The First Amendment, Commercial Speech, and the Advertising Lawyer

Justice Vernon R. Pearson with Michael O'Neill***

I. INTRODUCTION

The Supreme Court, in a few cases scattered over several decades, has implied the existence of a public right to a free flow of information[1] as one facet of the freedom of speech;[2] yet the Court has refrained from specifically basing a decision on any such right. But with the recent line of commercial speech decisions,[3] the concept of a public right to a free flow of information has become firmly established and merits detailed examination. That right, and the rationale of the Court in its commercial speech cases, may have far ranging implications. This Article explores these implications in three areas of immediate interest to the practitioner: general first amendment theory, the scope of the limited first amendment protection extended to commercial speech, and the application of commercial speech guidelines to attorney advertising.

First amendment theory should serve as a signpost by providing direction for a court dealing with a free speech problem. The lack of a cohesive general theory, however, has led to con-

---

* Justice, Washington Supreme Court. B.A., Jamestown College, 1947; J.D., University of Michigan, 1950.

** Clerk for United States Magistrate Franklin D. Burgess, Western District, Washington. B.A., University of Washington, 1980; J.D., University of Puget Sound School of Law, 1985.

1. Several of these cases are discussed *infra* notes 48-62 and accompanying text.

2. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech . . . ." This prohibition is applied to the states through the fourteenth amendment.

3. The Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), first solidly established first amendment protection of commercial speech. While the Court has not yet completely defined commercial speech, pure commercial speech has been described as speech that does "no more than propose a commercial transaction," such as "I will sell you the X prescription drug at the Y price." *Id.* at 761.

fused and inconsistent first amendment decisions.[4] The Supreme Court's commercial speech decisions provide a new viewpoint and an opportunity to reexamine traditional free speech theories. Part II of this Article explores the impact of the commercial speech cases on first amendment theory. Part III explores the development of the split of freedom of speech into freedom of expression and the right to a free flow of information, while part IV follows the development of commercial speech and the extension of first amendment protections to attorney advertising. Part V highlights some of the problems faced by the advertising lawyer, with specific reference to the newly adopted Washington Rules of Professional Conduct. State rules of professional responsibility commonly have lagged behind the Supreme Court's interpretation of the first amendment and have failed to provide any certain guidelines to the attorney or judge faced with an issue in attorney advertising.

II. THE ROLE OF FREE SPEECH VALUES IN FIRST AMENDMENT ANALYSIS

The Supreme Court's extension of partial first amendment protection to commercial speech has highlighted the confusion surrounding free speech analysis.[5] One leading scholar has noted that "[t]he outstanding fact about the first amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[6] Scrambling to keep up with the Supreme Court's first amendment opinions, commenta-

---

4. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

5. For example, the Court in *Virginia Bd. of Pharmacy* agreed that commercial speech was valuable enough to merit some protection but not as much as other types of speech:

> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does "no more than propose a commercial transaction," and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, . . . they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

425 U.S. at 771 n.24. *Virginia Bd. of Pharmacy* and its progeny are discussed *infra* at notes 72-140 and accompanying text.

6. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970); *see also* Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

tors are required to revise their analyses,[7] or suggest comprehensive philosophical justifications of first amendment protection for future decisions.[8]

Four principles or values have been advanced as justifying protections of speech:[9] (1) "advancing knowledge and discovering truth";[10] (2) facilitating the participation of people in social and political decision-making;[11] (3) enhancing "individual self-fulfillment";[12] and (4) supplying "a method of achieving a more adaptable and hence a more stable commentary, of maintaining the precarious balance between healthy cleavage and necessary consensus."[13]

Each of these values constitutes a particular virtue that is advanced by the mechanism of speech protection, and at one time or another each has been offered as the sole rationale for protecting speech. This section will explore these traditional values in light of the Supreme Court's commercial speech rulings.

A. The Role of Speech in Advancing Knowledge and Discovering Truth

Social theorists have long recognized the essential role of speech in Western cultural and social development. In 1859, John Stuart Mill wrote:

> The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still

---

7. Compare Professor Meiklejohn's justification of free speech for its value to the political process, in A. MEIKLEJOHN, FREE SPEECH (1948), to his later argument that protection is warranted for such "nonpolitical" forms of speech as art, literature, science, and education, apparently as necessary to ensure that participants in the political process have an educated and well-rounded point of view, in Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262-63.

8. *See, e.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1-56 (1976) (Professor Baker's attempt to persuade the Court to withdraw first amendment protection of commercial speech) [hereinafter cited as *Commercial Speech*].

9. T. EMERSON, *supra* note 6, at 6-7. While the values suggested by Emerson did not originate with him, his writings are unique in demonstrating the interaction of these values. *See also* Redish, *supra* note 6, at 591, citing Professor Emerson, "probably the leading modern theorist of free speech . . . ."

10. T. EMERSON, *supra* note 6, at 6.

11. *Id.* at 7.

12. *Id.* at 6.

13. *Id.* at 7. This last concept, for brevity, will be referred to as the "safety valve" function.

> more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[14]

Justice Holmes took up this theme and translated it into the marketplace of ideas concept: "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 . . . ."[15]

The value of a "marketplace of ideas" is in the promotion of truth through the collision and free exchange of opinions.[16] Commentators, however, have criticized this justification for protecting speech as unrealistic.[17] Moreover, the justification limits the scope of speech protection, for however effective the marketplace of ideas may be in promoting truth, it would not appear to protect such expression as dancing or painting. Com-

---

14. J. MILL, ON LIBERTY 24 (Oxford Univ. Ed. 1971) (1st ed. London 1859). Professor Baker credits Mill with having provided this concept's "best formulation." Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 968 n.9 (1978) [hereinafter cited as Baker]; *see also* R. WOLFF, THE POVERTY OF LIBERALISM 11-12 (1968).

15. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *Abrams* affirmed convictions under the espionage act for conspiring to print and distribute leaflets encouraging American workers to refuse to support the war effort.

16. The marketplace of ideas concept continues to persuade current first amendment writers. *See, e.g.*, Federal Communications Comm'n v. League of Women Voters, 104 S. Ct. 3106 (1984) (quoting from Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 380 (1969)):

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail . . . . [T]he right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not constitutionally be abridged either by the Congress or the FCC.

Id. at 3116.

17. One commentator has argued:

> Just as real world conditions prevent the laissez-faire economic market—praised as a social means to facilitate optimal allocation and production of goods—from achieving the socially desired results, critics of the classic marketplace of ideas theory point to factors that prevent it from successfully facilitating the discovery of truth or generating proper social perspectives and decisions. . . . Because of monopoly control of the media, lack of access of disfavored or impoverished groups, techniques of behavior manipulation, irrational response to propaganda, and the nonexistence of value-free, objective truth, the marketplace of ideas fails to achieve the desired results.

Baker, *supra* note 14, at 965-66. *See also* Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979).

mercial speech also would remain unprotected under this conceptualization because it, too, does not deal with ideas.[18] Thus, the marketplace of ideas justification is not helpful as a method for delineating first amendment rights in the area of commercial speech.

B. The Role of Speech in Promoting Democratic Decision Making

Commentators have asserted that the first amendment does not protect a "freedom to speak" but rather the freedom of those activities of thought and communication by which we "govern."[19] The free speech provision thus is concerned not with a private right but with a public power: the power of the people to be governed as they wish.

Certainly people exercise their governing power by voting. "But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them."[20]

One view of the first amendment as promoting the decision-making process would justify protection of cultural and artistic speech on the grounds that such speech leads the way "toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created."[21] Another view of the first amendment would protect only speech

---

18. Commercial speech, speech that is limited to who is producing and selling what product, for what reason, and at what price, is not commonly recognized as expressing the type of ideas that aid in the promotion of truth or knowledge. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976). Commercial speech has been described as "nonideological" in comparison with noncommercial or "ideological speech." Lehman v. City of Shaker Heights, 418 U.S. 298, 319 (1974) (Brennan, J. dissenting). Therefore, if free speech protections were theoretically based on the promotion of truth and knowledge, commercial speech could categorically be denied protection.

19. *See, e.g.*, Bork, *supra* note 4, at 26.

20. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255. *See also* BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308 (1978). For a perceptive critique and analysis of Professor Meiklejohn's writings, see Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 447-61 (1983).

21. Meiklejohn, *supra* note 20, at 257. *See also* Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

that is explicitly political. The underlying rationale behind this approach is that expressly political speech should enjoy absolute protection because if political speech is protected along with other types of speech less important to society, an overall erosion of speech protections could occur as courts determine the extent to which nonpolitical forms of speech should be protected. Differentiation of political speech thus is essential to preserving its absolute protection.[22]

The logic of the political speech model is persuasive, and the model has received broad support from commentators[23] and courts.[24] One commentator has pointed out, however, that while

---

22. Judge Bork explained:

> Explicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda. It does not cover scientific, educational, commercial or literary expressions as such. A novel may have impact upon attitudes that affect politics, but it would not for that reason receive judicial protection. This is not anomalous, I have tried to suggest, since the rationale of the first amendment cannot be the protection of all things or activities that influence political attitudes. Any speech may do that, and we have seen that it is impossible to leave all speech unregulated. Moreover, any conduct may affect political attitudes as much as a novel, and we cannot view the first amendment as a broad denial of the power of government to regulate conduct. The line drawn must, therefore, lie between the explicity political and all else. Not too much should be made of the undeniable fact that there will be hard cases. Any theory of the first amendment that does not accord absolute protection for all verbal expression, which is to say any theory worth discussing, will require that a spectrum be cut and the location of the cut will always be, arguably, arbitrary. The question is whether the general location of the cut is justified. The existence of close cases is not a reason to refuse to draw a line and so deny majorities the power to govern in areas where their power is legitimate.

Bork, *supra* note 4, at 28.

