

CHAPTER VIII ADVERTISING AND SOLICITATION

I. ADVERTISING

Read M.R. 7.1 - 7.5 and Comments.

A. Background

Revised Report of the Supreme Court Committee on Lawyer Advertising, 39 J.MO. BAR 34 (1983). [This Committee was constituted to recommend revised advertising rules to the Court in light of changes in the law regarding commercial speech.]

To properly research lawyer advertising, and to recommend new rules on the subject, an historical perspective may be helpful. Abraham Lincoln advertised his law practice in the newspapers around Springfield, Illinois as early as 1838. See L. Andrews, *Birth of a Salesman: Lawyer Advertising and Solicitation 1* (A.B.A. 1980). In 1910, shortly after the adoption of the ABA Canons of Ethics, George Archer, Dean of the Suffolk School of Law, wrote: "On the question of advertising there is probably more difference of opinion than upon any other that confronts the lawyer." . . . When the ABA first adopted its Canons on lawyer advertising, House of Delegates member A.A. Freeman of New Mexico told the other delegates: "I do not believe that it is any part of our duty to adopt a code of ethics, the effect of which is to deter the young and aspiring members of the Bar from bringing themselves before the public in a perfectly legitimate way." See 33 A.B.A. Rep. 85 (1908).

Issues relating to the scope of lawyer advertising are likewise not new to the State of Missouri. The first rules relating to the subject were adopted with this state's first ethics code, in 1906. . . . Substantially identical to the only then existing ethics code for lawyers in the United States, the 1887 Alabama Code, the 1906 Missouri Code provided:

Newspaper advertisements, circulars, and business cards, tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. Indirect advertisements for business, by furnishing or inspiring editorials or press notices, regarding cases in which the attorney takes part, the manner in which they are conducted, the importance of his positions, the magnitude of the interests involved, and all other self-laudation, is of evil tendency, and wholly unprofessional.

This provision continued in Missouri until 1914, when the Missouri Bar adopted the 1908 ABA Canons. . . . ABA Canon 27, as adopted in 1914 in Missouri provided:

the most worthy and effective advertisement possible, even for a young

lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisements for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, defy the traditions and lower the tone of our high calling, and are intolerable.

The provisions of this Canon remained as a guide for the Missouri lawyer from 1913 until 1934. Following [a landmark decision] declaring the court's plenary power over the practice of law, the court codified the ethics process into Court Rules. . . . Adopting the ABA Canons of Ethics as "the measure of the conduct and responsibility of the members of the bar of this Court and of all lawyers who practice in the State of Missouri," Canon 27 thus became the mandatory advertising standard for all Missouri lawyers.

Canon 27, permitting the publication or circulation of ordinary business cards remained as the rule of Missouri, from the adoption of the Court Rules in 1934 until the adoption of the Code of Professional Responsibility in 1971. . . . [I]t appears that between 1934 and 1971, the publication of the simple business card was permitted in this State/ As would later be observed by Henry Drinker, such advertising rules were [r]eally rules of professional etiquette rather than of ethics.

On January 1, 1971, the Code of Professional Responsibility became obligatory for all Missouri lawyers. Contained within that Code was Ethical Consideration 2-9, which spoke of "a traditional ban against advertising by lawyers." While the provisions of that ethical consideration thus overstate the history of lawyer advertising in Missouri, it is unquestioned that the provisions of the new D.R. 2-101 did ban virtually all forms of advertising and solicitation by lawyers.

The first challenge to the advertising ban of D.R. 2-101 came in *Bates v. State Bar of Arizona*. Today, while it is unquestioned that the decision in *Bates* extended some First Amendment protection to lawyer advertising, the decision can also be viewed as the result of a number of competing factors existing immediately prior to the decision. First, the total ban on lawyer advertising, a ban which had prompted one suit by Consumer's Union, and another challenge against the ABA, on antitrust grounds, by the Department of Justice . . . ; Second, the belief by the Bar that the consumer of legal services was generally uneducated about the role of lawyers, a result supported by the Missouri Bar/Prentice Hall Survey; Third, a belief that the rising cost of legal services was causing many Americans to be unable to use any legal services

that were available; and Fourth, a belief that all legal services were unavailable to persons with incomes above the poverty line, but below wealth, a perception that the ABA survey on legal needs was unable to document but which nonetheless existed. . . .In *Bates* all of these factors coalesced. Bates and O'Steen were former legal services attorneys who perceived that people above the poverty line had unmet legal needs. Their purpose was to perform routine legal services for which persons might not otherwise be able to seek legal counsel. They purposefully charged low fees. Finally, they believed the public would be uneducated about the services offered, and the cost thereof, unless they used the medium of advertising.

In *Bates*:

1. The Court did not consider advertising relating to the quality of legal services --- although it was recognized that claims of quality are probably not susceptible to verification by the public and could thus be deceiving.

2. The Court did not consider solicitation --- particularly in-person solicitation --- although it recognized that such actions could pose significant problems of overreaching.

3. The Court did not consider advertising of the name and address of the lawyer, the telephone number and related factors already approved as a result of amendments to the existing rule.

4. The Court did consider the advertising of prices at which certain routine services would be performed.

5. The Court held that attorney advertising could not be blanketly suppressed.

6. The Court held that the Bates and O'Steen advertisement was protected commercial speech within the meaning of the First Amendment.

7. The Court indicated that the states could regulate lawyer advertising and mentioned several permissible areas of regulation:

a) False, misleading or deceptive advertising could be banned

b) Reasonable restrictions could be placed on the time, place and manner of advertising;

Finally, although recognizing that advertising should not form the entire basis of a consumer's decision on the choice of a lawyer, the Court chose not to restrict the flow of information to the consumer, indicating instead that any absence of sophistication by the consumer should be resolved in favor of more disclosure, rather than less. The Court placed great faith in the consumer's ability to discern the nature of advertising:

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although the advertising might increase the use of the judicial machinery, we cannot

accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, the middle 70% of our population is not being reached or served adequately by the legal profession. . . . Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. . . . Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of an exchange. The disciplinary rule at issue has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."

In response to the decision in *Bates*, the ABA advanced two possible new rules: Proposal A, a regulatory proposal; and Proposal B, a prohibitory one. Proposal A provided a list of types of advertising that could be used by a lawyer-advertiser, while Proposal B prohibited advertising that was false, fraudulent or deceptive and gave some examples of advertising falling within that classification.

