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Attorney Advertising and Commercial Speech after Zauderer v. Office of Disciplinary Counsel

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RECENT DEVELOPMENT

ATTORNEY ADVERTISING AND COMMERCIAL SPEECH AFTER *ZAUDERER V. OFFICE OF DISCIPLINARY COUNSEL*

I. INTRODUCTION

In 1977, the Supreme Court sent shock waves through the legal community by determining that advertisements by attorneys were a protected form of speech.[1] Since that time, attorneys have struggled to determine the exact parameters which define the elusive concept of protected attorney speech.[2] The Supreme Court has, however, taken great strides toward clarifying its position on attorney advertisements as it has consistently ruled that most restrictions on an attorney's fundamental right to free speech cannot pass constitutional scrutiny.[3] The 1969 Model Code of Professional Responsibility, which included a blanket ban on attorney advertisements, was amended in 1978 in response to *Bates v. State Bar of Arizona*[4] to allow some forms of regulated advertising.[5] Although, as illustrated, the Supreme Court and the American Bar

1. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

2. Attorneys have long fought a battle between two intolerable extremes, both seemingly advocated by the ABA. At one extreme was the complete suppression of advertising, emphasized in the disciplinary rules of the Model Code of Professional Responsibility until its amending in 1978. The other extreme, also proposed in the Model Code of Professional Responsibility, is found in the ethical principles of Canon 2. Ethical Consideration 2-1 reads:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1979) (footnotes omitted). While it seems that the requisite of Canon 2 would be met by advertising, such advertisements by attorneys were clearly forbidden by the disciplinary rules of the Code.

3. *Bates*, 433 U.S. at 381. In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), a case that greatly influenced the *Bates* court, the Court held that a state may not completely suppress concededly truthful information which concerns a lawful activity. *Id.* at 773. The *Bates* Court expanded the *Virginia State Board* standard to include attorney advertisements.

4. 433 U.S. 350 (1977).

5. ABA Comm. on Ethics and Professional Responsibility, House Informational Rep. 130 (1978).

Association (ABA) both were successful in extending the boundaries that surrounded attorney advertising, the extent to which first amendment protection would be given to it had yet to be realized.[6] In addition, the amended Code of Professional Responsibility was untried insofar as its ability to regulate advertising without infringing on an attorney's first amendment rights. Cases decided after *Bates* suggest that perhaps the ABA has not gone far enough in its revitalization of attorney advertising.[7] *Zauderer v. Office of Disciplinary Counsel*[8] is the Supreme Court's latest statement concerning this continually evolving issue.

II. STATEMENT OF THE CASE

A. *Facts*

Late in 1981, Phillip Zauderer attempted to boost his clientele by publishing a newspaper advertisement in the *Columbus Citizens Journal*.[9] The advertisement suggested that Zauderer's firm would represent defendants in drunk driving cases and that the client's full legal fee would be refunded if he or she was convicted of drunk driving. Zauderer withdrew the advertisement after two days when he received a telephone call from an employee of the Office of Disciplinary Counsel [ODC] who suggested that the advertisement might be in violation of Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.[10]

In the spring of 1982, Zauderer again arranged for an advertisement to be published, this time aimed at a group of women who had suffered injuries from their use of an intrauterine device known as the Dalkon Shield.[11] The advertisement contained information concerning the de-

6. This same sentiment was expressed by the *Bates* Court in its conclusion of the case: "[W]e recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." *Bates*, 433 U.S. at 384.

7. *See infra* notes 108-17 and accompanying text.

8. 105 S. Ct. 2265 (1985).

9. The facts of the case are taken primarily from the syllabus to the Supreme Court decision in *Zauderer*, 105 S. Ct. at 2269.

10. DR 2-106(C) states in full: "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1978). The employee mentioned was concerned, and the ad seemed to suggest, that Zauderer was providing legal services to criminal defendants on a contingent-fee basis. Since the ad provided that Zauderer would refund the client's legal fee if a decision was not reached for the client, the employee felt that this clearly indicated that Zauderer was working on a contingent-fee basis. *Zauderer*, 105 S. Ct. at 2271.

11. The Dalkon Shield is an intrauterine device (IUD) that was introduced in 1971. Van Dyke, *The Dalkon Shield: A "Primer" in IUD Liability*, 6 W. ST. L. REV. 1, 1-2 (1978). Marketed as "an IUD of distinctively new design," the product was quickly sold to 2.2 million users. *Id.* at 2. As early as 1972, women began experiencing complications after using the IUD, including maternal

vice's history of causing injury to users and urged potential clients not to assume that their claims were time-barred.[12] The advertisement featured a line-drawing of the Dalkon Shield device, accompanied by the question: "Did you use this I.U.D.?"[13] In addition, the advertisement promised that if there was no recovery by the plaintiff, she would owe no legal fees.

The ODC instigated formal proceedings against Zauderer in July of 1982. The complaint alleged that the use of the drunken driving advertisement violated Disciplinary Rule 2-101(A)[14] because it offered representation on a contingent-fee basis for a criminal case—something that cannot be accomplished under Disciplinary Rule 2-106(C)—and was therefore misleading.[15] The complaint also alleged that, in publishing the Dalkon Shield advertisement, Zauderer had violated Disciplinary Rule 2-101(B)[16] which prohibits the use of illustrations in advertisements run by attorneys; Rule 2-103(A) which prohibits a lawyer from recommending himself or anyone associated with him to a non-lawyer who has not sought his advice;[17] and Rule 2-104(A) which prohibits an attorney from accepting employment resulting from such self-recommendation.[18]

Zauderer defended the charges by asserting that Ohio's rules restricting attorney advertising were unconstitutional in light of the

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deaths and septic and spontaneous abortions. *Id.* at 2 n.6. The device was pulled off the market in 1974, *id.* at 2, but many women continued its use, and by 1975, there were 16 known deaths associated with the use of the Dalkon Shield. *Id.* at 2 n.3. The Shield's producer, the A.H. Robins Company, was forced, because of the impact of filed and potential damage suits, to seek protection under the Bankruptcy Code. The company has paid more than $520 million in claims. USA Today, Jan. 16, 1986, at 3A, col. 1.