23. *See, e.g.*, Blasi, *The Checking Value in First Amendment Theory*, 177 A.B. FOUND. RESEARCH J. 521. Blasi proposes yet another variation: the ultimate value served by freedom of speech is its "checking" power on the government. In other words, the most favored speech is that which points out governmental or official misconduct. *Id.* at 527.

24. *See, e.g.*, Federal Election Comm'n v. National Conservative Political Action Comm., 105 S. Ct. 1459 (1985).

> There can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment. We said in *Buckley v. Valeo*:
>
> > "The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'. . . This no more than reflects our 'profound national commitment to the principle that debate on

under this theory the ultimate value of speech lies in its furthering of the democratic process, the democratic process itself may be seen as a means to furthering other social and individual ends.[25] In either event, there is no place in this theory for commercial speech, thus limiting the usefulness of this theory as an analytical tool.[26]

C. Speech as a Means to Self-Fulfillment

Speech can be seen as a natural right fundamental to human existence: "What, finally, of speech as an expression of self? As a cry of impulse no less than that as a dispassionate contribution to intellectual dialogue?"[27]

One view of free speech as an end in itself has been referred to as the "liberty model."[28] The liberty model founds protection of speech upon a perception of the self. "The values supported or functions performed by protected speech result from that speech being a manifestation of individual freedom and choice . . . ."[29] Accordingly, to be protected, speech must "represent an attempt to create or affect the world in a way which can be expected to represent [someone's] private or personal wishes."[30] Because the first amendment would protect only speech that is uttered in fulfillment of an individual need, merely profit-motivated or commercial speech would not enjoy the protection it now receives.[31]

---

public issues should be uninhibited, robust, and wide-open . . . ." *Id.* at 1467 (citations omitted).

25. Redish, *supra* note 6, at 603-04. *See also infra* text accompanying note 39; Redish, *supra* note 6, at 604-11 (attacking what he terms "Meiklejohn logic").

26. The Court's frequently employed categorical approach to speech cases allows commercial speech to be distinguished from political speech and thus afforded less protection. Accordingly, a theoretical approach to the first amendment based on valuing only political speech could lead to further disregard for commercial speech. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (advertisement paid for by civil rights group, soliciting funds and making critical comments on government officials, held to be political speech and not commercial speech, and thus was constitutionally protected speech.)

27. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1, at 577 (1978).

28. Baker, *supra* note 14, at 990. *See also Commercial Speech*, *supra* note 8, at 5.

29. *Commercial Speech*, *supra* note 8, at 3.

30. *Id.*

31. *Id.; see generally, supra* notes 3, 5, and *infra* notes 74-77. Thus, to Professor Baker, the freedom of speech embodied in the first amendment is solely an individual right to expression. One purpose of this Article is to demonstrate the growing recognition of a dual right: an individual right to express oneself, coupled with a societal right to know. This dual right will be explored *infra* notes 43-62 and accompanying text. *See also*

The liberty model has been criticized as artificially narrow and restrictive of information necessary to the development of individual fulfillment,[32] but the model does enunciate a real value that has been influential in some first amendment cases.[33] It does not, however, incorporate and synthesize the most recent developments in speech jurisprudence. Under the liberty model, not only would commercial speech be unprotected, but speech uttered by a corporation and other ordinarily protected speech that is uttered for a commercial reason also would be unprotected.[34] Yet the Supreme Court has, in each instance, found such speech to be protected.[35]

D. Speech as a "Safety Valve"

The "safety valve" model was suggested by the manner in which speech protections channel expression in ways that strengthen and support a social structure.

> Those who won our independence . . . knew that order can not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[36]

Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976). *Cf.*, Stoltenberg & Whitman, *Direct-Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381, 382-83 (1984); Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193, 205-10 (1979).

32. Redish, *supra* note 6, at 620-21.

33. *See* First Bank of Boston v. Bellotti, 435 U.S. 765, 804-05 (1978) (White, J. dissenting) ("Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech.").

34. Baker points out that commercial speech is directed at promoting the economic standing of an individual or company and not directed at expressing a personal belief. Thus, commercial speech is not a manifestation of individual freedom or choice and should not be protected under his theoretical model. *See Commercial Speech*, *supra* note 8, at 16-17.

35. Commercial speech was protected in Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1978); corporate speech was protected in First Bank of Boston v. Belliotti, 435 U.S. 765; otherwise protected speech uttered solely for commercial reasons was protected in Bigelow v. Virginia, 421 U.S. 809 (1974).

36. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, JJ., concurring). *See also*, Bollinger, *Free Speech and Intellectual Values*, 92 YALE L.J. 438, 454-55 (1983). This "safety valve" virtue of free speech continues to enter first amendment

As under the democratic decisionmaking theory, however, the safety valve model treats speech solely as a means and democratic processes as the end.[37] Such theories fail to take free

---

analysis. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (quoting with approval Brandeis' dissent in *Whitney*).

37. *See generally* Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983). Blum's model considers speech protections solely as a tool for turning the most politically helpless groups (those most likely to disrupt the system if frustrated) into eager participants in the political process.

> A concept of equal liberty has implicitly guided the Court in creating these entitlements. The Court has proclaimed individual rights only for speech activities that are accessible to citizens generally. The Court has accorded speech activities that are not accessible to everyone, such as radio and television broadcasts, the less absolute form of protection associated with the collective right. By making universal accessibility a precondition for the creation of behavioral entitlements, the Court effectively has equalized the first amendment liberty of the rich and the poor. By providing absolutist protection only for the common forms of speech to which all citizens have access, the Court has implicitly used a concept of equality to limit the domain of individual liberty.
>
> One cannot, however, attribute this use of equality as a limiting principle to our society's commitment to substantive political equality because no such commitment exists. The principle of equal liberty derives instead from strategic political considerations. The Supreme Court adopted and established the broad outlines of contemporary free speech doctrine during the New Deal period. Since its inception, the modern idea of free speech has been integral to a larger, essentially social or liberal democratic, strategy of governance. This strategy has included strong protection of individual's rights to speak and organize, and the creation of a strong, centralized, democratic welfare state. These two aspects of the strategy have been mutually supporting. First amendment protection has enhanced opportunities for legitimate political initiative among the lower classes, and this initiative has helped to create a political base for the welfare state. Conversely, the existence of a state sufficiently powerful to gain independence from dominant economic forces and to redistribute income has increased the likelihood of successful integration of dissident movements. The integration of social movements has reduced the need to use political repression except as a last resort.
>
> The interest in protecting the organizing activities of social movements accounts for the creation of behavioral entitlements for the traditional, in-person speech activities of assembling, speaking, and leafletting. Protection of these activities affords groups a secure sanctuary from threats of persecution and encourages dissidents to channel their energies into the established political system. Such channeling is facilitated by refraining from acts of repression that would diminish groups' ability and propensity to participate in the electoral system, but at the same time limiting groups' capacity to generate power by alternative means, such as the threat of disruption. It follows that activities the very exercise of which is potentially disruptive of the accepted conception of social order do not receive absolutist protection. Behavioral entitlements have been designed principally to permit movements to integrate into the political system, and their scope is limited by this design. While this strategy of channeling dissident movements into the political system has deradicalized some

speech into account as an entitlement of human existence[38] and an end in itself, and refuse to recognize that democratic processes perhaps are a means to developing and enjoying our humanity.[39] Thinking of free speech simply as a means to certain ends could signal the first step in removing the sanctity presently surrounding the first amendment and depriving it of the safeguards many believe it deserves.[40]

E. A New Approach: The "Self-Realization" Model

The four justifications discussed above—the marketplace of ideas model, the political speech model, the self-fulfillment model, and the safety-valve model—each embody a benefit that free speech offers society. However, these aggregated values focus on only one branch of the first amendment: the right of the individual speaker to express a view. None of these justifications directly incorporates a public right to receive information. The Supreme Court in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*[41] recognized such a right. A new model for the first amendment thus must be constructed.[42]

---

popular movements, it has also expanded the state's powers and humanitarian agenda by broadening its political base.

Id. at 1276-78 (footnotes omitted).

38. For example, speech may be a way to self-fulfillment. *See supra* notes 27-35 and accompanying text.

39. This philosophy was earlier propounded by John Locke:

> But though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative, as the good of the Society shall require; yet it being only with an intention in every one for the better to preserve himself his Liberty and Property; (For no rational Creature can be supposed to change his condition with an intention to be worse) the power of the Society, or Legislative constituted by them, *can never be supp'd to extend farther than the common good* . . . .

J. LOCKE, SECOND TREATISE OF GOVERNMENT 398 (from Cambridge University Press ed. 1063, J. LOCKE, TWO TREATISES OF GOVERNMENT) (emphasis added). *See also* Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966).

40. Moreover, commercial speech is not recognized under this model. Commercial speech is not generated by the frustrated or disenfranchised, and those are the speakers protected by the safety valve model. Thus, like the other models discussed, the safety valve model is an incomplete first amendment philosophy and cannot be relied upon to afford society the fullest measure of protection.

41. 425 U.S. 748 (1976).

42. *See Commercial Speech, supra* note 8. Although Baker embraces the self-fufillment model, he does not perceive it as incorporating public or societal rights. He does, however, focus on the individual's benefit from freedom: "To justify legal obligation, the community must respect individuals as equal, rational and autonomous moral beings. For the community legitimately to expect individuals to respect collective decisions, i.e.,

One commentator has proposed a value scheme that would encompass the models discussed above as well as a public right to information. The value has been labelled "individual self-realization."[43]

> This term [individual self-realization] has been chosen largely because of its ambiguity: it can be interpreted to refer either to development of the individual's powers and abilities—an individual "realizes" his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual "realizes" the goals in life that he or she has set.[44]

The self-realization model is grounded in the idea that an individual is constantly confronted with the necessity of making life-affecting decisions and therefore should have available a free flow of information upon which to base those decisions. Trying to choose a toothpaste for your family,[45] while mundane, nonetheless may ultimately be as life-affecting a decision as choosing an ideology.

