Zauderer v. Office of Disciplinary Counsel: Refining the Regulation of Attorney Advertising

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STUDENT MATERIAL

Case Comment

Zauderer v. Office of Disciplinary Counsel:
REFINING THE REGULATION OF ATTORNEY
ADVERTISING

I. Introduction

For the better part of this century, the traditional rules governing attorney advertising condemned the activity as a form of commercialization of the profession which could only lead to a decline in the legal profession's status of high public regard and confidence. At common law, advertising and solicitation by attorneys were viewed with contempt and sanctioned by prohibitions against barratry, champerty, and maintenance. From 1908 until 1977, the American Bar Association was instrumental in the promulgation of statutes in every state for the proscription of lawyer advertising. Only in recent years has attorney advertising been permitted due to the extension of first amendment protection for commercial speech.

In 1977, the United States Supreme Court decided Bates v. State Bar of Arizona, in which the majority held that certain disciplinary rules prohibiting the advertisement of fees charged by attorneys for routine services were unconstitutional. In the words of one analyst, Bates "struck the American Bar like a thunder-

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1 H. Drinker, Legal Ethics 210-12 (1953).
2 American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 4 (1931). In Opinion 1, drafted January 15, 1924, the Committee stated that "[a]ny conduct that tends to commercialize or bring 'bargain counter' methods into the practice of the law, lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the profession are called." See also H. Drinker, supra note 1, at 213 n.14.
3 "Barratry" is defined as "[t]he offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." Black's Law Dictionary 137 (5th ed. 1979). See generally Note, Maintenance By Champerty, 24 Calif. L. Rev. 48, 62-75 (1935).
4 "Champerty" is defined as "[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." Black's Law Dictionary 209 (5th ed. 1979). See generally Note, supra note 3, at 64-65.
5 "Maintenance" is defined as "[a]n officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." Black's Law Dictionary 860 (5th ed. 1979). See generally Note, supra note 3.
8 Id.
The decision of Bates represented the Court's first deviation from an enduring standard of professional legal conduct. It signaled an end to the persistent notion that the commercial promotion of a law practice is scandalous. It also put the profession on notice that its members had entered a new era of informational responsibility, with the enhanced obligation to truthfully advise the public of legal rights.

Zauderer v. Office of Disciplinary Counsel followed a logical progression of Supreme Court cases commencing with Bates. In Zauderer, the Court reaffirmed the idea that attorney advertising is protected commercial speech and can only be regulated by states to insure that such advertising is not false, misleading, or deceptive. The Court in Zauderer held that a state's prophylactic bans on unsolicited legal advice and illustrations contained in print advertisements were unconstitutional.

This comment will discuss the prior case law which led to the Court's holding in Zauderer and the subsequent contribution to the present state of the commercial speech doctrine. It will also analyze the various issues that the Court continues to struggle with in its attempts to define what is proper lawyer advertising.

II. STATEMENT OF THE CASE

The appellant, Philip Q. Zauderer, is a practicing attorney in Ohio. In 1981, Zauderer chose to promote his practice of law in Columbus by the use of advertisements placed in newspapers of local circulation. The appellant ran two advertisements in a number of Ohio newspapers, the first of which notified the reader that his firm was available to provide counsel for defendants charged with drunken driving. This first advertisement, placed in a Columbus newspaper, stated that the client's "full legal fee would be refunded if the client was convicted of DRUNK DRIVING." Two days after the advertisement first appeared, Zauderer was notified by the Office of Disciplinary Counsel of the Supreme Court of Ohio (hereinafter appellee) that the advertisement appeared to offer contingent-fee representation in criminal cases, which would be an arrangement in violation of Disciplinary Rule 2-106(c) of the Ohio Code of Professional Responsibility. Zauderer subsequently withdrew the advertisement and by correspondence with the Disciplinary Counsel apologized for the error and indicated his intention to refuse representation of any persons answering the ad.

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11 Zauderer, 53 U.S.L.W. at 4595.
12 Id.
13 Id. at 4588.
14 Id.
15 Id.
In 1982, Zauderer placed a second advertisement in thirty-six Ohio newspapers which indicated his desire to represent women injured through use of the Dalkon Shield Intrauterine Device. In this advertisement, Zauderer included a line drawing of the device and posed the question, “Did you use this IUD?” The advertisement informed the reader that the Dalkon Shield was allegedly responsible for serious injuries to some of its users. It also stated that the cases would be handled on a contingent-fee basis and “[i]f there is no recovery, no legal fees are owed by our clients.”

Zauderer was able to attract 106 clients with the second advertisement but also inspired the Disciplinary Counsel to file a complaint alleging violations of the disciplinary rules arising from the drunken driving and Dalkon Shield advertisements. Among the violations alleged in the complaint, it was asserted that the appellant’s drunken driving advertisement offended a rule prohibiting the inclusion of “false, fraudulent, misleading and deceptive” information. The appellee based this allegation of deception on the notion that Zauderer had offered contingent-fee representation to persons charged with a criminal offense, which violated a disciplinary rule prohibiting such an arrangement. The Dalkon Shield advertisement allegedly violated numerous provisions of the disciplinary rules, including a prohibition on the use of illustrations, restrictions against unrequested solicitation for employment, and a requirement to disclose important information regarding contingent-fee arrangements.

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16 The Dalkon Shield Intrauterine Device is a form of contraception which is placed in the cavity of the womb and “is thought to interfere with implantation of the embryo.” Urband Dictionary of Current Medical Terms 220 (1981) (quoted in Zauderer, 53 U.S.L.W. at 4588 n.2). The Dalkon Shield was first introduced in the early 1970s but was removed from the market in 1974 after it was believed to be hazardous to the user. Zauderer, 53 U.S.L.W. at 4588 n.2.

17 The information included in the ad stated the following:

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

Id. at 4588-89.

18 Id. at 4589.

19 Ohio Code of Prof. Resp. Disciplinary Rule [hereinafter cited as DR] 2-106(C) prohibits contingent-fee arrangements for criminal cases, while DR 2-101(A) states that “[a] lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.” Id. at 4589 n.3.