12. Because of the adoption in most states of the "discovery doctrine," the statute of limitations will not begin to run in most causes of action until the negligent injury is, or should have been, discovered. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 166-67 (5th ed. 1984).

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

14. DR 2-101(A) provides 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-laudating or unfair statement or claim.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1978).

15. *Id.* at DR 2-106(C); *see supra* note 10.

16. DR 2-101(B) reads in pertinent part:

> In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast . . . in print media or over radio or television. . . . The information disclosed by the lawyer in such publication or broadcast shall . . . 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 . . . .

Id. at DR 2-101(B).

17. *Id.* at DR 2-103(A).

18. *Id.* at DR 2-104(A).

Supreme Court's decisions in *Bates v. State Bar of Arizona*[19] and *In re R.M.J.*[20] A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio rejected Zauderer's argument, found that he had indeed violated the disciplinary rules alleged, and recommended a sanction of indefinite suspension from the practice of law.[21] The Supreme Court of Ohio agreed with the finding of the Board and determined that the first amendment did not prohibit the rules from being applied to Zauderer. The court ordered that Zauderer receive a public reprimand.[22]

B. *Issues*

In dealing with the *Zauderer* case, the Supreme Court grappled with three distinct issues, each of which was examined in light of the first amendment's commercial speech protection.[23] Under the current standard, a state may not regulate commercial speech unless it is false or misleading or unless the state can demonstrate the existence of a substantial interest to support its regulation.[24] In its examination of previous

19. 433 U.S. 350 (1977).

20. 455 U.S. 191 (1982). Zauderer contended that Ohio could not justify its disciplinary rules under the standards set by *Bates* and *R.M.J.* In support of his argument, Zauderer offered the testimony of expert witnesses who testified that Zauderer's Dalkon Shield advertisement was "socially valuable" because it provided consumers with information concerning their legal rights. Two women also testified on Zauderer's behalf, stating that they would not have learned of their legal rights but for Zauderer's advertisement. *Zauderer*, 105 S. Ct. at 2273.

21. *Zauderer*, 105 S. Ct. at 2274. Although the panel determined that Zauderer's drunk driving advertisement was deceptive, its reasoning behind that determination was significantly different than the reasoning advanced by the ODC. The panel found that the advertisement was misleading because it failed to include within the ad a statement concerning the common practice of plea bargaining in a drunken driving case. The panel felt that the omission might deceive potential clients who did not realize that they could still be found guilty of an offense, albeit a lesser offense than drunk driving, and still be liable for the payment of legal fees (because they had not been convicted of drunk driving). *Id.* The panel's deviation from the ODC's reasoning is the basis of Zauderer's procedural due process claim. *See infra* notes 60-63 and accompanying text.

22. 105 S. Ct. at 2274. The panel of the Board of Commissioners recommended that Zauderer receive a public reprimand for his misconduct, but the Board as a whole determined that Zauderer should be indefinitely suspended from the practice of law. The supreme court did not elaborate on its reasons, but sided with the panel in its determination of Zauderer's punishment. *Id.*

23. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Friedman v. Rogers, 440 U.S. 1 (1979); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

24. *Zauderer*, 105 S. Ct. at 2275. The Court described a four-part commercial speech test in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The test is set out as follows. Initially, the Court must determine whether the expression is actually protected by the first amendment. This means that the advertisement must not be false or misleading and must concern a lawful activity. Second, the Court must analyze the government interest asserted to determine whether it is substantial. Third, the Court must determine whether the regulation imposed directly advances the governmental interest asserted. Lastly, the restriction may not be more extensive than necessary to serve the interest. *Central Hudson*, 447 U.S. at 566.

cases dealing with attorney advertising, the Supreme Court determined that neither the adverse effect on professionalism[25] nor the difficulties of enforcing a less restrictive rule on advertisements[26] were sufficient to constitute a substantial government interest.

The first issue that the Court addressed was whether an attorney's solicitation through a public advertisement of clients with a specific legal problem merited protection under the first amendment.[27] Although the Supreme Court upheld Ohio's prophylactic rule concerning in-person solicitation by attorneys in *Ohralik v. Ohio State Bar Association*,[28] it emphasized in the discussion of Zauderer's solicitation-form advertisement that any type of commercial speech that is not false, misleading, or deceptive is entitled to individual examination based on the first amendment.[29] Ultimately, the Court was forced to decide whether the same state interests that justified a prophylactic rule in *Ohralik* would justify such a limitation concerning solicitation in Zauderer's public advertisement.

The Court also addressed the issue of illustrations in advertisements.[30] Initially, the Court was forced to make a determination of whether commercial illustrations are entitled to the same first amendment protection as free speech[31] and, if so, whether a prophylactic rule against illustrations can be justified.

Finally, the Court dealt with disclosure requirements and the stan-

25. *Bates*, 433 U.S. 350, 378 (1977). The Court concluded that restrictions on advertisements "are an ineffective way of deterring shoddy work," and that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising." *Id.*

26. *Id.* at 379. The Court addressed the Arizona Bar's contention that any means less restrictive than the blanket ban on advertisements would result in enforcement difficulties in this manner:

> It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize that opportunity to mislead and distort. . . . For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest . . . to assist in weeding out those few who abuse their trust.

