

11-1-1986

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## Recommended Citation

Dorothy V. Kibler, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision*, 65 N.C. L. REV. 170 (1986).

Available at: <http://scholarship.law.unc.edu/nclr/vol65/iss1/12>

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## Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses With the *Zauderer* Decision

No aspect of legal ethics has been more hotly debated than attorney advertising and solicitation.<sup>1</sup> Conflict among members of the bar intensified when, in 1977, the United States Supreme Court proclaimed that attorney advertising was protected under the newly created commercial speech doctrine of the first amendment.<sup>2</sup> Nearly ten years have passed since that decision and the controversy rages on. The primary reason this issue remains unresolved is that the Supreme Court insists on addressing attorney advertising and solicitation cases in an ad hoc manner and on fashioning its decisions as narrowly as the facts in each case will allow.

In *Zauderer v. Office of Disciplinary Counsel*<sup>3</sup> the Court had another opportunity to establish rules that would resolve the controversy, but once again the Court refused to do so. Attorney Phillip Zauderer ran a newspaper advertisement that informed users of Intrauterine Devices (IUDs) of the dangers of the Dalkon Shield IUD and indicated that readers who had been injured by the Dalkon Shield might be able to recover damages from the manufacturer. In the advertisement Zauderer offered to represent readers on a contingent fee basis and offered to give free information to people who telephoned him.<sup>4</sup> The State of Ohio disciplined Zauderer on grounds that the advertisement contained an illustration, failed to include necessary information concerning the contingent fee, and solicited business in violation of the Ohio Code of Professional Responsibility.<sup>5</sup> The Supreme Court held that the drawing and the advice contained in the advertisement were protected under the first amendment, but that Zauderer's failure to include additional information pertaining to the contingent fee justified the disciplinary action.<sup>6</sup>

This Note traces the evolution of the first amendment's commercial speech

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1. See *infra* notes 142-46 and accompanying text; note 165 (illustrating breadth of debate).

The Model Rules of Professional Conduct draw a distinction between "solicitation" and "advertising." However, these rules fail to define solicitation clearly: "The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983). Nor do the Rules define advertising. Instead, they state that "a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in rule 7.3." *Id.* Rule 7.2(a) (1983). "The term 'solicit' includes [a] . . . communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services . . . but who are so situated that they might in general find such services useful." *Id.* Rule 7.3 (1983). This distinction is somewhat artificial because solicitation is a form of advertising.

2. See *Bates v. State Bar*, 433 U.S. 350 (1977). First amendment rights in commercial speech were recognized in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

3. 105 S. Ct. 2265 (1985).

4. *Id.* at 2272.

5. *Id.* at 2273-74.

6. *Id.* at 2280-81.

doctrine through Supreme Court cases decided prior to *Zauderer* and discusses the application of the commercial speech doctrine in attorney advertising and solicitation cases. It also discusses the problems the intermediate level of protection afforded commercial speech poses for attorneys who wish to advertise or solicit and concludes that the uncertainty surrounding this intermediate level of protection, even after the *Zauderer* decision, discourages attorneys from reaching consumers through the media. Furthermore, the Note explores the injury that consumers suffer due to the lack of information available about legal services in the marketplace. It uses the issue of direct mail solicitation to illustrate the problems both attorneys and consumers face in light of the Supreme Court's insistence on rendering very narrow decisions in attorney advertising and solicitation cases. The Note concludes that the Supreme Court should establish general guidelines that protect and encourage a wide array of attorney advertising and solicitation.

For two days in late 1981 attorney Phillip Q. Zauderer ran the following advertisement in a Columbus, Ohio newspaper: "Full Legal fee refunded if convicted of DRUNK DRIVING. Expert witness (chemist) fees must be paid."<sup>7</sup> The Office of Disciplinary Counsel of the Ohio Supreme Court contacted Zauderer on the second day and informed him that the advertisement appeared to be an offer to represent a criminal defendant on a contingent fee basis in violation of the Ohio Disciplinary Rules.<sup>8</sup> Zauderer withdrew the advertisement that day.<sup>9</sup>

Undaunted, Zauderer placed a "more ambitious"<sup>10</sup> advertisement in thirty-six Ohio newspapers in the spring of 1982:

The Dalkon Shield . . . 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.<sup>11</sup>

The advertisement attracted 200 inquiries, and Zauderer initiated 106 lawsuits on behalf of those who contacted him.<sup>12</sup>

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7. Joint Appendix to Briefs at 8, *Zauderer*.

8. The Ohio Code of Professional Responsibility prohibits attorneys from handling criminal cases on a contingent fee basis. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1983). Ohio's rule is identical to the rule found in the ABA's Model Code. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1981).

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

10. *Id.*

11. *Id.* at 2271-72.

12. *Id.* at 2272. The advertisement contained an illustration of the Shield. Zauderer was hired by 53% of those who contacted him concerning the Dalkon Shield. He previously had run an advertisement without an illustration of the Shield and had received virtually no response from that advertisement. Stewart, *A Picture Costs Ten Thousand Words*, A.B.A. J., Jan. 1985, at 62-63.

On July 29, 1982, the Office of Disciplinary Counsel filed a complaint against Zauderer charging that both advertisements violated the Ohio Disciplinary Rules. The Disciplinary Counsel alleged that the drunk driving advertisement violated Ohio Code of Professional Responsibility Disciplinary Rule 2-101(A)<sup>13</sup> by offering a fee arrangement that could not be carried out under the Ohio rules<sup>14</sup> and thus was false, fraudulent, misleading, and deceptive to the public. The Disciplinary Counsel also alleged that the Dalkon Shield advertisement violated five disciplinary rules.<sup>15</sup> First, it contained an illustration in violation of Ohio Code of Professional Responsibility Disciplinary Rule 2-101(B),<sup>16</sup> which prohibits illustrations and drawings in advertisements run by attorneys and requires that advertisements be "dignified" and include nothing other than twenty items specified in the rule.<sup>17</sup> Second, the advertisement gave legal advice concerning the Dalkon Shield and suggested that interested women contact Zauderer. The state claimed that this violated Ohio Code of Professional Responsibility Disciplinary Rule 2-103(A),<sup>18</sup> which prohibits attorneys from recommending employment of themselves or those who work with them to the general public.<sup>19</sup> Third, the Dalkon Shield advertisement also allegedly violated Ohio Code of Professional Responsibility Disciplinary Rule 2-104(A),<sup>20</sup> which prohibits an attorney who has given unsolicited advice from accepting employment as a result of that advice.<sup>21</sup> Fourth, Zauderer's mention of a contingent fee triggered the requirements of Ohio Code of Professional Responsibility Disciplinary

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13. The rule reads: "A lawyer shall not, on behalf of himself . . . 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." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (Page 1983). The ABA rule is identical to Ohio's rule. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1981) (1981).

14. Ohio Code of Professional Responsibility Disciplinary Rule 2-106(C) prohibits contingent fees in criminal cases. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (Page 1983). This provision is identical to MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(c) (1981).

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

16. Ohio Code of Professional Responsibility Disciplinary Rule 2-101(B) states in pertinent part:

A lawyer may publish or broadcast . . . in print media or over radio or television. . . . The information disclosed by the lawyer in such publication . . . shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or . . . a portrayal of the scales of justice.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (Page 1983). The rule catalogs 20 pieces of information that can be included in the advertisement. *Id.*

Model Code of Professional Responsibility Disciplinary Rule 2-101(B) differs in that it restricts advertising to the geographic area in which the attorney practices and does not restrict the use of drawings and illustrations in advertisements. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1981). The list of permissible information in the Model Code includes categories not in Ohio's Code, but the substance of the two codes is the same.

17. *Zauderer*, 105 S. Ct. at 2272.

18. Ohio Code of Professional Responsibility Disciplinary Rule 2-103(A) states: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (Page 1983). This provision is substantially identical to MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1981).

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

20. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (Page 1983).

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

nary Rule 2-101(B)(15)<sup>22</sup> that advertisements of "[c]ontingent fee rates . . . [disclose] whether percentages are computed before or after deduction of court costs and expenses."<sup>23</sup> Zauderer's advertisement did not include this information. Last, the advertisement allegedly violated Ohio Code of Professional Responsibility Disciplinary Rule 2-101(A)<sup>24</sup> because it failed to specify that clients would be liable for costs and fees even if their claims were unsuccessful and thus was deceptive.<sup>25</sup>

The Board of Commissioners on Grievance and Discipline<sup>26</sup> heard the charges against Zauderer. The Board ruled that the drunk driving advertisement violated Ohio Code of Professional Responsibility Disciplinary Rule 2-101(A) because it failed to mention the common practice of plea bargaining and thus failed to alert potential clients that they might be found guilty of a lesser offense and still be liable for attorney's fees.<sup>27</sup> This ruling differed from the grounds originally set forth in the complaint filed against Zauderer. The Board ruled that the Dalkon Shield advertisement violated each of the rules as charged in the complaint.<sup>28</sup> The Board rejected Zauderer's claim that the rules as applied to him violated the first amendment's free speech guarantee<sup>29</sup> and recommended that he be indefinitely suspended from the practice of law.<sup>30</sup> The Ohio Supreme Court adopted the findings that Zauderer's conduct violated each rule alleged and that the first amendment did not protect the advertisement. The

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22. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B)(15) (Page 1983).

23. *Id.*

24. *Id.* DR 2-101(A).

25. *Zauderer*, 105 S. Ct. at 2273. An attorney may advance or guarantee the expenses of litigation provided that the client remains ultimately responsible. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (Page 1983). The reason for this requirement is to prevent the attorney from acquiring a financial interest in a client's suit. *See id.* DR 5-103(A). These rules seek to keep an attorney's professional judgment free from any personal interest and thus discourage overreaching. *See id.* EC 5-2 to -7.

