drawing, read the advertisement, and become informed of the medical problems and their legal rights. The Court found that the drawing was an important part of the intended communication and thus was entitled to the First Amendment protection afforded to commercial speech.

Since the drawing was not alleged to be misleading, deceptive, or confusing, the burden was on the state, in accordance with *Central Hudson*, to establish a substantial state interest which would justify the infringement upon Zauderer's First Amendment rights. The first interest asserted was to ensure that attorneys advertise in a dignified manner. The Court noted, however, that since there was no allegation that the drawing was not "dignified," the state's interest was not thwarted by this illustration. Furthermore, compared with the important communicative purposes served by this advertisement, the alleged state interest justified neither an abridgment of the attorney's First Amendment rights nor the public's right to be informed. The importance of illustrations in those advertisements which, like Zauderer's, use accurate representation to convey important information not easily conveyed in writing, outweighs the state's desire for regulatory convenience. The Court re-

42. Id. at 371-72, 97 S. Ct. at 2703.

43. Ohio Disciplinary Rule 2-101(B) provides in pertinent part: "The information disclosed by the lawyer in such publication (printed media, radio or television) shall . . . be presented in a dignified manner without the use of drawings, illustrations, animations . . . or the use of pictures. . . ." *Zauderer*, 105 S. Ct. at n.4.

44. Official Transcript of *Zauderer* at 4-5.

45. Id. at 8-9.

affirmed its position that although some people find attorney advertisements offensive and some attorneys consider advertising beneath their dignity, those reactions do not justify suppressing the free flow of communication protected under the First Amendment.[46]

Concerning the use of illustrations in advertisements, Ohio advanced arguments similar to those asserted with regard to written advertisements and alleged that, "abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions."[47] Ohio argued that it could not accurately police the subconscious effects of illustrations on the public, and that the only way to protect the public from manipulative illustrations was by a complete ban.

Again, the Court was unpersuaded by this argument, since the state provided no evidence to back up any of its assertions that a prophylactic rule is the only way to combat the problem. One the contrary, unlike other advertising where an object is for sale, attorneys advertise services which are not as conducive to representation by illustrations. The Court again referred to FTC, which has not found the task of policing visually deceptive advertising an impossible one. Thus, in rejecting both asserted state interests, the Court held: "Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration."[48]

Disclosure Requirements

The Supreme Court of Ohio also held that Zauderer's Dalkon Shield advertisement failed to comply with Ohio's disclosure requirement for advertisements mentioning contingent fee rates. Disciplinary Rule 2-101(B)(15) provided that certain contingent fee information could be published including contingent fee rates, "provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses."[49]

Zauderer attempted to equate disclosure requirements with restrictions on free speech, but the Court dismissed this argument as "overlook[ing] material differences."[50] The main difference being the

46. *Zauderer*, 105 S. Ct. at 2280.
47. Id. at 2280.
48. Id. at 2281.
49. Id. at 2272 n.4.
50. Id. at 2281.

Court's preference for more speech rather than public ignorance.[51] Rather than prohibiting speech, disclosure requirements demand that attorneys give all the information needed to present the public with a complete picture, thereby ensuring that advertisements are less likely to be misleading. Since the First Amendment protection afforded to commercial speech is principally due to the communicative value of the speech to the consumer, an attorney's protected interest is at its minimum when the attorney desires to withhold information from the public. For this reason, disclosure requirements are not subject to a *Central Hudson* scrutiny. Consequently, Zauderer could not evade the disclosure requirement by showing merely that a less restrictive means was available.

The Court did leave room for review of disclosure requirements by stating that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech."[52] But, the Court held, as long as the requirement is reasonably related to the State's interest in preventing deception, the advertiser's rights are protected. Based on this reasoning, the Court found Disciplinary Rule 2-101(B)(15) constitutional and upheld the public reprimand. Zauderer was also reprimanded for violating Disciplinary Rule 2-101(A), which provided: "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."[53]

Zauderer's advertisement did not disclose the difference between legal fees and costs. Since most people do not know the distinction between costs and fees in this context, Zauderer's advertisement may have appeared to many to offer a no-lose proposition.[54] Based on this nondisclosure, the Court found Zauderer's advertisement misleading and upheld the public reprimand.

Justice Brennan's dissenting opinion on this issue takes a different view.[55] He notes that Disciplinary Rule 2-101(B)(15) provided that when contingent fee rates are given, disclosure was required. The Dalkon Shield advertisement did not mention any rates[56] and therefore, by its

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51. "In any event, we view as dubious any justification (for regulation) that is based on the benefits of public ignorance. . . . 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." Bates, 433 U.S. at 375 (citations omitted).