The self-realization model is not aimed at superseding the other first amendment philosophies, but subsumes those other philosophies as subvalues of self-realization.[46] Each of the theories discussed above suggests a valid justification for the protection of speech, but the primary reason for protecting speech is its role in allowing each of us to realize our individual human potential. Thus, the self-realization theory recognizes each individual's need for an unrestrained flow of information to enable him to make informed choices in his daily existence. The theory makes no distinction between big choices, such as choosing between laissez-faire capitalism or socialism, and little choices, such as choosing between different makes of dishwashers (which could affect the amount of leisure time available for making big choices). The theory therefore acknowledges that there must be not only a freedom to speak but also a freedom to hear.

---

legal rules, the community must respect the dignity and equal worth of its members." Baker, *supra* note 14, at 991.

43. Redish, *supra* note 6, at 593.

44. *Id.*

45. Or seeking medicines at reasonable prices, *see Virginia Bd. of Pharmacy*, 425 U.S. 748.

46. Redish, *supra* note 6, at 594.

III. Freedom to Speak—Freedom to Hear

The individual self-realization model recognizes that the right to free speech is actually two rights. The value systems discussed in part II focused only upon the freedom of expression—the right of an individual to communicate outwardly an opinion, a point of view, or even a "cry of impulse."[47] However, the right to know and to be assured of a flow of information is essential to an individual's control over her "own destiny through making life-affecting decisions."[48]

The concept of a right to a free flow of information, and the extent to which the Supreme Court has recognized that right, has evolved over many years. As long ago as 1923 the Court criticized a state's attempt to hinder "the opportunities of pupils to acquire knowledge."[49] In 1943 the Court agreed that the first amendment "embraces the right to distribute literature . . . and necessarily protects the right to receive it."[50] In neither of these cases, however, does the right to receive information appear as much more than a gratuitous judicial flourish.

In *Thomas v. Collins*[51] the Court granted a writ of habeas

---

47. *See supra* note 27 and accompanying text.

48. Redish, *supra* note 6, at 593; *see also* Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L.Q. 1:

> It is clear at the outset that the right to know fits readily into the first amendment and the whole system of freedom of expression. Reduced to its simplest terms, the concept includes two closely related features: first, the right to read, to listen, to see, and to otherwise receive communications; and second, the right to obtain information as a basis for transmitting ideas or facts to others. Together these constitute the reverse side of the coin from the right to communicate. But the coin is one piece, namely the system of freedom of expression.
>
> Moreover, the right to know serves much the same function in our society as the right to communicate. *It is essential to personal self-fulfillment.* It is a signficant method for seeking the truth, or at least for seeking the better answer. It is necessary for collective decision-making in a democratic society. And it is vital as a mechanism for effectuating social change without resort to violence or undue coercion.

Emerson, *supra*, at 2 (emphasis added).

49. Meyer v. Nebraska, 262 U.S. 390, 401 (1923). In this case the Court reversed a conviction under a statute prohibiting the teaching of a foreign language to students under the eighth grade. Although the Court seemed to rest its decision largely upon the teacher's due process rights, the arbitrariness of the statute, and the lack of a reasonable relation to a legitimate state end, this case often is cited for its recognition of the value of encouraging a free flow of information. *See* L. Tribe, *supra* note 27, § 12-19 at 675.

50. Martin v. Struthers, 319 U.S. 141, 143 (1943) (an ordinance prohibiting "door-belling" for the purpose of distributing handbills held unconstitutional).

51. 323 U.S. 516 (1944).

corpus in favor of a labor organizer jailed for addressing an audience in violation of a temporary restraining order. In its reasoning, the Court seemed to rely not upon the labor organizer's right to speak, but upon the right of the audience "fully and freely to discuss and be informed concerning this choice, privately or in public assembly."[52] And in *Lamont v. Postmaster General*,[53] the Court struck down a postal regulation that provided for "communist propaganda" to be retained by the postal authorities and released only at the addressee's specific request, holding that the regulation violated the first amendment rights of the intended recipient.[54]

Other decisions have upheld the right of the individual to receive information,[55] but in *Procunier v. Martinez*,[56] the Court seemed temporarily to draw back from admitting the existence of such a right. Although the Court held that censorship of prison mail abridged the first amendment rights of the intended recipients, the Court limited its focus to individual rights of recipients and did not go so far as to find a societal right. "We

---

52. *Id.* at 534. This case is interesting too in that the state contended that there was no first amendment issue present because this was, in essence, commercial speech. It is perhaps for this reason that the Court did not rely heavily on the right of the organizer to speak, and rather on the right of the audience to know. Commercial speech was deemed to be unprotected until the decision in *Virginia Bd. of Pharmacy*, 425 U.S. 748.

53. 381 U.S. 301 (1964).

54. While the Court did not comment on the extent of an individual's right to receive information, Justice Brennan, concurring, wrote:

> It is true that the first amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those wholly fundamental personal rights necessary to make the express guarantees fully meaningful. [citations omitted] I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Id. at 308 (Brennan, J., concurring).

55. *See, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969) (upholding an individual's right to possess obscene films); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (affirming an FCC order that a radio station supply air time to the subject of a prior editorial attack). The Court in *Red Lion* stressed:

> It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

395 U.S. at 390. *See also* Kleindienst v. Mandel, 408 U.S. 753, 763 (1972). *But cf.* Miami Herald Publ. Co. v. Tornillo, 418 U.S. 241 (1974) (striking down statute that would force newspaper to give space to political candidate to rebut prior published accusations).

56. 416 U.S. 396 (1974).

do not deal here with difficult questions of the so-called 'right to hear' and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed."[57]

It was not until *Virginia Board of Pharmacy*[58] that the Court fully recognized a public right to receive information. The Court has continued to enunciate this right, primarily in commercial speech cases.[59] However, the Court occasionally has accompanied discussion of a public right to a flow of information with terminology similar to Justice Holmes' "marketplace of ideas" concept.[60] Such language has contributed to the confusion surrounding the constitutional status of commercial speech. The proponents of the traditional marketplace of ideas concept advance the theory as an avenue to truth.[61] Why, then, should mere commercial advertising be given protected status in a system meant to promote truth?

But despite the marketplace of ideas talisman, the Court clearly is promoting a value beyond the traditional marketplace of ideas concept:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue . . . . [C]ommercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system . . . . In short, *such speech serves individual and societal interests in assuring informed and reliable decisionmaking.*[62]

Thus the Court apparently has moved beyond traditional first amendment theory and has approached the individual self-reali-

---

57. *Id.* at 409.

58. 425 U.S. 748 (1976).

59. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977), discussed *infra* notes 90-113 and accompanying text; Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 92 (1977), discussed *infra* note 145 and accompanying text; Central Hudson Gas and Elec. v. Public Serv. Comm'n, 447 U.S. 557, 561-62 (1980), discussed *infra* notes 143-55 and accompanying text; *In re* R.M.J., 455 U.S. 191 (1982), discussed *infra* notes 114-27 and accompanying text.

60. *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 825-26 (1975); *Virginia Bd. of Pharmacy*, 425 U.S. at 760.

61. *See supra* notes 17-18 and accompanying text.

62. Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (emphasis added). *See also Virginia Bd. of Pharmacy*, 425 U.S. at 764.

zation model.

IV. Protected Commercial Speech

The idea that commercial speech is somehow different from other, protected forms of speech was set out in *Valentine v. Chrestensen*.[63] A merchant advertised an exhibit by distributing handbills, thereby violating a New York litter law that banned commercial handbills. The Supreme Court upheld the constitutionality of the statute: "[T]he Constitution imposes no such restraint on government [regulation] as respects purely commercial advertising."[64]

This complete exclusion of commercial advertising from first amendment protection was eroded in subsequent decisions.[65] In *Cammarano v. United States*,[66] Justice Douglas, concurring with a judgment that upheld IRS regulations classifying funds spent for political advertising as a nonbusiness expense, stated that the *Valentine* ruling was "casual, almost offhand. And it has not survived reflection."[67] He went on to explain that simply because speech is "advertising, it is not thereby completely stripped of first amendment protection."[68] Justice Brennan, dissenting in *Lehman v. City of Shaker Heights*,[69] cited Justice Douglas' *Cammarano* concurrence and noted that

---

63. 316 U.S. 52 (1941).

64. *Id.* at 54.

65. "With one exception, the commercial speech doctrine was never employed by the Supreme Court as a basis for denying first amendment protection." Comment, *Attorney Advertising in Maryland: A Need for Stricter Control*, 13 U. Balt. L. Rev. 92, 95 (1983) (footnote omitted). *See also Virginia Bd. of Pharmacy*, 425 U.S. at 765. *But see* Capital Broadcasting v. Acting Attorney General, 333 F. Supp. 582 (D.D.C. 1971) (ban on cigarette advertising on television held not to violate first amendment because ads were commercial speech; therefore, cigarette advertising less protected than other speech), *aff'd*, 405 U.S. 1000 (1972); *accord*, Pittsburgh Press Co. v. Human Rel. Comm'n, 413 U.S. 376 (1973) (order preventing newspaper from organizing want ads in male-female columns held constitutional).

Neither of the above cases rested squarely on the *Valentine* rule. *Capital Broadcasting* made much of the uniquely regulatory nature of the electronic broadcasting medium while *Pittsburgh Press* rested much of its weight on the principle that the ads were illegal and thus unprotected, regardless of whether they were commercial speech or not.

66. 358 U.S. 498 (1959) (Douglas, J., concurring).

67. *Id.* at 514.

68. *Id.*

69. 418 U.S. 298 (1974). Lehman was a candidate for state office, and sued the City of Shaker Heights for its refusal to sell him advertising space on the city bus system. The Court held that the city's policy of refusing political ads was within the city's discretion, and that card space on a bus was not a traditional first amendment forum.