Id.

27. 105 S. Ct. at 2275.

28. 436 U.S. 447, 468 (1978).

29. *Zauderer*, 105 S. Ct. at 2275; *see supra* notes 23-24 and accompanying text. This communication, as opposed to the communication at issue in *Ohralik*, was not in-person. Because solicitations which occur in person suggest a need for a more restrictive approach than those that do not occur in person, it is necessary for a state to examine its solicitation regulations in light of both scenarios. Although the Court upheld Ohio's solicitation ban in *Ohralik*, it recognized the need to reexamine the objectives offered to support the restriction to determine whether a public advertisement also merited such a restraint. *Id.*

30. 105 S. Ct. at 2280-81.

31. *See infra* notes 78-86 and accompanying text.

dard a state must meet to impose such requirements.[32] In its analysis, the Court determined what interests are at stake when disclosures are required and what role the first amendment plays in protecting attorneys from making unnecessary disclosures.[33]

III. HISTORY

After the Supreme Court's ruling in *Bates* that blanket bans on attorney advertising were unconstitutional,[34] the ABA responded in 1978 with an amendment to its Model Code of Professional Responsibility.[35] The new Code allowed for restricted forms of advertising both in print media and in television and radio broadcasts[36] by taking a "laundry list"[37] approach to the type of information that would be permitted in attorney advertisements.[38] This approach, however, was found to be wanting in *In re R.M.J.*[39]

In *R.M.J.*, the Supreme Court determined that Missouri's use of the "laundry list" approach could not be sanctioned if it prevented the dissemination of nonmisleading information.[40] Although the "laundry list" method was not ruled unconstitutional *per se*,[41] the Court's reasoning suggested that a more lenient approach was required.[42] The holding in

32. 105 S. Ct. at 2281-83.

33. In dealing with disclosure requirements in the past, the Court has held that the compulsion to speak, in some instances, can be as violative of the first amendment as prohibitions on speech. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

34. *Bates*, 433 U.S. at 384. Initially, the *Bates* decision related only to those advertisements that concerned the "availability and terms of routine legal services." *Id.*

35. ABA Comm. on Ethics and Professional Responsibility, House Informational Rep. 130 (1978).

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

37. The "laundry list" approach was so named because of the checklist manner that the Code utilized in its presentation of acceptable content in an advertisement. *See id.* at DR 2-101(B). The disciplinary rule listed 20 different characteristics an attorney could include in his ad and provided that only the information contained in those 20 categories could be published. *Id.*

38. *Id.*

39. 455 U.S. 191 (1982).

40. *See id.* at 205. Among the alleged violations that R.M.J. was to have committed was the categorization of his practice as "personal injury" instead of "tort law" and "real estate" instead of "property law." The Supreme Court noted that the appellee Advisory Committee did not argue that R.M.J.'s listings were misleading. The Court then went on to state that "in certain respects appellant's [R.M.J.'s] listing is more informative than that provided in the addendum" [to Rule 4 of Missouri's Code of Professional Responsibility]. *Id.*

41. It is theoretically conceivable that a state could devise an exhaustive list of acceptable information that could be contained in an ad, but the likelihood of this occurring seems extremely slim.

42. 455 U.S. at 207. The Court noted that although a state may regulate commercial speech, it must regulate it in a manner that is no more extensive than reasonably necessary to comply with the first and fourteenth amendments. *Id.* From this premise, it becomes apparent that a list which summarily bans all advertisements that may be neither false nor misleading but simply do not fall

R.M.J. focused the ABA's attention on the already existing Commission on Evaluation of Professional Standards.[43] The Commission was formed in 1977 with the purpose of examining the present status of the Model Code of Professional Responsibility and determining the desirability of amending the format.[44]

Realizing the age-old struggle that attorneys continued to face between the requirement that they educate the public[45] and the restrictive approach taken toward advertisements, the Commission ultimately suggested that the ABA Model Code be abandoned altogether.[46] The ABA apparently accepted the Commission's logic and adopted the Model Rules in August of 1983.[47] The existence of both the Code and the Model Rules has resulted in a period of transition in which some states have adopted the Rules while others have retained the Code.[48] Oklahoma chose to adopt a form of the Model Rules with respect to attorney advertisements shortly after its acceptance by the ABA in 1983.[49]

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within its accepted categories cannot comply with the regulation requirement set out above. Because of this shortcoming in disciplinary rules, many states have changed this canon of their Code of Professional Responsibility to eliminate the laundry list. *See, e.g.*, OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-102 (1983).

43. See Kettlewell, *Keep the Format of the Code of Professional Responsibility*, 67 A.B.A. J. 1628, 1628 (1981) for a discussion of the Commission.

44. *Id.* The Commission on Evaluation of Professional Standards, also known as "The Kutak Commission" (named for its chairman, Robert J. Kutak) was responsible for suggesting necessary amendments to the existing Model Code of Professional Responsibility to bring it more in line with recent state and federal law decisions. *Id.*

45. *See supra* note 2 and accompanying text.

46. MODEL RULES OF PROFESSIONAL CONDUCT chairman's introductory note (Final Draft 1982) (reprinted in 68 A.B.A. J. 3 (pullout supp. Nov. 1982)). Included in its reasoning justifying the amendment, the Commission asserted that the discrepancies within the Code and other law which bound attorneys and discrepancies between clients' expectations and Code standards necessitated the change. Kutak, *Model Rules of Professional Conduct: Ethical Standards for the '80s and Beyond*, 67 A.B.A. J. 1116, 1116 (1981).