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

53. Id. at 2272 n.3.

54. Zauderer's advertisement stated, "if there is no recovery, no legal fees are owed by our clients." See text accompanying supra note 1.

55. Joined by Justice Marshall.

56. See text accompanying supra note 1.

own terms, the rule did not apply. He stated that the majority's failure to reverse the disclosure requirements reprimand creates significant due process and First Amendment problems, since before the state may punish a person for violating a disciplinary rule, the behavior being punished must actually be proscribed by that rule. The Ohio disciplinary rule did not require an attorney to disclose the client's liability for costs and expenses unless contingent fee rates were mentioned. Additionally, Zauderer, in a prudent effort to comply with the rule, sought the advice of representatives from the Disciplinary Counsel. Those representatives refused to give advice as to what, if any, disclosure was required, and furthermore, there was no precedent interpreting the rule as requiring disclosure absent the mention of rates. Nevertheless, Zauderer was publicly reprimanded for violating Disciplinary Rule 2-101(B)(15).

As stated in *Connally v. General Construction Company*, a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[57] Justice Brennan stated, "this requirement 'applies with particular force in review of laws dealing with speech. . . 'a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser.'"[58] Apart from violating the notice requirement of the due process clause, reprimanding attorneys for conduct not directly proscribed by statute, will certainly produce a "chilling" effect on commercial speech.[59]

The majority handled this entire problem in a footnote.[60] The Court acknowledged that the rule, on its face, did not require any disclosure absent mention of contingent fee rates, and characterized the Ohio Supreme Court's vague opinion on what disclosure is required as "unfortunate." Further, the majority recognized the significant due process concerns which would have arisen had this been a disbarment proceeding. But since the punishment at issue was only a public reprimand and the

57. *Zauderer*, 105 S. Ct. at 2289, citing Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926).

58. *Zauderer*, 105 S. Ct. at 2290, citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760 (1976) and Smith v. California, 361 U.S. 147, 151, 80 S. Ct. 215, 218 (1959).

59. It was argued in *Bates* that commercial advertising was not susceptible to the same "chilling effect" that noncommercial speech is subject to because commercial speech is motivated by monetary gain that outweighs any punishment received for exceeding the prescribed parameters of permissible speech. Attorney advertising was previously grouped with commercial speech in this regard. But when attorneys may be publicly reprimanded for their first violation and indefinitely suspended or disbarred after only the second violation, attorneys will be extremely reluctant to advertise unless the rules are clear and applied as they are written.

60. *Zauderer*, 105 S. Ct. at 2283 n.15.

attorney's livelihood is not at stake, the Court concluded that there was "no infirmity."

Justice Brennan found the majority's distinction, "thoroughly unconvincing,"[61] and he pointed out that in *R.M.J.*, *Primus*, and *Bates*, punishments of both equal and lesser severity were struck down when found to be in contravention of an attorney's constitutional rights.[62] Justice Brennan further noted that in Ohio, once publicly reprimanded, an attorney subsequently found guilty of misconduct may be suspended from practice for an indefinite time or permanently disbarred, casting this reprimand in a much more serious light.[63]

While the majority in *Zauderer* upheld the public reprimand on grounds that it was both misleading and failed to comply with disclosure requirements, and while Justice Brennan would reverse both reprimands,[64] there is another alternative: After pointing out that the disclosure requirement rule did not apply to Zauderer, the Court could have encouraged the use of disclosure requirements by states as an alternative to prohibiting or restricting commercial speech by attorneys, and should have instructed states to construct their disciplinary rules accordingly to eliminate any due process and first amendment problems.

The remaining public reprimand based on Disciplinary Rule 2-101(A) could have been sustained by adopting the definition of "misleading" advocated by Court in oral arguments as, "not only if it affirmatively represents something but if it fails to state a material fact which would have been required to make it completely true."[65] Under this definition, Zauderer's Dalkon Shield advertisement was misleading under Rule 2-101(A), since by not disclosing that costs and expenses were to be paid by the client even if the suit was lost, the advertisement could lead one to believe that hiring an attorney on a contingency fee basis is a cost-free endeavor. Because the advertisement was misleading and violative of the Ohio statute, a public reprimand on that ground was justified under a Central Hudson analysis. Thus, where a misleading solicitation is concerned a state clearly has the right to regulate and restrict its occurrence.[66]

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61. Id. at 2291.