The Office of Disciplinary Counsel stipulated in *Zauderer* that the information and advice concerning Dalkon Shield litigation in the advertisement was accurate and that the illustration was an accurate depiction of the Dalkon Shield. *Zauderer*, 105 S. Ct. at 2273.

26. The disciplinary procedure in Ohio is similar to that of most states. The prosecuting attorney is called the Disciplinary Counsel and is appointed by the Ohio Supreme Court. This individual investigates alleged violations and prosecutes in disciplinary actions. Each local bar has its own grievance committee that also investigates alleged violations. The local grievance committee determines whether sufficient evidence exists to charge an attorney with a disciplinary violation. If sufficient evidence does exist, a formal complaint is filed with the Board of Commissioners on Grievance and Discipline for hearing. The Board consists of seventeen members from the Ohio bar appointed to serve for three years. A panel consisting of three board members hears each complaint and determines if there is sufficient evidence for a referral to the full board. A referral will include the panel's findings of facts and recommendations with respect to a public reprimand, suspension, or disbarment. The full board then hears and rules on disciplinary matters referred to it by the panel, and if the complaint is not dismissed, its findings are filed with the clerk of court. The attorney then has the opportunity to appear before the Ohio Supreme Court and show cause why the findings should not be confirmed and the disciplinary order not entered. The Ohio Supreme Court ultimately is responsible for any punishment. OHIO SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO V (Page 1983).

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

28. *Id.*

29. The first amendment provides, in part: "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

30. *Zauderer*, 105 S. Ct. at 2274. The panel that originally heard the case, *see supra* note 26, only recommended that Zauderer receive a public reprimand. *Zauderer*, 105 S. Ct. at 2274.

court also concluded that Zauderer's infractions merited a public reprimand.<sup>31</sup>

The United States Supreme Court examined the Dalkon Shield advertisement and found that it was neither false nor deceptive. Therefore, the advertisement deserved the limited protection of the first amendment's commercial speech doctrine.<sup>32</sup> The Court began its inquiry by adopting the test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>33</sup> which requires that a regulation of commercial speech directly advance a substantial state interest and be no more extensive than necessary.<sup>34</sup> The Court searched for a substantial state interest in prohibiting Zauderer's Dalkon Shield advertisement and found none. Concerns about overreaching and invasion of privacy—the bases for prohibition of in-person solicitation by attorneys—were not justified in the context of printed advertisements. Advertisements, said the Court, do not have the same force as a trained advocate nor are they likely to create pressure for an immediate answer.<sup>35</sup> The fact advertising would encourage litigation did not justify the legislation, said the Court.<sup>36</sup> The Court also observed that the possibility of attorneys filing meritless claims did not give the state the right to ban advertising that contained advice.<sup>37</sup> The Court refused to recognize litigation itself as an evil, and indicated that the public should be made aware of their legal rights.<sup>38</sup> Because Ohio did not have an interest at stake strong enough to overcome the constitutional protection of commercial free speech,<sup>39</sup> the Court held that printed advertisements which solicit business by giving legal advice and contain truthful, nondeceptive information are protected under the first amendment.<sup>40</sup>

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31. *Id.* at 2274.

32. *Id.* at 2276.

33. 447 U.S. 557 (1980). In *Central Hudson* the Supreme Court established the level of first amendment protection currently afforded commercial speech. The *Central Hudson* test is discussed *infra* text accompanying notes 97-102.

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

35. *Id.* at 2277.

36. "The state is not entitled to interfere with . . . access [to the courts] by denying its citizens accurate information about their legal rights." *Id.* at 2278.

There has been both public outcry, see Gest, Solorzano, Shapiro & Doan, "See You in Court: Our Suing Society," U.S. NEWS & WORLD REP., Dec. 20, 1982, at 58; Stone, *Our Hungry Lawyers*, U.S. NEWS & WORLD REP., Nov. 13, 1978, at 116, and scholarly debate over the issue of our litigious society. The major complaints raised by scholars include extensive case backlogs, massive percentage increase in the number of suits filed, and filing of frivolous claims. See Galanter, *Reading the Landscapes of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-66 (1983). Other scholars have severely criticized the anti-litigation viewpoint. These critics claim that publicized statistics focus solely on the appellate level and that statistics at the trial level do not bear out anti-litigation hypotheses. See, e.g., *id.* at 61-62. Further, pro-litigation critics argue that there has been no scholarly development of over-litigation arguments. Anti-litigation scholars are accused of echoing identical arguments, cross-citing each other, and duplicating the same examples of abuse in the legal system. See, e.g., *id.* at 64.

For a view of the increase in litigation from an historical perspective, see L. FRIEDMAN, *AMERICAN LAW* 280-90 (1984).

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

38. *Id.* at 2277-78. "The State is not entitled to interfere with access [to the courts] by denying its citizens accurate information about their legal rights." *Id.* at 2278.

39. *Id.* at 2280.

40. *Id.*

The eight justices who heard the case<sup>41</sup> agreed that illustrations also were entitled to protection under the commercial speech doctrine and applied the *Central Hudson* test to the drawing in the Dalkon Shield advertisement. Ohio's sole interest in prohibiting illustrations was in preserving dignity in the legal profession and the Court found this interest insufficient to abridge first amendment rights.<sup>42</sup>

The Court next considered whether Zauderer could be disciplined for failing to disclose in the Dalkon Shield advertisement that clients whose cases were handled on a contingent fee basis would be liable for significant litigation costs regardless of the results of their suits and that clients who answered the drunk driving advertisement could owe attorney's fees if convicted of a lesser charge. The majority opinion and Justice O'Connor's partial concurrence agreed that Ohio could require the disclosure of this information. The majority reasoned that because first amendment protection rested on the consumer's right to receive information, the speaker had only a minimal first amendment interest in not providing particular information.<sup>43</sup> For this reason, traditional first amendment doctrine in the area of compelled speech did not apply.<sup>44</sup> The majority explained that some first amendment protection against compelled speech in the commercial speech context did exist: unjustified or unduly burdensome disclosure requirements would offend the first amendment. "But we 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."<sup>45</sup>

Justice Brennan, in his partial dissent, took issue with this "reasonable relationship" test for compelled speech in the commercial speech context.<sup>46</sup> Brennan contended that this test stripped away first amendment protection guaranteed by *Central Hudson*'s intermediate level of scrutiny and argued that the *Central Hudson* test should apply to compelled speech.<sup>47</sup>

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41. Justice Powell did not participate in the decision. *Id.* at 2284.

42. *Id.* at 2280-81. Ohio also argued that the difficulty of policing illustrations justified a prophylactic ban. The Court noted that the Federal Trade Commission had been identifying and suppressing visually deceptive advertisements and there was no reason why Ohio could not do likewise. *Id.*

43. The advertiser's speech is protected largely because advertisers need a financial incentive to disseminate information to the consumer. First amendment protection of commercial speech hinges on the consumer's right to information. *See* *Bates v. State Bar*, 433 U.S. 350, 364 (1977).

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

45. *Id.*

46. *Id.* at 2285-87 (Brennan, J., concurring in part and dissenting in part).

47. Justice Brennan found it equally troubling that the state never clearly articulated the information that it required be disclosed. The Dalkon Shield advertisement was not misleading enough to justify punishment absent a clear statement of required disclosures by state disciplinary rules. *Id.* at 2289-90 (Brennan, J., concurring in part and dissenting in part). Several other states had approved Dalkon Shield advertisements containing the identical statement concerning contingent fees. *Id.* at 2291 & n.12 (Brennan, J., concurring in part and dissenting in part). Subjecting advertising to vague requirements chilled speech and thus violated the first amendment, he argued, and forced attorneys to advertise at their own peril. *Id.* at 2289-90 (Brennan, J., concurring in part and dissenting in part). If an attorney had omitted some information and the state subsequently created an interest reasonably related to preventing deception that required the omitted information be included, then the advertiser would be punished without knowledge of or intent to commit the alleged wrong. And the consequences of guessing wrong would be severe. Although Zauderer received only

Commentators historically have debated whether any first amendment protection should extend to commercial speech.<sup>48</sup> Early Supreme Court cases generally discounted contentions that commercial speech merited protection.<sup>49</sup> The seminal case on this issue is *Valentine v. Chrestensen*,<sup>50</sup> in which the Court refused to strike down an ordinance that denied advertisers the right to distribute handbills in public. The Court was convinced "that the Constitution imposes no such restraint [as is imposed with political speech<sup>51</sup>] on government as respects purely commercial advertising."<sup>52</sup> The Court did not articulate its reasons for denying first amendment protection to commercial speech, but commentators

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a public reprimand, this discipline made him vulnerable to disbarment if he committed a second violation of any kind. *Id.* at 2291-92 (Brennan, J., concurring in part and dissenting in part). Public discipline sullies an attorney's reputation, and more severe punishment can deprive the attorney of his or her livelihood. Justice Brennan argued that the gamble an advertiser faces creates a "potential trap for an unwary attorney acting in good faith . . . [and] imposes an intolerable chill upon the exercise of First Amendment rights." *Id.* at 2292 (Brennan, J., concurring in part and dissenting in part).

In addition to first amendment implications, the state's failure to specify the required disclosures raised procedural due process concerns. Zauderer could have no notice of a rule that was not clearly explicated prior to his disciplinary hearing. The due process clause was implicated in the adjudication of deception involving the drunk driving advertisement. The Committee had found this advertisement misleading and deceptive on a ground different from that charged in the original complaint. This change in theories deprived Zauderer of reasonable notice of the specific charges he had to meet. *Id.* at 2289-93 (Brennan, J., concurring in part and dissenting in part). The majority, however, ruled that a change in theories did not deny Zauderer notice of the situation out of which the complaint arose. Rather, the majority found that general notice of the charges against him was sufficient in this case to satisfy due process requirements. *Id.* at 2283-84.