"[t]here is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity."[70]

In other cases, the Court found ways of sidestepping the *Valentine* holding; commonly, the Court found speech in the disputed advertisement worthy of protection because it discussed social or political issues.[71] In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[72] the Supreme Court finally faced the *Valentine* commercial speech rule head on and held that even pure commercial speech deserved some measure of first amendment protection.

A. Extension of Protection to Pure Commercial Speech

In *Virginia Board of Pharmacy* a consumer group challenged a statute that forbade pharmacists to advertise drug prices. The Virginia Board of Pharmacy, defending the regulation, asserted that aggressive competition would endanger the quality of the pharmacist's services, harm valuable pharmacist-customer relationships, and damage the professional image of the pharmacist.[73] The United States Supreme Court disagreed.

Justice Blackmun, writing for the majority, noted that freedom of speech assumes both a willing speaker and a listener,

---

70. *Id.* at 314 n.6 (Brennan, J., dissenting) (citation omitted). Justice Brennan went on to suggest that even advertising "is 'speech' nonetheless, often communicating information and ideas found by many persons to be controversial." *Id.* at 314 (footnote omitted).

71. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) (ordinance applied to prohibit door-to-door selling of religious literature held to be violation of the first amendment; although states may prohibit distribution of purely commercial leaflets, even those with a " 'moral platitude' " attached, "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise"); Thomas v. Collins, 323 U.S. 516, 531-32 (1944) (labor organizer, violating a court order to avoid urging workers to join union, granted a writ of habeas corpus: "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions . . . is protected . . . as part of free speech" and so cannot be dismissed as "business or economic activity"); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (in libel suit against publishers of an advertisement soliciting funds for civil rights movement, advertisement was protected by first amendment). The Court in *New York Times* held, *inter alia*, that the advertisement was protected under the commercial speech doctrine because it discussed "matters of the highest public interest and concern." *Id.* at 266; Bigelow v. Virginia, 421 U.S. 809, 822 (1974) (in conviction of newspaper publisher for violating statute forbidding encouraging abortion, the Court held that although speech was commercial, it was protected by the first amendment because "[it] conveyed information of potential interest and value to a diverse audience . . . .").

72. 425 U.S. 748.

73. *Id.* at 766-69.

and that the first amendment protects both.[74] The free flow of information, even if limited "to who is producing and selling what product, for what reason, and at what price,"[75] is indispensable to the allocation of resources in our market economy and to the "formation of intelligent opinions as to how that system ought to be regulated or altered."[76] He concluded that the free flow of information should therefore be protected by the first amendment.[77]

Virginia Board of Pharmacy does not hold, however, that commercial speech has the same level of protection as other forms of expression. Justice Blackmun pointed out that pure commercial speech is in certain respects different from other kinds of speech.[78] Compared with news reporting, for instance, the truth of commercial speech would be easier for the advertiser to ascertain. Because advertising is for the advertiser's own financial interest, it is less likely to be chilled by regulation than would other types of speech.[79] Therefore, when a substantial governmental interest exists, commercial speech may be regulated as to the time, place, and manner of presentation,[80] and as

---

74. *Id.* at 756-57.

75. *Id.* at 765.

76. *Id.*

77. *Id.*

78. *Id.* at 771 n.24.

79. The "commonsense differences" between commercial speech and other protected forms

> suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary . . . . Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely . . . .
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it being deceptive. . . . They may also make inapplicable the prohibition against prior restraints. . . .

Id. at 771, n.24 (citations omitted).

80. "[T]ime, place, and manner restrictions are permissible if 'they are justified without reference to the content of the regulated speech, . . . serve significant governmental interests, and . . . leave open ample alternative channels for communication of the information.'" Metromedia, Inc. v. San Diego, 453 U.S. 490, 526 (1981) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 771). *Accord* Spencer v. Honorable Justices of Supreme Court of Pennsylvania, 579 F. Supp. 880, 889 n.12 (1984), discussed *infra* notes

to any illegality of the transaction proposed. Additionally, commercial speech is not protected if it is false or misleading.[81]

Finally, *Virginia Board of Pharmacy* expressly refrained from extending commercial speech protection to professions that do not dispense standardized products, such as the profession of law.[82] That extension was left for another case the following year. The Court offered further guidance to commercial speech analysis in its opinion in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[83] by formulating the following test for commercial speech regulation:

> Speech may be regulated if (1) it is false, misleading, deceptive or concerns an unlawful activity; or (2) if the government has a substantial interest to be protected; and (a) the questioned regulation directly advances that asserted government interest; and (b) the questioned regulation is not more extensive than is necessary to further that interest.[84]

The *Central Hudson* Court found that a state's prohibition of advertising by electrical utilities violated the first amendment, even though the state had a substantial interest in energy conservation and even though the state regulation directly advanced the state interest.[85] The Court ruled that the regulation—a complete ban on advertising by electric utilities—was too extensive and might bar promotion of possible energy saving

---

179-89 and accompanying text.

81. *Virginia Bd. of Pharmacy*, 425 U.S. at 771-72.

82. *Id.* at 773 note 25.

83. 447 U.S. 557 (1980).

84. *Id.* at 566.

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. Note that the second line of the above quote implies that speech is protected where it falls into a certain content category. *See* Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671 (1983) (critique of the dangers of "categorizing" speech on the basis of its capacity to mislead).

85. 447 U.S. at 571-72. Some guidance may be found as to what constitutes a substantial governmental interest by referring to Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). In *Metromedia*, the Court upheld an ordinance restricting billboard use, based on the governmental interests in traffic safety and city aesthetics.

devices.[86] According to the Court, "no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests."[87] It should be noted that the Court gave the state the burden of showing that the regulation was not overbroad and in the absence of such a showing the regulation failed: "In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising."[88] The Court suggested alternative schemes of advancing the state's interests, including prescreening of proposed advertising, and indicated that the doctrine of prior restraint may not apply to commercial speech.[89]

B. First Amendment Protections of Attorney Advertising

1. Bates v. State Bar of Arizona[90]

In *Bates*, two Arizona attorneys advertised their law firm in a newspaper, offering "legal services at very reasonable fees" and listing their fees for certain routine legal services.[91] The Arizona Supreme Court held that the attorneys had violated Arizona's code of professional responsibility.[92] Upon appeal to the United States Supreme Court, the Arizona Bar Association, in defense of its disciplinary rule, argued that advertising would (1) adversely affect professionalism, (2) detract from the administration of justice, (3) affect the quality of legal service, (4) be inherently misleading, (5) drive up the cost of legal services, and (6) be difficult to effectively regulate.[93] The Court, reversing the Arizona Supreme Court, held that the Arizona Code of Professional Responsibility, as applied to defendant's conduct, violated the first amendment.[94]

Responding to the state's first assertion, the Court downplayed the idea that public notice of the fact that attorneys make their living by practicing law would significantly tarnish

86. 447 U.S. at 570.
87. *Id.*
88. *Id.* at 571.
89. *Id.* at 571, n.13.
90. 433 U.S. 350 (1977).
91. *Id.* at 354.
92. *Id.* at 356-58.
93. *Id.* at 368-79.
94. *Id.* at 384.

the image of the profession either in the eyes of the practitioners or in the eyes of the public.[95] The Court noted that other professions allow advertising and yet are not considered undignified.[96] The Court placed little credence in the contention that advertising would detract from the administration of justice,[97] and it was not persuaded that advertising would encourage fraudulent use or overuse of the judicial system,[98] citing statistics showing that advertising might help to reverse the present trend towards underutilization of attorneys.[99]

The Court dismissed the idea that advertising would affect the quality of legal work: "An attorney who is inclined to cut

---

95. *Id.* at 369.

96. *Id.* (finding that bankers and engineers, in particular, advertise and are not considered undignified). *See also* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 77 (1980) ("It might be argued that advertising can't do anything to worsen the image of lawyers. A 1977 Harris poll of 17 institutions showed the public holds the legal profession in fairly low esteem, ranking lawyers only above advertising executives.").

97. *Bates*, 433 U.S. at 376.

98. Specifically, the Arizona Bar suggested that advertising would "have the undesirable effect of stirring up litigation." *Id.* at 375. The Court minimized this concern: "[W]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376. *See also In re* Appert, 315 N.W.2d 204 (Minn. 1981) (dismissal of disciplinary proceeding against attorneys who had violated state's disciplinary rules in distributing brochure advising women who had used "Dalkon Shield" intra-uterine devices of their legal rights against the IUD manufacturer). The court in *Appert* agreed that the attorney's brochure did indeed stir up litigation, but held that the brochures were protected speech:

> In contrast to the lack of compelling state justifications for restricting advertising, the facts in this case demonstrate that important individual and public interests are present. The information supplied through respondents' distribution of the letter and brochure made several injured parties aware of their legal position and absent access to the letter and brochure, some of these individuals would not have been made aware of their rights. The manufacturer, against whom the solicited litigation was directed, apparently engaged in particularly egregious conduct which resulted in severe and permanent injuries to a substantial number of people.

Id. at 210. The Supreme Court considered a similar advertisement, in Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985), and held in accord with the Minnesota court. *See infra* note 133.