62. It is particularly interesting to note that the *Zauderer* majority emphasized the difference between the public reprimand issued to Zauderer, and one specifying fewer infractions. The majority stated: "A reprimand that specified fewer infractions would be a different punishment and would be a lesser deterrent to future advertising." Id. at 2274 n.6.

63. Id. at 2291.

64. Justice Brennan would not find Zauderer's Dalkon Shield advertisement to be misleading, because there was nothing in the record to indicate that it was actually misleading. Id. at 2290.

65. Official Transcript of *Zauderer* at 34.

66. Prior to running the Dalkon Shield advertisement, Zauderer had run another

Residual State Rights

Because the Court strained to apply the Ohio disclosure requirement in *Zauderer*, the most obvious effect of this opinion is to encourage states to regulate attorney advertising through disclosure requirements rather than through prohibitions or other restrictions. The Court acknowledged disclosure requirements as a form of state regulation not subject to a *Central Hudson* analysis, since disclosure requirements mandate that the attorney divulge information sufficient to ensure that the potential client makes an informed decision. This is entirely consonant with the Court's view that the remedy for public ignorance regarding attorneys is more speech rather than no speech. States may find this method particularly valuable since the Court stated that no less restrictive means can be introduced when a disclosure requirement is used.

Only days after the *Zauderer* decision was handed down, the Supreme Court denied writs in *Committee of Professional Standards v. Von Wiegen*.[67] *Von Wiegen* involved direct mail solicitation by an attorney to victims of the Hyatt Regency skywalk collapse in Kansas City. While noting the inherent dangers present in Ohralik, the New York Court of Appeals held that the state could not impose a blanket prohibition on all mailings to potential clients.[68] With this writ denial, the Court seems to have left the door open for direct mail solicitation by attorneys,

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newspaper advertisement which read: "Full legal fee refunded if convicted of DRUNK DRIVING. Expert witness (chemist) fees must be paid, "followed by the name, address, and phone number of Zauderer's firm. Appellant's Brief, Fiche 70, Docket No. 83-2166, 1985 term.

After the advertisement had run for two days, a representative of the Ohio Disciplinary Counsel informed Zauderer that the advertisement violated a provision of the disciplinary rules. Zauderer apologized, immediately withdrew the advertisement, and promised not to accept employment by people responding to it. A few months later, Zauderer launched a much more comprehensive advertising campaign with the newspaper advertisement in the text. When suit was filed on the Dalkon Shield advertisement, charges were also brought on the drunk driving advertisement.

Zauderer asserted a violation of his due process rights since the Supreme Court of Ohio publicly reprimanded him for violating of a different disciplinary rule than the one which the Board of Commissioners on Grievances and Discipline originally held he had violated. The *Zauderer* majority, however, dismissed the alleged due process violation by pointing out that the Supreme Court of Ohio has the ultimate authority to reprimand and that the charges put Zauderer on notice of the charges in the Ohio Supreme Court's opinion. *Zauderer*, 105 S. Ct. at 2283-84.

Justice Brennan vehemently disagreed largely because the Ohio Supreme Court could only conduct a limited record review of the Commissioner's findings, did not hear the case de novo, and did not give Zauderer the opportunity to present additional evidence. Id. at 2293.

67. Committee on Professional Standards v. Von Wiegen, 105 S. Ct. 2701 (1985).

68. Committee on Professional Standards v. Von Wiegen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (N.Y. 1984), cert. denied 105 S. Ct. 2701 (1985).

perhaps seeing no more inherent danger in this form of solicitation than with newspaper advertisements, or at least not a sufficient level to require a different result.

Another important aspect of attorney advertising, an issue expressly reserved in *Bates*, is the special problem associated with advertising on electronic broadcast media which the *Bates* Court said would "warrant special consideration."[69] The *Zauderer* Court also left this issue unresolved, but subsequently the Court vacated the judgment of the Supreme Court of Iowa in *Humphrey v. Committee on Professional Ethics*,[70] and remanded for further consideration in light of *Zauderer*. The Iowa Supreme Court had upheld the constitutionality of its rule prohibiting television advertisements that contain "background sound, visual displays, more than a single, non-dramatic voice or self-laudatory statements."[71] This remand indicates that even television advertising may not possess enough of the dangers associated with in-person solicitation to justify the curtailment of first amendment freedoms.

Bates and *Zauderer* also left open the question of self-laudatory statements. Bates, without deciding the issue, stated that claims as to the quality of services offered were not susceptible of measurement or verification and may be "so likely to be misleading as to warrant restriction."[72] The *Zauderer* Court was careful to note that Zauderer's advertisement did not guarantee the success of a lawsuit, nor did it suggest that Zauderer had any special expertise in this field. It merely stated a fact, that Zauderer's firm was presently handling other similar claims.