48. The Constitution states that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I. Many judges and commentators have theorized about what speech this constitutional language protects. Alexander Meiklejohn puts forth the most restrictive view of the kinds of speech protected by the first amendment. In his view, only "public" speech deserves constitutional protection. Public speech consists of speech connected to public issues or to self-government and would not include commercial speech. A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 26-28 (1960). What Meiklejohn terms public speech can also be termed political speech. See *infra* note 51.

Thomas Emerson takes a more moderate view and distills speech into four functions: (1) a way to ensure self-fulfillment to individual members of a society, (2) a means to develop knowledge and to discover truth, (3) a method of providing individuals with a means of influencing decision-making, and (4) a way of balancing change and stability in society. In Emerson's view speech that falls under any one of these four categories merits first amendment protection. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 878-79 (1963). It is unclear whether commercial speech would merit protection under Emerson's view. G. GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1109 n.3 (10th ed. 1980).

The most liberal view was espoused by Oliver Wendell Holmes. Holmes, who believed that all speech was important as an end in itself, stated that the proper way to control speech was to allow it to control itself in the marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Under Holmes' view commercial speech clearly would deserve protection.

49. See *Breard v. Alexandria*, 341 U.S. 622, 641-45 (1951) (upholding ordinance banning door-to-door commercial solicitation); *Martin v. City of Struthers*, 319 U.S. 141, 141-42 & n.1, 149 (1943) (suggesting state may prohibit door-to-door distribution of commercial matter but not material of a political or religious nature); *Murdock v. Pennsylvania*, 319 U.S. 105, 110-111 (1943) (noting different treatment of religious and commercial material under the first amendment); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (commercial leaflets not protected by first amendment); *Fifth Ave. Coach Co. v. City of New York*, 221 U.S. 467, 477 (1911) (upholding state ban on "advertising trucks, vans or wagons").

50. 316 U.S. 52 (1942).

51. Political speech consists of speech that is connected to public issues or self-government. That the first amendment protects speech of this type is beyond dispute. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (protecting political speech of Ku Klux Klan leader).

52. *Valentine*, 316 U.S. at 54.



have formulated at least two theories to explain the Court's holding in *Valentine*. First, commercial speech does not enhance individual growth through matters of belief and expression; the interests of the speaker and the listener are merely economic.<sup>53</sup> Second, failure to protect commercial speech does not harm political speech because commercial speech contains no expression essential to self-government.<sup>54</sup> The value of commercial speech is its usefulness in assisting consumers decide when and from whom to purchase products or services. Thus, the value of commercial speech is in continuing the market economy.<sup>55</sup>

For more than three decades the Supreme Court excluded commercial speech from first amendment protection.<sup>56</sup> Therefore, when the Supreme Court in 1976 faced a first amendment challenge to a state ban on advertising, the result seemed certain. However, the Court broke three decades of precedent and in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>57</sup> recognized first amendment protection for commercial speech.<sup>58</sup> The Virginia statute at issue banned price advertising by pharmacists.<sup>59</sup> The Court found the statute offensive to the first amendment and held that a state may not completely suppress dissemination of truthful information about a lawful activity.<sup>60</sup> The Court characterized the speech at issue as "I will sell you the X prescription drug at the Y price"<sup>61</sup> and stated that even this basic market transaction deserved first amendment protection. A major reason for granting protection to commercial speech was "the particular consumer's interest in the free flow of commercial information."<sup>62</sup> Such information, the Court observed, is vital in the preservation of a market economy:

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53. Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 14-15 (1979).

54. *Id.* at 15.

55. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 760-63 (1976) (noting the value of advertising in both the market of products and services and in the marketplace of ideas).

56. From *Valentine*, 316 U.S. 52, discussed *supra* notes 50-54 and accompanying text, to *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), discussed *infra* notes 57-68 and accompanying text, the Court consistently denied protection to pure commercial speech.

57. 425 U.S. 748 (1976).

58. This recognition was not entirely unexpected. Several previous cases had indicated the Court's willingness to afford first amendment protection to commercial speech and thereby break existing precedent. In 1964 the Court ruled in *New York Times v. Sullivan*, 376 U.S. 254 (1964), that commercial motivation did not preclude first amendment protection from a political advertisement. In 1975 the Court held that state prohibition of an advertisement in a Virginia newspaper that advised Virginia residents of the availability of abortions in New York violated the first amendment. *Bigelow v. Virginia*, 421 U.S. 809 (1975); see Note, *Constitutional Protection of Commercial Speech*, 82 COLUM. L. REV. 720, 722-24 (1982).

59. The statute provided:

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

VA. CODE ANN. § 54-524.35 (1974) (amended 1980).

60. *Virginia Pharmacy*, 425 U.S. at 773.

61. *Id.* at 761.

62. *Id.* at 763.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.<sup>63</sup>

After establishing that the speech merited protection because of the consumer's need for information, the Court analyzed Virginia's justifications for the ban. The Court recognized a strong state interest in promoting professionalism, but ruled that regulation of pharmacists, not their advertising, was the appropriate way to advance this interest.<sup>64</sup> The Court termed Virginia's approach "highly paternalistic" and stated:

[The] alternative [to Virginia's approach] is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.<sup>65</sup>

The Court structured its opinion as if it were balancing state interests against the value of commercial speech, but it adopted what appeared to be a strict scrutiny standard.<sup>66</sup> Simply put, truthful information could not be suppressed completely. Despite this strict scrutiny language, the Court recognized that "common-sense" differences existed between commercial speech and political speech. These differences justified a lesser degree of protection for commercial speech.<sup>67</sup> Some commentators nevertheless believed that full first amendment protection for commercial speech followed from the strict scrutiny standard employed in *Virginia Pharmacy* regardless of these common-sense differences.<sup>68</sup> Cases that followed *Virginia Pharmacy* also seemed to indicate that commercial speech would be afforded full first amendment protection. Of these cases, *Bates v. State Bar*<sup>69</sup> was the first in which the Court considered first

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63. *Id.* at 765.

64. *Id.* at 770.

65. *Id.*

66. *See id.*

67. The differences that the Court noted were: (1) commercial speakers can verify their information more easily than other speakers; (2) the information may be more durable and less likely to be chilled by regulation because advertising is crucial in a market economy; (3) affirmative requirements such as warnings, disclaimers, or additional information might be required to prevent deception. *Id.* at 771 & n.24.

68. In 1978, for example, Professor Laurence H. Tribe noted that "[t]ruthful statements which are neither misleading nor obscene are protected by the first amendment even though made for a commercial purpose." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663 n.51 (1978) (quoted in Note, *supra* note 58, at 727).

69. 433 U.S. 350 (1977).

amendment protection for attorney advertising.<sup>70</sup>

In *Bates* the Court held that advertising by attorneys could not be subject to blanket suppression.<sup>71</sup> The advertisement in question contained entirely truthful, fixed prices for routine legal services.<sup>72</sup> The interest at stake in this advertisement, said the Court, was the consumer's need to have the information the ad conveyed<sup>73</sup> to make an informed decision about hiring an attorney.<sup>74</sup> This information, which could have increased utilization of the legal system, might have been unavailable to the consumer through other channels.<sup>75</sup>

The Court rejected each of the State's asserted justifications for the ban on attorney advertising. The Court first observed that a ban on advertising was an ineffective method of promoting quality legal services.<sup>76</sup> The State argued that advertising would detract from professionalism among attorneys and would lead to public distrust of the profession. The Court rejected this argument and found the nexus between professionalism and advertising "severely strained."<sup>77</sup> Indeed, the Court saw advertising as a means of reducing public hostility toward lawyers by informing the public that legal services are affordable.<sup>78</sup> The Court found that the benefits of advertising outweighed the perhaps undesirable effect of increasing litigation.<sup>79</sup> The Court also rejected the notion that attorney advertising was inherently misleading.<sup>80</sup> Fixed price advertising, said the Court, probably would not and could not be done in cases involving unique or highly individualized services.<sup>81</sup> The fact advertising provided an incomplete basis for selecting an attorney supported the state's argument, but did not justify a suppression of speech: "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."<sup>82</sup> As in *Virginia Pharmacy*, the Court found

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70. Two cases involving commercial speech were decided prior to *Bates*. In *Linmark Assoc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court ruled on first amendment grounds that a ban on "For Sale" and "Sold" signs was an impermissible method of achieving the laudable objective of racial integration. In *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977), the Court found that a ban on advertisements of contraceptives was an unconstitutional infringement of the right to privacy, *id.* at 687-88, and the commercial speech protection of the first amendment, *id.* at 700. See Note, *supra* note 58, at 726-27.

71. *Bates*, 433 U.S. at 383.

72. The services advertised were an uncontested divorce, a simple will, an adoption, a simple personal bankruptcy, and a name change. *Id.* at 385.

73. The Court could refuse to hear cases brought by attorney advertisers on the basis of a lack of standing to sue because advertisers assert the rights of consumers, not their own rights. The Court has never addressed this issue and probably never will. That the Court ignores the standing issue comports with the notion that standing is merely a docket control device. See *Allen v. Wright*, 468 U.S. 737, 766 (1984) (Brennan, J., dissenting); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 490 (1982) (Brennan, J., dissenting); *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (Brennan, J., concurring in the result and dissenting).

74. *Bates*, 433 U.S. at 364.

75. See *id.* at 375-77.

76. *Id.* at 378-79.

77. *Id.* at 368.

78. *Id.* at 368-72.

79. *Id.* at 375-77.

80. *Id.* at 372.

