Chapter 2

Advertising & Solicitation

1. Advertising

Model Rules of Professional Conduct

Rule 7.1: Communications Concerning a Lawyer's Services

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

Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

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

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

As part of its regulation of the Arizona Bar, the Supreme Court of that State has imposed and enforces a disciplinary rule that restricts advertising by attorneys. This case presents two issues: whether §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, forbid such state regulation, and whether the operation of the rule violates the First Amendment, made applicable to the States through the Fourteenth.

I

Appellants John R. Bates and Van O'Steen are attorneys licensed to practice law in the State of Arizona. As such, they are members of the appellee, the State Bar of Arizona. After admission to the bar in 1972, appellants worked as attorneys with the Maricopa County Legal Aid Society.

In March 1974, appellants left the Society and opened a law office, which they call a "legal clinic," in Phoenix. Their aim was to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid. In order to achieve this end, they would accept only routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. More complicated cases, such as contested divorces, would not be accepted. Because appellants set their prices so as to have a relatively low return on each case they handled, they depended on substantial volume.

After conducting their practice in this manner for two years, appellants concluded that their practice and clinical concept could not survive unless the availability of legal services at low cost was advertised and, in particular, fees were advertised. Consequently, in order to generate the necessary flow of business, that is, "to attract clients," appellants on February 22, 1976, placed an advertisement in the Arizona Republic, a daily newspaper of general circulation in the Phoenix metropolitan area. As may be seen, the advertisement stated that appellants were offering "legal services at very reasonable fees," and listed their fees for certain services.

Appellants concede that the advertisement constituted a clear violation of Disciplinary Rule 2-101(B). The disciplinary rule provides in part:

> (B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Upon the filing of a complaint initiated by the president of the State Bar, a hearing was held before a three member Special Local Administrative Committee. Although the committee took the position that it could not consider an attack on the validity of the rule, it allowed the parties to develop a record on which such a challenge could be based. The committee recommended that each of the appellants be suspended from the practice of law for not less than six months. Upon further review by the Board of Governors of the State Bar, the Board recommended only a one-week suspension for each appellant, the weeks to run consecutively.

Appellants then sought review in the Supreme Court of Arizona, arguing, among other things, that the disciplinary rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition, and that the rule infringed their First Amendment rights. The court rejected both claims. The plurality may have viewed with some skepticism the claim that a restraint on advertising might have an adverse effect on competition. But, even if the rule might otherwise violate the Act, the plurality concluded that the regulation was exempt from Sherman Act attack because the rule "is an activity of the State of Arizona acting as sovereign." The regulation thus was held to be shielded from the Sherman Act by the state-action exemption.

Turning to the First Amendment issue, the plurality noted that restrictions on professional advertising have survived constitutional challenge in the past. Although recognizing that *Virginia Pharmacy Board v. Virginia Consumer Council* and *Bigelow v. Virginia* held that commercial speech was entitled to certain protection under the First Amendment, the plurality focused on passages in those opinions acknowledging that special considerations might bear on the advertising of professional services by lawyers. The plurality apparently was of the view that the older decisions dealing with professional advertising survived these recent cas-

es unscathed, and held that Disciplinary Rule 2-101(B) passed First Amendment muster. Because the court, in agreement with the Board of Governors, felt that appellants' advertising "was done in good faith to test the constitutionality of DR 2-101(B)," it reduced the sanction to censure only.

Of particular interest here is the opinion of Mr. Justice Holohan in dissent. In his view, the case should have been framed in terms of "the right of the public as consumers and citizens to know about the activities of the legal profession," rather than as one involving merely the regulation of a profession. Observed in this light, he felt that the rule performed a substantial disservice to the public:

> Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. The rule at issue prevents access to such information by the public.

Although the dissenter acknowledged that some types of advertising might cause confusion and deception, he felt that the remedy was to ban that form, rather than all advertising. Thus, despite his "personal dislike of the concept of advertising by attorneys," he found the ban unconstitutional.

III The First Amendment

B

The issue presently before us is a narrow one. First, we need not address the peculiar problems associated with advertising claims relating to the quality of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. Appellee does not suggest, nor do we perceive, that appellants' advertisement contained claims, extravagant or otherwise, as to the quality of services. Accordingly, we leave that issue for another day. Second, we also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or "runners." Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. Hence, this issue also is not before us. Third, we note that appellee's criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney's name, address, and telephone number, office hours, and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information, and more, in the classified section of the telephone directory. We recognize, however, that an advertising diet limited to such spartan fare would provide scant nourishment.

The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed. Numerous justifications are proffered for the restriction of such price advertising. We consider each in turn:

1. The Adverse Effect on Professionalism. Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. In fact, the American Bar Association advises that an attorney should reach "a clear agreement with his client as to the basis of the fee charges to be made," and that this is to be done "as soon as feasible after a lawyer has been employed." If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.

Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of ser-

vices or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

2. The Inherently Misleading Nature of Attorney Advertising. It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at standardized rates. Indeed, until the decision of this Court in *Goldfarb v. Virginia State Bar*, the Maricopa County Bar Association apparently had a schedule of suggested minimum fees for standard legal tasks. We thus find of little force the assertion that advertising is misleading because of an inherent lack of standardization in legal services.

The second component of the argument—that advertising ignores the diagnostic role—fares little better. It is unlikely that many people go to an attorney merely to ascertain if they have a clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, 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 naiveté 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.

3. The Adverse Effect on the Administration of Justice. Advertising is said to have the undesirable effect of stirring up litigation. The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling societal repose. There is even a suggestion of barratry.