20 DR 2-101(B) states that information contained in advertisements must be presented “in a dignified manner without the use of drawings, illustrations, . . . .” The rule also provides that the information used must conform to a list of 20 items. Id. at 4589 n.4.

21 DR 2-103(A); DR 2-104(A). Id. at 4589.

22 DR 2-101(B)(15) requires that advertisements relating to contingent fee rates must disclose “whether percentages are computed before or after deduction of court costs and expenses.” The appellee’s
The complaints resulted in a hearing before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The panel concluded that the appellant’s advertisements were indeed in violation of numerous disciplinary rules and recommended that Zauderer receive a public reprimand as punishment.\(^{23}\) In support of this conclusion, the panel found that Zauderer’s advertisements violated the rules in five respects. The panel agreed with the Office of Disciplinary Counsel that the drunken driving advertisement was misleading, but founded the claim of deception on the failure to disclose to the reader that, if a case resulted in a plea bargain, the client could be found guilty and would nonetheless be liable for the legal fees involved.\(^{24}\) With respect to the Dalkon Shield advertisement, the panel concluded that the illustration of the device, as well as the failure to point out the potential liability for court costs in the event of an unsuccessful suit, were both in violation of the rules.\(^{25}\) Finally, the panel reasoned that since the advertisement amounted to a form of self-recommendation, and the appellant received clients in response to that form of solicitation, Zauderer’s Dalkon Shield ad had consequently violated two other rules. The Board subsequently adopted the panel’s conclusions but recommended to the Supreme Court of Ohio that Zauderer’s punishment be increased to indefinite suspension from the practice of law.\(^{26}\)

The Supreme Court of Ohio agreed with the Board’s conclusions, as set forth in the 1984 opinion of Disciplinary Counsel v. Zauderer.\(^{27}\) In holding that the disciplinary rules are not in conflict with the first amendment, the state court referred to the United States Supreme Court’s decisions of Bates v. State Bar of Arizona\(^{28}\) and In re R.M.J.\(^{29}\) and indicated that the rules could constitutionally prohibit deceptive advertising and may restrict nondeceptive advertising in the presence of a compelling state interest.\(^{30}\) In reference to the specific provisions of the rules at issue, the court summarily provided justifications for the restrictions. The court’s opinion pointed out that it was proper to prohibit assertions of expertise in the absence of methods that verify such claims.\(^{31}\) Restrictions insuring the clarity of contingent-fee arrangements and preventing unsolicited self recommendation also served a legitimate state interest. Finally, the court noted that the deceptive nature of the appellant’s advertisements warranted the application of the rule prohibiting the in-complaint alleged the Dalkon Shield advertisement failed to notify the reader that court costs might be assessed from the losing party, and the claim regarding legal fees was thus “deceptive” and in violation of DR 2-101(A). \(^{\text{Id. See supra note } 18.}\) 

\(^{23}\) Zauderer, at 4589.

\(^{24}\) Id.

\(^{25}\) Id. at 4589-90.

\(^{26}\) Id.

\(^{27}\) Zauderer, 10 Ohio St. 3d 44, 461 N.E.2d 883.


\(^{29}\) In re R.M.J., 609 S.W.2d 411 (Mo. 1980), rev’d, 455 U.S. 191 (1982).

\(^{30}\) Zauderer, 10 Ohio St. 3d at 47-48, 461 N.E.2d at 886.

\(^{31}\) Id. at 48, 461 N.E.2d at 887.
clusion of false and misleading information. Having dispensed with the constitutionality of applying the disciplinary rules to the appellant, the court issued a public reprimand.32

On appeal, the United States Supreme Court affirmed in part and reversed in part the decision of the Supreme Court of Ohio.33 In a five to three decision, with Justice Powell taking no part, the Court held that attorney advertising may be regulated to the extent that such restrictions prohibit the dissemination of false, deceptive, or misleading information.34 Although the Court found that the legal advice and the illustration contained in appellant's advertisements were not false or deceptive, it chose not to vacate the public reprimand, as certain aspects of the advertisements were actually misleading.35

The majority opinion, authored by Justice White, was joined by Justices Blackmun and Stevens.36 Justice Brennan submitted a dissenting opinion, joined by Justice Marshall, expressing disapproval of Justice White's conclusion that disclosure requirements regarding contingent-fee arrangements are rationally related to the states' purpose of preventing consumer deception. The dissent also disapproved of the majority's dismissal of a claim that the appellant was denied the protections of procedural due process.37 Justice O'Connor also authored a dissenting opinion, joined by Chief Justice Burger and Justice Rehnquist, which took issue with Justice White's holding that Ohio's prophylactic restraints on all unsolicited legal advice, and on the use of illustrations in advertisements, were unconstitutional.38

III. PRIOR LAW

A. The "Commercial Speech Exception" to First Amendment Protection

The commercial speech doctrine in its present form is the result of relatively recent developments in constitutional law. Prior to the Supreme Court's decision of Bigelow v. Virginia39 in 1975, the prevailing view was that commercial speech was the exception to first amendment free speech protections, rather than the rule. In 1942, the holding in Valentine v. Chrestensen40 affirmed the notion that the Court was not ready to extend the first amendment right of free speech to communications designed to achieve some form of financial gain for the speaker. In

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32 Id.
33 Zauderer, 53 U.S.L.W. at 4587.
34 Id. at 4588.
35 Id. at 4587.
36 Id. at 4588.
37 Id. at 4595.
38 Id. at 4600.
40 Valentine v. Chrestensen, 122 F.2d 511 (2d Cir. 1941), rev'd, 316 U.S. 52 (1942).
Valentine, the Court upheld an ordinance which prohibited the distribution of commercial hand bills and circulars in the streets of New York City. The opinion acknowledged that the first amendment guards against the complete suppression of most forms of communication in the public streets, yet the Court concluded that "the Constitution imposes no such restraint on government as respects purely commercial advertising." In effect the decision in Valentine had drawn a distinction between speech of a commercial nature and that which is of noncommercial character.

