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Comment: Zauderer v. Office of Disciplinary Counsel

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may be all that is necessary to make that silence a silence for prayer. If not, the teacher's answer — "Certainly, that's why we have the silence," or "That's what you're supposed to do" — could easily have the same effect. A statutory moment of silence creates a vessel into which the contents of prayer and religious preference are all too easily poured. Even in the absence of a searching purpose inquiry, the *Lemon*-mandated effect analysis, properly applied, should be sufficient to overturn moment-of-silence statutes.

E. Freedom of Speech, Press, and Association

1. *Attorney Advertising*. — Eight years ago, in *Bates v. State Bar*,¹ the Supreme Court held that attorneys have a first amendment right to advertise prices for certain routine legal services.² Subsequent decisions sharpened the boundaries of permissible state regulation of attorney advertising and solicitation³ but left many issues unresolved. Last Term, in *Zauderer v. Office of Disciplinary Counsel*,⁴ the Court decided some of these questions, holding that although a state may not discipline attorneys for running newspaper advertisements that contain nondeceptive illustrations or legal advice, it may require attorneys who advertise to disclose information relating to their fee arrangements. Although the decision lengthened the list of permissible forms of attorney advertising, the Court remained reluctant to grant such advertising the same degree of first amendment protection afforded other commercial speech.

In the spring of 1982, Philip Zauderer, an Ohio attorney, published an advertisement that featured a drawing of a Dalkon Shield Intrauterine Device and asked the reader, "DID YOU USE THIS IUD?" The advertisement also advised that it was not too late for women who had been harmed by the Dalkon Shield to sue the device's manufacturer and that Zauderer would represent women in such cases on a contingent-fee basis.⁵ The Ohio Supreme Court's Office of Disciplinary Counsel filed a complaint charging that this and another⁶

¹ 433 U.S. 350 (1977).

² *Id.* at 384.

³ *See, e.g., In re R.M.J.*, 455 U.S. 191, 206-07 (1982) (unanimous Court) (holding that a state may not discipline an attorney for failing to use state-approved terminology to advertise his practice); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (unanimous Court) (upholding sanctions against an attorney who engaged in in-person solicitation); *In re Primus*, 436 U.S. 412, 439 (1978) (7-1 decision) (holding that a reprimand of an ACLU attorney who solicited a client by mail in order to achieve political objectives violated rights of free association and expression).

⁴ 105 S. Ct. 2265 (1985).

⁵ *See id.* at 2271-72.

⁶ The Office of Disciplinary Counsel also recommended that Zauderer be reprimanded for having published an advertisement in which he offered to represent defendants in drunk driving cases on a contingent-fee basis. The Office contended that the advertisement proposed an illegal

advertisement violated Ohio's code of legal ethics.⁷ Adopting the findings of a panel of its Board of Commissioners on Grievances and Discipline, the Supreme Court of Ohio publicly reprimanded Zauderer. The court held that the Dalkon Shield advertisement was impermissible because it featured an illustration, included legal advice, and failed to disclose a client's possible liability for costs even if she lost her suit.⁸

The United States Supreme Court affirmed in part and reversed in part. Justice White, writing for the majority,⁹ began by reaffirming that the first amendment protects commercial speech, although to a lesser extent than noncommercial speech.¹⁰ According to Justice White, government may freely ban commercial speech that is "false, deceptive, or misleading" or that "proposes an illegal transaction," but may restrict nondeceptive speech concerning lawful activities "only in the service of a substantial governmental interest, and only through means that directly advance that interest."¹¹