In Missouri, the Supreme Court appointed the Hawkins Committee, which made an extensive study of the Constitutional issues involved in *Bates*. The Hawkins Committee also studied Proposals A and B of the ABA and elected to propose a rule utilizing the regulatory approach of Proposal A, with substantial modifications. Following the adoption of this new rule, the Court sought the aid of the Advisory Committee, which provided a list of those areas of practice which could be used in advertising.

Missouri was not alone in adopting the regulatory approach to lawyer advertising. The ABA also adopted the provisions of Proposal A, and, in her 1980 survey of advertising changes among the states following *Bates*, Lori Andrews, a research attorney for the American Bar Foundation, found that some 29 states had followed that model. Of those 29 states, however, Andrews also concluded that 26 of them, including Missouri, would still not permit the very advertising that was approved by the court in *Bates*.

In June, 1980, the Supreme Court decided *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557 (1980). In its opinion, the Court announced a four-prong test for commercial speech regulation:

At the outset, we must determine (1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. (2) Next, we must ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

Because *Central Hudson* did not involve advertising by lawyers, there was a substantial question as to its applicability to such advertising. The opinion itself did not indicate that it was expanding the rules announced in

Bates. Thus, when the Missouri Supreme Court decided *R.M.J.*, it was unclear that *Central Hudson* was applicable to issues of lawyer advertising, and, consequently, the Missouri Supreme Court elected not to overrule the advertising rule previously adopted by it as a result of the Hawkins Committee report.

As this Committee reads the United States Supreme Court's decision in *R.M.J.*, it concludes that the *Central Hudson* test is applicable to lawyer advertising, and reaches the following conclusions:

1. Truthful advertising relating to lawful activities is generally entitled to protection under the First Amendment as commercial speech;
2. If the method or content of the advertising makes it inherently misleading, such advertising may be restricted;
3. If otherwise truthful advertising proves itself misleading in fact, it too can be restricted;
4. Misleading advertising can generally be prohibited;
5. Any restrictions on advertising can be no broader than reasonably necessary to prevent the deception claimed by the restriction;
6. Thus, absolute prohibitions may not be made on material which can be presented in a truthful way, such as field of practice advertising;
7. Truthful advertising may only be regulated if the state demonstrates a substantial state interest in the regulation, and if the regulation furthers that interest, and is no more restrictive than is necessary to further that interest;
8. The states are freely able to control the practice of lawyer-advertisers, so long as they do so consistently with the forgoing Constitutional guidelines.

Based on all of the foregoing, the Committee has developed a draft of the permissible purposes of lawyer-advertising:

1. To provide a method for members of the public who need a lawyer to obtain information about lawyers;
 - a. By public, the Committee refers to all members of the public, together with corporations and other groups of persons;
 - b. Such methodology will necessarily create competition among members of the profession;
 - c. Such information would probably include personal information about the lawyer, but is not thereby limited;
2. To provide information to the public about their rights so the public can make informed decisions about the need to employ a lawyer;
3. To provide information about special competencies of

particular lawyers in special areas (e.g., field of practice advertising);

4. To protect the First Amendment commercial speech rights of lawyer-advertisers;

5. To assist the public in a general understanding of the role of a lawyer as a professional.

Recognizing, then, that advertising by lawyers should generally be permitted, the Committee finds that the following regulatory measures would aid those purposes:

1. Regulation to prevent the dissemination of misleading information as to any of the purposes of advertising;

2. Regulation to prevent abuse and/or harassment of the public even from truthful advertising;

3. Regulation of the inherently misleading nature of qualitative advertising;

4. Regulation recognizing that the profession of law is different from that of a trade in that the attorney-client relationship is a uniquely personal one based on emotion and confidence and that the lawyer advertiser may have a higher duty to prevent deception.

B. Permissible Advertising Expands

Following *Bates* and *RMJ*, the Supreme Court once again addressed attorney advertising in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (a portion of which is reproduced *infra* at 145). Among the issues in *Zauderer* were whether a total ban on the use of illustrations or pictures in lawyer advertising violated the first amendment and whether the state could require an attorney to include in his ad a disclaimer advising potential clients that they might be liable for significant litigation costs if they were unsuccessful in their lawsuit.

With regard to the first issue, the Court struck down the blanket ban on use of pictures or illustrations.

. . . The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. . . .

The text of DR 2-101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's

interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. As we held in *Carey v. Population Services International*, the 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.

In its arguments before this Court, the State has asserted that the restriction on illustrations serves a somewhat different purpose

The use of illustrations in advertising by attorneys, the State suggests, creates unacceptable risks that the public will be misled, manipulated, or confused. Abuses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions. Because illustrations may produce their effects by operating on a subconscious level, the State argues, it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative. Thus, once again, the State's argument is that its purposes can only be served through a prophylactic rule.

We are not convinced. The State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban. Moreover, none of the State's arguments establish that there are particular evils associated with the use of illustrations in attorneys' advertisements. Indeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations in lawyer's advertisements will probably be less likely to lend themselves to material misrepresentations than illustrations in other forms of advertising.

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circumstances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. 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. . . . Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

The Court was more receptive to the state's argument that requiring a disclaimer did not violate the first amendment. In rejecting Zauderer's argument that this issue was essentially the same as that involving the use of illustrations, the Court stated:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. Indeed, . . . the Court went so far as to state that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."

But the interests at stake in this case are not of the same order as those discussed Ohio has not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception."

We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

The State's application to appellant of the requirement that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful (assuming that to be

the case) easily passes muster under this standard. Appellant's advertisement informed the public that "if there is no recovery, no legal fees are owed by our clients." The advertisement makes no mention of the distinction between "legal fees" and "costs," and to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge. The assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as "fees" and "costs"--terms that, in ordinary usage, might well be virtually interchangeable. When the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the ... public before it [may] determine that the [advertisement] had a tendency to mislead." The State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed.

In dissent, Justices Brennan and Marshall questioned whether discipline of Zauderer based on his omission of the disclaimer was consistent with the first amendment and due process.

C. Future Directions

The Court has not decided a "pure advertising" case in recent years. It noted probable jurisdiction in a case involving testimonials in 1988, but, due to a procedural quirk in the case, it dismissed it after oral argument for want of a properly presented federal question. See *Oring v. State Bar of California*, 489 U.S. 1092 (1989). Until the Court speaks definitively, jurisdictions are taking various approaches to try to get some control over lawyer advertising. Many jurisdictions require disclaimers of all types. Several jurisdictions have limited radio and TV ads, and some require that advertisements be predominantly informative. In addition, interesting and difficult questions are now facing attorneys regarding the use of the Internet, and in particular whether home pages and other presence on the Internet constitute advertisement (and are therefore subject to restrictions and disclaimer requirements). These issues are likely to be even more difficult as the technology becomes more advanced and the economics of presence on the Internet changes much of our thinking about advertising by lawyers.