The commercial speech exception would stand firm on the distinction set forth in Valentine for more than thirty years, until the Court embarked upon a course of decisions which eroded that principle. During that period of time between the holdings of Valentine in 1942 and Bigelow in 1975, the Court continued to strengthen the precedent for the commercial speech exception in cases such as Breard v. City of Alexandria. In Breard, the Court affirmed the appellant's conviction for violation of a municipal ordinance which prohibited house-to-house solicitation that was neither requested nor invited. The Court in Breard found that the ordinance served the legitimate purpose of sanctioning an "obnoxious" form of solicitation and did not abridge, among other things, the appellant's rights of free speech or free press guaranteed by the first amendment. The Court's decision of Breard reaffirmed that speech of a commercial nature would not be afforded the same protection as that which preserves traditional noncommercial speech.

B. The Development of the Commercial Speech Doctrine

In Bigelow v. Virginia, the Court seized upon the opportunity to cast aside the old notion that speech of a commercial nature is not entitled to the same privileges extended to noncommercial expression. By its decision in Bigelow, the Court overturned the conviction of the editor of a Virginia newspaper for violation of a state statute prohibiting the sale or circulation of any publication which encouraged the procurement of an abortion. The violation of this statute resulted from the publication of an advertisement in the appellant's newspaper which an-

41 Valentine, 316 U.S. at 55.
42 Id. at 54.
44 Breard, 341 U.S. at 624-25.
45 Id. at 644-45.
46 With respect to the different treatments of commercial and noncommercial speech, the Court's opinion in Breard indicated no deviation from the previous distinction. The Court stated as follows: This kind of distinction is said to be protected because the mere fact that money is made out of the distinction does not bar the publications from First Amendment protection. We agree that the fact that periodicals are sold does not put them beyond the protection of the First Amendment. The selling, however, brings into the transaction a commercial feature. Id. at 641-42 (footnotes omitted).
47 Bigelow, 421 U.S. at 829.
nounced the services and location of an abortion clinic in New York. In reversing the lower court's decision, the United States Supreme Court held that the Virginia Supreme Court had erred in placing speech of a "purely commercial nature" outside the zone of protected forms of speech. The Court's opinion further suggested that while commercial speech may not deserve protection equivalent to that given noncommercial speech, some degree of protection is warranted. Because commercial advertising serves a function of disseminating economic information "of potential interest and value to a diverse audience," it follows that some degree of first amendment protection is in the public interest. However, the Court declined to delineate the scope and extent of that protection on this occasion. One commentator suggested that the Court's restraint in commenting further on this issue was based on the notion that the holding in Bigelow resulted primarily from an analysis of the ideological content of the abortion advertisement rather than its commercial content. Consequently, the Court was not willing to explicitly overrule Valentine but indicated that this earlier decision was strictly limited to its facts. Nevertheless, the decision in Bigelow established the basis for the recognition that commercial speech in the form of advertising deserves some degree of first amendment protection.

In the year which followed the decision in Bigelow, the Court faced another opportunity to address the commercial speech doctrine in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. The case of Virginia Pharmacy involved a Virginia statute which declared the advertisement of prescription drug prices by pharmacists to be unprofessional and illegal conduct. Justice Blackmun authored the majority opinion, which affirmed the district court's declaration that the Virginia statute at issue was unconstitutional. Following a balancing test implied in Bigelow, the Court found that a consumer's interest in the unimpaired flow of commercial information weighed heavier than a state's interest in "maintaining a high degree of professionalism on the part of licensed pharmacists."

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4 Id. at 812.
49 Id. at 818.
50 Id.
51 Id. at 822.
52 Id. at 825-26.
53 Note, supra note 6, at 737-38.
54 Id.
56 Id. at 749-50.
57 The Court in Bigelow adopted a balancing test which was first employed in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973). The test was stated as follows:
Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation or economic activity.
58 Virginia Pharmacy, 425 U.S. at 766.
In the view of Justice Blackmun, the state is not justified in totally suppressing the dissemination of truthful information regarding lawful activities. Although the opinion did not present a detailed analysis of the scope of the protection to be extended to commercial advertising as a form of expression, Justice Blackmun suggested that state regulation could constitutionally restrict the time, place, and manner of such advertising and could proscribe advertisements that are false or misleading.

The holding in *Virginia Pharmacy* was significant to the development of first amendment protection for speech activities located outside the realm of noncommercial expression. The immediate impact of the decision would not, however, affect the more narrow aspects of commercial speech, such as those which relate to professional services in general. Justice Blackmun cautioned that the decision reached in *Virginia Pharmacy* was of limited application and should only be interpreted in the context of advertising by pharmacists. In a footnote to the majority opinion, Justice Blackmun clarified the applicability of the holding as follows:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety, with the enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

These fears expressed by Justice Blackmun, with respect to advertising by attorneys, would restrain the Court in subsequent cases from allocating the same degree of protection for attorney advertising as that extended to general commercial advertising in *Virginia Pharmacy*. In the following term, however, the Court would begin to formulate a new policy toward attorney advertising with the decision of *Bates v. State Bar of Arizona*.

C. *A New Attitude Toward Lawyer Advertising.*

*Bates* reached the United States Supreme Court in 1977 as an appeal by two attorneys who received disciplinary sanctions for violation of a disciplinary rule of the Supreme Court of Arizona which made illegal any form of advertising by attorneys. The appellants in this case advertised the availability of legal services provided by their legal clinic and the fact that those services could be performed for "very reasonable fees." The appellants' advertisement also listed a number

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59 *Id.* at 773.
60 *Id.* at 771.
61 *Id.* at 773.
62 *Id.* at 773 n.25.
64 *Id.* at 358.
65 *Id.* at 354.
of fees for routine legal services such as divorce, legal separation, adoption, and bankruptcy.\textsuperscript{66} The majority of the Court, led by Justice Blackmun, held that the application of the disciplinary rules to the two attorneys was in violation of protections afforded by the first amendment to commercial speech.\textsuperscript{67}