Justice White then addressed the portion of Zauderer's Dalkon Shield advertisement that advised women that their claims might not be time-barred.¹² Because this legal advice was neither false nor deceptive,¹³ the Court required the state to show that its restriction

transaction because state law prohibited attorneys from representing criminal defendants on a contingent-fee basis. *See id.* at 2271-72. The Ohio Supreme Court agreed that the advertisement was deceptive, but based its conclusion on a theory not advanced by the Office. Following the report of its Board of Commissioners, the court found the advertisement deceptive because it failed to mention that a client could plead guilty to a lesser offense and still be liable for attorney fees; under the contingent-fee arrangement, legal fees would be waived only if the client were convicted of drunken driving. *See id.* at 2273-74. On appeal to the United States Supreme Court, Zauderer argued unsuccessfully that the Ohio court's adoption of this view violated his due process rights because he had not had an opportunity to introduce evidence to contest the new theory. *See id.* at 2283-84. Only Justice Brennan, joined by Justice Marshall, concluded that Zauderer had been denied procedural due process on this count. *See id.* at 2292-94 (Brennan, J., concurring in part and dissenting in part).

⁷ *See* 105 S. Ct. at 2272-73.

⁸ *See id.* at 2274. The Ohio Supreme Court also held that Zauderer had violated the state's rule against "recommending employment of himself as a private practitioner to a non-lawyer who had not sought his advice regarding employment of a lawyer." *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 46, 461 N.E.2d 883, 886 (1984).

⁹ Justice White's opinion was joined by Justices Blackmun and Stevens. Justice Brennan, joined by Justice Marshall, filed an opinion concurring in part and dissenting in part. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, also filed an opinion concurring in part and dissenting in part. Justice Powell did not participate in the decision.

¹⁰ *See* 105 S. Ct. at 2274-75 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)).

¹¹ *Id.* at 2275 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)).

¹² Four other Justices joined the portion of Justice White's opinion holding that the first amendment protects attorney advertisements containing legal advice. Chief Justice Burger and Justices Rehnquist and O'Connor dissented from this holding.

¹³ Ohio had stipulated that the advice was neither false nor deceptive. *See* 105 S. Ct. at

directly advanced a substantial governmental interest.¹⁴ Neither of the state's asserted interests satisfied the Court. Justice White first rejected the state's claim that a ban on attorney advertising containing legal advice was necessary to prevent coercion of prospective clients.¹⁵ He distinguished *Ohralik v. Ohio State Bar Association*,¹⁶ which upheld restrictions on in-person solicitation by attorneys; he argued that printed advice, unlike in-person solicitation, does not invade a reader's privacy, lacks the coercive influence of the physical presence of a "trained advocate," and does not press the prospective client for an immediate, on-the-spot answer.¹⁷ Second, Justice White rejected the argument that the prevention of meritless litigation could justify a ban on printed legal advice. He observed that free access to the courts is a valuable asset of our system of justice: "we cannot endorse the proposition that a lawsuit, as such, is an evil."¹⁸ Finally, Justice White dismissed the state's argument that the administrative difficulties in distinguishing truthful from deceptive legal advice justified a flat ban on all advertising containing legal advice. He rejected the contention that the accuracy of legal advertising would be more difficult to assess than that of other commercial advertising.¹⁹

The Court followed a parallel line of analysis in invalidating Ohio's ban on illustrations in attorney advertising. Asserting that the state must demonstrate that the ban directly advanced a substantial governmental interest, Justice White questioned the significance of the state's interest in prohibitions designed to preserve the dignity of the bar and rejected the claim that a "prophylactic rule" was needed to maintain standards of propriety or to prevent deception. According to the majority, a blanket ban was unnecessary because state regulatory agencies could identify undignified or deceptive visual advertising.²⁰

Having struck down two of the grounds for Zauderer's reprimand, the Court sustained the state's requirement that Zauderer disclose that clients might have to pay costs even if their Dalkon Shield suits

2276. Justice White remarked that the advice was entirely accurate because in Ohio and many other jurisdictions a cause of action for latent injury or disease does not accrue until the plaintiff discovers the harm. *See id.* at 2276-77 & n.11 (citing *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 90, 447 N.E.2d 727, 732 (1983)).

¹⁴ *See* 105 S. Ct. at 2277.