Did the Court in vacating *Humphrey* intend reconsideration of the self-laudatory ban as well as the ban on visuals and background sounds? Because the Court took care in characterizing Zauderer's advertisement as not being self-laudatory, it is unlikely that it intended to open this area of attorney advertising as well. The justification for visual aids in attorney advertising, the value of the information to the public, is not present when the attorney merely asserts that he is skilled. One would hope that since all attorneys go through the rigors of law school and bar exams, they would all be capable of doing a fine job. However, self-laudatory statements which go beyond the mere assertion that an attorney possesses the degree of skill commonly possessed by other attorneys similarly situated, when made by the attorney himself or one affiliated with him, may well prompt the Court to approve a complete

69. *Bates*, 433 U.S. at 384, 97 S. Ct. at 2709.

70. Humphrey v. Committee on Professional Ethics of the Iowa State Bar Ass'n, 105 S. Ct. 2693 (1985).

71. Humphrey v. Committee on Professional Ethics of the Iowa State Bar Ass'n, 355 N.W.2d 565, 566 (Iowa 1984).

72. *Bates*, 433 U.S. at 383-84, 97 S. Ct. at 2709.

ban on these communications due to the particular dangers associated with this type of "puffing."

The same reasoning does not apply, however, when dealing simply with the information regarding firm specialization or types of cases presently handled. These are easily verifiable facts which would be very helpful to the person seeking legal assistance for a particular problem. Once the Court in *Virginia State Pharmacy Board* recognized that commercial speech involves reciprocal rights, those of the speaker and those of the listener, the door was opened for attorney advertising.[73] The *Bates* Court, while recognizing that advertising is not the complete answer to the public's need for information relevant to their legal needs, stated, "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."[74]

The *Zauderer* decision does not detract from the earlier statements of states' rights to restrict false, deceptive, or misleading advertisements, or advertisements proposing involvement in illegal transactions. Reasonable time, place, and manner restrictions which directly advance a significant state interest while leaving open alternative channels of communication also remain in tact.[75]

More importantly, however, a new form of regulation short of a complete ban has been sanctioned by the Court, the disclosure requirement. There are at least two approaches to the use of disclosure requirements. The first is for a state to affirmatively adopt a specific requirement. The second is for the judiciary to recognize the duty of all advertisements to disclose all information needed to give the reader an accurate representation, the lack of which should render it misleading and subject the advertiser to discipline according to state law.

Attorney's Right to Advertise

After *Zauderer*, attorneys are permitted to solicit business through printed advertising, as long as those advertisements are truthful, nondeceptive, nonfraudulent, and do not propose involvement in an illegal transaction. After *Von Wiegen,* this apparently includes direct mailing to known victims for monetary gain. These advertisements may still, however, be subject to reasonable state regulation that directly advances a substantial governmental interest.

Despite *Von Wiegen*, the direct mailing issue has not been directly addressed by the Court, and therefore, an attorney should avoid using any language in advertisements which creates an inference that pressure

73. Virginia State Pharmacy Board, 425 U.S. at 756-57, 96 S. Ct. at 1822-23.
74. *Bates*, 433 U.S. at 374, 97 S. Ct. at 2704.
75. *Zauderer*, 105 S. Ct. at 2275.

is being exerted on the receiver. The Court may well find such an advertisement overreaching.

Moreover, an attorney should avoid any self-laudatory statements about himself or any attorney with whom he is affiliated, when made for the purpose of solicitation. An attorney should be aware of and broadly construe any disclosure requirements his state may have, since the United States Supreme Court has found them applicable even when they do not apply by their own terms. Most importantly, an attorney should stick to easily verifiable facts; when advertising with contingency fee agreements, he should disclose the client's liability for costs and expenses; and finally, an attorney should avoid anything which, by either affirmative statements or omissions, might be seen as misleading, deceptive, or proposing involvement in an illegal transaction.

Conclusion

Zauderer is important as a reaffirmation of the Supreme Court's recognition of the dilemma created by the public's ignorance regarding legal services. The Court has seemingly laid to rest the dignity interest traditionally asserted as the justification for the attorney advertising ban, finding the need to inform the public much more compelling. The disclosure requirement has been approved as a method of state regulation over the content of attorney advertisements. However, *Zauderer* may well be a larger victory for state regulation than for the recognition of an attorney's first amendment freedoms. The *Zauderer* Court's application of Ohio's disclosure requirements when there was no indication of their applicability may chill an attorney's inclination to advertise, thus discouraging the dissemination of information to the public.

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