Justice Blackmun’s opinion, which relied to a large degree on the rationale underlying \textit{Virginia Pharmacy}, focused primarily on the broad nature of the Arizona Supreme Court’s disciplinary rules and the importance of an individual’s right to the unrestrained flow of consumer information. The opinion suggested that the holding in \textit{Bates} “might be said to flow \textit{a fortiori}” from the principles stated in \textit{Virginia Pharmacy}, and “[l]ike the Virginia Statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance.”\textsuperscript{68} The Court further suggested that, with this significant interest at stake, prophylactic restraints on attorney advertising such as those enacted by the Supreme Court of Arizona cannot be sustained.\textsuperscript{69} The Court found that because commercial speech deserves some uncertain degree of protection and attorney advertising implicates a form of expression important to both the consumer and the attorney, then a blanket suppression of this type of commercial speech is unconstitutional.\textsuperscript{70} In support of this conclusion, Justice Blackmun balanced the public’s interest in consumer information against a number of justifications asserted in defense of the Arizona Supreme Court’s disciplinary rule.\textsuperscript{71} Justice Blackmun dismissed the claims made in support of the Arizona rule, indicating that concerns about the potentially adverse effects of authorizing attorney advertising were essentially unfounded.\textsuperscript{72} In effect, the Court had held that advertising by lawyers falls within the zone of commercial speech protection established in \textit{Virginia Pharmacy}.\textsuperscript{73} However, Justice Blackmun was careful to emphasize the narrow scope of the holding in \textit{Bates}. The decision merely justified the advertisement of fees charged for routine legal services but provided no guidance for the promotion of “non-routine” legal services.\textsuperscript{74}

Although the holding in \textit{Bates} signaled a new approach to be taken in review of restrictions on lawyer advertising, the Court’s opinion indicated that states were not powerless to regulate such advertising.\textsuperscript{75} Justice Blackmun suggested that states could continue to proscribe false, misleading, or deceptive advertising and would

\begin{itemize}
  \item Id. at 385.
  \item Id. at 384.
  \item Id. at 365.
  \item Id. at 383.
  \item Id.
  \item Id. at 367-79.
  \item Id. at 383-84.
  \item Id.
  \item Id. at 383.
\end{itemize}

\textsuperscript{66} Id. at 385.
\textsuperscript{67} Id. at 384.
\textsuperscript{68} Id. at 365.
\textsuperscript{69} Id. at 383.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 367-79.
\textsuperscript{72} The concerns which were raised in support of the disciplinary rule included the potential negative impact of advertising on the quality and integrity of professionalism; the propensity for misleading and deceptive advertising; the encouragement of fraudulent and frivolous litigation; increases in legal costs; and problems associated with enforcement of restrictions on attorney advertising. \textit{Id.}
\textsuperscript{73} Id. at 383-84.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 383.
be justified in placing "reasonable restrictions" on the time, place, and manner of advertisement. The Court's opinion, nonetheless, guarded against extension of its holding to the various forms that attorney advertising might take or the mediums through which the advertisements would be conveyed. As an example, Justice Blackmun clarified that questions surrounding the regulation of claims made by a lawyer about the quality of services rendered could not be resolved in this instance. Furthermore, it was pointed out that the issue of "in-person solicitation" by attorneys was not present in this case and not addressed by the opinion. The problems associated with the use of electronic media also remained unresolved.

In essence, the Court recognized unanswered questions and issues regarding attorney advertising as a means of stressing the narrow applicability of the holding in Bates.

Following the decision in Bates, the degree of protection afforded attorney advertising remained vague and ambiguous. According to one writer, this uncertainty resulted in considerable variation in the nature of the rules subsequently adopted by the states. Another commentator noted that, after the Court's decision in Bates, a majority of jurisdictions chose to interpret the holding narrowly and reacted by modifying their rules in close resemblance to the rules proposed by the American Bar Association in 1977. The attorney advertising cases which followed Bates involved modified rules and enabled the Court to expand upon the principles announced by its decision. It is apparent from the restraint demonstrated by Justice Blackmun's opinion that defining the scope and extent of permissible state regulation in the area of attorney advertising requires a rather sensitive case-by-case analysis. The decisions subsequent to Bates made relatively narrow contributions in defining the scope of permissible regulation, an indication that the Court was cognizant of the discriminate analytical approach required for such an intricate melange of state and individual interests.

One year after Bates was decided, the Supreme Court was given another opportunity to define the limits of state regulation of lawyer solicitation in two
cases decided the same day, *In re Primus*82 and *Ohralik v. State Bar of Ohio*.83 The case of *In re Primus* involved an attorney who received a public reprimand by the South Carolina Supreme Court for violations of that court’s disciplinary rules.84 The appellant’s alleged violation occurred when she sent a letter to a woman informing her that free legal services could be provided by the American Civil Liberties Union (ACLU) for representation of the woman in a possible lawsuit against a doctor who had sterilized her.85 The lawsuit was to be based on the premise that the doctor had sterilized this woman, as well as other women in similar situations, after suggesting that the continued stream of Medicaid payments to her depended upon her consent to the treatment.86 A complaint filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) resulted in a determination that the appellant’s letter soliciting the woman was in violation of the Disciplinary Rules of the Supreme Court of South Carolina87 and led to the issuance of a private reprimand.88 The Board’s findings and conclusions were adopted by the South Carolina Supreme Court, and the sanction was increased to a public reprimand.89

On appeal to the United States Supreme Court, a majority of the justices found that the appellant’s public reprimand could not be sustained.90 In an opinion authored by Justice Powell, the Court indicated that, while the state is justified in its concern for the evils of “undue influence, overreaching, misrepresentation, invasion of privacy” and other possible abuses hypothetically posed by attorney advertising,91 the restrictions imposed on mailings by the ACLU and its attorney did not promote a legitimate and significant interest.92 The Court found that, because the appellant’s solicitation was not compelled by the possibility of personal pecuniary gain, the evils feared by the State were not present.93 With the involvement of the ACLU in these activities, the Court also found that the form of speech at stake in *Primus* involved an “associational aspect,”94 and as a form of political expression it falls “within the generous zone of First Amendment protection reserved