¹⁵ *See id.*

¹⁶ 436 U.S. 447 (1978).

¹⁷ 105 S. Ct. at 2277.

¹⁸ *Id.* at 2278.

¹⁹ *See id.* at 2278-80. The Court also noted that the American Bar Association agrees that it is "neither impractical nor unduly burdensome" to separate truthful legal advertising from deceptive advertising. *Id.* at 2279 n.13.

²⁰ *See id.* at 2280-81. All seven of the other participating Justices joined this portion of Justice White's opinion.

failed.²¹ Justice White reasoned that Zauderer's first amendment interest in withholding commercial information was less significant than his interest in disseminating such information, because constitutional protection for commercial speech largely grows out of the consumer's right to know, not the vendor's right to sell his wares.²² Accordingly, the Court adopted a standard of review more relaxed than the general requirement that restrictions on commercial speech directly serve a substantial state interest. The majority held that Ohio's disclosure requirements need only be "reasonably related" to the state's interest in preventing the deception of consumers.²³ Noting the likelihood that potential clients would misinterpret Zauderer's promise not to charge a fee to mean that he would not bill them for costs, Justice White concluded that the disclosure requirement was reasonably related to prevention of deception.²⁴

Justice Brennan concurred with those portions of the Court's opinion holding that a state may not discipline attorneys for including illustrations or legal advice in their advertising.²⁵ He dissented, however, from the holding that Ohio could discipline Zauderer for failing to disclose details of his fee arrangements. Although he agreed with the majority that states may promulgate narrow disclosure rules to prevent confusion between fees and costs,²⁶ he argued that all regulation of commercial speech, whether through disclosure rules or prohibitions, must "directly" advance a "substantial interest."²⁷ In Justice

²¹ See *id.* at 2281-83. Five other Justices joined this part of Justice White's opinion, with Justices Brennan and Marshall dissenting.

²² See *id.* at 2282 (citing *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Justice White also noted that Zauderer's first amendment interest in withholding commercial information was significantly weaker than the interest of noncommercial speakers in refusing to express beliefs they do not hold. See *id.* Specifically, Justice White distinguished a case in which a party sought to require a newspaper to publish a reply to its editorials, see *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), as well as cases in which states sought to force citizens to express an ideological belief on their license plates, see *Wooley v. Maynard*, 430 U.S. 705 (1977), or to force a student to recite the pledge of allegiance, see *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²³ See 105 S. Ct. at 2282. In a footnote, the Court turned aside the suggestion that strict scrutiny should apply to disclosure requirements, noting that the right of a commercial speaker to withhold accurate factual information is not a fundamental right and that past Court decisions have in fact "recommended" disclosure requirements as one of the less restrictive alternatives to suppression of speech. *Id.* at 2282 n.14.

²⁴ See *id.* at 2283.

²⁵ See *id.* at 2284-85 (Brennan, J., concurring in part and dissenting in part).

²⁶ See *id.* at 2287.

²⁷ *Id.* at 2285 & n.1. While acknowledging that the difference between rules requiring disclosure and rules requiring suppression of commercial speech "supports some differences in analysis," Justice Brennan argued that the Court "greatly overstated[d]" the distinction. *Id.* at 2285 n.1. Justice Brennan agreed with the majority that strict scrutiny, which requires regulations to be the least restrictive means of achieving a compelling state interest, does not apply to commercial disclosure requirements. See *id.* at 2286 n.2.