81. *Id.*

82. *Id.* at 374.

that the effects of competition would offset any increase in costs from advertising and thus the state could not justify an advertising ban on grounds of undesirable economic effects.<sup>83</sup> Finally, the Court was not convinced that problems surrounding the enforcement of less restrictive regulations were severe enough to justify an outright ban on advertising.<sup>84</sup>

The Court in *Bates*, however, did recognize that legal advertising differed from general advertising and thus was subject to more restrictive regulation.<sup>85</sup> Misstatements that might be insignificant in other contexts could be significant in legal advertising. Statements about the quality of services that cannot be verified and in-person solicitation could be prohibited.<sup>86</sup> In addition, the Court suggested that the state might require that supplemental information—a warning or limited disclaimer—be included in an advertisement.<sup>87</sup>

The Court's decision in *Bates* failed to answer fully attorneys' questions about the extent of protection afforded attorney advertising under the first amendment. Two 1978 cases, both involving solicitation,<sup>88</sup> gave the Court an opportunity to address these questions. In the first, *In re Primus*,<sup>89</sup> the Court held that a state could not ban in-person solicitation by an attorney for political or social purposes when economic gain was not a motive. Thus, under *Primus*, if the predominant motive behind an advertisement is within the area protected as political speech, the advertisement will be afforded full first amendment protection.<sup>90</sup>

When the motive for in-person solicitation is personal profit rather than political or social change, the Court has denied first amendment protection. In

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83. *Id.* at 377-78.

84. *Id.* at 379. Opponents of advertising and solicitation argued that complete prohibition of all advertising promotes professionalism by maintaining esprit de corps, increasing public esteem (because advertising suggests that money is the prime motivation of lawyers), and preventing consumer selection of an attorney for the wrong reasons (low price rather than skill level). An advertising ban theoretically limits the business available to dishonest or incompetent attorneys because without advertising attorneys must depend on referrals based on their reputation. Dissatisfied consumers will not refer others to a dishonest or incompetent attorney. See, e.g., Brief of State Bar of Arizona at 23, *Bates*; Brief of the State Bar of North Carolina as Amicus Curiae in Support of the State Bar of Arizona at 11, 14, *Bates*; Note, *Advertising, Solicitation and Legal Ethics*, 7 VAND. L. REV. 677, 684 (1954); Cappel, *Lawyers Seem Naive About Advertising Use*, Chicago Daily News, Dec. 9, 1975, at 30, col. 1; Cappel, *Lawyers Advertise? Watch Out McBarrister*, Chicago Daily News, June 3, 1975, at 28, col. 1. The *Bates* court noted that "the postulated connection between advertising and true professionalism . . . presumes that attorneys must conceal . . . the real-life fact that lawyers earn their livelihood" by practicing law. *Bates*, 433 U.S. at 368.

85. *Bates*, 433 U.S. at 383 & n.37.

86. *Id.* at 383-84.

87. *Id.* at 384.

88. In this context solicitation means to recommend one's self for employment. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1981). Because solicitation is but a subcategory of advertising, see *supra* note 1, the commercial speech doctrine should apply in cases of solicitation in the same manner as in the more general advertising cases.

89. 436 U.S. 412 (1978). The attorney, an American Civil Liberties Union (ACLU) representative, sought to recruit plaintiffs who had been sterilized wrongfully and who would file suit against the parties involved. The attorney was disciplined for writing a letter offering representation at no cost to a woman who was a possible plaintiff. *Id.* at 416 & n.6. The ACLU was to receive no fee for representing these plaintiffs. *Id.* at 422.

90. *Id.* at 424-32.

*Ohralik v. Ohio State Bar Association*<sup>91</sup> the Supreme Court held that a state could ban in-person solicitation by attorneys for profit. The Court recognized the potential dangers consumers faced from door-to-door lawyers.<sup>92</sup> The lawyer could invade the consumer's privacy. The soliciting lawyer could also exert pressure on the client to hire him or her, demand an immediate response without opportunity for consumer comparison or reflection, and even discourage consumer investigation of other attorneys.<sup>93</sup> The Court further recognized that regulation of in-person solicitation would be difficult.<sup>94</sup> An attorney allowed to solicit unchecked might subordinate a client's best interests to the best interests of the attorney's bank account.<sup>95</sup> The Court's decision in *Ohralik* thus applied a prophylactic ban to one type of commercial speech, signalling a departure from what had appeared to be full first amendment protection for commercial speech.<sup>96</sup>

The process of chipping away at first amendment protection of commercial speech continued in *Central Hudson*. In *Central Hudson* the Court established a three part test to determine whether a regulation restricting commercial speech was valid.<sup>97</sup> The Court held that the regulation must (1) advance a substantial government interest, (2) directly advance the interest asserted, and (3) be no more extensive than necessary to serve the interest.<sup>98</sup> Applying this test to a ban on promotional advertising by electric utilities, the Court held that the ban did not satisfy the third element of the test. The ban suppressed speech that in no way impaired the state interest at issue.<sup>99</sup> This overly expansive ban "[reduced] the information available for consumer decisions and thereby [defeated] the purpose of the First Amendment."<sup>100</sup>

Some commentators claimed that *Central Hudson* broadened protection for commercial speech by setting up a least restrictive means analysis under which one need only find a slightly less drastic alternative to prove unconstitutionality.<sup>101</sup> These commentators, however, were proved wrong by subsequent deci-

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91. 436 U.S. 447 (1978). The attorney, Ohralik, had heard about an automobile accident that resulted in serious injury to two young women. Ohralik raced to the hospital and convinced one of the women, who was then in traction, to sign a contract employing him as her attorney. *Id.* at 450. He later convinced the second woman to employ him after visiting her at her home. *Id.* at 451. When both women later fired Ohralik he refused to allow himself to be dismissed and instituted a breach of contract action against his clients. *Id.* at 451-52 & n.5.

92. *Id.* at 457-58.

93. *Id.*

94. *Id.*

95. *Id.* at 461 n.19.

96. A year later the Court upheld a state ban on the use of trade names by optometrists on grounds that trade names had a great potential to mislead. *Friedman v. Rogers*, 440 U.S. 1, 12-13 (1979).

97. To qualify for protection, the speech must fall within the scope of the commercial speech doctrine. The speech must not be false, fraudulent, deceptive, or misleading and must not propose an illegal transaction. *Central Hudson*, 477 U.S. at 563-64.

98. *Id.* at 566.

99. *Id.* at 569-70.

100. *Id.* at 567.

101. See Note, *supra* note 58, at 729-30; Note, *Legislative Choice and Commercial Speech: Central Hudson Gas & Electric Corp.*, 1981 UTAH L. REV. 831, 831-40; Note, *Electric & Gas Utility Advertising: The First Amendment Legacy of Central Hudson*, 60 WASH. U.L.Q. 459, 493-94 (1982).

sions.<sup>102</sup> In *Metromedia, Inc. v. City of San Diego*,<sup>103</sup> decided in 1981, the Court struck down a billboard restriction on grounds of excessive interference with noncommercial speech.<sup>104</sup> The Court stated that the ban would have been valid had it affected only commercial speech.<sup>105</sup> The Court, albeit in dicta, employed deferential scrutiny in applying the *Central Hudson* test.<sup>106</sup>

In 1982 the Court applied this intermediate level of scrutiny to attorney advertising. In *re R.M.J.*<sup>107</sup> posed the question whether an attorney could be limited to a list of categories when describing his or her area of practice in an advertisement.<sup>108</sup> The Court found that the restriction served no substantial state interest and granted protection to an attorney whose advertised description of practice deviated from the list.<sup>109</sup> The advertising attorney also faced charges that he had mailed announcements to persons other than "lawyers, clients, former clients, friends and relatives"<sup>110</sup> in violation of a disciplinary rule. The Court found the justifications offered by the state superficial and stated that a less restrictive path could have been taken to supervise the content of mailings.<sup>111</sup> The Court thus applied an intermediate level of scrutiny to the prophylactic ban and held that first amendment considerations controlled.<sup>112</sup>

Nonetheless, the Court in *R.M.J.* found that the special risks of deception inherent in legal advertising justified regulations that might violate the first amendment if applied to other types of advertising. The Court reemphasized that states could regulate claims of quality because they were likely to mislead as a category.<sup>113</sup> A state, suggested the Court, could restrict in-person solicitation and could require that a warning or disclaimer be included in advertisements.<sup>114</sup> The bar could define services characterized as "routine," and the Court added that price advertising of nonroutine legal services might evoke a judicial response different from that in *Bates*.<sup>115</sup> Clearly, the state could regulate inherently misleading advertising or advertising that had actually misled consumers.<sup>116</sup>

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102. Proven right, however, was Justice Blackmun in his *Central Hudson* concurrence. Blackmun argued that the *Central Hudson* test reduced the protection that had been provided to commercial speech in previous cases. He stated that "this level of intermediate scrutiny [was inappropriate] when a state seeks to suppress information about a product in order to manipulate a private economic decision that the state cannot or has not regulated or outlawed directly." *Central Hudson*, 447 U.S. at 573 (Blackmun, J., concurring).

103. 453 U.S. 490 (1981).

104. *Id.* at 512-17.

105. *Id.* at 512.

106. *Id.* at 507-12.

107. 455 U.S. 191 (1982).

108. *Id.* at 195 n.6. The list is no longer included in the current MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1981).

109. *R.M.J.*, 455 U.S. at 207.

110. *Id.* at 206.

111. *Id.*

112. *Id.* at 206-07.

113. *Id.* at 201.

114. *Id.*

115. *Id.* at 200 & n.11.

116. *Id.* at 202.