47. MODEL RULES OF PROFESSIONAL CONDUCT 1 (1983). The Model Rules' most significant deviation from the Model Code with regard to attorney advertising is the absence of the "laundry list" approach in determining what type of information is acceptable in an ad. The list was replaced with this regulation: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1983). This brief statement, which replaces the myriad of categories labeled as "acceptable" for advertising purposes, places great emphasis on the truthfulness of the attorney's advertisement. The Committee seems to be moving toward a standard that can only be individually applied; each advertisement must be examined only for purposes of determining whether it is false or misleading.

48. *See, e.g.*, OHIO CODE OF PROFESSIONAL RESPONSIBILITY (1978). It is precisely because of the fact that Ohio had continued to implement the Code that two portions of the disciplinary action against Zauderer were reversed. The Ohio Code attempted to prohibit illustrations in ads as well as to prohibit direct mail solicitation by not including them in the list of acceptable categories contained within the "laundry list."

49. OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101 to 2-106 (1983) (incorporated into the Oklahoma Code of Professional Responsibility). For an in-depth analysis of Oklahoma's Code

IV. DECISION

The decision of the *Zauderer* Court is important in two areas. The first area affected is that of allowable content in an attorney's advertisement.[50] Initially, the Court held that Ohio's disciplinary rules prohibiting solicitation, self-recommendation and the use of illustrations in advertisements were unconstitutional.[51] Public advertisements geared to a specific legal problem, the Court reasoned, are not as likely to produce the overreaching effect that in-person solicitation does.[52] Since Zauderer's advertisement contained none of the dangers commonly associated with in-person solicitation,[53] and because it was not misleading,[54] the Court determined that the advertisement was entitled to protection.[55]

In the same vein, the Court rejected Ohio's argument that its restriction on illustrations was supported by its interest in preventing the public from being misled.[56] In dismissing Ohio's interest as insubstantial, the Court suggested that a total ban on illustrations was not the least restric-

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change, see Recent Development, *Oklahoma's New Rules on Advertising and Solicitation*, 19 TULSA L.J. 292 (1983).

50. The Court previously set out standards to determine whether a particular form of commercial speech would be protected. Beginning with Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, the Court made the initial categorization of advertisements containing concededly truthful information and stated that a state may not completely suppress its dissemination. 425 U.S. 748, 774 (1976). The Court did add, however, that a state may regulate commercial speech that is not false or misleading, if a substantial government interest can be shown. *Id.* at 772. In Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977), the Court discussed a second area of commercial speech categorization with this comment: "We do not foreclose the possibility that some limited supplementation, by way of a warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today [speech that is not false or misleading] so as to assure that the consumer is not misled." In *In re* R.M.J., 455 U.S. 191, 200-01 (1982), the Court further expanded the state's power to restrict commercial speech by stating that where a particular area of advertising is inherently likely to deceive or where the record indicates that the form has been deceptive in practice, the state may impose restrictions. *Id.* at 202. Such a restriction, as suggested by the *Bates* excerpt, would come, not in the form of a ban, but rather in a required explanation or disclaimer. The disclaimer, just as any other restriction on commercial speech, must be no broader than reasonably necessary to prevent deception. *Id.* at 201. The groundwork laid in *Bates* and *R.M.J.* concerning disclosure requirements was substantially cultivated in the *Zauderer* discussion. *See infra* notes 88-93 and accompanying text.

51. *Zauderer*, 105 S. Ct. at 2280-81.

52. 436 U.S. 447 (1978). Although the Court was especially critical in its evaluation and conclusion of the *Ohralik* communication, it did not allow its decision here to affect the evaluation of another in-person solicitation situation decided the same day as the *Ohralik* case. In *In re* Primus, 436 U.S. 412 (1978), the Court determined that at least some forms of solicitation would be permissible, provided none of the potential dangers commonly found in in-person solicitation situations were present. *See infra* notes 109-118 and accompanying text.

53. *Ohralik*, 436 U.S. at 465.

54. *See Zauderer*, 105 S. Ct. at 2277.

55. *Id.*

56. *Id.* at 2280-81.

tive means possible for furthering this interest.[57]

The second area affected by the Court's decision is that of disclosure requirements. In comparing disclosure requirements to outright restrictions on speech, the Court asserted that disclosure requirements are not as likely to chill protected speech, and, hence, do not require as high a level of scrutiny.[58] The disclosure requirement need only be reasonably related to the state's interest to be upheld.[59]

In connection with the disclosure requirement analysis, the Court dismissed Zauderer's claim of procedural due process deprivation, which he based upon the argument that he did not receive adequate notice of the charges against him.[60] Zauderer contended that the theory relied on by the Ohio Supreme Court as to the deceptiveness of his drunk driving advertisement was different from the theory relied on by the Board of Commissioners.[61] The Court admitted that Zauderer had not received notice of the theory upon which the court ultimately based his guilt, but that he had received notice of "the charges he had to answer,"[62] and consequently both the notice and due process requirements were met.[63]

V. ANALYSIS

The Court initially examined Ohio's rules against self-recommendation[64] and the acceptance of legal employment resulting from the giving of legal advice regarding a specific legal problem.[65] After first disposing of the notion that Ohio's rules against self-recommendation entirely for-

57. *Id.* at 2281. The possibility of policing each illustrated advertisement in a case-by-case manner convinced the Court that the complete ban on illustrations, indeed, was not the least restrictive means available to further Ohio's interest. *Id.*

58. *Id.* at 2282.

59. *Id.*

60. *See supra* note 21.