Brennan's view, Ohio's requirement that Zauderer specify a particular contingent-fee percentage rate did not directly advance the state's concededly substantial interest in preventing deception, because the state had failed to introduce evidence of a single instance in which omission of fee rates had been misleading.²⁸ Moreover, the disclosure rule was unduly burdensome because it compelled Zauderer "fully to disclose"²⁹ the terms of his fee arrangements — a wording which, if taken "seriously," would require the publication of detailed fee information that would fill much more space than the advertisement itself.³⁰ Even if the state's disclosure rule were meant to be more narrowly construed, Justice Brennan argued, it was far too vague to give Zauderer fair notice of his disclosure obligations and therefore violated both due process and the first amendment.³¹

Justice O'Connor also filed an opinion concurring in part and dissenting in part. She dissented only from the holding that states may not prohibit advertisements that contain unsolicited legal advice. She argued that such advertising creates an enhanced risk of deception and that an attorney's self-interest may "color the advice" offered in the advertisement. Justice O'Connor stressed that "[l]awyers are *professionals*, and as such they have greater obligations."³²

The majority opinion in *Zauderer* wisely recognized that prohibitions on the use of illustrations and legal advice in attorney advertising would serve no substantial state interest. The Court declined, however, to go further and acknowledge that no restriction on nondeceptive and noncoercive attorney advertising can advance a substantial governmental interest. By limiting its holding to the specific advertising techniques before it — implying that other methods, such as the undignified "hard sell," might still be prohibited — and by failing to reject traditional, unpersuasive rationales for restrictions on attorney advertising, the Court in effect left a heavier burden on the

²⁸ See *id.* at 2287.

²⁹ *Id.* (quoting *Zauderer*, 10 Ohio St. 3d at 48, 461 N.E.2d 883, 886 (1984)) (emphasis added by Justice Brennan).

³⁰ See *id.* at 2288–89 & n.6. Justice Brennan also suggested that the absence of comparably burdensome disclosure requirements for other fee arrangements in Ohio implied that contingent-fee advertising was being "impermissibly singled out for onerous treatment." *Id.* at 2289 n.7 (citations omitted).

³¹ See *id.* at 2289–92. According to Justice Brennan, before Zauderer published his Dalkon Shield advertisement he asked state authorities whether it would violate state ethical guidelines, but they refused to offer an advisory opinion. Even after full disciplinary hearings, the Ohio Supreme Court did not specify exactly what disclosures were required. See *id.* at 2289. Justice Brennan also remarked on the majority's concession that the disclosure requirements might have raised a significant due process issue had Zauderer been disbarred rather than reprimanded. Justice Brennan argued that a public reprimand also implicated Zauderer's due process rights because it amounted to a potentially grave deprivation of Zauderer's liberty and property interests in his professional reputation. See *id.* at 2291–92 & n.16.

³² *Id.* at 2294–95 (O'Connor, J., concurring in part and dissenting in part).

commercial speech of lawyers than on other forms of commercial speech. The Court's reluctance to extend its holding to all nondeceptive and noncoercive attorney advertising might have been more understandable had it not also established a standard of review that broadly applies to all laws requiring disclosure in advertising, not just to rules requiring disclosures in attorney advertising. This relaxed standard of review, together with the majority's approval of Ohio's vague disclosure requirement, suggests that the Court underestimates the chilling effect of disclosure regulations.

Although the Court did bury one of the most persistent and least convincing objections to attorney advertising — the contention that advertising stirs up frivolous litigation³³ — the Court otherwise seemed reluctant to reject unpersuasive rationales for restrictions. The majority, for example, did not respond to Justice O'Connor's contention that legal advertising is unnecessary because citizens have alternative sources of information about their legal rights.³⁴ The Court could easily have rebutted this argument by observing that states allow other advertising despite the existence of alternative sources of commercial information or by pointing to the strong evidence that "people don't know where to turn when they need a lawyer."³⁵

The majority also declined to answer Justice O'Connor's argument that lawyers should not include legal advice in their advertising because they will "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."³⁶ This contention simply points to the risk that lawyers will run deceptive or misleading advertisements; it is not an independent justification for a ban. There is no reason to suppose that accurate advice in an advertisement gives rise to a greater conflict of interest than accurate advice in any other phase of an attorney-client relationship. The Court's failure to foreclose Justice O'Connor's argument may leave room for states to claim that other kinds of advertising — for example, advertising that contains fee information — create an inherent conflict of interest.