What should the scope of permissible regulation be? Should some advertising be prohibited because it is in bad taste and demeaning to the profession? If so, what will it take for a state to be able to enforce such prohibitions?

II. SOLICITATION

OHRALIK V. OHIO STATE BAR ASS'N. 436 U.S. 447 (1978)

In *Bates v. State Bar of Arizona*, this Court held that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments

against blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of "in-person solicitation of clients--at the hospital room or the accident site, or in any other situation that breeds undue influence--by attorneys or their agents or 'runners.'" Today we answer part of the question so reserved, and hold that the State--or the Bar acting with state authorization-- constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

I.

Appellant, a member of the Ohio Bar, lives in Montville, Ohio. Until recently he practiced law in Montville and Cleveland. On February 13, 1974, while picking up his mail at the Montville Post Office, appellant learned from the postmaster's brother about an automobile accident that had taken place on February 2 in which Carol McClintock, a young woman with whom appellant was casually acquainted, had been injured. Appellant made a telephone call to Ms. McClintock's parents, who informed him that their daughter was in the hospital. Appellant suggested that he might visit Carol in the hospital. Mrs. McClintock assented to the idea, but requested that appellant first stop by at her home.

During appellant's visit with the McClintocks, they explained that their daughter had been driving the family automobile on a local road when she was hit by an uninsured motorist. Both Carol and her passenger, Wanda Lou Holbert, were injured and hospitalized. In response to the McClintocks' expression of apprehension that they might be sued by Holbert, appellant explained that Ohio's guest statute would preclude such a suit. When appellant suggested to the McClintocks that they hire a lawyer, Mrs. McClintock retorted that such a decision would be up to Carol, who was 18 years old and would be the beneficiary of a successful claim.

Appellant proceeded to the hospital, where he found Carol lying in traction in her room. After a brief conversation about her condition,¹ appellant told Carol he would represent her and asked her to sign an agreement. Carol said she would have to discuss the matter with her parents. She did not sign the agreement, but asked appellant to have her parents come to see her.² Appellant also attempted to see Wanda Lou Holbert, but learned that she had just been released from the hospital. He then departed for another visit with the McClintocks.

On his way appellant detoured to the scene of the accident, where he took a set of photographs. He also picked up a tape recorder, which he concealed under his raincoat before arriving at the McClintocks' residence. Once there, he re-examined their automobile insurance policy, discussed with them the law applicable to passengers, and explained the consequences of the

¹Carol also mentioned that one of the hospital administrators was urging a lawyer upon her. According to his own testimony, appellant replied: "Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal."

²Despite the fact that appellant maintains that he did not secure an agreement to represent Carol while he was at the hospital, he waited for an opportunity when no visitors were present and then took photographs of Carol in traction.

fact that the driver who struck Carol's car was an uninsured motorist. Appellant discovered that the McClintocks' insurance policy would provide benefits of up to \$12,500 each for Carol and Wanda Lou under an uninsured-motorist clause. Mrs. McClintock acknowledged that both Carol and Wanda Lou could sue for their injuries, but recounted to appellant that "Wanda swore up and down she would not do it." The McClintocks also told appellant that Carol had phoned to say that appellant could "go ahead" with her representation. Two days later appellant returned to Carol's hospital room to have her sign a contract, which provided that he would receive one-third of her recovery.

In the meantime, appellant obtained Wanda Lou's name and address from the McClintocks after telling them he wanted to ask her some questions about the accident. He then visited Wanda Lou at her home, without having been invited. He again concealed his tape recorder and recorded most of the conversation with Wanda Lou. After a brief, unproductive inquiry about the facts of the accident, appellant told Wanda Lou that he was representing Carol and that he had a "little tip" for Wanda Lou: the McClintocks' insurance policy contained an uninsured-motorist clause which might provide her with a recovery of up to \$12,500. The young woman, who was 18 years of age and not a high school graduate at the time, replied to appellant's query about whether she was going to file a claim by stating that she really did not understand what was going on. Appellant offered to represent her, also, for a contingent fee of one-third of any recovery, and Wanda Lou stated "O. K."

Wanda's mother attempted to repudiate her daughter's oral assent the following day, when appellant called on the telephone to speak to Wanda. Mrs. Holbert informed appellant that she and her daughter did not want to sue anyone or to have appellant represent them, and that if they decided to sue they would consult their own lawyer. Appellant insisted that Wanda had entered into a binding agreement. A month later Wanda confirmed in writing that she wanted neither to sue nor to be represented by appellant. She requested that appellant notify the insurance company that he was not her lawyer, as the company would not release a check to her until he did so. Carol also eventually discharged appellant. Although another lawyer represented her in concluding a settlement with the insurance company, she paid appellant one-third of her recovery in settlement of his lawsuit against her for breach of contract.

Both Carol McClintock and Wanda Lou Holbert filed complaints against appellant with the Grievance Committee of the Geauga County Bar Association. The County Bar Association referred the grievance to appellee, which filed a formal complaint with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. After a hearing, the Board found that appellant had violated Disciplinary Rules (DR) 2-103(A) and 2-104(A) of the Ohio Code of Professional Responsibility. The Board rejected appellant's defense that his conduct was protected under the First and Fourteenth Amendments. The Supreme Court of Ohio adopted the findings of the Board, reiterated that appellant's conduct was not constitutionally protected, and increased the sanction of a public reprimand recommended by the Board to indefinite suspension. . . .

II

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years. Last Term the Court ruled that the justifications for prohibiting truthful, restrained" advertising concerning "the availability and terms of routine legal services" are insufficient to override society's interest, safeguarded by the First and Fourteenth Amendments, in assuring the free flow of commercial information. The balance struck in *Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition.

A

Appellant contends that his solicitation of the two young women as clients is indistinguishable, for purposes of constitutional analysis, from the advertisement in *Bates*. Like that advertisement, his meetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer to pursue their claims. According to appellant, such conduct is "presumptively an exercise of his free speech rights" which cannot be curtailed in the absence of proof that it actually caused a specific harm that the State has a compelling interest in preventing. But 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, let alone with forms of speech more traditionally within the concern of the First Amendment.

Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." . . . [T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, as was held in *Bates* and *Virginia Pharmacy*, it lowers the level of appropriate judicial scrutiny.

As applied in this case, the Disciplinary Rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services, it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decision making."

It also is argued that in-person solicitation may provide the solicited individual with information about his or her legal rights and remedies. In this case, appellant gave Wanda Lou a "tip" about the prospect of recovery based on the uninsured-motorist clause in the McClintocks' insurance policy, and he explained that clause and Ohio's guest statute to Carol McClintock's parents. But neither of the Disciplinary Rules here at issue prohibited appellant from communicating information to these young women about their legal rights and the prospects of obtaining a monetary recovery, or from recommending that they obtain counsel. DR 2-104(A) merely prohibited him from using the information as bait with which to obtain an agreement to represent them for a fee. The Rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.

Appellant does not contend, and on the facts of this case could not contend, that his approaches to the two young women involved political expression or an exercise of associational freedom, "employ[ing] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." Nor can he compare his solicitation to the mutual assistance in asserting legal rights that was at issue in *United Transportation Union v. Michigan Bar* A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests.

B

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

As is true with respect to advertising, it appears that the ban on solicitation by lawyers originated as a rule of professional etiquette rather than as a strictly ethical rule. "[T]he rules are based in part on deeply ingrained feelings of tradition, honor and service. Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." But the fact that the original motivation behind the ban on solicitation today might be considered an insufficient justification for its perpetuation does not detract from the force of the other interests the ban continues to serve. While the Court in *Bates* determined that truthful, restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers, this was only because it found "the postulated connection between advertising and the erosion of true professionalism to be severely strained." The *Bates* Court did not question a State's interest in maintaining high standards among licensed professionals. Indeed, to the extent that the ethical standards of lawyers are linked to the service and protection of clients, they do further the goals of "true professionalism."

The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation. The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR 2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest.¹⁹

We need not discuss or evaluate each of these interests in detail as

¹⁹ A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.

appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

III

Appellant's concession that strong state interests justify regulation to prevent the evils he enumerates would end this case but for his insistence that none of those evils was found to be present in his acts of solicitation. He challenges what he characterizes as the "indiscriminate application" of the Rules to him and thus attacks the validity of DR 2-103(A) and DR 2-104(A) not facially, but as applied to his acts of solicitation.²⁰ And because no allegations or findings were made of the specific wrongs appellant concedes would justify disciplinary action, appellant terms his solicitation "pure," meaning "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them," without more. Appellant therefore argues that we must decide whether a State may discipline him for solicitation per se without offending the First and Fourteenth Amendments.

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. But appellant errs in assuming that the constitutional validity of the judgment below depends

²⁰To the extent that appellant charges that the Rules prohibit solicitation that is constitutionally protected--as he contends his is--as well as solicitation that is unprotected, his challenge could be characterized as a contention that the Rules are overbroad. But appellant does not rely on the overbreadth doctrine under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him. On the contrary, appellant maintains that DR 2-103(A) and 2-104(A) could not constitutionally be applied to him. Nor could appellant make a successful overbreadth argument in view of the Court's observation in *Bates* that "the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." Commercial speech is not as likely to be deterred as noncommercial speech, and therefore does not require the added protection afforded by the overbreadth approach. Even if the commercial speaker could mount an overbreadth attack, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." The Disciplinary Rules here at issue are addressed to the problem of a particular kind of commercial solicitation and are applied in the main in that context. Indeed, the Bar historically has characterized impermissible solicitation as that undertaken for purposes of the attorney's pecuniary gain and as not including offers of service to indigents without charge. Solicitation has been defined in terms of the presence of the pecuniary motivation of the lawyer, and ABA Formal Opinion 148 states that the ban on solicitation "was never aimed at a situation . . . in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed." We hold today in *Primus* that a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe. As these Disciplinary Rules thus can be expected to operate primarily if not exclusively in the context of commercial activity by lawyers, the potential effect on protected, noncommercial speech is speculative.

on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

Appellant's argument misconceives the nature of the State's interest. The Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

The State's perception of the potential for harm in circumstances such as those presented in this case is well founded.²² The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.

The efficacy of the State's effort to prevent such harm to prospective clients would be substantially diminished if, having proved a solicitation in circumstances like those of this case, the State were required in addition to prove actual injury. Unlike the advertising in *Bates*, in-person solicitation is not visible or otherwise open to public scrutiny. Often there is no witness other than the lawyer and the lay person whom he has solicited, rendering it difficult or impossible to obtain reliable proof of what actually took place. This would be especially true if the lay person were so distressed at the time of the solicitation that he could not recall specific details at a later date. If appellant's view were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the State or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective,

²² Although our concern in this case is with solicitation by the lawyer himself, solicitation by a lawyer's agents or runners would present similar problems.

objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

On the basis of the undisputed facts of record, we conclude that the Disciplinary Rules constitutionally could be applied to appellant. He approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. Appellant urged his services upon the young women and used the information he had obtained from the McClintocks, and the fact of his agreement with Carol, to induce Wanda to say "O. K." in response to his solicitation. He employed a concealed tape recorder, seemingly to insure that he would have evidence of Wanda's oral assent to the representation. He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw when Mrs. Holbert requested him to do so only a day after the initial meeting between appellant and Wanda Lou and continued to represent himself to the insurance company as Wanda Holbert's lawyer.

The court below did not hold that these or other facts were proof of actual harm to Wanda Holbert or Carol McClintock but rested on the conclusion that appellant had engaged in the general misconduct proscribed by the Disciplinary Rules. Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public. We hold that the application of DR2-103(A) and 2-104(A) to appellant does not offend the Constitution.

Accordingly, the judgment of the Supreme Court of Ohio is

Affirmed.

In a concurring opinion, Justice Marshall expressed concern with the far-reaching scope of the Court's decision. Believing that total restriction on in-person solicitation has a discriminatory impact on less privileged classes of society and on sole practitioners and small firms, and that some solicitation can have the same beneficial effects on public knowledge of availability of legal services as advertising, Justice Marshall expressed reservations that a total ban on solicitation could pass constitutional muster.