99. 433 U.S. at 370-71 nn.22-23. The Court cites to, among other reports, the ABA's REVISED HANDBOOK ON PREPAID LEGAL SERVICES, at 26 (1972): "We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wider utilization of legal services." *See also* CURRAN, THE LEGAL NEEDS OF THE PUBLIC (1977). In an ABA sponsored survey, 10% of those surveyed agreed with the statement, "[M]ost people who go to lawyers are troublemakers"; 44% agreed that "[a] person should not call upon a lawyer until he has exhausted every other possible way of solving his problem"; and 83% agreed that "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem." *Id.* at 228.

quality will do so regardless of the rule on advertising."[100] The Court also disagreed that attorney advertising is inherently misleading. For example, the State had suggested that legal services were not so routine as to allow advertisement of fixed prices for particular services.[101] The Court responded that these prices would not be misleading so long as the attorney performed the advertised services at the advertised price.[102] The State also contended that advertising is misleading in that it does not provide sufficient foundation on which to select an attorney.[103] While the Court conceded that advertising could not provide all of the information needed to choose an attorney wisely, it noted that the solution was not to ban advertising, thereby preventing any information from getting to the consumer,[104] but rather to encourage information flow.[105]

In response to the contention that advertising would drive up legal fees, the Court pointed to statistics that tended to show that advertising would lower prices for legal services.[106] Finally, in response to the State's assertion that extensive enforcement problems justified banning attorney advertising, the Court disagreed with the State's assumption that a large number of attorneys would "overreach through advertising," suggesting that attorneys by and large would continue to be "candid and honest and straightforward."[107] In conclusion, the Court agreed that while the Arizona State Bar had raised some plausible concerns, none of those concerns overcame the public need for information about attorneys.[108]

The *Bates* holding, although narrow,[109] reiterated the rule of *Virginia Board of Pharmacy*: advertising that is false or mis-

---

100. *Bates*, 433 U.S. at 378. *See also* L. ANDREWS, *supra* note 96, at 80-82.
101. *Bates*, 433 U.S. at 372.
102. *Id.* at 372-73.
103. *Id.* at 374-75.
104. *Id.* at 374.
105. *Id.* at 375.
106. *Id.* at 377. *See also* L. ANDREWS, *supra* note 96, at 79-80.
107. *Bates*, 433 U.S. at 379.
108. *Id.*
109. The Court narrowed its holding thusly:

> The constitutional issue in this case is only whether the state may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

Id. at 384.

leading or proposes illegal transactions may be suppressed, and reasonable restrictions on the time, place and manner of advertising will be allowed.[110] The Court reserved judgment as to advertising via electronic media[111]and suggested that claims having to do with quality of services or any in-person solicitation might be inherently misleading.[112] The Court further suggested that the state might be permitted to require disclaimers or warnings in some advertisements.[113]

2. *In re* R.M.J.[114]

The Court applied the *Central Hudson* formula[115] to determine the constitutionality of attorney advertising regulation in *In re R.M.J.*.[116] In so doing, the Court held that the state failed to show that its interests were directly advanced by the regulation.[117]

At issue was a Missouri regulation containing a list of areas of practice that were approved for advertisement.[118] In his newspaper advertisement, the appellant attorney departed from the exact authorized terms (using, for example, "personal injury" rather than the approved "tort law") and listed legal areas not authorized in the regulation.[119] The Court, ruling that the appellant's list was protected, stated that "[b]ecause the listing published by the appellant has not been shown to be misleading, and because the Advisory Committee suggests no substantial interest promoted by the restriction, we conclude that this portion of [the rule] is an invalid restriction upon speech as applied to appellant's advertisements."[120]

Missouri's regulation also did not authorize inclusion of information about the courts before which an attorney was entitled to practice.[121] The appellant, however, included in the

---

110. *Id.* at 383-84.
111. *Id.* at 384.
112. *Id.* at 383-84.
113. *Id.* at 384.
114. 455 U.S. 191 (1982).
115. *See supra* note 84 and accompanying text.
116. 455 U.S. at 203-04 n.15.
117. *Id.* at 205 (referring to Sup. Ct. Rule 4, DR 2-101 (1978) and Rule 4, Addendum III (Adv. Comm. Nov. 13, 1977), found at page 193 nn.1-6)).
118. *Id.* at 195-96, n.6.
119. *Id.* at 197.
120. *Id.* at 205.
121. *Id.* at 197-98.

advertisement in large type: "Admitted To Practice Before THE UNITED STATES SUPREME COURT." Justice Powell, writing for the majority, found this statement to be in poor taste and possibly deceptive,[122] but because there was no finding in the lower courts that the statement was misleading, the Court held the issuance of a reprimand by the Missouri Court to be unwarranted.[123]

Missouri's disciplinary rule also prohibited mailings to persons with whom the attorney had not had prior dealings.[124] The appellant had sent cards announcing the opening of his office to people with whom he had no relation. Again, the Supreme Court held that the disciplinary rule was not narrow enough. The Court noted that mailings might be more difficult to supervise than newspaper advertisements, but suggested that attorneys be required to submit a copy of all mailings to the Advisory Committee.[125] Similarly, in response to the Advisory Committee's claim that direct mailings would be "frightening" to an unsophisticated public, Justice Powell suggested that the face of all such envelopes be stamped with the legend, "This is an Advertisement."[126]

The *R.M.J.* decision crystallized attorney commercial speech analysis. The succinct four-part test announced in *Central Hudson* now is applicable to most regulation of advertising and other commercial speech.[127]

3. Zauderer v. Office of Disciplinary Counsel[128]

The Court in *Zauderer* applied the now familiar[129] *Central*

---

122. Justice Powell stated:

> Indeed, such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court. Yet there is no finding to this effect by the Missouri Supreme Court. There is nothing in the record to indicate that the inclusion of this information was misleading. Nor does the Rule specifically identify this information as potentially misleading or, for example, place a limitation on type size or require a statement explaining the nature of the Supreme Court Bar.

Id. at 205-06.

123. *Id.* at 206.

124. *Id.* at 196.

125. *Id.* at 206.

126. *Id.* at 206 n.20.

127. *Id.* at 203, and n.15.

128. 105 S. Ct. 2265 (1985).

129. "Our general approach to restrictions on commercial speech is by now well settled." *Id.* at 2275.

Hudson commercial speech formula to three new first amendment questions: whether a state could: (1) prohibit advertisements that contained advice regarding specific legal problems; (2) prohibit advertisements containing illustrations; or (3) require certain disclaimers relating to the terms of contingent fees.[130]

In *Zauderer*, an attorney had placed a newspaper advertisement containing specific advice addressed to users of the Dalkon Shield intrauterine device.[131] The Court noted that there was nothing deceptive or misleading in the advice offered regarding the shield users' specific legal problem. Therefore, the advertisement could not be restricted under the state's power to regulate inherently deceptive advertising.[132] The holding thus placed on the State the burden of showing that its regulation advanced a substantial government interest. The Court also concluded that the advertisement did not approach the dangers inherent in in-person solicitation.[133]

The State asserted that inhibiting lawyers from stirring up litigation was a sufficient state interest for regulating legal advice in advertisements. The State's evidence showed that the advertisement had encouraged 106 women to come to the attorney and sue the makers of the Dalkon Shield. The State argued that even if this particular advertisement were harmless, such a prophylactic rule is warranted by the regulatory difficulties in ensuring that attorneys do not stir up "meritless" litigation.[134]

The Court disagreed:

> 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

---

130. *Id.*

131. The advertisement reported that the Dalkon shield had set off many lawsuits and that the attorney represented other women in such lawsuits, and advised women not to assume that their claims were time barred. *Id.* at 2271-72.

132. *Id.* at 2276-77.

133. *Id.* at 2277 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), in which the Court held that states could bar in-person solicitation by attorneys because of the strong likelihood of undue influence or overreaching). The *Zauderer* Court noted that "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." *Zauderer*, 105 S. Ct. at 2277.

134. *Id.* at 2278-79.

> 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." 455 U.S. at 203. 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.[135]

The State offered a different justification for its second type of regulation—the prohibition of illustrations. The Court summarized the State's argument as follows:

> [A]buses 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.[136]

The Court, dismissing this argument, noted that the State had offered no evidence to back up its contentions. Therefore, accepting such an argument would allow the State to regulate advertising on the bare allegation that that regulation is necessary to prevent deception.[137]

Finally, regarding the third issue, contingent fees, the Court did agree, consistent with dicta in *Bates* and *R.M.J.*, that the state could require disclaimers as to certain kinds of language to ensure that the public is not deceived.[138] The attorney's adver-

---

135. *Id.* at 2278. The Court added that "if the State's concern is with abuse of process, it can best achieve its aim by enforcing sanctions against vexatious litigation." *Id.* at 2279 n.12.

136. *Id.* at 2280-81.

137. 105 S. Ct. at 2281. The court included language that might ease the way for television advertising.

138. *Bates*, 433 U.S. at 384; *R.M.J.*, 455 U.S. at 201.

tisement had stated that if a lawsuit failed, no legal fees were owed.[139] The State had required adding a disclaimer that noted that the client would still bear the cost of filing fees and other legal expenses. The Court agreed that such regulation did not violate the first amendment.[140]

V. Extending the Rule: Guidelines to Advertising

Most states continue to maintain rules of professional conduct that are inconsistent with the highest Court's commercial speech decisions.[141] It is therefore difficult for the attorney who is considering advertising to draw guidance from the contradictory welter of state attorney advertising cases. The United States Supreme Court rulings may be synthesized, however, and logically applied to almost any kind of advertising. Part A of this section will attempt to reformulate the Court's *Central Hudson* rule,[142] and Part B will apply the Court's reasoning to some of the choices faced by the advertising lawyer.

A. Central Hudson *Enhanced*

Throughout its commercial speech decisions the Supreme Court has consistently encouraged regulation that would provide the public with more information, not less.

> [We] view as dubious any justification that is based on the benefits of public ignorance. . . . Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.[143]

Justice Blackmun noted in *Bates* that the Court did not intend to "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to

---

139. 105 S. Ct. at 2272.

140. *Id.* at 2283.

141. L. Andrews, *supra* note 96, at 62. In Washington State, the new Rules of Professional Conduct [hereinafter cited as Washington RPC] were adopted effective September 1, 1985, and will be referred to herein where appropriate.

142. *See supra* note 84 and accompanying text.