In addition, the Court failed to reject Ohio's argument that its interest in preserving the dignity of its bar justified restrictions on advertisements; instead, the majority said only that it was "unsure" whether this rationale would ever justify regulation.³⁷ Undignified publicity is sometimes the only way to inform citizens of their legal rights. Whereas Zauderer's arguably tasteless Dalkon Shield adver-

³³ See 105 S. Ct. at 2278.

³⁴ See *id.* at 2297 (O'Connor, J., concurring in part and dissenting in part).

³⁵ Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 809 (1982).

³⁶ 105 S. Ct. at 2296 (O'Connor, J., concurring in part and dissenting in part).

³⁷ 105 S. Ct. at 2280.

tisement attracted over 200 inquiries and led to 106 lawsuits,³⁸ some of which may have been meritorious claims, the unillustrated, presumably more dignified version of his advertisement attracted no clients.³⁹ Although states have a valid interest in protecting consumers from incompetent, overreaching, or dishonest lawyers,⁴⁰ the desire to preserve the status or self-image of the profession cannot justify abridgement of unseemly or unbecoming speech.⁴¹ Far from undermining the effectiveness of the profession, attorney advertising may improve legal services by increasing competition and reducing prices.⁴² A ban on truthful but undignified advertising might harm consumers by denying them helpful information about their rights and about the market for legal help.

Finally, by apparently limiting its holding to printed advertising,⁴³ the *Zauderer* Court declined to establish that lawyers' use of television advertising falls within the purview of the first amendment. A more recent Supreme Court decision, *Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Association*,⁴⁴ nonetheless suggests that the Court is prepared to extend first amendment protection to television advertising by attorneys. In *Humphrey*, the Court summarily vacated an Iowa Supreme Court decision enjoining the broadcast of nondeceptive television advertisements by lawyers and remanded the case for consideration in light of *Zauderer*. The reasoning behind *Zauderer's* holding that states cannot ban illustrations in attorney advertising — that states can distinguish deceptive from nondeceptive uses of "visual media in advertising"⁴⁵ — should extend to attorney advertising through all forms of visual media, not just printed illustrations. The FTC and similar state agencies already

³⁸ See *id.* at 2272.

³⁹ See Stewart, *Lawyer Wins Advertising Case, But Reprimand Sticks*, A.B.A. J., Aug. 1985, at 84, 84.

⁴⁰ See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467-68 (1978) (holding that a state may discipline a lawyer for in-person solicitation of clients under potentially coercive circumstances).

⁴¹ See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1189-90 (1972); cf. Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 329 (1970) ("It is likely that the real beneficiaries of a 'dignified' legal profession are the lawyers instead of the clients.").

⁴² See Note, *supra* note 41, at 1206-08.

⁴³ The Court confined its endorsement of solicitation containing legal advice to "printed advertising." 105 S. Ct. at 2280. Although the Court also approved *Zauderer's* use of a "nondeceptive illustration," *id.* at 2281, it did not specify whether it considered a television image an "illustration." Justice O'Connor, writing separately, said that "advertising on the electronic broadcast media will warrant special consideration." *Id.* at 2294 n.1 (O'Connor, J., concurring in part and dissenting in part) (quoting *Bates v. State Bar*, 433 U.S. 350, 384 (1977)).

⁴⁴ 105 S. Ct. 2693 (1985) (mem.), *vacating* 355 N.W.2d 565 (Iowa 1984).

⁴⁵ 105 S. Ct. at 2281.

regulate deceptive broadcast advertisements for a broad range of products and services;⁴⁶ there is no reason to suppose that regulatory agencies cannot also distinguish visually deceptive attorney advertising from nondeceptive attorney advertising. Indeed, lawyers often cast their television advertisements in simple, straightforward terms;⁴⁷ in many cases it may be easier to identify deceptive attorney advertising than to identify deceptive commercial advertising. Nonetheless, the *Zauderer* Court passed up an opportunity to clarify that first amendment protection extends to broadcast attorney advertising and, more generally, to establish that prevention of deception or coercion is the only state interest sufficiently substantial to justify restrictions on attorney advertising.