Although the risk of deception justified some regulation of advertising, a later case dismissed potential offense to the consumer as a legitimate rationale for regulation. In *Bolger v. Youngs Drug Products Corp.*<sup>117</sup> the Supreme Court struck down a federal statute<sup>118</sup> that prohibited an advertiser from mailing unsolicited advertisements for contraceptives. Potential offensiveness was of no concern to the Court because the consumer could avoid contact with the information by having his or her name removed from the company's mailing list pursuant to the statute or the consumer could discard the material.<sup>119</sup>

Recently, the Supreme Court even further narrowed the protection afforded commercial speech by the first amendment. In *Posadas de Puerto Rico Associates v. Tourism Co.*<sup>120</sup> the Supreme Court refused to strike down a Puerto Rico statute that prohibited advertisements inviting Puerto Ricans to visit local casinos.<sup>121</sup> The Puerto Rico Superior Court had interpreted the statute to allow local advertising by casinos so long as "the object of the advertisement is the tourist."<sup>122</sup> The Supreme Court majority applied the *Central Hudson* test and found that this limitation on advertising was the Puerto Rico Legislature's means of reducing local demand for casinos. The limitation thus was intended to protect the health, safety, and welfare of its citizens.<sup>123</sup> The majority based its decision on the states' power to prohibit completely gambling by its own citizens.<sup>124</sup> The majority ignored the problem posed by such "back-door regulation" through advertising restrictions,<sup>125</sup> and ignored the position taken in *Virginia Pharmacy* that information alone is not harmful.<sup>126</sup>

The question arises to what extent advertisers can be compelled to include specific information in an advertisement. In *Bates* the Court suggested that supplemental information—a warning or limited disclaimer—could be an appropriate alternative to blanket suppression of attorney advertising.<sup>127</sup> In *R.M.J.* the Court repeated its statement that a state could require inclusion of a warning or disclaimer in an advertisement. The Court, however, did not explore the implications of compelled speech<sup>128</sup> on current first amendment doctrine. The issue

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117. 463 U.S. 60 (1983).

118. 39 U.S.C. § 3001(e)(2) (1982).

119. *Bolger*, 463 U.S. at 72. The company produced condoms. Not all of the pamphlets at issue attempted to sell the company's "Trojan" brand directly. Some of the pamphlets discussed the generic condom. These informational pamphlets presented a close question whether the material fell within the commercial speech doctrine or deserved protection as core first amendment speech. *Id.* at 66-67 & nn.12-14. The Court concluded that the pamphlets were commercial speech and were entitled to the qualified protection of the commercial speech doctrine. *Id.* at 68.

120. 106 S. Ct. 2968 (1986).

121. *Id.* at 2972.

122. *Id.* at 2974.

123. *Id.* at 2976-78.

124. *Id.* at 2979.

125. The dissenters, however, did recognize the dimensions of this problem. See *id.* at 2980 (Brennan, J., dissenting), 2986 (Stevens, J., dissenting).

126. For a discussion of *Virginia Pharmacy*, see *supra* notes 57-68 and accompanying text.

127. *Bates*, 433 U.S. at 383-84.

128. Compelled speech is speech that a speaker is forced to utter or print. The first amendment protects both the right to speak and the right to refrain from speaking. See *infra* notes 129-33 and accompanying text.

of compelled speech was not litigated in either *Bates* or *R.M.J.*<sup>129</sup> In addition, the Court's suggestions in *Bates* and *R.M.J.* did not indicate what level of scrutiny applied to compelled speech in commercial speech cases.

Although doubt existed in the commercial speech context, the Court had made it clear that a state cannot compel a person to speak either verbally or symbolically in the noncommercial context. A schoolchild cannot be forced to recite the pledge of allegiance;<sup>130</sup> a newspaper cannot be forced to print a reply to editorial statements free of charge;<sup>131</sup> and an automobile owner cannot be compelled to display the slogan "Live Free or Die" on a license plate when the owner objects to that slogan on moral, religious, or political grounds.<sup>132</sup> These three cases illustrate expansive protection of core first amendment speech against regulations that compel specific statements. Because the Court affords a lesser degree of protection to commercial speech generally, it was initially unclear whether the rules concerning compelled core first amendment speech would apply to compelled commercial speech. The Supreme Court in *Zauderer* for the first time directly addressed the constitutionality of compelled speech as part of a state's regulation of commercial speech, and held that compelled speech regulations need only bear a rational relationship to a legitimate state interest.<sup>133</sup>

The intermediate level of scrutiny for commercial speech reaffirmed in *Zauderer* is an understandable result of the Court's ambiguity toward commercial speech.<sup>134</sup> Protection of commercial speech stems from recognition that for a market economy to function, much less function efficiently, information must be available to consumers. The consumer must know where goods and services can be purchased at affordable prices.<sup>135</sup> Information enhances competition

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129. The attorney in *R.M.J.* had been charged with failure to include a required disclaimer of expertise in a listed area, but the state admitted that the discipline administered was not based on a failure to include the disclaimer. *R.M.J.*, 455 U.S. at 197, 204-05 n.18. The court suggested in *R.M.J.* that a disclaimer or explanation would be a way to "assure that the consumer is not misled." *Id.* at 200 n.11 (quoting *Bates*, 433 U.S. at 384).

130. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

131. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

132. *Wooley v. Maynard*, 430 U.S. 705 (1977).

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

134. One explanation for the Court's reluctance to provide workable guidelines is concern that the Court would be moving into economic regulation if it did more in this area. Current doctrine indicates that this is not an appropriate role for the Court. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (nonlawyers can be prohibited from debt-adjusting); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (opticians can be restricted from fitting glasses into frames without a prescription). This was not always the law. *See, e.g.,* *Coppage v. Kansas*, 236 U.S. 1 (1915) (state cannot interfere with employment contract when there is no reasonable ground for the exercise of the state's police power); *Lochner v. New York*, 198 U.S. 45 (1905) (state cannot interfere with employment contract when there is no reasonable ground for the exercise of the state's police power).

135. The first amendment protects the consumer's right to receive information, rather than the commercial speaker's desire to speak. *See Central Hudson*, 447 U.S. at 562; *Bates*, 433 U.S. at 364; *Virginia Pharmacy*, 425 U.S. at 763. The protection granted in *R.M.J.* is consistent with this idea. Consumers did not understand the meaning of the terms that the regulation required. The attorney used language that was clearer to the consumer. This fact is made evident by comparing the terms the state required, *R.M.J.*, 455 U.S. at 195 n.6, with the terms the attorney actually used, *id.* at 196-97 & n.8. The attorney's interest in disseminating information is important only as a means to provide information to the consumer. Justice Brennan, however, suggested in *Zauderer* that the first



which, in turn, lowers prices.<sup>136</sup>

However, not all speech provides information that assists in consumer decision-making. Information that is false, fraudulent, misleading, or deceptive harms the consumer.<sup>137</sup> Even truthful information can be used to harm the consumer.<sup>138</sup> An intermediate level of scrutiny allows a court to weed out harmful advertisements or methods of advertising from the helpful advertisements or methods. This intermediate level allows the court to weigh competing interests in a way that a bright line rule cannot.<sup>139</sup> It also allows the Court to deal with technological change in an area prone to rapid advancement.

The Court's application of intermediate scrutiny to attorney advertising, however, has created severe problems that threaten to undermine first amendment protection for this type of commercial speech.<sup>140</sup> The Court has narrowly

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amendment protects the commercial speaker's right to speak. *Zauderer*, 105 S. Ct. at 2292 n.17 (Brennan, J., concurring in part and dissenting in part).

The Court could limit first amendment protection to advertising and solicitation that communicates information which a consumer could use in making decisions. Advertising and solicitation that does not provide useful information does not aid consumers in making choices and, therefore, generally should not be granted first amendment protection. Some amount of such information should be protected because it serves to differentiate advertising and thus would encourage the advertiser to disseminate the information. This additional requirement could be dealt with under an intermediate scrutiny standard. Distinguishing "informational" from "noninformational" advertising and solicitation, however, would be difficult. It would be necessary to judge each advertisement on an ad hoc basis. This approach would not give advertisers a clear notion of what is protected content in an advertisement. The problems created under this approach would be identical to those created by the use of intermediate scrutiny to protect commercial speech. See *infra* text accompanying notes 140-77. Realistically, one would expect regulations that defined two ends of the spectrum and that approached the middle area with liberality. A rule that examined the predominant content of the advertisement would operate in much the way that the commercial speech intermediate scrutiny test operates. A motive test would be inapplicable because the motive for all advertising is profit.

136. In *Bates* the court stated:

[A]dvertising does increase an attorneys overhead costs, and . . . may increase substantially the demand for services. Both these factors will tend to increase the price of legal services. On the other hand, the tendency of advertising to enhance competition might . . . produce pressures on attorneys to reduce fees. The net effect of these competing influences is hard to estimate. We deem it significant, however, that consumer organizations have filed briefs as *amici* urging that the restriction on advertising be lifted. And we note as well that . . . competition through advertising is ordinarily the desired norm.

*Bates*, 433 U.S. at 377-78 n.35.

137. There are controls on harmful information that occur naturally in the market. Consumers are knowledgeable and intelligent and they gather information to make decisions. A seller faces a high cost if he or she maintains a reputation for dishonesty and competitors call to the attention of consumers the false claims made by the seller. Furthermore, private law remedies sounding in tort and contract are available to aggrieved consumers. R. POSNER, REGULATION OF ADVERTISING BY THE FTC 5-7 (1973).

138. This is the fundamental premise underlying the decision in *Ohrlik*. See *supra* text accompanying notes 91-96.

139. The Court in *Bates* could have announced a bright line test that an attorney could advertise fixed prices for routine legal services only. Such a rule would ignore that fixed prices for nonroutine services might be appropriate in some instances. Such a situation might occur when an attorney seeks to represent plaintiffs in similar circumstances—such as in the *Dalkon Shield* cases. An attorney who has handled a large number of cases of this type is likely to know his or her approximate expenses in preparing such a case. Although this approach poses the danger that an attorney might opt for a financially beneficial result rather than a result that is in the client's best interest, the danger might be less than the benefit to the consumer of the fixed fee compared with the cost of a contingent fee. A bright line test would prohibit such advertising, while intermediate scrutiny would afford a court the opportunity to consider the facts and circumstances surrounding each case.