143. *Bates*, 433 U.S. at 375.

assure that the consumer is not misled."[144]

The *R.M.J.* Court expressed this idea in stronger terms:

> Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.[145]

Therefore, the formula as set out in *Central Hudson* and *R.M.J.* can be rephrased as follows:

Commercial speech may be regulated if (1) it is false, misleading, deceptive, or concerns an unlawful activity; or (2) the government has a substantial interest to be protected; and

---

144. *Id.* at 384.

145. *In re* R.M.J., 455 U.S. at 203. *See also* Linmark Assoc. Inc. v. Willingboro, 431 U.S. 85 (1977) (ordinance banning "for sale" signs on residence lawns to help prevent "panic selling" by white residents challenged on first amendment grounds). The Court in *Linmark* stated:

> The constitutional defect in this ordinance, however, is far more basic. The Township Council here, like the Virginia Assembly in *Virginia Bd. of Pharmacy*, acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town . . . . *Virginia Bd. of Pharmacy* denies government such sweeping powers. As we said there in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:
>
> > "There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them . . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. 425 U.S. at 770.
>
> Or as Mr. Justice Brandeis put it: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California*, 174 U.S. 357, 377 (1927) (concurring opinion).
>
> 431 U.S. at 96-97.

> (a) the questioned regulation *directly* advances that asserted government interest; and
>
> (b) the questioned regulation *is not so broadly applicable that it excludes non-deceptive information along with deceptive information.*[146]

This formulation suggests that prophylactic regulation generally is not acceptable and that the only acceptable regulation is that which requires inclusion of any explanation or disclaimer necessary to render the advertisement nondeceptive. The Court has not in any decision stated directly that commercial speech regulation is limited to requiring explanations or disclaimers rather than permitting blanket prohibitions,[147] but the Court clearly has favored such regulation because it eliminates deception by increasing the flow of information.[148] This preference for informational flow must not be underemphasized in the context of legal services, where the public admittedly lacks sophistication.

Thus, the *R.M.J.* Court suggested that the appropriate remedy for a particularly tasteless and potentially misleading advertisement—an advertisement announcing that an attorney was admitted to practice before the Supreme Court—was not to bar such a statement altogether, but to require that the attorney add an explanation of the nature of admission to the Supreme Court Bar.[149]

---

146. This formulation bears a certain resemblance to the classic "overbreadth doctrine," whereby a particular litigant may challenge a statute on first amendment grounds by showing that it could unconstitutionally suppress speech, even if the statute was constitutional as applied to the particular litigant. While the Court has agreed that "overbreadth" analysis is not applicable in commercial speech cases, *see, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978), litigants have successfully challenged regulations of speech by posing one particular advertisement that was not violative of the state's interests but would be prevented by the regulation, *see, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The Court recognized this resemblance, or quasi-overbreadth, in Secretary of State v. Munson, 104 S. Ct. 2839, 2852 n.13 (1984).

147. *See, e.g.*, Justice White's discussion of whether a prophylactic rule would ever be appropriate to prevent deception in commercial speech, in *Zauderer*, 105 S. Ct. at 2278-79.

148. "[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the States' interest in preventing deception of consumers." *Id.* at 2282 (emphasis added).

149. *In re* R.M.J., 455 U.S. at 205-06. In *Zauderer*, the appellant attorney challenging Ohio's requirement of a disclaimer when advertising a contingent fee arrangement pointed out that in many cases the Supreme Court had been reluctant to require a speaker to speak, even if so doing would correct a previous falsehood:

> 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. *See, e.g.*,

The rationale of the Court in *Central Hudson* and *Linmark Associates v. Willingboro*,[150] and the fundamental step in the extension of the partial commercial speech protections to attorney advertising in *Bates*,[151] demonstrate the Court's recognition of a societal right to information—that is, a recognition of a right to "individual self-realization." Attorney advertising and the regulation of attorney advertising therefore should be designed to further the flow of information about legal services.

It may fall to state regulatory bodies to take a hand in educating the public.[152] Well-drafted and detailed regulation may greatly help the advertising attorney.[153] Regulation should, for

---

Wooley v. Maynard, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Indeed, in *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), 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 in *Wooley, Tornillo*, and *Barnette*. 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." Id., at 642. 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, see Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., . . . appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal.

Zauderer, 105 S. Ct. at 2282.

150. *See supra* note 145.

151. See Justice Blackmun's extensive documentation of the general public's need for information regarding available attorneys and legal services, in Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.33 (1976). *See also Zauderer*, 105 S. Ct. at 2282 ("the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides. . . .").

152. "If the naivete of the public will cause advertising to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective." *Bates*, 433 U.S. at 375.

153. The new WASHINGTON RULES, modeled after the MODEL RULES OF PROFESSIONAL CONDUCT (1983), are more succinct than detailed. Washington RPC 7.1 sets out the general rule concerning false or misleading advertising:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

instance, point out potential deceptiveness in the most commonly used advertising language. The brevity of the standard advertisement creates a great potential for deception because of the information that is not included. The greatest deception in advertising lies in what is left unsaid, and what is left unsaid is often far from obvious.[154] It is therefore not enough for court rules to set out the general rule that advertising is permitted if not false, misleading, deceptive, or regards illegal activity.

> [T]he Court's opinion does not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." . . . I view this as at least some recognition of the potential for deception inherent in fixed-price advertising of specific legal services. This recognition, though ambiguous in light of other statements in the opinion, may be viewed as encouragement to those who believe—as I do—that if we are to have price advertisement of legal services, the public interest will require *the most particularized regulation.*[155]

In short, attorneys, through advertising, may educate the public as to the subtleties of the practice of law. The question remains as to who will educate the attorneys as to the subtleties of advertising?

B. Advertising Practices—Deceptive or Not?

1. Print Media

All of the attorney advertising cases considered thus far by the Supreme Court have been print media cases.[156] The print

---

(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

Washington RPC 7.1 (1985).

154. As Justice Brennan noted in *Zauderer*, while the majority agreed that the attorney's advertised contingent fee arrangement, "If there is no recovery, no legal fees are owed by our clients," was misleading in that the advertisement should have explained that legal costs are not legal fees and that legal costs would be owed regardless of the outcome, the deceptiveness in the language was far from obvious: "Several other states have approved the publication of [advertisements] . . . containing the *identical* no-legal fees statement, without even a suggestion that the statement might be deceptive." 105 S. Ct. at 2291 (Brennan, J., concurring in part and dissenting in part) (emphasis in original).

155. *Bates*, 433 U.S. at 402 (Powell, J., concurring in part and dissenting in part) (emphasis added).

156. *Bates*, 433 U.S. at 385 (newspaper advertisement); *In re* R.M.J., 455 U.S. at

media is therefore the safest area for attorney advertising. The Supreme Court has never found anything in that medium itself to be inherently misleading, going so far in *Zauderer* as to allow illustrations[157] and the offer of specific legal advice. The Court concluded further that the print medium could not reach the level of overreaching or undue influence that would justify a prophylactic law.

> 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 [than in-person solicitation] 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 substan-

---

196-97 (newspaper, mail, and yellow pages); *Zauderer*, 105 S. Ct. at 2271-72 (newspaper). Washington RPC 7.2 states that subject to Washington RPC 7.1, a lawyer may advertise through "public media, such as telephone directory, legal directory, newspaper or other periodical, . . . or through written communication not involving solicitation as defined in rule 7.3." The rule goes on to require that copies of such advertising be kept by the lawyer for two years.

157. The *Zauderer* majority stated:

> 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. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965) [material deception to give false impression of actual test to TV viewers by using mock test of shaving cream]. *See generally* E. KINTER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 158-173 (2d ed. 1978). 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.

Zauderer, 104 S. Ct. at 2281.

> tial 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.[158]

This is not to say, however, that any kind of printed advertisement will not give rise to a disciplinary action. Probably the greatest danger faced by the advertising lawyer is the inclusion of terms in an advertisement that are clear and nondeceptive to the lawyer but that may be misleading to the lay public. Thus, the Court in *Zauderer* upheld Ohio's requirement of explanatory language in an advertisement that mentioned contingent fee arrangements.[159]

An attorney must therefore draft an advertisement with painstaking attention to how such language would be perceived by a layman. An attorney, for example, might publish an advertisement virtually identical to the advertisement at issue in *Bates*.[160] The Court in *Bates* did not say that this advertisement was completely nondeceptive, merely that what potential deception existed did not justify Arizona's prophylactic regulation of attorney advertising. But as Justice Powell noted in dissent:

> In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine. Neither quantitative nor qualitative measurement of the service actually needed is likely to be feasible in advance. . . .
>
> This definitional problem is well illustrated by appellant's advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds and tax liabilities; and the disposition of other property rights.[161]

---

158. *Id.* at 2277.

159. "[W]e 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." *Id.* at 2282.

160. That advertisement listed "routine" legal services and the fees for such services. One service offered was: "Divorce or legal separation—uncontested (both spouses sign papers) $175.00 plus $20.00 court filing fee." *Bates*, 433 U.S. at 385.

161. *Id.* at 392-93 (Powell, J., dissenting) (citations omitted).