61. 105 S. Ct. at 2284.

62. *Id.*

63. *Id.* The majority was not impressed with Zauderer's argument. They said:

> That the Board of Bar Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of the Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio.

Id.

64. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1978). The rule, in full, 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." *Id.*

65. *Id.* at DR 2-104(A). This rule states: "A lawyer who has given unsolicited legal advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice. . . ." *Id.*

bid advertisements by attorneys,[66] the Court concentrated on the solicitation element of Zauderer's advertisement.

Since Zauderer's Dalkon Shield advertisement was neither false nor misleading,[67] the ODC was required to prove that its suppression of this type of speech was supported by a substantial government interest. When the counsel then attempted to utilize the same defenses for this restriction of speech it had used in the in-person solicitation found in *Ohralik v. Ohio State Bar Association*,[68] the Court would not be persuaded; instead, it drew a clear distinction between the dangers involved in in-person solicitation and those involved in solicitation by a public advertisement.[69] Among the differences the Court enumerated, perhaps the most convincing is the fact that public advertisements directed at a specific legal problem, because they are open to public scrutiny and because the pressure for an immediate response is noticeably removed, are not so likely to invade the privacy of the individual concerned.[70]

The Court also rejected the ODC's claim that lawyers will "stir up litigation"[71] if the restriction is not upheld. Acknowledging that lawsuits are, indeed, responsible for the consumption of "vast quantities of social resources" and often produce "little of tangible value,"[72] the Court was quick to reject the proposition that lawsuits, of themselves, are an evil. "That our citizens have access to their civil courts is not an evil to be regretted, rather, it is an attribute of our system of justice in which we ought to take pride."[73]

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66. 105 S. Ct. at 2276. The Court discussed the issue in this manner:

> Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising . . . . But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

Id.

67. The ODC actually stipulated that Zauderer's Dalkon Shield advertisement was "entirely accurate." *Id.* at 2276.

68. 436 U.S. 447 (1978); *see supra* notes 52-54 and accompanying text. In its reasoning behind upholding the in-person solicitation ban, the Court explained that in-person solicitation is a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. 436 U.S. at 464-65.

69. 105 S. Ct. at 2277. Here, the Court drew upon its logic from the *Ohralik* case, and reminded the ODC that even in the *Ohralik* opinion, it was "careful to point out that in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services." *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978)).

70. 105 S. Ct. at 2277.

71. *Id.*

72. *Id.* at 2278.

73. *Id.*

Finally, the Court was unpersuaded by the ODC's contention that distinguishing deceptive from nondeceptive advertising is more difficult in legal than in nonlegal advertising.[74] The Court disposed of this argument by emphasizing that the first amendment commercial speech right would mean very little if every form of advertising were prevented simply to spare the state the trouble of distinguishing truthful from deceptive advertisements.[75] The Court went on to state: "Our recent decisions . . . have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."[76] By analyzing each of Ohio's justifications for its restriction on self-recommendation and solicitation and finding each, in turn, to be insubstantial, the Court arrived at the conclusion that an attorney who solicits legal information through printed advertising that is not false or misleading may not be disciplined for his or her action.[77]

The Court next directed its attention to Ohio's ban on illustrations contained within advertisements.[78] Initially, the Court made the determination that illustrations are a protected form of speech and are entitled to the protection afforded by the *Central Hudson* test.[79] And again, because Zauderer's illustration was not false or misleading,[80] the state was required to advance a substantial interest explaining its restriction.

Two possible state interests were discussed in the analysis of this topic. The first was the state's interest in ensuring that attorneys adver-

74. *Id.* at 2279. The state's argument that it is easier to distinguish misleading advertising when it involves a product other than legal services was not readily accepted by the Court. Case law suggests that distinguishing deceptive from nondeceptive claims in *any* form of advertisement is far from a simple and straightforward process. *Id.* (citing Warner-Lambert Co. v. FTC, 562 F.2d 749 (7th Cir. 1977) and National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977)). These cases illustrate that "distinguishing deceptive from nondeceptive advertising in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics." *Id.*

75. *Id.*

76. *Id.* at 2279-80.

77. *Id.* at 2280. The Court's decision in this area raises interesting questions concerning other types of solicitation, including the use of direct mail and television and radio. *See infra* notes 124-25 and accompanying text.

78. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1978); *supra* note 16. Because Oklahoma has chosen to implement a form of the Model Rules of Professional Conduct, this restriction on illustrations is not present in the Oklahoma Code of Professional Responsibility. *See* OKLA. STAT. tit. 5, ch. 1, app. 3, DR 2-101-2-102 (1983).

79. The Court's determination was based on the reasoning that illustrations in advertisements often serve important communicative functions, including the direct provision of information and the attraction of an audience to the advertiser's message. 105 S. Ct. at 2280.

80. 105 S. Ct. at 2280; *see supra* note 24 and accompanying text.

tise "in a dignified manner."[81] This justification was quickly rejected by the Court as it compared the state's desire that attorneys maintain their dignity with the resulting abridgement of their first amendment rights. The Court concluded: "[T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."[82]

The state also attempted to justify its ban on illustrations by suggesting that the risk that the public will be misled, manipulated, or confused is too great to allow the use of illustrations in advertisements.[83] The Court responded to this allegation by labeling it as "little more than unsupported assertions,"[84] not based on any tangible evidence or authority. Indeed, the Court went so far as to suggest that illustrations in attorney advertisements would probably be less likely to mislead the public than similar illustrations in non-legal advertisements.[85] Additionally, the Court cited the possibility of policing the use of illustrations on a case-by-case basis, and, in so doing, concluded that a prophylactic ban on illustrations was not the least restrictive approach available.[86]

Having settled the issues concerning Zauderer's first amendment right to free speech, the Court then concentrated on Zauderer's right *not* to speak, or the issue of disclosure requirements. Although the Court conceded that the compulsion to speak may at times be as violative of the first amendment as a prohibition on speech,[87] it refused to require the same level of scrutiny for rules that provided for the disclosure of information as it does for rules that restrict free speech.[88] The analysis the

81. 105 S. Ct. at 2280.