140. For an in-depth study of attorney advertising and its effect on the market, see FEDERAL

tailored its decision in each of the attorney advertising and solicitation cases to fit only the facts of the case and thereby it has offered virtually no guidance to attorneys who wish to advertise or otherwise solicit business.<sup>141</sup>

To date, efforts of disciplinary rulemakers directed toward attorney advertising and solicitation have been attempts to discourage these practices. Traditionally, there has been strong sentiment among members of the bar that attorney advertising is inherently wrong.<sup>142</sup> One notable opponent is former

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TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984) (cited in *Zauderer*, 105 S. Ct. at 2279 n.13) [hereinafter FTC STAFF REPORT]. This staff report concludes that current rules are too restrictive and should be relaxed. *Id.* at 172. The methodology of this study has been criticized by the executive director of the Michigan State Bar, Michael Franck. Franck argues that the data does not support the study's conclusion. The FTC, of course, disagrees. *ABA Conference Focuses on Trends in Lawyer Advertising*, 1 Law. Man. on Prof. Conduct (ABA/BNA) 813, 814 (1985).

141. The following examples illustrate questions left unanswered by the Court's commercial speech decisions to date:

1. *Contact with Sophisticated Consumers.* A labor attorney wishes to solicit business in-person and for personal profit from corporations known to have small legal staffs and large labor problems. Can that attorney do so? The dangers of overreaching and undue influence that justified the *Ohralik* decision are absent when the consumer solicited is knowledgeable. Therefore, under the balancing test of intermediate scrutiny the attorney's solicitation arguably is protected.

Attorney X, who successfully defends personal injury suits, wishes to place in a newspaper an advertisement that reads "four out of five insurers sued in City A recommend using Firm X." This statement is entirely true. The Court in *Bates* and *R.M.J.* has suggested that a statement in legal advertising that cannot be verified may be barred, but if the statement can be verified and the consumer is far less susceptible than the layperson, the flexible standard protecting commercial speech ought to protect this statement as well.

Both of these examples currently are prohibited under disciplinary rules. See *infra* text accompanying notes 157-59.

2. *Endorsements By Celebrities.* A familiar advertising tactic is to have a popular sports figure or other celebrity promote a product. Suppose Attorney X hired a celebrity to appear on television and in magazines stating "Attorney X can handle all of your general legal needs. Come see X at her office if you need legal advice." Can the state bar such conduct? The purpose of protecting commercial speech is to ensure that market information reaches consumers. Using a celebrity does not convey this vital information and, therefore, arguably could be barred without offending the first amendment. Existing disciplinary rules do not address this issue. Cf. *infra* notes 143-44 and accompanying text (giving Chief Justice Burger's view of "flagrant" advertising).

3. *Enticing Consumers with Free Gifts.* Suppose that Attorney X, thwarted in the two earlier attempts, now places in a newspaper an advertisement that offers "one free car wash and wax with each visit to Firm X." Can the state prohibit this advertisement? The advertisement contains market information (price is reduced by value of the wash and wax to consumer), but this tactic relegates the profession to the status of a product on a grocery store shelf. The first amendment value of the information contained in the advertisements presented in *Bates* and *R.M.J.* outweighed the state's interest in professionalism, but neither *Bates* nor *R.M.J.* eliminated professionalism as a legitimate, protectable interest. The advertising in this example all but destroys professionalism. The information in the advertisement is not "true" price information such as fixed prices for routine services, sliding scale fee arrangements, or an offer of a free consultation. Arguably, professionalism in this case is more important than the information conveyed in X's advertisement. However, unless one could argue that the advertising is misleading, which is unlikely, this conduct is not prohibited under current decisions on state regulation of lawyer advertising.

4. *Advertising in Places Where Injured People Will Notice.* Attorney X and City A Ambulance Company enter into a contract that gives Attorney X space to advertise her personal injury practice on the side of ambulances. Attorney X also places a generous supply of business cards in the receiving area of the Emergency Room. Can the state bar these practices? Arguably, these acts are equivalent to prohibited direct mail solicitation and thus justify discipline—they reach particular consumers with specific legal needs addressed in the advertising. This conclusion, however, is far from clear. The state could prohibit such advertisements by enacting a valid time, place, and manner restriction such as may be imposed on any speech protected under the first amendment.

142. 3 G. ROSDEN & P. ROSDEN, THE LAW OF ADVERTISING § 46.02 (1973).

Chief Justice Warren E. Burger. Addressing a meeting of the American Bar Association in July of 1985, he claimed that "advertising in flagrant ways is pulling down the image of the entire profession."<sup>143</sup> He stated that he would "dig ditches" before resorting to "flagrant" advertising.<sup>144</sup> Perhaps these sentiments, which are shared by some others on the Court,<sup>145</sup> explain why the Supreme Court has failed to establish general rules protecting attorney advertising or solicitation. The Court's insistence that its holdings fit precisely the facts at issue, however, fuels the controversy among members of the bar over attorney advertising. There is a push from members of the bar who disfavor all advertising for restrictive rules treading very near the boundaries set in the commercial speech cases. As a result, attorneys who would otherwise advertise or solicit business do not do so for fear of incurring the wrath of their fellow lawyers.<sup>146</sup>

Supreme Court decisions prior to *Zauderer* established ends of the attorney advertising spectrum. The Court in *Bates* and *R.M.J.* established that two isolated advertisements disseminated in newsprint were permissible. The *Ohralik* decision identified a method of advertising that was impermissible.<sup>147</sup> The *Zauderer* case represents the Court's first venture into the grey area between *R.M.J.* and *Ohralik*, and the decision in *Zauderer* is disappointing. The Court

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143. *Burger Assails Lawyer Advertising*, The Washington Post, July 8, 1985, at A1, col. 2.

144. *Id.* at A6, col. 1. The Chief Justice was criticizing an advertisement showing a National Football League star making a touchdown in the Super Bowl and then stating that if he were hurt he would use a particular law firm. The local bar association criticized the advertisement but took no disciplinary action against the firm. The firm took the advertisement off the air voluntarily. *Id.*

The Chief Justice's view against advertising also extends to less flagrant conduct. For example, he dissented in *In re Admission of Benton*, 50 U.S.L.W. 3713 (1982), which involved an application for admission to practice before the Supreme Court. Earlier in his legal career the applicant had included an advertisement in a "Val-Pak." Val-Pak is a mail out package of coupons that provides discounts on goods and services. *Id.* The applicant's advertisement stated that a first consultation would cost \$10. *Id.* The state supreme court disciplined the attorney for soliciting business at an undefined discount. The United States Supreme Court denied the attorney's petition for certiorari from the state supreme court decision. Not long after the petition was denied, the attorney filed an application to practice before the Supreme Court and the Court admitted him to the Supreme Court Bar. *Id.* at 3714. Burger's dissent characterized the attorney's advertisement as "shoddy professional practices" and stated that he would have denied the attorney's application to practice before the Supreme Court. *Id.* at 3714 (Burger, C.J., dissenting).

145. Justice O'Connor, joined by Justices Burger and Rehnquist, partially concurred in *Zauderer*, but argued that the likelihood of overreaching and undue influence justified a prophylactic ban on advertisements giving legal advice. The removal of personal contact did not eliminate the risks associated with solicitation, O'Connor argued. *Zauderer*, 105 S. Ct. at 2294 (O'Connor, J., concurring in part and dissenting in part). Professionals have greater obligations than merchants, she argued, and the difference between offering legal advice and offering merchandise for sale merited greater deference to the state. *Id.* at 2295. Legal advertising is dangerous, she contended, because it "[encourages] lawyers to present that advice most likely to bring potential clients into the office." *Id.* at 2296 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor used the *Central Hudson* test and in her balancing found that the dangers of solicitation—any solicitation—justified a prophylactic ban.

146. In 1978, an ABA poll showed that only 3% of the attorneys surveyed advertised. In 1979 that figure rose to 7%. L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING & SOLICITATION 43 (1980). That percentage moved to 10% in 1981 and to 13% in 1983. See FTC STAFF REPORT, *supra* note 140, at 70.

147. The decision in *Ohralik* could have been a reaction to the outrageousness of the attorney's conduct in that case. The attorney heard about the accident and, after obtaining the assent of the accident victim's parents, approached the victim while she was still hospitalized and in traction. *Ohralik*, 436 U.S. at 450. Had the conduct been less offensive, the decision might have come out differently.

took only a tiny step beyond *R.M.J.* An attorney who wishes to run an advertisement that deviates from those ruled permissible in the case law faces a grave risk. The attorney can present to the public what he or she reasonably believes is an advertisement protected by the first amendment and suffer disciplinary action if the guess is wrong. Advisory wings of disciplinary bodies have been of little aid to attorneys who wish to advertise. Phillip Zauderer's situation provides an example of the untenable situation in which attorneys who wish to advertise find themselves. Zauderer took his advertisement to the Office of Disciplinary Counsel for approval, but the Office refused to advise him on whether the advertisement might expose him to discipline.<sup>148</sup> Zauderer then examined the case law and made his best guess; a guess which ultimately resulted in discipline.<sup>149</sup> The Court's refusal to establish workable guidelines chills advertising by placing grave risks on attorney advertisers and, by inhibiting the flow of information, harms the consumer.<sup>150</sup>

Attorneys have failed to reach vast segments of the legal market. An estimate of a Special Committee of the American Bar Association in 1977 indicated that effective access to legal services is denied to seventy percent of the population.<sup>151</sup> Potential consumers are not people unable to pay legal fees; they do not seek counsel because they erroneously believe that fees are unaffordable<sup>152</sup> or because they have no way to select an attorney other than making a random choice from the "yellow pages" of the telephone directory.<sup>153</sup> One method to reach those in need of legal assistance is through direct mail. In *R.M.J.* the Court held that an attorney could mail announcements to the general public.<sup>154</sup> Direct mail solicitation is a step beyond *R.M.J.*; it is mailing information about a specific legal problem to a consumer who the attorney knows has need of the specific legal information that the attorney can provide. Commentators have suggested that *Zauderer* indicates that direct mail solicitation is protected commercial speech.<sup>155</sup> This suggestion has fueled a lively debate,<sup>156</sup> and the dimensions of the problems that flow from uncertainty in the area of attorney advertising are evident in the direct mail solicitation issue.