82 *Primus*, 436 U.S. at 414-19.
83 *Id.* at 417.
84 *Id.*
85 *Id.*
86 *Id.*
87 The Board determined that the appellant had violated DR 2-103(D)(5)(a) and (c) and DR 2-104(a)(5). *Id.* at 418-19.
88 *Id.* at 420-21.
89 *Id.*
90 *Id.* at 439.
91 *Id.* at 432.
92 *Id.* at 432-38.
93 *Id.* at 422.
94 *Id.* at 438 n.32.
for associational freedoms." In essence, the Court pointed out a distinction between speech of a purely commercial nature and expression which seeks to further an ideological goal. The opinion also suggested that the regulation of ideological expression deserves a heightened level of scrutiny, as "[i]n the context of political expression and association, however, a state must regulate with significantly greater precision." Thus, *Primus* represented a new dimension by which attorney advertising restrictions would be scrutinized. The Court nonetheless had the opportunity to further develop its policy towards purely commercial speech that same day in *Ohralik v. State Bar of Ohio*.

The appellant in *Ohralik* was an attorney who received an indefinite suspension from the practice of law for the in-person solicitation of two victims of an automobile accident. Both victims originally agreed to retain the lawyer on a contingent-fee basis, but they subsequently discharged the appellant as their attorney. The victims filed formal complaints against the appellant, which were ultimately received by a State bar grievance committee following settlement of the attorney's claim against the victims for breach of contract. The complaints resulted in the indefinite suspension of the attorney by the Ohio Supreme Court. The attorney appealed the suspension to the United States Supreme Court, which held that the application of the State's disciplinary rules to the appellant was constitutional.

The Court in *Ohralik* affirmed the appellant's indefinite suspension, placing much reliance on the distinction drawn in *Primus* between solicitation for and not-for pecuniary gain. In effect, the Court had accepted the proposition that the incentive of financial benefit that might be gained from in-person solicitation is "inherently conductive" to the forms of abuse which presumably result, such as overreaching, undue influence, and misrepresentation. Justice Powell's opinion indicated that the circumstances present in *Ohralik* created a need for preventative measures such as those adopted by the State. Hence, the Court found that the proscription of in-person solicitation for pecuniary gain was supported by a legitimate and substantial state interest, which is appropriate where the potential for abuse is significant. With the decision of *Ohralik*, the Court fashioned a separate constitutional standard involving a lower level of scrutiny to be applied to state regulation of in-person attorney solicitation.

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95 *Id.* at 431.
96 *Id.* at 438.
97 *Ohralik*, 436 U.S. 447.
98 *Id.* at 452-53.
99 *Id.* at 449-54.
100 *Id.*
101 *Id.* at 463-64.
102 *Id.* at 464.
103 *Id.* at 462-65.
104 *Id.* at 457.
Reading *Primus* and *Ohralik* together, it is apparent that the Court had not established a substantially clearer picture of solicitation that may be proscribed by the states or solicitation that deserves some degree of protection. However, the decisions do indicate that the proscription of attorney solicitation for pecuniary gain is appropriate, unless that proscription has implicated countervailing and more significant rights of the attorney or client. It is important to understand that *Primus* and *Ohralik* not only provided guidance for situations such as those presented by the respective cases but also affirmed principles that survived the earlier decisions of *Virginia Pharmacy* and *Bates*. These basic principles, reiterated in *Primus* and *Ohralik*, again focused on the states' legitimate interests in proscribing false and misleading advertising and imposing reasonable restrictions as to the time, place, and manner of advertising.\(^{105}\)

In 1982, the Court availed itself of the opportunity to scrutinize the "laundry list"\(^{106}\) approach to regulating attorney advertising in the case of *In re R.M.J.*\(^{107}\). *R.M.J.* centered on the activities of an attorney who advertised the establishment of his practice in St. Louis in the newspapers and yellow pages of the phone directory for the local area. The attorney also mailed announcement cards to a preselected list of addresses.\(^{108}\) The Supreme Court of Missouri reviewed the activities of the attorney and held that his advertisements were in violation of the disciplinary rules by including information which was not authorized by the court-approved "laundry list" and by listing areas of concentration differently than the wording authorized by the rules.\(^{109}\) The State Supreme Court also held that he had violated a disciplinary rule which specified persons to which announcements could be sent.\(^{110}\) The attorney was consequently issued a private reprimand which was appealed to the United States Supreme Court.\(^{111}\)

In a majority opinion written by Justice Powell, the Supreme Court reversed the findings of the Missouri court, holding that the disciplinary rules as applied to the appellant were unconstitutional.\(^{112}\) On this occasion, the Court was able to formulate the most extensive summarization to date of the commercial speech doctrine as applied to the advertising of professional services. The touchstone of this

\(^{105}\) *Primus*, 436 U.S. at 438; *Ohralik*, 436 U.S. at 462.

\(^{106}\) The "laundry list" approach has been adopted by a number of states as a means of guiding attorneys who wish to advertise the areas of law in which their practice is concentrated. The states adopting this approach designate the proper words or phrases that may be used to describe the areas of concentration, i.e., "administrative law," "criminal law," "property law," "tort law," etc. Note, *In re R.M.J.: The Scope of Lawyer Advertising Expands*, 1983 *Utah L. Rev.* 99, 108-10; Note, *supra* note 6, at 744-45 nn.121-24 and accompanying text.


\(^{108}\) *Id.* at 196-97.

\(^{109}\) *Id.* at 197.

\(^{110}\) The rule regarding the mailing of announcements specified that they could only be sent to "lawyers, clients, personal friends and relatives." *Id.* at 196.

\(^{111}\) *Id.* at 198.

\(^{112}\) *Id.* at 207.
decision lies in the determination of whether or not the advertising in question is truthful and related to a lawful activity.\textsuperscript{113} Building on this basic inquiry, the Court noted that a state may retain regulatory authority over all types of attorney advertising, provided that the regulation is "no broader than reasonably necessary to prevent the deception" that has been associated with this form of commercial speech.\textsuperscript{114} The opinion implies that while there may exist a substantial interest in the state regulation of commercial speech by attorneys, the restrictions must be narrowly drawn and drafted with precision.\textsuperscript{115} In effect, the Court in \textit{R.M.J.} severely limited the ability of the states to further proscribe the broad aspects of attorney advertising.