In a companion case, *In re Primus*, 436 U.S. 412 (1978), the Court held that solicitation undertaken to offer representation in litigation that will express political beliefs and advance civil-liberties objectives rather than for pecuniary gain is not subject to the same analysis as that in *Ohrlik*. Rather, because such speech and conduct are closer to the core of the First Amendment, they are to be governed by "pure" First Amendment analysis rather than the more restrictive analysis used for

commercial speech. Thus, a state may not categorically ban such solicitation, but must examine each case to determine, on the facts, whether the solicitation in question actually involved the undue influence, misrepresentation, overreaching or invasion of privacy that the solicitation rules are designed to prevent. Only in cases where such evils are actually present may discipline be imposed.

Justice Rehnquist concurred in *Ohralik* but dissented in *Primus*, finding no basis for a “principled distinction” between the two cases.

III. THE JUNCTURE OF ADVERTISING AND SOLICITATION

A. Targeted Advertisements

Is a newspaper ad providing advice that a particular claim may exist and offering representation to those potentially having such a claim closer to advertising or solicitation for purposes of first amendment analysis? The Court addressed that issue in *Zauderer*.

In the spring of 1982, appellant placed an advertisement in 36 Ohio newspapers publicizing his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device. The advertisement featured a line drawing of the Dalkon Shield accompanied by the question, "DID YOU USE THIS IUD?" The advertisement then related the following information:

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, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

The ad concluded with the name of appellant's law firm, its address, and a phone number that the reader might call for "free information.

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant

He was charged with recommending employment of himself to a non-lawyer who had not sought his advice (D.R. 2-103[A]) and with accepting employment from persons to whom he had given unsolicited advice (D.R. 2-104[A]). A disciplinary panel found that Zauderer's ad violated the rules and recommended sanctions. Both the Board of Commissioners of the Bar and the Ohio Supreme Court upheld this finding and rejected appellant's claim that the

rules as applied in this case violated the first amendment. On this issue, the Supreme Court reversed:

There is no longer any room to doubt that what has come to be known as "commercial speech" is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded "noncommercial speech." More subject to doubt, perhaps, are the precise bounds of the category of expression that may be termed commercial speech, but it is clear enough that the speech at issue in this case--advertising pure and simple-- falls within those bounds. Our commercial speech doctrine rests heavily on "the 'common-sense' distinction between speech proposing a commercial transaction ... and other varieties of speech," and appellant's advertisements undeniably propose a commercial transaction. Whatever else the category of commercial speech may encompass, it must include appellant's advertisements.

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using nondeceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible.

III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. 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 by attorneys--a result obviously not in keeping with our decisions in *Bates* and *In re R.M.J.* 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.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield

has spawned an impressive number of lawsuits and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred--advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease accrues. The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik* suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*. We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were 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."

It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement--and print advertising generally--poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.

Nor does the traditional justification for restraints on solicitation--the fear that lawyers will "stir up litigation"--justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from

stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "[A]s a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death."

But we cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy: "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights. Accordingly, it is not sufficient justification for the discipline imposed on appellant that his truthful and nondeceptive advertising had a tendency to or did in fact encourage others to file lawsuits.

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless--may even have had the salutary effect of informing some persons of rights of which they would otherwise have been unaware--the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of advertising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes. Indeed, in *In re R.M.J.* we went so far as to state that "the States may not place an absolute prohibition on certain types of potentially misleading information ... if the information also may be presented in a way that is not deceptive." The State's argument, then, must be that this dictum is incorrect--that there are some circumstances in which a prophylactic rule is the least restrictive possible means of achieving a substantial governmental interest.

We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest. The State's contention that the problem of distinguishing deceptive and nondeceptive legal advertising is different in kind from the problems presented by advertising generally is unpersuasive.

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in ... commerce," 15 U.S.C. § 45(a)(1), reveals 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. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such arguments were allowed to prevail. Our recent decisions involving commercial speech 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. The value of the information presented in appellant's advertising is no less than that contained in other forms of advertising--indeed, insofar as appellant's advertising tended to acquaint persons with their legal rights who might otherwise be shut off from effective access to the legal system, it was undoubtedly more valuable than many other forms of advertising. Prophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to appellant's advertising. An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients.

Justice O'Connor, joined by then Chief Justice Burger and current Chief Justice Rehnquist, dissented.

. . . I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dispensed is professional advice. Almost every State restricts an attorney's ability to accept employment resulting from unsolicited legal advice. At least two persuasive reasons can be advanced for the restrictions. First, there is an enhanced possibility for confusion and deception in marketing professional services. Unlike standardized products, professional services are by their nature complex and diverse. Faced with this complexity, a layperson may often lack the knowledge or experience to gauge the quality of the sample before signing up for a larger purchase. Second, and more significantly, the attorney's personal interest in obtaining business may color the advice offered in soliciting a client. As a result, a potential customer's decision to employ the attorney may be based on advice that is neither complete nor disinterested.

These risks are of particular concern when an attorney offers unsolicited advice to a potential client in a personal encounter. In that context, the legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered. For these reasons, most States expressly bar lawyers from accepting employment resulting from in person unsolicited advice. Some States, like the American Bar Association in its Model Rules Professional Conduct, extend the prohibition to employment resulting from unsolicited advice in telephone calls, letters, or communications directed to a specific recipient. Ohio and 14 other States go a step further. They do not limit their rules to certain methods of communication, but instead provide that, with limited exceptions, 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."

The issue posed and decided in Part III of the Court's opinion is whether such a rule can be applied to punish the use of legal advice in a printed advertisement soliciting business. The majority's conclusion is a narrow one: "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive ... advice regarding the legal rights of potential clients." As the Court notes, *Central Hudson* establishes that a State can prohibit truthful and nondeceptive commercial speech only if the restriction directly advances a substantial government interest. *In re R.M.J.* went further, stating that a State cannot place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive.

Given these holdings, the Court rejects Ohio's ban on the legal advice contained in Zauderer's Dalkon Shield advertisements do not assume it is too

late to take legal action against the ... manufacturer." Surveying Ohio law, the majority concludes that this advice "seems completely unobjectionable." Since the statement is not misleading, the Court turns to the asserted state interests in restricting it, and finds them all wanting. The Court perceives much less risk of overreaching or undue influence here than in *Ohralik* simply because the solicitation does not occur in person. The State's interest in discouraging lawyers from stirring up litigation is denigrated because lawsuits are not evil, and States cannot properly interfere with access to our system of justice. Finally, the Court finds that there exist less restrictive means to prevent attorneys from using misleading legal advice to attract clients: just as the Federal Trade Commission has been able to identify unfair or deceptive practices in the marketing of mouthwash and eggs, the States can identify unfair or deceptive legal advice without banning that advice entirely. The majority concludes that "[t]he qualitative distinction the State has attempted to draw eludes us."