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148. *Zauderer*, 105 S. Ct. at 2289 (Brennan, J., concurring in part and dissenting in part); see Stewart, *supra* note 12, at 63.

149. Stewart, *supra* note 12, at 63.

150. An example of harm occurring to consumers is *Gunn v. Washek*, 405 Pa. 521, 522-25, 176 A.2d 635, 635-37 (1961) (Musmanno, J., dissenting), in which an insurance adjuster convinced the mother of an injured five-year-old child to delay hiring an attorney. The statute of limitations ran and the child collected nothing. Had the mother known of the limitations period the child might well have been compensated. See M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* 113 (1975).

151. Freedman, *Advertising and Solicitations by Lawyers: Legal Ethics, "Commercial" Speech, and Free Speech*, in *ADVERTISING AND FREE SPEECH* 67, 68 (A. Hyman & M. Johnson ed. 1977).

152. *Id.*

153. One study reports that 83% of those interviewed agreed with the statement that people do not go to lawyers because they have no way of knowing which attorneys are competent to handle their problems. Anderson, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RES. J. 967, 968.

154. For a discussion of *R.M.J.*, see *supra* text accompanying notes 107-16.

155. *Analysis*, 1 Law. Man. on Prof. Conduct (ABA/BNA) 838-39 (1985).

156. See *infra* note 165 and accompanying text.

An example illustrates the dilemma in the direct mail context. Suppose an attorney discovers that a woman was injured by a Dalkon Shield. The attorney realizes that the consumer probably does not know that she can recover damages for her injuries. The attorney also realizes that the statute of limitations is running and that the consumer's claim will be barred unless suit is filed very soon. The attorney is aware that he or she is almost certain to win this suit and collect a fee. The attorney writes a letter to the consumer that reads:

Enclosed is a sketch of the Dalkon Shield. This device has been alleged to have caused serious pelvic inflammations 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. Do not assume that it is too late to take legal action against the Shield's manufacturer.

I am an attorney in town and am currently representing women in such cases. The cases are handled on a contingent fee basis of the amount recovered. You pay only the costs of litigation if you lose the suit. If you win then a percentage of the fee (computation omitted) goes to me after costs are paid.

If you have any questions, please call me for a free consultation.<sup>157</sup>

The consumer calls the attorney and requests representation. The attorney accepts employment and begins work on the case. Is the attorney subject to discipline?

Under the Model Code of Professional Responsibility the answer clearly is yes. Disciplinary Rule 2-103(A) states that an attorney "shall not . . . recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer."<sup>158</sup> The attorney in the above example has recommended that a layperson employ the attorney, and by doing so has violated Disciplinary Rule 2-103(A).<sup>159</sup> By accepting employment the attorney also has violated Disciplinary Rule 2-103(E), which prohibits an attorney from accepting employment as a result of prohibited conduct.<sup>160</sup>

The attorney fares no better under the Model Rules of Professional Conduct. Rule 7.3 states that "[a] lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."<sup>161</sup> In the example, despite the attorney's concern that the consumer's rights be vindicated, a signifi-

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157. This language is identical to that used by the attorney in *Zauderer*, except that this letter goes a step further and discloses the required information about the costs of litigation.

158. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1981).

159. Nor would the result change if the consumer were a business executive and the lawyer were writing to propose to do collections for the company. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1436 (1979).

160. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(E) (1981).

161. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

cant motive for the action was the attorney's own economic interest. That motive is present with any advertiser and any method of advertising—such as direct mail solicitation. As a result, the attorney is again subject to discipline.

That direct mail solicitation is prohibited under both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct is not determinative. The crucial inquiry is whether prohibition of direct mail solicitation by attorneys violates the Constitution. The letter itself is protectable commercial speech because it is not false, fraudulent, deceptive, or misleading, nor does it propose an illegal transaction. Whether protection is actually granted depends on whether a ban of direct mail solicitation passes the intermediate scrutiny of the *Central Hudson* test.<sup>162</sup>

To pass scrutiny under *Central Hudson*, the direct mail ban must (1) advance a substantial state interest, (2) directly advance the interest served, and (3) be no more extensive than necessary.<sup>163</sup> Direct mail, just as any method of advertising, could be used by an unethical attorney to overreach or exercise undue influence over a potential consumer. The court considered prevention of overreaching a substantial interest in *Ohralik*.<sup>164</sup> In the typical direct mail situation the attorney contacts a vulnerable consumer.<sup>165</sup> The consumer has suffered

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162. See *supra* notes 97-100 and accompanying text.

163. See *supra* text accompanying note 98.

164. *Ohralik*, 436 U.S. at 457.

165. See *In re Von Wiegman*, 101 A.D.2d 627, 628, 474 N.Y.S.2d 147, 148, modified, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), on remand, 485 N.Y.S.2d 399, cert. denied, 105 S. Ct. 2701 (1985).

The Supreme Court denied certiorari in *Von Wiegman* after it handed down the *Zauderer* decision. This has resulted in much speculation about the implications of *Zauderer* on direct mail prohibitions. In *Von Wiegman* an attorney had solicited clients through a direct mailing. The New York court held that a state ban on direct mail solicitation violated the first amendment. *Von Wiegman*, 63 N.Y.2d at 175, 470 N.E.2d at 845, 481 N.Y.S.2d at 47. The attorney in *Von Wiegman* was subject to discipline despite this holding because his direct mail advertisement was misleading and deceptive. *Id.* at 175-76, 470 N.E.2d at 845, 481 N.Y.S.2d at 47. That the attorney would have been punished regardless of the outcome of the direct mail issue could explain why the Supreme Court refused to hear the case. The Court has likewise refused to hear cases in which discipline was imposed as a result of direct mail solicitation. See *Eaton v. Supreme Court of Arkansas*, 270 Ark. 573, 607 S.W.2d 55 (1980) (attorneys included advertisement of \$10 initial consultation fee in packet containing discount coupons), cert. denied, 450 U.S. 966 (1981); *Dayton Bar Ass'n v. Herzog*, 70 Ohio St. 2d 261, 436 N.E.2d 1037 (attorney sent letters to defendants listed in "Daily Court Reporter"), cert. denied, 459 U.S. 1016 (1982). Compare *Analysis*, 1 Law. Man. on Prof. Conduct (ABA/BNA) 941-42 (1985) (Supreme Court will uphold ban on direct mail solicitation) with *Analysis*, 1 Law. Man. on Prof. Conduct (ABA/BNA) 838-39 (1985) (Supreme Court's decision in *Zauderer* and refusal to hear *Von Wiegman* indicate that ban on direct mail solicitation violates first amendment).

Other courts recently have addressed the issue of direct mail advertising. See *Adams v. Attorney Registration and Disciplinary Comm'n*, 617 F. Supp. 449 (N.D. Ill. 1985) (enjoining state from enforcing prohibition of direct mail advertising on first amendment grounds); *Spencer v. Honorable Justices of Supreme Court*, 579 F. Supp. 880 (E.D. Pa. 1984) (direct mail ban unconstitutional), *aff'd*, 760 F.2d 261 (3d Cir. 1985); *Leoni v. State Bar of Cal.*, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985) (in dicta, state cannot ban direct mail solicitation), *appeal dismissed for want of substantial federal question*, 106 S. Ct. 1170 (1986); see also 1 ABA/BNA LAW. MANUAL PROF. CONDUCT MANUAL 801:4201-02 Op. 16 (1980 Maine opinion from The Professional Ethics Commission of the Board of Overseers of the Bar stating that direct mail advertising to personal injury victims may be permissible); 1 ABA/BNA LAW. MANUAL PROF. CONDUCT MANUAL 801:8304 Op. 414 (1984 Texas opinion from Professional Ethics Committee, State Bar of Texas, stating that direct mail is permissible).

some wrong that can be righted by an attorney, but the consumer may not realize that someone other than the advertiser can handle the problem. Direct mail solicitation may say just enough to entice a consumer into an attorney's office voluntarily at which time the consumer may be subjected to the same treatment that the Court found abhorrent in *Ohralik*. Conduct in an attorney's own office is not subject to public scrutiny. But this is a danger faced by every consumer who consults an attorney. Few people come to attorneys for a legal check-up.<sup>166</sup> Rather, clients come to attorneys when they have problems. The dangers from direct mail solicitation are no greater and no less than those found elsewhere in our legal system. In addition, the effect of a direct mailing and a general mailing<sup>167</sup> on the vulnerable consumer are identical, and clearly *R.M.J.* states that the first amendment protects general mailings. The conclusion is obvious: no state interest justifies a prophylactic ban on direct mail advertising. The provisions in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct fail on the first element of the *Central Hudson* test and thus violate the Constitution.

In addition to requiring a substantial state interest, the *Central Hudson* test requires that state regulation of advertising or solicitation be no more extensive than necessary to serve the interests advanced. Assuming that the dangers of overreaching and undue influence exist in direct mail advertising, the proper inquiry is whether a ban on direct mail goes beyond what is necessary to prevent overreaching and undue influence. In answering this question, a court must look for any available alternative to blanket suppression of direct mail. Three such alternatives deserve attention.