In applying the premises of the commercial speech doctrine in its newly adopted form, Justice Powell concluded that the information included by the appellant in the advertisements and announcement cards was neither misleading nor inherently misleading. Because the appellant's claims were, in fact, truthful, the Court found that the Missouri rules at issue were overly broad and unconstitutional.\textsuperscript{116} The Court further found that one of the rules was unacceptable because it had not been proven that the appellant's use of words not contained in the "laundry list" carried an increased potential for deception or threatened any significant state interest.\textsuperscript{117} The opinion emphasized that states should follow a least restrictive means approach, as suggested for commercial speech regulation in \textit{Central Hudson Gas and Electric Corporation v. Public Service Commission of New York},\textsuperscript{118} in the adoption of advertising restrictions to insure that truthful and undeceptive advertising is not unnecessarily restricted.\textsuperscript{119} The effect of the decision of \textit{R.M.J.} would appear to be that attorneys are justified in advertising the areas in which their practice concentrates, in their own words, provided that the description is not false or misleading. However, \textit{R.M.J.} did not resolve the question initially posed in \textit{Bates} regarding qualitative assertions as to special areas of expertise held by an attorney.\textsuperscript{120} Nonetheless, the decision of \textit{In re R.M.J.} provided the most refined version of

\textsuperscript{113} \textit{Id.} at 203.
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 203-04.
\textsuperscript{116} \textit{Id.} at 205-06.
\textsuperscript{117} \textit{Id.} at 205.
\textsuperscript{119} \textit{R.M.J.}, 455 U.S. at 206. The Court in \textit{R.M.J.} relied in part on the decision of \textit{Central Hudson}. In \textit{Central Hudson}, the Court held that an electric utility may not be prohibited from the practice of promotional advertising, provided that the advertising is nondeceptive. \textit{Central Hudson}, 447 U.S. 557. To arrive at this conclusion, the Court in \textit{Central Hudson} formulated a four-pronged test for ascertaining the constitutionality of regulation which restricts nondeceptive advertising. \textit{Id.} at 566. First, it must be determined whether or not the commercial speech at issue "concerns lawful activity and [is not] misleading." \textit{Id.} Second, the purported state interest underlying the regulation must be substantial. \textit{Id.} If the first two questions are answered in the affirmative, then the regulation must "directly advance the governmental interest asserted," and the regulation must be no more restrictive than necessary to support that interest. \textit{Id.}
\textsuperscript{120} \textit{Bates}, 433 U.S. 350, 366. \textit{See supra} note 77 and accompanying text.
the commercial speech doctrine to that point and prior to the Court’s decision of Zauderer v. Office of Disciplinary Counsel.\textsuperscript{121}

IV. SUPREME COURT ANALYSIS

At the outset of the opinion in Zauderer, the Court pointed out that the commercial speech doctrine as applied to attorney advertising rests on a firm foundation established by the decisions of Bates through R.M.J. Accepting the propositions on which those cases relied, Justice White acknowledged that the outcome in Zauderer would depend upon the doctrine’s application to the regulations in question, which were summarized as taking on three distinct forms: (1) the prohibition of unsolicited legal advice contained in advertisements; (2) the prohibition on the use of illustrations in attorney advertising; and (3) the propriety of disclosure requirements imposed on the advertisement of contingent-fee arrangements.\textsuperscript{122}

The Court’s analysis of Ohio’s disciplinary rules initially focused on the interests served by restrictions against solicitation and against accepting clients responding to advertisements which include some form of legal advice.\textsuperscript{123} While recognizing that the state is not powerless in prohibiting forms of attorney advertising that are conducive to “vexatious conduct,” Justice White noted an important distinction between the outcome of Ohralik and the facts of Zauderer.\textsuperscript{124} The holding in Ohralik, heavily relied on by the appellee, justified the state’s strict regulation of a form of solicitation that is inherently dangerous by its very nature.\textsuperscript{125} Because print advertising creates much less of a risk than face-to-face solicitation, Ohio’s blanket suppression of all forms of solicitation was not necessarily reinforced by Ohralik.\textsuperscript{126}

Justice White dismissed a number of contentions by the appellee in support of the prophylactic ban on unsolicited legal advice. First, the opinion rejected the appellee’s insistence that any regulation short of a total ban on all solicitation would not adequately protect the public and the courts from a deluge of meritless litigation.\textsuperscript{127} The Court found that there is no reason to believe that civil litigation should be discouraged as an iniquity of our society. Furthermore, advertising that is neither false nor misleading serves the valuable function of informing the public of their legal rights. Second, the Court disagreed with the appellee’s argument that blanket suppression is warranted by enforcement problems associated with distinguishing

\textsuperscript{121} Zauderer, 53 U.S.L.W. 4587.
\textsuperscript{122} Id. at 4591.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 4591-92.
\textsuperscript{127} Id. at 4592.
between deceptive and nondeceptive attorney advertisements.\textsuperscript{128} In relation to the appellant's Dalkon Shield advertisement, the Court pointed out that it was not difficult to confirm the truthfulness of the statements made by Zauderer. Justice White also suggested that claims made in legal advertisements are not necessarily any more complex, or more conducive to misinterpretation, than other forms of general commercial advertising.\textsuperscript{129}

With respect to Ohio's prophylactic suppression of unsolicited legal advice, the Court in effect employed the balancing test that was initially applied in \textit{Bigelow} and \textit{Virginia Pharmacy}.\textsuperscript{130} Arriving at much the same conclusion reached in the earlier cases, the Court held that the interest in the free flow of commercial information to consumers far outweighs a state's interest in the efficient and simplified application of prohibitions against false or deceptive commercial advertising.\textsuperscript{131} Reasoning that blanket bans are unacceptable as applied to attorney advertising, as well as commercial advertising at-large, the Court displayed the desire to continue to whittle away at the distinction between the two, originally formed in \textit{Virginia Pharmacy}.\textsuperscript{3} The Court expressed no reservations in placing on the state the burden of discriminating between deceptive and nondeceptive advertising, with the added responsibility of drafting regulations with precision, to insure that truthful and non-misleading advertising will not be suppressed.\textsuperscript{133} This aspect of the opinion in \textit{Zauderer} is consistent with the Court's rationale in \textit{Bigelow} and \textit{Virginia Pharmacy} and is a sign that prophylactic restraints on any form of attorney advertising will be met with greater skepticism in the future.