The Court's reluctance to extend appropriate first amendment protection to attorney advertising stands in contrast to its unhesitating adoption of a relaxed standard of review for all rules requiring disclosure of information in advertising, not just those directed at attorney advertising. The Court's holding that disclosure rules need only be "reasonably related" to an important goal — based on the argument that disclosure rules are less objectionable than prohibitions because they provide the public with more rather than less information — misconceives the first amendment interests of commercial speakers and consumers. An advertiser may find disclosure requirements more expensive or burdensome than censorship; it may well be easier for an attorney to delete a misleading word than to explain all the details of fee arrangements.⁴⁸ In addition, a consumer may find a disclosure rule less helpful than a ban on advertising, because exhaustive disclaimers and warnings may mean little to, and may even confuse, an unsophisticated buyer. Certainly states may in some circumstances constitutionally require attorneys to disclose specific information in order to prevent deception of potential clients. But, as with any regulation of commercial speech, the Court in *Zauderer* should have required Ohio to show that its disclosure requirement directly advanced its interest in preventing deception.

That the majority approved Ohio's fee disclosure requirement suggests that the Court does not fully perceive the chilling effect of vague disclosure rules. Justice White argued plausibly that states could

⁴⁶ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 390 (1965) (upholding FTC's finding that a television advertiser's use of an undisclosed mock-up in a shaving-cream demonstration was deceptive).

⁴⁷ See, e.g., Middleton, *The Right Way to Advertise on TV*, 69 A.B.A. J. 893, 894 (1983) (reporting that Hyatt Legal Services, which advertises more than any law firm in the country, projects a "low-key" message that "tells consumers, 'We can handle simple matters effectively.'").

⁴⁸ See 105 S. Ct. at 2288 (Brennan, J., concurring in part and dissenting in part) (arguing that a rule requiring full disclosure of all relevant fee information would impose an intolerable burden on attorneys who advertise).

require attorneys to explain that contingent-fee clients would always be liable for costs, but the majority glossed over the imprecision of the Ohio Supreme Court's opinion, which seemed to require full explanation of a lawyer's fee arrangements — an extremely burdensome task⁴⁹ — and which “punished Zauderer for violating requirements that did not exist prior to this disciplinary proceeding.”⁵⁰ The majority's only defense for what it termed this “unfortunate” vagueness — that Ohio had reprimanded rather than disbarred Zauderer⁵¹ — ignored the harshness of a reprimand that was published in statewide legal journals and reports.⁵²

If the opinion reflected an overly indulgent view of vaguely-worded disclosure rules, the majority nonetheless did not endorse burdensome disclosure regulations requiring “extensive disclosure of all relevant liability rules,”⁵³ as Justice O'Connor suggested it had. Justice White narrowly construed the Ohio court's decision as requiring an attorney only to clarify that contingent-fee plaintiffs would be liable for costs even if their suits failed, not as requiring an attorney to divulge every conceivable detail relating to fee arrangements.⁵⁴ The Court reaffirmed that “unduly burdensome” disclosure rules might violate the first amendment.⁵⁵

Whereas the Court's deferential standard for disclosure rules at least treats all advertisers equally, the Court's reluctance to dismiss traditional objections to attorney advertising treats the commercial speech of lawyers as different from that of other citizens. Lawyers, unlike other advertisers, may hesitate to use television, or to publish accurate but aggressive printed advertisements, because they fear the possibility of sanctions. Similarly, the Court's approach may allow states to continue to require lawyers, unlike other advertisers, to adhere to standards of “dignity” and orthodoxy — rules that have been and will continue to be used to harass unorthodox or unpopular attorneys.⁵⁶ The Court's hesitance to put lawyers on the same footing

⁴⁹ See *id.* at 2288 & n.6.

⁵⁰ *Id.* at 2291.