First, a "safe harbor"<sup>168</sup> could be established. The bar could formulate direct mail advertising that does not overreach and could make the material available as models for attorneys who wish to advertise through direct mail. Attorneys who use the bar's material substantially verbatim would be safe from disciplinary action. Mailings that deviate from the safe harbor could be grounds for discipline, depending on their content. However, the problems with this approach are considerable. It is doubtful that a bar reluctant to permit advertising would create a formula with enough flexibility to protect freedom of speech. Furthermore, if consumers are unable to distinguish between mailings, they will remain uninformed. If all of the mailings are similar, they will provide the consumer no basis on which to make an informed decision. In addition, the safe harbor approach does not take into account the fact consumers differ. A direct mail advertisement may be genuinely helpful to one consumer and work undue influence on another. The idiosyncracies of individual consumers, however, should not dictate whether consumers generally have access to information through the media, nor should they dictate the first amendment protection afforded commercial speech.

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166. *Bates*, 433 U.S. at 374.

167. A general mailing means postal distribution of advertising to random consumers. Direct mailing targets consumers in need of legal advice; a general mailing does not.

168. This term was employed in *R.M.J.*, 455 U.S. at 194 n.4, to describe a rule listing categories of information that could be advertised.

The second alternative would be to form a screening committee to review the propriety of individual direct mailings.<sup>169</sup> The use of a committee promotes more flexibility than does the use of a rigid formula because each mailing is examined separately. But the problems associated with lack of distinctiveness, with the bar's reluctance to permit extensive advertising or solicitation, and with differences among consumers remain.

The third approach was suggested in *Zauderer*: A requirement that specific statements be included in all direct mail solicitation.<sup>170</sup> The Court has lowered the test for constitutionality of these required statements, and only a reasonable relationship between a government interest and the affirmative requirement must be shown. This lenient standard, however, creates potential problems. Bars, which are predisposed against advertising or solicitation, could impose regulations requiring that extensive, albeit helpful, information be included.<sup>171</sup> The result, as with the safe harbor approach, would be to render mailings uninteresting and indistinguishable from one another. This result would render all advertising ineffective, and attorney advertisers would not be interested in sending ineffective direct mail. Consumers ultimately would suffer since they would not receive vital information.

Each of these three approaches falls within the bounds of reason, but each places considerable limits on direct mail solicitation. At the very least, affirmative speech requirements should be subject to a level of scrutiny above mere reasonableness. An outright ban on direct mail solicitation, the most restrictive measure, clearly extends beyond the state's interests, fails to pass the third element of the *Central Hudson* test, and should not be upheld by a reviewing court.

That a state can regulate within constitutional limits does not mean that it should. The simple solution to these problems, and by far the best solution, is to allow attorneys to use any type or method of advertisement that contains information which is not false, fraudulent, deceptive, or misleading.<sup>172</sup> The problems

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169. See *In re Von Wiegand*, 63 N.Y.2d 163, 175, 470 N.E.2d 838, 845, 481 N.Y.S.2d 40, 47 (1984) (less drastic alternative of filing direct mail with the State Bar), *on remand*, 108 A.D.2d 1012, 485 N.Y.S.2d 399, *cert. denied*, 105 S. Ct. 2701 (1985).

170. If this is the method chosen by a bar association, then it is imperative that the affirmative requirement—the compelled speech—be clearly delineated. The *Zauderer* majority reached an odd result on a less than clear requirement. The Court ruled that the degree of punishment inflicted determined whether an affirmative requirement violated either the first amendment or the due process clause. Had the requirement been even more opaque, the Court probably would have reached a different result on this issue. See *Zauderer*, 105 S. Ct. at 2281-83 & n.15.

The majority in *Posadas* rejected this alternative as a less extensive means of regulation when the state has the right to ban the underlying activity advertised. *Posadas*, 106 S. Ct. at 2979. However, this case has limited application to attorney advertising and solicitation cases because the state has no right to ban the practice of law. The *Posadas* decision gave no indication that a state's ability merely to regulate a certain activity also gives that state the authority to restrict advertising. For a discussion of *Posadas*, see *supra* text accompanying notes 120-26.

171. The majority in *Zauderer* noted that regulations which went too far were "burdensome," chilled speech, and therefore would be unconstitutional. *Zauderer*, 105 S. Ct. at 2282. It is unclear how the Court expects to decide which regulations chill speech impermissibly using a "reasonableness" standard.

172. Advertisers have argued that the determination of what advertising "misleads" could thwart protection of deserving advertisements. The Federal Trade Commission has created a large body of law that addresses the question of determining whether advertisements are misleading. This FTC law should be the basis of any bar regulation that establishes the definition of "misleading."



with advertising that concern the state center around the conduct of attorneys, not their advertisements. The rationale of *Virginia Pharmacy* is relevant: the conduct of attorneys, like the conduct of pharmacists, merits state attention. Attorney advertising and solicitation—in any form or fashion that is truthful and not misleading—does not merit such attention.<sup>173</sup> For example, the rules that govern attorney conduct prohibit an attorney from filing a meritless claim.<sup>174</sup> These rules encourage professionalism in an attorney's day-to-day activities. These are the rules that must be enforced to protect consumers and maintain the integrity of the legal system. Studies indicate that these rules are not enforced effectively.<sup>175</sup> One alternative to self-regulation is to remove the task of policing ranks from the legal profession. This would be a drastic step and should not be taken unless less drastic measures fail. State bars could retain their disciplinary function by strengthening the present system, by investing more money in disciplinary bodies for the purpose of investigation, by informing consumers of their rights against attorneys, and by imposing strict reporting requirements on fellow bar members who know of misconduct.

However, the problem of encouraging advertising and solicitation in a bar that is hopelessly divided on the issue of *any* advertising remains. It is unrealistic to rely on the bar to encourage attorneys to reach out to consumers through the media. The sentiments against advertising and solicitation are too firmly entrenched for the bar to make the necessary changes. The responsibility rests

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See *Zauderer*, 105 S. Ct. at 2283. For a discussion of FTC regulation of misleading advertisements, see E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (2d ed. 1978).

173. For a discussion of *Virginia Pharmacy*, see *supra* text accompanying notes 57-68. Rules have been promulgated that adopt this expansive view of advertising. The Roscoe Pound-American Trial Lawyers Foundation is one organization with expansive, and workable, rules on advertising:

CHAPTER VII.  
INFORMING THE PUBLIC ABOUT LEGAL SERVICES

Rules

7.1 A lawyer shall not knowingly make any representation that is materially false or misleading, and that might reasonably be expected to induce reliance by a member of the public in the selection of counsel.

7.2 A lawyer shall not advertise for or solicit clients in a way that violates a valid law imposing reasonable restrictions regarding time or place.

7.3 A lawyer shall not advertise for or solicit clients through another person when the lawyer knows, or could reasonably ascertain, that such conduct violates a contractual or other legal obligation of that other person.

7.4 A lawyer shall not solicit a member of the public when the lawyer has been told by that person or someone acting on that person's behalf that he or she does not want to receive communications from the lawyer.

7.5 A lawyer who advertises for or solicits clients through another person shall be as responsible for that person's representations to and dealings with potential clients as if the lawyer acted personally.

ROSCOE POUND-AM. TRIAL LAW. FOUND., THE AMERICAN LAWYER'S CODE OF CONDUCT 701 (Discussion Draft 1980).

174. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109(A)(2) (1981).

175. See generally AMERICAN BAR ASS'N SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Final Draft 1970) (reporting results of comprehensive study of all state disciplinary systems and suggesting solutions to problems uncovered). See also AMERICAN BAR ASS'N, PROPOSED FINAL DRAFT: MODEL RULES OF PROFESSIONAL CONDUCT 208 (1981) (legal background to Rule 8.3: rule requiring other attorneys to report misconduct "has been essentially a dead letter").

with the courts.<sup>176</sup> Courts must establish rules that force bars to permit advertising and solicitation. If this issue is to be resolved and the consumer is to be informed, then the Supreme Court must expand its decisions in attorney advertising cases. The Court has held that the Constitution protects commercial speech because it is valuable to consumers and to our market economy.<sup>177</sup> The Court's holdings in the attorney advertising and solicitation cases are wholly inconsistent with its reasons for protecting commercial speech. The Court should no longer limit its holdings to narrow fact situations. Consumers will remain uninformed, the purpose of commercial speech protection will remain unfulfilled, and the legal profession will remain hopelessly deadlocked until the Supreme Court establishes general rules encouraging attorney advertising and solicitation.

The intermediate level of protection for commercial speech has proved unsatisfactory as applied to attorney advertising and solicitation because it fails to provide guidance to attorneys who wish to advertise and solicit. Attorneys, aware that legal advertising and solicitation is protected by the first amendment but discouraged by the bar and many judges, are understandably reluctant to advertise. Thus, the legal profession has failed to inform consumers and, as a result, many people do not receive the legal assistance they need.

The Supreme Court should encourage attorney advertising and solicitation as the only effective means to reach many consumers needing legal assistance. To do this, the Court must establish general guidelines that protect and encourage attorney advertising and solicitation. To date, the Supreme Court has failed to establish the boundaries of first amendment protection of attorney's commercial speech. The resistance to any advertising from the American bar is high, and the bar itself has proved unable to establish the flexible rules necessary to encourage the use of the media by attorneys to reach consumers. Until the Supreme Court establishes clear guidelines and removes existing impediments imposed by Model Code of Professional Responsibility Disciplinary Rules 2-103(A) and 2-103(E) and Model Rules of Professional Conduct Rule 7.3, attorneys are unlikely to advertise extensively. The uninformed consumer bears the ensuing injury.

DOROTHY VIRGINIA KIBLER

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176. Another possibility would be to entrust this change to the legislature. But that is entrusting the changes to attorneys and politicians who will be influenced by attorneys who disfavor advertising. The only realistic chance for change is through the courts.

177. *Virginia Pharmacy*, 425 U.S. at 763-65.