82. *Id.*; *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 701 (1977).

83. 105 S. Ct. at 2280.

84. *Id.* at 2281.

85. The Court explained its rationale for this statement by suggesting that most consumers do not base their decisions regarding legal services upon what is represented visually (as may be the case with other products). *Id.*

86. *Id.* The Court relied on its decision in FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965), to show that policing illustrations in a case-by-case method is a viable alternative. "Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising." 105 S. Ct. at 2281.

87. 105 S. Ct. at 2282 (citing West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 633, 642 (1943)) (state must have immediate and urgent grounds for forcing disclosure in matters of politics, nationalism, and religion).

88. *Id.* The Ohio bar did not attempt to force Zauderer to disclose matters of politics, nationalism, or religion (which disclosure the first amendment would protect), but only the "purely factual and uncontroversial information about the terms under which his services will be available," *id.*, to which the Court will not extend first amendment protection.

Court used to arrive at its conclusion was the evaluation of the reasoning behind first amendment protection for commercial speech. Ultimately, the justification for this protection lies in the readily available information to consumers, and not in the seller's right to provide information.[89] Since commercial speech protection is designed as an information tool for consumers, the Court determined that an advertiser's "interest in *not* providing . . . information . . . is minimal."[90]

The Court did express the concern that unduly burdensome disclosure requirements could have the effect of chilling first amendment speech.[91] In response to this danger, the Court made the determination that requirements for disclosures must be reasonably related to the state's objective.[92] In the light of this more lenient standard, Ohio's proffered objective of preventing misleading information from reaching the consumer was found to be reasonably related to the disclosure requirement.[93]

Although the Court effectively protected Zauderer's first amendment right, they failed to extend this protection to Zauderer's substantive due process rights. The problem concerning substantive due process that the Court dealt with only perfunctorily is the failure of the Ohio court to specify precisely what disclosures would be required to comply with the state's rule.[94] The majority apparently felt that since the disciplinary action against Zauderer for his failure to adequately disclose resulted in a public reprimand only, as opposed to disbarment, the ambiguity in Ohio's rules was insubstantial.[95] Justice Brennan's dissent impressively conveys the weakness in the majority's argument.

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89. *Id.; see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("free flow of commercial information is indispensible" in a free enterprise economy).

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

91. *Id.*

92. *Id.* The Court also addressed Zauderer's argument that a "least restrictive means" analysis (which strikes down any restriction that is not the least intrusive manner to regulate speech) should be utilized in dealing with disclosure requirements. Since "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," *id.* at 2282, the Court rejected this argument and added that the first amendment interest affected by disclosure requirements are considerably weaker than those affected when speech is actually suppressed. *Id.*

93. *Id.* at 2283. Zauderer's advertisement, which promised that "if there is no recovery, no legal fees are owed by our clients," was held to be deceptive because of its failure to differentiate between fees and costs. *Id.* The Court felt that an uneducated layperson unfamiliar with legalese could easily interpret the advertisement as a "no-lose proposition," failing to understand that she would still be responsible for any court costs incurred. *Id.*

94. *Id.* at 2283 n.15 (Brennan, J., dissenting).

95. *Id.* The majority examined the wording in a previous case, *In re* Ruffalo, 390 U.S. 544, 554 (1968), which suggested that an attorney must be on notice that a court would condemn his conduct before he could be disbarred. Since the Ohio court sought only a public reprimand and not disbar-

According to Brennan, a disclosure requirement or suppression of commercial speech "is 'reasonable' only to the extent that a state can demonstrate a legitimate and substantial interest to be achieved by the regulation."[96] Brennan initially attacked the majority's approval of disclosure requirements that are unknown.[97] In the majority's own words, "[e]valuation of this claim is somewhat difficult in light of the Ohio court's failure to specify precisely what disclosures were required."[98] Assuming arguendo that the state was justified in imposing particular disclosure requirements, the problem remains that at the time of the advertisement's dissemination, Ohio's disclosure requirements were, at best, ambiguous. "An advertiser may not be punished for failing to include such disclosures 'unless his failure is in violation of valid state statutory or decisional law requiring the [advertiser] to label or take other precautions to prevent confusion of customers.' "[99] Regardless of whether a state may impose such disclosure requirements, Ohio failed to provide Zauderer with notice that such disclosures would be required and thus deprived him of basic due process guarantees.[100]

To illustrate the harshness in the Court's decision, it is necessary to stress that in an effort to determine whether the advertisement met with ethical standards, Zauderer approached the ODC *before* he released it. The office refused to advise him,[101] so Zauderer was left with nothing but his own judgment to determine whether his advertisement would be objectionable.[102] Brennan captures the essence of Zauderer's plight with this comment:

No matter what disclaimers he [Zauderer] includes, Ohio may decide

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ment against Zauderer, the majority saw "no infirmity" in its decision to issue a public reprimand without the appropriate notification. 105 S. Ct. at 2283 n.15.

96. 105 S. Ct. at 2285 (citing *In re* R.M.J., 455 U.S. 191, 203 (1982) and Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980)). In addition, the regulation "may extend only as far as the interest it serves." *Id.* (quoting *Central Hudson*, 447 U.S. at 565).