After dispensing with the state's prohibitions on legal advice and solicitation, the review of the disciplinary rules in question turned to the restrictions against the use of illustrations such as that found in the appellant's Dalkon Shield advertisement. Because the appellant's line drawing served much the same function as the advice in providing information about legal rights, the Court found that first amendment protection must be extended to the use of an illustration as if it were "verbal commercial speech."\textsuperscript{134} Consequently, Justice White applied the least restrictive means analysis first used in the context of attorney advertising in \textit{R.M.J.}.\textsuperscript{135} With this analysis, the Court was unpersuaded that the appellee satisfied the burden of proving that a total ban on the use of illustrations served a legitimate and compelling interest. Justice White could not accept the argument that illustrations, any more than printed legal advice, are inherently misleading or difficult to police.\textsuperscript{136}

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{See supra} notes 57-58, 70-72 and accompanying text.
\textsuperscript{131} \textit{Zauderer}, 53 U.S.L.W. at 4593.
\textsuperscript{132} \textit{Id.} at 4592-93. \textit{See supra} notes 65-66 and accompanying text.
\textsuperscript{133} \textit{Zauderer}, 53 U.S.L.W. at 4593.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} \textit{See supra} note 119.
\textsuperscript{136} \textit{Zauderer}, 53 U.S.L.W. at 4593-94.
Having considered the alternative of utilizing a case-by-case analysis of illustrations used in lawyer advertisements, the Court could not agree with the proposition that Ohio had invoked the least restrictive means of assuring that these illustrations are not deceptive.\textsuperscript{137} In this respect, the Court merely confirmed the teachings of \textit{R.M.J.} as a balanced approach to regulating the accuracy of the contents of legal advertisements. The authority for this approach nonetheless follows from the basic tenet of the commercial speech doctrine that survived the line of cases from \textit{Bates} through \textit{R.M.J.}: the states may regulate attorney advertising only to the extent necessary to prevent the inclusion of false, deceptive, or misleading information.

Following the discussion of the broader implications behind abrogation of Ohio's prophylactic restraints, the Court's opinion shifted to the much narrower issues surrounding disclosure requirements applied to attorney advertising.\textsuperscript{138} In this section of the majority opinion, Justice White invoked a means-ends analysis to test the weight of the State's interest supporting the disclosure requirements.\textsuperscript{139} It was argued by the appellee that these requirements are designed to provide the reader with important information regarding potential liability for court costs if a lawsuit is unsuccessful.\textsuperscript{140} The Court concluded that the State demonstrated a rational relationship between the concerns for the prevention of consumer deception and the use of disclosure requirements to abate those concerns.\textsuperscript{141} However, the Court did not ignore the appellant's contention that such requirements amount to a compulsion to speak and could lead to a chilling effect on commercial speech. In response to this argument, the Court cautioned that disclosure requirements must not be so restrictive that protected commercial speech is suppressed.\textsuperscript{142} Nonetheless, Justice White found that the State's requirement to fully describe the implications of contingent-fee arrangements was justified in light of the appellant's advertisements and the potential for deception regarding the assessment of costs.\textsuperscript{143} In essence, the Court was employing a less exacting standard of review for state regulation of attorney advertising by means of disclosure requirements than for the broader restrictions on commercial speech.\textsuperscript{144} These requirements satisfied the Court's demands in \textit{Bates} and \textit{R.M.J.} that regulations be drafted with precision and must be no broader than necessary to achieve the purported goal. Hence, the disclosure requirements represented what the Court had been asking for since \textit{Bates}—an alternative to broad, sweeping restraints on attorney advertising.

Justice White briefly dismissed the appellant's claim that he had been deprived of procedural due process by a change in the theory underlying one of the charges.

\textsuperscript{137} \textit{Id.} at 4594.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 4594 n.14.
\textsuperscript{140} \textit{Id.} at 4594.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} n.15.
\textsuperscript{144} \textit{Id.}
Zauderer contended that alleged deception in the drunken driving advertisement was initially based on the theory that he proposed to offer an illegal contingent-fee arrangement in a criminal case. However, the appellant argued, the panel commissioned by the Board grounded this allegation of deception on a different theory: the advertisement had not disclosed that, in the event of a plea bargain, the client might be found guilty and at the same time would be liable for the attorney's fees. The Court's opinion swept aside the contention that the change in theory deprived Zauderer of ample notice and opportunity to respond to the charges. It was sufficient that the Board's recommendations notified the appellant that he would be required to respond to the charges before the Supreme Court of Ohio. This point in the majority opinion would provide the stimulus for a most fervent dissent by Justice Brennan.

In his dissent, Justice Brennan directed his attack at Justice White's rulings with regard to perceived due process violations. First, Justice Brennan took issue with Ohio's disclosure requirements which, in his view, were so "vaguely expressed" that an attorney acting in compliance with the rule could not be expected to fully understand what is actually required. In stressing the impropriety of the disclosure requirements, and consequently Justice White's ruling on them, Justice Brennan insisted that the rule which requires the attorney to publicize contingent-fee percentage rates does not further a significant state interest. He added that Ohio's enforcement of the rule against the appellant forced the attorney to anticipate what will satisfy the state's requirement of "full disclosure of the terms" of representation, even though the disciplinary rules do not detail what amounts to sufficient disclosure. As a result, Justice Brennan concluded, the Supreme Court of Ohio had imposed against the appellant a standard so obscure that it should be considered void for vagueness. Even if the rule specifically stipulated that full disclosure is necessary, such a mandate would be unduly burdensome and would create a potential chilling effect on commercial speech. However, Justice Brennan argued, Ohio's disclosure requirement did not put the appellant on notice that certain elements were necessary for full disclosure, hence the rule should not have been enforced against the appellant in such an unpredictable manner. In light of the rule's ambiguity, the public reprimand issued to the appellant worked a serious deprivation of his liberty and property interests protected by constitutional due process by publicizing his "unethical" behavior with "casual indifference to the gravity of the injury inflicted."