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of professional conduct, and the distinction between professional services and standardized consumer products. The States understandably require more of attorneys than of others engaged in commerce. Lawyers are professionals, and as such they have greater obligations. As Justice Frankfurter once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be exacted ... qualities of truth-speaking, of a high sense of honor, of granite discretion." The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large.

The Court's commercial speech decisions have repeatedly acknowledged that the differences between professional services and other advertised products may justify distinctive state regulation. Most significantly, in *Ohralik*, the Court found that the strong state interest in maintaining standards among members of licensed professions and in preventing fraud, overreaching, or undue influence by attorneys justified a prophylactic rule barring in person solicitation. Although the antisolicitation rule in *Ohralik* would in some circumstances preclude an attorney from honestly and fairly informing a potential client of his or her legal rights, the Court nevertheless deferred to the State's determination that risks of undue influence or overreaching justified a blanket ban. At a minimum, these cases demonstrate that States are entitled under some circumstances to encompass truthful, nondeceptive speech within a ban of a type of advertising that threatens substantial state interests.

In my view, a State could reasonably determine that the use of unsolicited legal advice "as bait with which to obtain agreement to represent [a client] for a fee," poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a

significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's Dalkon Shield advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether "it is too late to take legal action against the ... manufacturer" without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim were completely accurate--even if liability were in fact clear and the attorney actually thought it to be so--I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights. Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, while at the same time opposing the use of self-interested legal advice to solicit clients.

In the face of these substantial and legitimate state concerns, I cannot agree with the majority that Ohio DR 2-104(A) is unnecessary to the achievement of those interests. The Ohio rule may sweep in some advertisements containing helpful legal advice within its general prohibition. Nevertheless, I am not prepared to second-guess Ohio's longstanding and careful balancing of legitimate state interests merely because appellant here can invent a less restrictive rule. As the Iowa Supreme Court recently observed, "[t]he professional disciplinary system would be in chaos if violations could be defended on the ground the lawyer involved could think of a better rule." Because I would defer to the judgment of the States that have chosen to preclude use of unsolicited legal advice to entice clients, I respectfully dissent from Part III of the Court's opinion.

Which analysis is more persuasive? Why?

B. Targeted Direct Mail

SHAPERO V. KENTUCKY BAR ASSOCIATION
486 U.S. 466 (1988)

Justice BRENNAN announced the judgment of the Court and delivered the opinion of the Court as to Parts I and II and an opinion as to Part III in which Justice MARSHALL, Justice BLACKMUN, and Justice KENNEDY join.

This case presents the issue whether a State may, consistent with the First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems.

I

In 1985, petitioner applied to the Kentucky Attorneys Advertising Commission for approval of a letter that he proposed to send "to potential clients who have had a foreclosure suit filed against them." The proposed letter read as follows:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them.

"You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

"Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling."

[The Commission, although not finding the letter to be false or misleading, deemed it impermissible under both an older solicitation rule and under a newly enacted rule that was identical to Model Rule 7.3. The Kentucky Court upheld the Commission's and the Ethics Committee's determinations that dissemination of the letter would violate the Rule and subject Shapero to potential discipline. The Supreme Court granted certiorari "to resolve whether such a blanket prohibition is consistent with the First Amendment" and reversed.]

II

Lawyer advertising is in the category of constitutionally protected commercial speech. The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Since state regulation of commercial speech "may extend only as far as the interest it serves," state rules that are designed to prevent the "potential

for deception and confusion ... may be no broader than reasonably necessary to prevent the "perceived evil."

In *Zauderer*, application of these principles required that we strike an Ohio rule that categorically prohibited solicitation of legal employment for pecuniary gain through advertisements containing information or advice, even if truthful and nondeceptive, regarding a specific legal problem. We distinguished written advertisements containing such information or advice from in-person solicitation by lawyers for profit, which we held in *Ohralik*, a State may categorically ban. The "unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain," we observed, are "not present" in the context of written advertisements.

Our lawyer advertising cases have never distinguished among various modes of written advertising to the general public. Thus, Ohio could no more prevent *Zauderer* from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers. Similarly, if petitioner's letter is neither false nor deceptive, Kentucky could not constitutionally prohibit him from sending at large an identical letter opening with the query, "Is your home being foreclosed on?," rather than his observation to the targeted individuals that "It has come to my attention that your home is being foreclosed on." The drafters of Rule 7.3 apparently appreciated as much, for the Rule exempts from the ban "letters addressed or advertising circulars distributed generally to persons ... who are so situated that they might in general find such services useful."

The court below disapproved petitioner's proposed letter solely because it targeted only persons who were "known to need [the] legal services" offered in his letter, rather than the broader group of persons "so situated that they might in general find such services useful." Generally, unless the advertiser is inept, the latter group would include members of the former. The only reason to disseminate an advertisement of particular legal services among those persons who are "so situated that they might in general find such services useful" is to reach individuals who actually "need legal services of the kind provided [and advertised] by the lawyer." But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

The court below did not rely on any such theory. Rather, it concluded that the State's blanket ban on all targeted, direct-mail solicitation was permissible because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." By analogy to *Ohralik*, the court observed:

Such solicitation subjects the prospective client to pressure from a trained lawyer in a direct personal way. It is entirely possible that the potential client may feel overwhelmed by the basic situation which caused the need for the specific legal services and may have seriously impaired capacity for good judgment, sound reason and a natural protective self-interest. Such a condition is full of the possibility of undue influence, overreaching and intimidation.

Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement--concededly constitutionally protected activities--or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "condition" makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.

Thus, respondent's facile suggestion that this case is merely "*Ohralik* in writing" misses the mark. In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." Second, "unique ... difficulties," would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Like print advertising, petitioner's letter--and targeted, direct-mail solicitation generally--"poses much less risk of overreaching or undue influence" than does in-person solicitation. Neither mode of written communication involves "the coercive force of the personal presence of a trained advocate" or the "pressure on the potential client for an immediate yes-or-no answer to the offer of representation." Unlike the potential client with a badgering advocate breathing down his neck, the recipient of a letter and the "reader of an advertisement ... can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,' " A letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. In short, both types of written solicitation "conve[y] information about legal services [by means] that [are] more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.

Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent. It could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is. Similarly, an inaccurately targeted letter could lead the recipient to believe she has a legal problem that she does not actually have or, worse yet, could offer erroneous legal advice.

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise

means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation, solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place," do not apply to written solicitations. The court below offered no basis for its "belie[f] [that] submission of a blank form letter to the Advertising Commission [does not] provid[e] a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation. Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

"State lawyer discipline agencies struggle for resources to investigate specific complaints, much less for those necessary to screen lawyers' mail solicitation material. Even if they could examine such materials, agency staff members are unlikely to know anything about the lawyer or about the prospective client's underlying problem. Without such knowledge they cannot determine whether the lawyer's representations are misleading." .

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients (e.g., "It has come to my attention that your home is being foreclosed on"), the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated (by supplying copies of the court documents or material that led the lawyer to the fact); it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "[o]ur recent decisions involving commercial speech 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."

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," which is not protected. First, respondent asserts that the letter's liberal use of underscored, uppercase letters (e.g., "Call NOW, don't wait"; "it is FREE, there is NO charge for calling") "fairly shouts at

the recipient ... that he should employ Shapero." Second, respondent objects that the letter contains assertions (e.g., "It may surprise you what I may be able to do for you") that "stat[e] no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing."

The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type. But a truthful and nondeceptive letter, no matter how big its type and how much it speculates can never "shou[t] at the recipient" or "gras[p] him by the lapels," as can a lawyer engaging in face-to-face solicitation. The letter simply presents no comparable risk of overreaching. And so long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and nondeceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information ... if the information may also be presented in a way that is not deceptive," unless the State "assert[s] a substantial interest" that such a restriction would directly advance. Nor may a State impose a more particularized restriction without a similar showing. Aside from the interests that we have already rejected, respondent offers none.

To be sure, a letter may be misleading if it unduly emphasizes trivial or "relatively uninformative fact[s]," or offers overblown assurances of client satisfaction. . . . Respondent does not argue before us that petitioner's letter was misleading in those respects. Nor does respondent contend that the letter is false or misleading in any other respect. Of course, respondent is free to raise, and the Kentucky courts are free to consider, any such argument on remand.

The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice WHITE, with whom Justice STEVENS joins, concurring in part and dissenting in part.

I agree with Parts I and II of the Court's opinion, but am of the view that the matters addressed in Part III should be left to the state courts in the first instance.

Justice O'CONNOR, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

Relying primarily on *Zauderer*, the Court holds that States may not prohibit a form of attorney advertising that is potentially more pernicious than the advertising at issue in that case. I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so

destructive that I believe the analytical framework itself should now be reexamined.

I

Zauderer held that the First Amendment was violated by a state rule that forbade attorneys to solicit or accept employment through advertisements containing information or advice regarding a specific legal problem. I dissented from this holding because I believed that our precedents permitted, and good judgment required, that we give greater deference to the States' legitimate efforts to regulate advertising by their attorneys. Emphasizing the important differences between professional services and standardized consumer products, I concluded that unsolicited legal advice was not analogous to the free samples that are often used to promote sales in other contexts. First, the quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods. Second, and more important, an attorney has an obligation to provide clients with complete and disinterested advice. The advice contained in unsolicited "free samples" is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining.

Zauderer dealt specifically with a newspaper advertisement. Today's decision--which invalidates a similar rule against targeted, direct-mail advertising--wraps the protective mantle of the Constitution around practices that have even more potential for abuse. First, a personalized letter is somewhat more likely "to overpower the will and judgment of laypeople who have not sought [the lawyer's] advice." For people whose formal contacts with the legal system are infrequent, the authority of the law itself may tend to cling to attorneys just as it does to police officers. Unsophisticated citizens, understandably intimidated by the courts and their officers, may therefore find it much more difficult to ignore an apparently "personalized" letter from an attorney than to ignore a general advertisement.

Second, "personalized" form letters are designed to suggest that the sender has some significant personal knowledge about, and concern for, the recipient. Such letters are reasonably transparent when they come from somebody selling consumer goods or stock market tips, but they may be much more misleading when the sender belongs to a profession whose members are ethically obliged to put their clients' interests ahead of their own.

Third, targeted mailings are more likely than general advertisements to contain advice that is unduly tailored to serve the pecuniary interests of the lawyer. Even if such mailings are reviewed in advance by a regulator, they will rarely be seen by the bar in general. Thus, the lawyer's professional colleagues will not have the chance to observe how the desire to sell oneself to potential customers has been balanced against the duty to provide objective legal advice. An attorney's concern with maintaining a good reputation in the professional community, which may in part be motivated by long-term pecuniary interests, will therefore provide less discipline in this context than in

the case of general advertising.

Although I think that the regulation at issue today is even more easily defended than the one at issue in *Zauderer*, I agree that the rationale for that decision may fairly be extended to cover today's case. Targeted direct-mail advertisements--like general advertisements but unlike the kind of in-person solicitation that may be banned under *Ohralik*--can at least theoretically be regulated by the States through prescreening mechanisms. In-person solicitation, moreover, is inherently more prone to abuse than almost any form of written communication. *Zauderer* concluded that the decision in *Ohralik* was limited by these "unique features" of in-person solicitation, and today's majority simply applies the logic of that interpretation of *Ohralik* to the case before us.

II

Attorney advertising generally falls under the rubric of "commercial speech." Political speech, we have often noted, is at the core of the First Amendment. One reason for the special status of political speech was suggested in a metaphor that has become almost as familiar as the principle that it sought to justify: "[W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." Traditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation.

In *Virginia Pharmacy Bd.*, however, the Court concluded that the First Amendment protects the communication of the following so-called "idea": "I will sell you the X prescription drug at the Y price." The Court argued that the public interest requires that private economic decisions be well informed, and it suggested that no satisfactory line could be drawn between ideas about public affairs and information relevant to such private decisions. The dissent observed that the majority had overstated the difficulties of distinguishing public affairs from such matters as the "decision ... to purchase one or another kind of shampoo." The dissent also foresaw that the logic of *Virginia Pharmacy* would almost necessarily extend to advertising by physicians and attorneys. This prediction soon proved correct, and subsequent decisions have radically curtailed the power of the States to forbid conduct that I believe "promote[s] distrust of lawyers and disrespect for our own system of justice."