⁵¹ See 105 S. Ct. at 2283 n.15.

⁵² See *id.* at 2291 (Brennan, J., concurring in part and dissenting in part).

⁵³ *Id.* at 2297 (O'Connor, J., concurring in part and dissenting in part).

⁵⁴ See 105 S. Ct. at 2283.

⁵⁵ *Id.* at 2282.

⁵⁶ See Comment, *supra* note 41, at 312-14 (1970) (arguing that the established bench and bar have frequently used vague disciplinary rules to discipline unpopular or unorthodox attorneys); Comment, *The Privilege Against Self-Incrimination in Bar Disciplinary Proceedings: What Ever Happened to Spevak?*, 23 VILL. L. REV. 127, 135-36 (1977). Zauderer himself may have been singled out for especially harsh treatment. “No member of the general public has ever complained . . . about Zauderer's Dalkon Shield advertisement. . . . Instead, the [state] filed its charges only as a result of complaints received from other attorneys — including the local counsel for A.H. Robins Company, manufacturer of the Dalkon Shield.” 105 S. Ct. at 2290 n.11 (Brennan, J., concurring in part and dissenting in part) (citations omitted).

as other commercial speakers contrasts with its decision last Term in *Supreme Court of New Hampshire v. Piper*,⁵⁷ in which the Court held that the privileges and immunities clause forbids a state to impose residency requirements on members of its bar.⁵⁸ Although *Piper* might be read as simply prohibiting discrimination against nonresidents, the case also suggests that states may not discriminate against lawyers.⁵⁹ A consistent first amendment jurisprudence would similarly prevent states from holding the speech of lawyers to a stricter standard than is applied to speech by any other group.

The Court's reluctance is also unfortunate because it effectively impedes the flow of valuable information to people in need of legal help. Ultimately, the first amendment interests of lawyers who wish to advertise protect the public's more significant first amendment right to know. Attorney advertising can provide people with information about the market for legal services, data that could help people find legal counsel and lead to "lower priced services of better quality."⁶⁰ Public interest lawyers favor attorney advertising because they believe it will "provide middle income individuals with greater access to legal services."⁶¹

To be sure, by approving the use of illustrations and legal advice, the Court in *Zauderer* has taken a significant step toward full recognition of the first amendment protection to which attorney advertising is entitled. Indeed, there is every reason to expect that as attorneys continue to challenge state laws against undignified or broadcast advertising, the Court will eventually permit all forms of attorney advertising that are not misleading or coercive.⁶² For the time being, however, the Court seems to be moving toward proper protection of attorney advertising in a hesitant, case-by-case fashion.

2. *Public Forum Doctrine*. — Nearly half a century ago, in *Hague v. CIO*,¹ the Supreme Court held that the first amendment requires

⁵⁷ 105 S. Ct. 1272 (1985).

⁵⁸ *Id.* at 1280.

⁵⁹ *Cf. id.* at 1278 (holding that a lawyer cannot be denied the protections of the privileges and immunities clause on the grounds that a lawyer is an officer of the state).

⁶⁰ Hazard, Pearce & Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1109 (1983).

⁶¹ *Id.* at 1111 (citation omitted).

⁶² For example, the Court recently declined to review a state court decision that, while sustaining the suspension of an attorney who included misleading statements in a direct-mail solicitation, nonetheless held that direct-mail solicitation of clients is entitled to some first amendment protection. See Committee on Professional Standards v. Von Wiegen, 63 N.Y.2d 163, 168, 170, 470 N.E.2d 838, 840, 841, 481 N.Y.S.2d 40, 43 (1984), *cert. denied*, 105 S. Ct. 2701 (1985). Last Term, the Court also vacated a judgment upholding a ban on television advertising by attorneys. See *Humphrey v. Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n*, 105 S. Ct. 2693 (1985) (mem.), *vacating* 255 N.W.2d 565 (Iowa 1984).

¹ 307 U.S. 496 (1939).