145 Id. at 4595.
146 Id.
147 Id. at 4589.
148 Id. at 4595.
149 Id. at 4595-96.
150 Id. at 4596-97.
151 Id. at 4597.
152 Id.
153 Id. at 4598.
154 Id. at 4599.
The second point of departure for Justice Brennan was with the majority opinion's dismissal of a procedural due process issue surrounding the appellee's change in theory for the charge that the drunken driving advertisement had been misleading and deceptive. Justice Brennan considered the change in theory to be without reasonable notice of the specific charges that the appellant would need to refute. He found little comfort in Justice White's assertion that the appellant was afforded sufficient opportunity to dispute the Board's findings before the Ohio Supreme Court. Because Zauderer had not been given a meaningful chance to present evidence against the new theory, Justice Brennan reasoned, the appellant's rights protected by procedural due process were violated.

The dissent authored by Justice O'Connor and joined by Chief Justice Burger and Justice Rehnquist challenged the Court's holding that Ohio had no constitutional authority for prohibiting the inclusion of truthful and nondeceptive information and advice in attorney advertising. Justice O'Connor's opinion reflected a steadfast concern initially posed in Virginia Pharmacy by Justice Blackmun. In essence, Justice O'Connor insisted that attorney advertising is so inherently misleading and conducive to overreaching that states should not be foreclosed from restricting any form or element of truthful attorney advertising. With respect to the case at bar, Justice O'Connor contended that print advertising is "only one step removed" from the in-person solicitation banned in Ohralik. Since the possibilities for "vexatious conduct" are almost as great when lawyers are permitted to offer legal advice through the print media, states have nearly as strong an interest in regulating this form of attorney advertising. Justice O'Connor concluded that these legitimate and compelling state interests justified the regulation of unsolicited legal advice that is so closely associated with an attorney's pecuniary self-interest.

The Court's decision in Zauderer held important implications for the commercial speech doctrine as applied to attorney advertising. The holding in this case confirmed the notion that the Court would maintain a strong suspicion of state restrictions applied to truthful and nondeceptive attorney advertising. However, Zauderer also appears to have provided more help in outlining the substance of appropriate state regulation. Although Justice Brennan disputed the Court's ruling on Ohio's disclosure requirements, there was no indication by any of the justices that these requirements would not be proper, if carefully drawn and not unnecessarily

155 Id.
156 Id. at 4599-600.
157 Id. at 4600.
158 Id.
159 Id. at 4600-02.
160 See supra notes 61 and 62 and accompanying text.
161 Zauderer, 53 U.S.L.W. at 4601.
162 Id.
163 Id. at 4600.
164 Id. at 4601-02.
burdensome. In regard to the O'Connor dissent, a minority of the justices continue to echo the long-standing concerns about attorney advertising and its effect on professionalism and the integrity of client representation. Nonetheless, Zauderer teaches that the Court desires to stay on the course set forth in Bates and R.M.J. affirming the principle that attorney advertising will be permissible provided that it is truthful, not misleading and nondeceptive.

V. Conclusion

The result in Zauderer illustrates that the Court is beginning to address the more narrow issues which pervade the regulation of lawyer advertising. Although a minority of the justices still hold fears that for decades were emphasized by the ABA, these concerns have not been equally persuasive of the majority. With Zauderer, the Court continues to place lawyer advertising in the proper perspective of first amendment free speech protections. The Court has reached a point at which it will be able to focus its analysis in future cases toward the narrow avenues of permissible state regulation, involving approaches such as disclosure requirements and disclaimers of qualitative assertions imposed on attorney advertising. While the Court maintained the desire to foreclose broad and sweeping regulation, it also displayed a genuine interest in delineating proper means for the states to attain legitimate regulatory goals. The decision of Zauderer reaffirmed the notion that state regulation of attorney advertising must be narrow in scope and drafted with utmost precision.

The recent Supreme Court decisions relevant to lawyer advertising demonstrate that the issues presented involve not only matters of professional integrity and constitutional law, but also require consideration of the interests of the consumer in the free flow of legal information. However, throughout the line of cases which led to Zauderer, the Court has been somewhat consumed with the role that the first amendment has played in the protection of attorney advertising and with fending off persistent claims regarding adverse effects on the profession and the quality of legal representation. As a result, the Court has yet to make its own predictions as to the impact of the decisions in these cases, particularly with respect to the consumer.

Zauderer marks an important juncture in the Supreme Court's approach towards state regulation of lawyer advertising. At the present time, Zauderer is of minimal guidance for the proper use of disclosure requirements and disclaimers, yet the case is a significant step beyond past decisions which have only been able to focus on the broader aspects of state regulation. The use of disclosure requirements appears to be the most effective way that states may insure that attorney advertising is truthful and nondeceptive, without abridging the constitutional rights of the lawyer or potential client. State regulation may very well evolve into compilations of disclosure requirements aimed at producing particular results that further legitimate interests. In the context of current state regulation, though, Zauderer represents
a point at which the Supreme Court has begun to sharpen its scrutiny of state restrictions, beyond the basic inquiry of whether such regulations insure that truthful and nondeceptive advertising by attorneys is protected.\textsuperscript{165}

\textit{Brent P. Copenhaver}

\textsuperscript{165} On June 10, 1985, the Supreme Court announced that it had vacated the judgment of Humphrey v. Committee on Professional Ethics, 53 U.S.L.W. 3868 (U.S. June 10, 1985), \textit{vacating and remanding}, 355 N.W.2d 565 (Iowa 1984) (to be remanded in light of \textit{Zauderer}). In \textit{Humphrey}, the Iowa Supreme Court upheld a disciplinary rule which prohibited television advertising that contains background sound, visual displays, more than one single nondramatic voice, or self-laudatory statements even though the ads may not be misleading.