The latest developments, in *Zauderer* and now today, confirm that the Court should apply its commercial speech doctrine with more discernment than it has shown in these cases. Decisions subsequent to *Virginia Pharmacy* and *Bates*, moreover, support the use of restraint in applying this doctrine to attorney advertising. We have never held, for example, that commercial speech has the same constitutional status as speech on matters of public policy, and the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review.

Expression concerning purely commercial transactions has come within the ambit of the [First] Amendment's protection only recently.... To require a parity

of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

A standardized legal test has been devised for commercial speech cases. Under that test, such speech is entitled to constitutional protection only if it concerns lawful activities and is not misleading; if the speech is protected, government may still ban or regulate it by laws that directly advance a substantial governmental interest and are appropriately tailored to that purpose. Applying that test to attorney advertising, it is clear to me that the States should have considerable latitude to ban advertising that is "potentially or demonstrably misleading," as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession.

Some forms of advertising by lawyers might be protected under this test. Announcing the price of an initial consultation might qualify, for example, especially if appropriate disclaimers about the costs of other services were included. Even here, the inherent difficulties of policing such advertising suggest that we should hesitate to interfere with state rules designed to ensure that adequate disclaimers are included and that such advertisements are suitably restrained.

As soon as one steps into the realm of prices for "routine" legal services such as uncontested divorces and personal bankruptcies, however, it is quite clear to me that the States may ban such advertising completely. The contrary decision in *Bates* was in my view inconsistent with the standard test that is now applied in commercial speech cases. Until one becomes familiar with a client's particular problems, there is simply no way to know that one is dealing with a "routine" divorce or bankruptcy. Such an advertisement is therefore inherently misleading if it fails to inform potential clients that they are not necessarily qualified to decide whether their own apparently simple problems can be handled by "routine" legal services. Furthermore, such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the world that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some clients' cases as anything but routine. It may be possible to devise workable rules that would allow something more than the most minimal kinds of price advertising by attorneys. That task, however, is properly left to the States, and it is certainly not a fit subject for constitutional adjudication. Under the *Central Hudson* test, government has more than ample justification for banning or strictly regulating most forms of price advertising.

Solicitation practices like the "free sample" techniques approved by *Zauderer* and today's decision are even less deserving of constitutional

protection than price advertising for supposedly routine legal services. Applying the *Central Hudson* test to the regulation at issue today, for example, I think it clear that Kentucky has a substantial interest in preventing the potentially misleading effects of targeted, direct-mail advertising as well as the corrosive effects that such advertising can have on appropriate professional standards. Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment. This is especially true when the solicitation includes the offer of a "free sample," as petitioner's proposed letter does. I therefore conclude that American Bar Association Model Rule of Professional Conduct 7.3 (1984) sweeps no more broadly than is necessary to advance a substantial governmental interest. The Kentucky Supreme Court correctly found that petitioner's letter could permissibly be banned under Rule 7.3, and I dissent from the Court's decision to reverse that judgment.

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations. In *Bates*, for example, the majority appeared to demand conclusive proof that the country would be better off if the States were allowed to retain a rule that served "to inhibit the free flow of commercial information and to keep the public in ignorance." Although the opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was little more than a bare conclusion that "we are not persuaded that price advertising will harm consumers." Dismissing Justice Powell's careful critique of the implicit legislative factfinding that underlay its analysis, the *Bates* majority simply insisted on concluding that the benefits of advertising outweigh its dangers. In my view, that policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.

Bates was an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application. Rather than continuing to work out all the consequences of its approach, we should now return to the States the legislative function that has so inappropriately been taken from them in the context of attorney advertising. The *Central Hudson* test for commercial speech provides an adequate doctrinal basis for doing so, and today's decision confirms the need to reconsider *Bates* in the light of that doctrine.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. Restrictions on truthful advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertising, and perhaps sometimes an intended

effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

Assuming, *arguendo*, that the removal of advertising restrictions should lead in the short run to increased efficiency in the provision of legal services, I would not agree that we can safely assume the same effect in the long run. The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession. While it may be difficult to defend this role with precise economic logic, I believe there is a powerful argument in favor of restricting lawyer advertising and that this argument is at the very least not easily refuted by economic analysis.

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms. This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of

economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession. A few examples include the great efforts made during this century to improve the quality and breadth of the legal education that is required for admission to the bar; the concomitant attempt to cultivate a subclass of genuine scholars within the profession; the development of bar associations that aspire to be more than trade groups; strict disciplinary rules about conflicts of interest and client abandonment; and promotion of the expectation that an attorney's history of voluntary public service is a relevant factor in selecting judicial candidates.

Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other. There is no guarantee, of course, that the restrictions will always have the desired effect, and they are surely not a sufficient means to their proper goal. Given their inevitable anticompetitive effects, moreover, they should not be thoughtlessly retained or insulated from skeptical criticism. Appropriate modifications have been made in the light of reason and experience, and other changes may be suggested in the future.

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

1. Which is the better view? Why? Does the increasing tendency to view law as a business rather than a profession mandate the result reached by the majority? Is this desirable?

2. Is effective regulation possible? What about telephone calls? Are they closer to letters or in-person solicitation? What about use of the Internet? How, if at all, should such use be regulated?

3. What is the line between advertising and solicitation? Can an attorney hand out brochures or letters on the street? In front of the courthouse? Outside the arraignment courtroom of the Municipal Court? Can someone else do it on the attorney's behalf? Why or why not? See *Attorney Grievance Committee v. Gregory*, 536 A.2d 646 (Md. 1988).

C. What's Next?

Can a state prevent lawyers from sending letters to victims of accidents or disasters until after a thirty-day waiting period expires? The Court said “yes” in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Court stated:

We believe that the Florida Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-part *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study [showing that members of the public view such letters as an invasion of privacy and as adversely affecting their opinions of the lawyers who send them], unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.

Does *Went for It* reflect a retrenchment by the Court and a move toward Justice O'Connor's views, or does it merely reflect an unwillingness to extend the first amendment any further than it has so far? Which is more desirable? More likely? Which view of advertising and solicitation is more consistent with your own views of the profession?

Look at the recent changes adopted in Missouri to its advertising and solicitation rules. See Missouri Supreme Court Rules 4-7.1 through 4-7.3 appearing at <http://www.courts.mo.gov/sup/index.nsf/da0f8eb4e845dc6d86256c0e00759846/3608230ed5cbe92786256f0b0062df37?OpenDocument>. Are these rules constitutional? Desirable? These are difficult issues that are not likely to be resolved to everyone's satisfaction any time soon.