There can be little doubt that if Arizona had required a simple disclaimer that many divorce actions would not appropriately fall within the *routine* matter advertised, such a disclaimer requirement would have been upheld by the Supreme Court.[162]

Another potential problem area lies in advertising the quality of legal services. Justice Blackmun in *Bates* suggested that "advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction."[163]

The American Bar Association (ABA), however, expressed less caution regarding quality of services in its comment to the Model Rules of Professional Conduct: "[S]tatements that a lawyer's fees are reasonable, or that services will be rendered competently or promptly, can be verified by reference to objective standards independently established by the profession," but statements comparing the quality of a lawyer's services to another's services "can be misleading and require special caution."[164] Another view was expressed by Justice Powell, dissenting in *Bates*:

> The advertising of specified services at a fixed price is not the only infirmity of the advertisement at issue. . . . Appellants also assert that these services are offered at "very reasonable fees." That Court finds this to be an accurate statement since the advertised fee fell at the lower end of the range of customary charges. But the fee customarily charged in the locality for similar services has never been considered the sole determinant of the reasonableness of a fee. . . . This is because reasonableness reflects both the quantity and quality of the

---

162. The Court in *Zauderer* held that a disclosure requirement need only be "reasonably related" to the state's interest in preventing deceptive advertising. 105 S. Ct. at 2282. *But see Zauderer* 105 S. Ct. at 2288 (Brennan and Marshall, JJ., dissenting). Justice Brennan suggested that Ohio's disclaimer requirement (upheld by the majority) may have been so burdensome as to amount to a chilling of commercial speech and a violation of the first amendment. The requirement demanded that the advertisement fully disclose the terms of the attorney's contingent fee arrangement. Justice Brennan also pointed out that Zauderer's normal contingent fee contract was several pages long, and such full disclosure "would be entirely out of proportion to the State's legitimate interest in preventing potential deception." *Id.* However, this is the first time the Court has noted a concern with the chilling of commercial speech and the Court at this point is unlikely to frown upon reasonable disclaimer requirements.

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

164. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (Proposed Final Draft (1981)). (This comment was not included in the adopted ABA Model Rules of Professional Conduct.)

> service. A $195 fee may be reasonable for one divorce and unreasonable for another; and a $195 fee may be reasonable when charged by an experienced divorce lawyer and unreasonable when charged by a recent law school graduate . . . Whether a fee is "very reasonable" is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives—such as "fair," "moderate," "low-cost," or "lowest in town"—to describe the bargain they offer to the public.[165]

This Article cannot resolve the problem presented by the use of terms that may be objectively verifiable and yet in another light inherently subjective. This is a decision that must be considered carefully by the advertising attorney.[166]

But what of advertising claims that can be objectively verified, such as an attorney's jury trial success rate or average personal injury recovery? These are considerations of extreme importance to a layperson seeking an attorney, and therefore at first glance worthy of protection under the public's right to a free flow of information. However, even such naked facts can be extremely misleading and are very likely to be challenged by a state's disciplinary authority. An advertisement would survive such a challenge only if it contained sufficient information to make the statement non-deceptive. One possible approach would be to advertise an attorney's sixty-five percent jury trial success rate, but to add that many cases with less favorable evidence never went to trial and, therefore, that such a success rate was not indicative of the likelihood that a potential client's claim would be successful.

Thus, while the medium of print advertising is not inherently misleading, the unwary lawyer advertising in print may nevertheless deceive or mislead the public. The concerns raised above regarding the wording of a printed advertisement will apply to other communications media as well. This Article will examine only two other modes of advertising that present decep-

---

165. 433 U.S. at 394-95 (Powell, J., dissenting) (citations omitted).

166. According to WASHINGTON RPC 7.1(b) and (c), it is probably permissible to advertise that one is "competent," but probably impermissible to suggest that one is a "leading attorney in town." The distinction hinges on what exactly is an "unjustified expectation." The advertising attorney would wisely avoid any language approaching "puffing". Another problem arises with the "unjustified expectations" that may stem from statements that are factually substantiable. For example, a high success rate may portray quality but in fact reflect only the attorney's choice of sure winners.

tion problems unique to their nature: direct mailing and electronic advertising.

2. *Direct Mail and Solicitation*[167]

Direct mail advertising is perhaps of most interest to the new attorney seeking to build a practice within a limited geographical area. A direct mailing is much less costly than television advertising and is more likely than a newspaper advertisement to receive close attention.[168] The direct nature of the contact, however, presents questions as to whether in some instances a direct mailing amounts to an objectionable solicitation of business.

While it has been said that "all advertising either implicitly or explicitly involves solicitation,"[169] certain solicitation is prohibitable. Because the Supreme Court has not attempted a comprehensive definition of solicitation, to determine what is a prohibitable solicitation one must look to the effect of that solicitation.

(a) In-person solicitation

In *Ohralik v. Ohio State Bar Ass'n*,[170] the United States Supreme Court affirmed disciplinary measures against an attorney who had personally approached two accident victims—one of whom was still in the hospital—and advised them to accept his services. Such solicitation, the Court held, constituted overreaching, invaded the privacy of the accident victim, increased the likelihood of a conflict of interest for the attorney, and, if permitted, would be impossible to supervise.[171] The Court in *R.M.J.* cited *Ohralik* for the principle that the likelihood of

---

167. Washington RPC 7.3 defines solicitation:

> [C]ontact in person, by telephone, or telegraph, by letter or other writing, or by other communication directed to a specific recipient but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

168. *See generally* Stoltenberg & Whitman, *Direct Mail Advertising by Lawyers*, 45 U. PITTS. L. REV. 381, 416-19 (1984).

169. Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980), *cert. denied*, 450 U.S. 1026 (1981).

170. 436 U.S. 447 (1978). This is the only case in the field of attorney advertising where the Supreme Court upheld a blanket prohibition of a mode of advertising.

171. *Id.* at 461-62.

unprofessional conduct was so great in in-person solicitation that such solicitation could be forbidden altogether.[172]

(b) Third-party Solicitation

Certain dangers inherent in in-person solicitation also have been identified in third-party solicitation—that is, soliciting a third party to recommend an attorney to another. In *Koffler v. Joint Bar Ass'n*, the New York Court of Appeals declared unconstitutional the New York rule that prohibited direct mailings to prospective clients.[173] Nevertheless, the court criticized mailed solicitations by third persons: "For example, third person mailings will, if their ends are to be achieved, almost always involve in-person solicitation by the intermediary, and are, therefore, much closer to speech of the type *Ohralik* has held can be proscribed."[174]

The *Koffler* court also noted that a potential conflict of interest is created when the third party solicitor may be a valuable source of law business for the attorney.[175] In fact, the conflict of interest danger in such third party solicitation may be a greater problem than the danger of overreaching and is probably sufficient by itself to justify banning third party solicitation.

(c) General and Targeted Mailings

If anything can be concluded from the prior sections on solicitation, it is that solicitation is most dangerous when used to pressure someone to choose an attorney without allowing the potential client the breathing space to consider and choose wisely. A mailing to the residents of a particular city or neighborhood is unlikely to create the same kind of pressure as in-

---

172. *In re* R.M.J., 455 U.S. at 202.

173. Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 151, 412 N.E.2d 927, 934, 432 N.Y.S.2d 872, 878-79 (1980), *cert. denied*, 450 U.S. 1026 (1981).

174. *Id.* at 144 n.2, 412 N.E.2d at 930 n.2, 432 N.Y.S.2d at 874 n.2 (attorney wrote to real estate brokers, asking the brokers to refer clients to the attorney in connection with the sale or purchase of real property) (citation omitted). *Accord* Greene v. Grievance Committee 54 N.Y.2d 118, 126, 429 N.E.2d 390, 394, 444 N.Y.S.2d 883, 888 (1981).

175. *Koffler*, 51 N.Y.2d at 144-145, 412 N.E.2d at 930, 432 N.Y.S.2d at 874. *Accord* Spencer v. Honorable Justices, 579 F. Supp. 880, 890 (E.D. Pa. 1981). In Greene v. Grievance Committee, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S. 883 (1981), the New York Court of Appeals upheld a prohibition of third party solicitation largely because of the danger that the attorney could become dependent on the real estate broker for client referral.

person solicitation,[176] even though the communication is addressed to a particular individual.[177] On the other hand, a letter sent directly to an individual known to be in great need of legal counsel, such as a badly injured and vulnerable potential client, may constitute sufficient undue influence to equate it with an *Ohralik* type in-person solicitation.[178]

In *Spencer v. Honorable Justices*,[179] the district judge held the direct mail ban in Pennsylvania's Code of Professional Responsibility unconstitutional. The suit was initiated by an attorney who was a certified pilot and had a master's degree in computer science. The plaintiff attorney wanted to use targeted mailings to reach aircraft owners and pilots, and computer owners and operators.[180] In invalidating the Pennsylvania rules, the judge stated:

> [T]o prohibit lawyers from selecting as the recipients of their communications those who may be most in need of a lawyer's services would totally ignore the reason commercial speech is constitutionally protected—because it "serves to inform the public of the availability, nature, and prices of products and services and thus performs an indispensable role in the allocation of resources in a free enterprise system."[181]

The Court of Appeals of New York in *In re Von Wiegen*[182] took this reasoning one step further, holding that an attorney

---

176. Especially where an attorney stamps "This is an Advertisement" on the envelope, as suggested by Justice Powell in *R.M.J.*, 455 U.S. at 206 n.20.

177. Many state regulations ban solicitation, defining it in terms of a direct communication to a particular individual, regardless of the means of communication involved. *See, e.g.*, the MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1983).

178. The concern in *Ohralik* was that in-person solicitation did not allow the client "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." *Ohralik*, 436 U.S. at 457. A mailing directed to someone known to be in grave need of advice, confused and frightened, may be said to deprive that individual of a realistic opportunity for informed decisionmaking.

179. 579 F. Supp. 880 (1984).

180. It is not clear from Washington RPC 7.3 whether this *Spencer* type of targeted mailing would be allowable. Washington RPC 7.3 prohibits solicitation, which includes any communication directed to a specific recipient, but does not include letters addressed generally to persons "not known to need legal services of the kind provided by the lawyer . . . ." The *Spencer* type of targeted mailing is probably constitutionally defensible (not deceptive or misleading), yet may not be considered to have been "addressed generally" to a person not known to need that kind of advice.

181. *Spencer*, 579 F. Supp. at 891 (quoting Bates v. State Bar of Arizona, 433 U.S. at 364).