97. *Id.* at 2286.

98. *Id.* at 2283 n.15. The only explicit reference to a disclosure requirement involving contingent fees in the Ohio rules can be found at DR 2-101(B)(15), and this section does not require any disclosures except when the ad mentions contingent-fee *rates*—something that Zauderer's advertisement did not do.

99. *Id.* at 2289 (citing Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238-39 (1964)).

100. *Id.* Neither the published rules, statutory authority nor the ODC put Zauderer on notice as to what was required to be included in the advertisement. *Id.*

101. The ODC would not advise Zauderer because it did "not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements." *Id.* (citing Stipulation of Fact Between Relator and Respondent ¶¶ 22, 27, App. 16).

102. In Connally v. General Construction Co., 269 U.S. 385 (1926), the Court made the determination that a regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

> after the fact that further information should have been included and might, under the force of its rules, attempt to suspend him indefinitely from his livelihood. Such a potential trap for an unwary attorney acting in good faith not only works a significant due process deprivation, but imposes an intolerable chill upon the exercise of First Amendment rights.[103]

By acquiescing to Ohio's lack of specificity in its rules, the Court has allowed a standard to remain that is clearly violative of an attorney's basic due process rights.

VI. FUTURE IMPLICATIONS

The decision in *Zauderer* suggests several areas concerning attorney advertising that may need to be modified in the future. The first area concerns various forms of solicitation by attorneys.[104] Since the Court determined that Zauderer's solicitation of potential clients through a public advertisment could not be restrained,[105] the question arises as to what extent this decision will apply to other forms of solicitation. And, concurrently, the decision raises questions concerning the constitutionality of Model Rule 7.3.[106]

Although the Court's decision relates only to public, printed advertisements, the Court's analysis and its rulings in the past suggest that the decision will be interpreted to include other forms of solicitation.[107] Two cases that lead to that conclusion are *In re Primus*[108] and *Ohralik v. Ohio State Bar Association*.[109] In *Primus*, the Court held that an American Civil Liberties Union (ACLU) representative who mailed a letter to a woman offering legal representation on behalf of the ACLU[110] could not

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103. 105 S. Ct. at 2292 (Brennan, J., dissenting).

104. *See supra* notes 64-77 and accompanying text.

105. *See supra* notes 50-55 and accompanying text; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1979).

106. Taylor, *Update: Lawyer Advertising*, LITIGATION NEWS, Fall 1985, at 3, 15-16. In pertinent part, Model Rule 7.3 provides:

> 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 [or] . . . by telephone or telegraph, by letter or other writing or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

107. *Compare* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) *with In re* Primus, 436 U.S. 412 (1978) (suggesting that solicitation contained within a letter may not be objectionable while solicitations occurring in-person may be objectionable).

108. 436 U.S. 412 (1978).

109. 436 U.S. 447 (1978).

110. 436 U.S. at 412, 416 n.6. The letter was written after Primus had met with a group of women who had allegedly been sterilized as a condition of receiving Medicaid benefits. Primus

be disciplined unless her actions had in fact resulted in overreaching or fraud.[111] In *Ohralik*, the Court upheld Ohio's ban on solicitation by determining that Ohralik's in-person, high-pressure solicitation of the representation of two 18-year-old girls was an evil likely to result in fraud and undue influence.[112]

In distinguishing these two cases, it becomes apparent that the Court felt that, due to the difference in pressure exerted on the person solicited,[113] there are measurable differences between in-person solicitation and direct mail solicitation.[114] The Court in *Ohralik* noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny."[115] Although direct mail solicitations are also unavailable for public scrutiny, the threat of undue influence by an attorney is significantly diminished because of the absence of an in-person confrontation. Because direct mail solicitation lacks the danger of a high-pressure sales pitch, the only justification the state can offer for its restriction is the regulatory difficulties that accompany it. In *Zauderer*, however, the Court rejected enforcement difficulty as a justification for the regulation of commercial speech.[116] It seems apparent that a state may no longer use such a justification for a restriction in direct mail solicitation situations.

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advised the women of their legal rights, suggesting the possibility of a lawsuit. The ACLU later informed Primus that they would provide free legal counsel to women who had been sterilized by one particular doctor. Primus's letter simply conveyed this offer to one of the women. *Id.*

111. 436 U.S. at 437-38. The Court gave great credence to the fact that Primus's letter, which acted as a catalyst in stimulating the sterilization litigation, was used "as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.* at 431. This type of speech may not be regulated without a showing of *actual* abuse; potential abuse is not enough. *Id.* at 437-38. Since there was no evidence that Primus's letter resulted in abuse, the Court held that a prophylactic rule concerning solicitation because of the mere potential for overreaching was too broad.

112. 436 U.S. at 467-68. In this case, attorney Ohralik visited the two girls, one at home and the other in the hospital, after they had been involved in an automobile accident. After they had "agreed" to allow Ohralik to represent them in cases against their insurance companies, both girls, on advice from their parents, decided not to sue. Ohralik, not to be dissuaded, produced a tape recording of each conversation and then attempted to collect his percentage of the estimated worth of each claim. *Id.* at 451 n.3, 452 n.5.

113. The Court upheld Ohio's interest in preventing advertisements that are "rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." *See Zauderer*, 105 S. Ct. at 2277 (summarizing the holding in *Ohralik*).

114. There are four primary differences between the solicitation involved in *Ohralik* and that in *Primus*: (1) Ohralik's solicitation was in-person, Primus's by letter; (2) Ohralik hoped to receive money for the work done for the prospective client, Primus did not; (3) Primus had a political motivation, Ohralik did not; (4) Ohralik's prospective clients were unusually vulnerable, Primus's were not.

115. 436 U.S. at 466.

116. *See supra* notes 74-76 and accompanying text.

The comments to Model Rule 7.3 use the precise rationale mentioned above in attempting to justify its prophylactic rule against direct mail solicitation.[117] Although the comments suggest that "[d]irect mail solicitation cannot be effectively regulated by means less drastic than outright prohibition,"[118] the *Zauderer* Court suggests that this is not so. Given the possibility of policing each situation individually,[119] the Court is likely to find that a prophylactic ban is too broad.

This view that the *Zauderer* decision should also apply to direct mail solicitation situations is further supported by *In re Von Wiegen*, a recent New York Court of Appeals case to which the Supreme Court has denied certiorari.[120] In this case, a New York attorney mailed unsolicited letters to victims of a hotel disaster, offering to represent them in their particular cause of action. The New York Court of Appeals granted first amendment protection to the mailings, offering the rationale that direct mailing solicitations were not fraught with the same inherent possibilities for overreaching as in-person solicitation.[121] The reasoning of this court seems to demonstrate the same logic seen in both *Zauderer* and *Primus*. Although the Supreme Court has not yet directly overruled the direct mail solicitation ban of Model Rule 7.3 as unconstitutional, the *Von Wiegen* and *Zauderer* decisions take a step toward undermining its validity. Since the Court has taken the attitude that any form of advertising that is not false or misleading must be analyzed in a case-by-case manner, it seems likely that any form of solicitation by attorneys must be examined in the same light. It must follow that direct mail solicitation, when examined in the same individual manner, will also be afforded first amendment protection.

The *Zauderer* decision implies further changes in the area of television and radio advertisements.[122] Although the Court has avoided dealing directly with the issue of broadcast media,[123] it seems likely that the same individualized approach to television and radio broadcasts must be implemented to preserve the attorney's right to disseminate truthful,

117. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (1983).

118. *Id.*

119. Such a policing could take the form of a regulatory agency by which each letter must be cleared.

120. 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. denied*, 105 S. Ct. 2701 (1985); *see also* Taylor, *supra* note 106, at 16.

121. *Von Wiegen*, 63 N.Y.2d at 163, 470 N.E.2d 838.

122. Taylor, *supra* note 106, at 20.

123. The Supreme Court has noted that "the special problems of advertising on the electronic broadcast media will warrant special consideration." Bates v. State Bar of Ariz., 433 U.S. 350, 389 (1977).

non-misleading information. It appears that the broadcast media may be an area where the possibility of a case-by-case analysis would be plausible.[124]

The last area on which the *Zauderer* decision sheds some light is that of advertisements by lawyers in the yellow and white pages of telephone directories. Model Rule 7.4 states that a lawyer may not claim that he is a specialist in a particular field of law.[125] The comment to Rule 7.4 goes even further in stating that a lawyer may not state that his practice is "limited to" or "concentrated in" a particular field of law.[126]

In the area of telephone directory advertisements, the consumer appears to be in an especially susceptible position. Consumers might easily be misled by attorneys who advertise as "specialists" if they happened to compare the directory listing of physicians with the listing of attorneys. Physicians are categorized by specialty but must be board-certified before they can claim any particular area of specialization.[127] It might seem logical to a consumer that attorneys categorized as specialists must pass similar board requirements to be certified as a specialist. Since the ABA has no such testing requirement, the government's interest in preventing consumers from being misled would seem to be substantial.

For Oklahoma attorneys, the question of specialist listing in telephone directories came to the forefront beginning in November of 1985.[128] At that time, the first edition of the Southwestern Bell Yellow Pages for Greater Tulsa listing lawyers according to specialty was published. Although the traditional alphabetical listing of attorneys remains, Southwestern Bell has added a separate "Attorneys Guide" which lists attorneys "by area of practice." While the guide contains a disclaimer—in very small typeface—which suggests that an attorney listed is not necessarily a specialist, the potential for confusion among consumers is great. The subject of specialization has been before the Oklahoma Bar Association, but has failed to win approval.[129] Although the Association has refused to approve specialist listings in attorney advertisements, Southwestern Bell has apparently disregarded its stance. Since Novem-

124. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(D) (1979).

125. With the exception of the area of admiralty and patent law, Model Rule 7.4 specifically requires that: "A lawyer shall not state or imply that the lawyer is a specialist." MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1983).

126. *Id.*

127. The Tulsa World, Sept. 1, 1984, at 1, col. 1.

128. *Id.*

129. *Id.*

ber of 1985, an attorney has been allowed to be listed in an Oklahoma telephone directory according to specialty. As a result, clients now "have to take an attorney's word that he is a specialist in any given legal field."[130]

VII. CONCLUSION

Zauderer strengthened the general proposition that aside from advertisements that are false and misleading, any attorney advertisement is entitled to first amendment free speech protection. The decision implies that the broad, general approach that many states have taken to attorney advertisements will no longer hold up under constitutional scrutiny and must be replaced by a more individualized approach to the regulation of advertisements. Whether the same constitutional protection will be afforded advertisements in the broadcast media remains to be seen, but in light of the Court's tendency to favor the attorney's first amendment rights, it seems logical that the Court will extend the same type of protection to those forms of media. The Court has indicated a willingness to liberally impart first amendment protection to attorney advertisements that it was not so quick to protect in the past. Attorney advertising may no longer be approached simplistically, as the Supreme Court determines that advertising by attorneys can be regulated no differently than any other form of commercial speech.

Julie E. Heath

130. *Id.*