182. 63 N.Y.2d 163, 170, 470 N.E.2d 838, 841, 481 N.Y.S.2d 40, 43 (1984).

could not be prohibited from sending letters directly to the victims and families of those injured when the skywalk collapsed at the Hyatt-Regency Hotel in Kansas City, Missouri, in 1981. That court found little chance of the overreaching or invasion of privacy in solicitation by mail that had concerned the United States Supreme Court in *Ohralik*.[183]

Balanced against these "pro-informational" decisions encouraging communications with the public is the concern of the ABA that a "prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment and protective self interest."[184] The ABA Comment, noting the dangers of undue influence, intimidation, and overreaching inherent in target mailings, also makes the obvious point that direct private mail is difficult to police:

> Advertising is out in public view, thus subject to scrutiny by those who know the lawyer . . . . Direct, private communications from a lawyer to a prospective client are not subject to such third person scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.[185]

The ABA Comment states that there are no effective mechanisms to regulate such communications, and that neither stamping "advertising" on a letter nor requiring a filing with the Bar would be sufficient.[186] The Comment agrees, however, that "general mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings . . . ."[187]

There is some commonsense appeal to the views of the *Spencer* and *Von Wiegen* courts. Indeed, it may be difficult to imagine unduly influencing someone with a letter that has been stamped "advertising" or a letter containing other warnings as may be required by appropriate regulation.[188] Nonetheless, an

---

183. *Id.*

184. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 comment (1983). *See also* L. ANDREWS, *supra* note 96, at 71.

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

186. *Id.*

187. *Id.*

188. Indeed, the Supreme Court in *Zauderer*, in the section quoted at note 133, casts some doubt about a printed advertisement reaching the level of coercion banned in *Ohralik*. While the Court at that passage was not speaking directly to mailings, the infer-

attorney would be wise to avoid a direct mailing if the attorney has personal knowledge of an individual's particular need for legal services or if the mailing contains language that might unduly play upon the fears of a recipient.[189] It also would appear prudent to stamp the outside of an envelope with notice of advertisement contents to allay any fear that many recipients might feel upon receiving a letter from an attorney. Such stamping also would avoid any appearance of interfering with a recipient who is already represented by counsel.

3. *Electronic Media*[190]

The Supreme Court in *Bates* reserved judgment on television and radio advertising: "the special problems of advertising on the electronic broadcast media will warrant special consideration."[191] At the date of this writing, the Court has not again approached the question.

The debate on electronic media may be summed up as (1) encouraging use of television as an incomparable tool for reaching the segments of the population who most need to be educated about attorneys, and (2) damning television as an incomparable tool for manipulating huge numbers of people in subliminal ways that are impossible to supervise.

The Iowa Supreme Court, for example, recently upheld a regulation limiting electronic media advertisements to articulation by a single nondramatic voice (not the voice of the lawyer), with no other background sound. No visual display is allowed "except that allowed in print as articulated by the announcer," and the advertisement must be "dignified."[192]

The Iowa court pointed out the subliminal dangers of television and radio advertising:

> In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart . . . . It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even

---

ence may be drawn that the Court will not be likely to find such coercion where there is no in-person contact.

189. So as to avoid *Ohralik* concerns; *see supra* note 159.

190. Washington RPC 7.2(a) specifically allows advertising by radio or television, but prescribes no guidelines for such advertising.

191. Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977).

192. Committee on Professional Ethics v. Humphrey, 355 N.W.2d 565, 568-69 (Iowa 1984).

> if not listened to, but it may reasonably be thought greater than the impact of the written word.[193]

The opposite side of the debate was articulated in a decision by the Connecticut Supreme Court:

> Some members of our society are functionally illiterate. Many others, because of handicaps, financial circumstances, or personal preference, do not avail themselves of printed material. Thus, television and radio are the informational media of choice for many, and of necessity for others.[194]

The Connecticut court, unlike the Iowa court, was not weighing a partial regulation of the broadcast media, but was considering a total prohibition of such advertising. However, the court did hold that the appellant's television advertisements[195] were not false, fraudulent, or misleading.[196]

The ABA agreed with the Connecticut court's reasoning:

> Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.[197]

The Supreme Court in *Zauderer* did not approach the problem of electronic advertising. While discussing the deceptive potential of illustrations, however, the Court praised the Federal Trade Commission's ability to identify visually deceptive advertising. The Court cited sources that describe the Federal Trade Commission's efforts in regulating both illustration and television.[198] Nothing in its analysis of the illustration's subliminal

---

193. *Id.* at 569 n.3. *See also* Comment, *First Amendment Dialogue and Subliminal Messages*, 11 N.Y.U. REV. L. & SOC. CHANGE 331 (1982-83).

194. Grievance Committee v. Trantolo, 192 Conn. 15, 22, 470 A.2d 228, 234 (1984).

195. Those advertisements were complex productions that went well beyond the Iowa guidelines and were actually rather humorous.

196. Grievance Committee v. Trantolo, 192 Conn. 15, 22, 470 A.2d 228, 234 (1984).

197. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 comment (1983).

198. *Zauderer*, 105 S. Ct. at 2281. It could be argued that the Court's attitude as regards the success of the Federal Trade Commission implies that the Court sees no inherent difficulty in supervising the electronic media. On the other hand, Justice O'Connor, joined by the Chief Justice and Justice Rehnquist, specifically reserved judgment on the manageability of electronic media supervision, in *Zauderer*, 105 S. Ct. at

potential implies that the Court would approach television advertising in a more restrictive fasion.

The Supreme Court probably will not approve a complete ban of television advertising, given its emphasis on a popular right to a free flow of information, because television is arguably the only realistic way of extending legal information to a significant portion of the public. Even so, the deceptive potential of television or radio advertising must not be underemphasized. An attorney considering whether to use a snappy tune or attractive announcer should be aware that commercial speech is protected for the sake of its informational value and not its entertainment value. A parallel may be drawn to the Court's analysis in *Friedman v. Rogers*,[199] where the Court upheld a state ban on tradename use by optometrists. The Court rested its decision upon two major considerations: first, that the state had been able to show that some in the profession had used tradenames deceptively and, more importantly, that tradenames *have little informational value*.[200] The same may be said of an advertising jingle or any other advertisement component that has high deception potential and low informational value.

An attorney therefore would be less likely to run afoul of a state disciplinary authority by keeping any television or radio advertisement very simple, by paying close attention to maximizing information content, and by dispensing with frills that may only distract from the informational content of the advertisement.

VI. Conclusion

The rule applied by the Supreme Court in testing regulation of attorney advertising may be stated simply: States may ban speech that is false, misleading, or that concerns an illegal act. The Supreme Court to date has not upheld a ban on prophylactic regulation of printed or electronic advertising. But a state may require that an advertisement include such language as is

---

2294 (O'Connor, J., concurring in part and dissenting in part).

199. 440 U.S. 1 (1979).

200. Washington RPC 7.5, contrary to Model Rules of Professional Conduct Rule 7.5, allows no use of trade names other than the words "legal clinic." In Friedman v. Rogers, 440 U.S. at 15-16, the Court agreed that a prophylactic trade name measure was not violative of the first amendment. Still, it is possible that a ban of law firm trade names, absent a state history of abuse or deceptiveness, and without the facts of *Friedman*, might be unconstitutional.

necessary to render a potentially deceptive message nondeceptive. Most states, if not all states, prohibit attorney advertising that is deceptive or misleading, but much of the deceptive potential of advertising is not readily apparent to the attorney. The advertising attorney must therefore take extreme caution in designing promotional information. While an advertisement may be consistent with detailed advertising guidelines, it could easily violate an overall prohibition of deceptive or misleading advertising.

Television and radio advertisements have an extra dimension of uncertainty because of the imponderables of sound and visual imagery. The United States Supreme Court has not yet considered whether or not electronic media are inherently deceptive; the Court could well limit the scope or complexity of a television advertisement.[201] Lawyers wishing to advertise on television thus should focus on informational content and not visual or aural embellishments.

Those attorneys contemplating advertising should remember two things. First, the first amendment does not absolutely protect commercial speech. The commercial speaker may be heavily regulated and held accountable to a greater degree than the non-commercial speaker. Second, commercial speech is protected only for its information value. An attorney designing an advertisement should, for each facet of the advertisement, examine that facet for its information content.[202] If it does not inform, the attorney would be safer to do without it.

Those charged with the responsibility of regulating the legal profession would do well to discontinue total bans on specific types of advertising or exclusive laundry lists of what the lawyers may or may not advertise. Instead, the direction of appropriate regulation should be to require advertisers to provide more information to reduce the probability of the public being misled or deceived.

I would like to conclude this Article with a personal statement. The analysis concerning my interpretation of the cases in this area does not mean that I have pre-judged any disciplinary

---

201. Television advertising is not likely to be held completely prohibitable because of its unparalleled ability to reach poor segments of the populace. One must keep in mind, however, the potential for deceptiveness in the television format and the Iowa court rules discussed *supra* at notes 192-94 and accompanying text.

202. That is, for each divisible segment of the advertisement, each phrase, illustration, jingle, and so forth.

matter that may come before the Washington Supreme Court for decision. To my knowledge, there are no pending cases involving lawyer advertising. Also, this Article should in no way be considered my endorsement of lawyer advertising. Even though such advertising is constitutionally permissible to some undetermined extent, its effect on the public's perception of the profession has received too little attention. Lawyers' primary function is to provide the public with access to justice, give meaning to rule of law, and be the primary defenders of liberty. Advertising may tend to direct public attention away from these purposes of our profession and instead focus attention on issues involving the marketplace and the pocketbook. To the extent that advertising lawyers' services promotes public access to the rule of law and to justice, its effects will be salutory. To the extent that such advertising tends to place lawyers on a par with commercial products or makes lawyers look like barkers at a carnival, it will demean our profession.