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

4. The Undesirable Economic Effects of Advertising. It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members.

These two arguments seem dubious at best. Neither distinguishes lawyers from others, and neither appears relevant to the First Amendment. The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.

The entry-barrier argument is equally unpersuasive. In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

5. The Adverse Effect of Advertising on the Quality of Service. It is argued that the attorney may advertise a given "package" of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs.

Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee's own prepaid Legal Services Program. Even if advertising leads to the creation of "legal clinics" like that of appellants'—clinics that emphasize standardized procedures for routine problems—it is possible that such clinics will improve service by reducing the likelihood of error.

6. The Difficulties of Enforcement. Finally, it is argued that the wholesale restriction is justified by the problems of enforcement if any other course is taken. Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action

by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the overseeing of advertising will be burdensome.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.

IV

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

Advertising that is false, deceptive, or misleading of course is subject to restraint. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, 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. Similar objections might justify restraints on in-person solicitation. We do 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. In sum,

we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

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.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I cannot join the Court's holding that under the First Amendment "truthful" newspaper advertising of a lawyer's prices for "routine legal services" may not be restrained. Although the Court appears to note some reservations, it is clear that within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined "routine legal services." In my view, this result is neither required by the First Amendment, nor in the public interest.

I

A

It has long been thought that price advertising of legal services inevitably will be misleading because such services are individualized with respect to content and quality and because the lay consumer of legal services usually does not know in advance the precise nature and scope of the services he requires. Although the Court finds some force in this reasoning and recognizes that "many services performed by attorneys are indeed unique," its first answer is the optimistic expression of hope that few lawyers "would or could advertise fixed prices for services of that type." But the Court's basic response in view of the acknowledged potential for deceptive advertising of "unique" services is to divide the immense range of the professional product of lawyers into two categories: "unique" and "routine." The only insight afforded by the opinion as to how one draws this line is the finding that services similar to those in appellants' advertisement are routine: "the

uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like." What the phrase "the like" embraces is not indicated. But the advertising of such services must, in the Court's words, flow "both freely and cleanly."

Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. 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 appellants' 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. The processing of court papers—apparently the only service appellants provide for $100—is usually the most straightforward and least demanding aspect of the lawyer's responsibility in a divorce case. More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem. Although those professional functions are not included within appellants' packaged routine divorce, they frequently fall within the concept of "advice" with which the lay person properly is concerned when he or she seeks legal counsel. The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inescapably will mislead many who respond to it. In the end, it will promote distrust of lawyers and disrespect for our own system of justice.

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 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. For reasons that are not readily apparent, the Court today discards the more discriminating approach which the profession long has used to judge the reasonableness of a fee, and substitutes an approach based on market averages. 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.

B

Even if one were to accept the view that some legal services are sufficiently routine to minimize the possibility of deception, there nonetheless remains a serious enforcement problem. The Court does recognize some problems. It notes that misstatements that may be immaterial in "other advertising may be found quite inappropriate in legal advertising" precisely because "the public lacks sophistication concerning legal services." It also recognizes that "advertising claims as to the quality of services are not susceptible of measurement or verification" and therefore "may be so likely to be misleading as to warrant restriction." After recognizing that problems remain in defining the boundary between deceptive and nondeceptive advertising, the Court then observes that the bar may be expected to have "a special role to play in assuring that advertising by attorneys flows both freely and cleanly."

The Court seriously understates the difficulties, and overestimates the capabilities of the bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful. There are some 400,000 lawyers in this country. They have been licensed by the States, and the organized bars within the States—operating under codes approved by the highest courts acting pursuant to statutory authority—have had the primary responsibility for assuring compliance with professional ethics and standards. The traditional means have been disciplinary proceedings conducted initially by voluntary bar committees subject to judicial review. In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proved to be extremely difficult.

The Court's almost casual assumption that its authorization of price advertising can be policed effectively by the bar reflects a striking underappreciation of the nature and magnitude of the disciplinary problem. The very reasons that tend to make price advertising of services inherently deceptive make its policing wholly impractical. With respect to commercial advertising, MR. JUSTICE STEWART, concurring in *Virginia Pharmacy*, noted that since "the factual claims contained in commercial price or product advertisements relate to tangible goods or services,

they may be tested empirically and corrected to reflect the truth." But there simply is no way to test "empirically" the claims made in appellants' advertisement of legal services. There are serious difficulties in determining whether the advertised services fall within the Court's undefined category of "routine services"; whether they are described accurately and understandably; and whether appellants' claim as to reasonableness of the fees is accurate. These are not factual questions for which there are "truthful" answers; in most instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion. These difficulties with appellants' advertisement will inhere in any comparable price advertisement of specific legal services. Even if public agencies were established to oversee professional price advertising, adequate protection of the public from deception, and of ethical lawyers from unfair competition, could prove to be a wholly intractable problem.

II

The Court emphasizes the need for information that will assist persons desiring legal services to choose lawyers. Under our economic system, advertising is the most commonly used and useful means of providing information as to goods and other services, but it generally has not been used with respect to legal and certain other professional services. Until today, controlling weight has been given to the danger that general advertising of such services too often would tend to mislead rather than inform. Moreover, there has been the further concern that the characteristics of the legal profession thought beneficial to society—a code of professional ethics, an imbued sense of professional and public responsibility, a tradition of self-discipline, and duties as officers of the courts—would suffer if the restraints on advertising were significantly diluted.

Pressures toward some relaxation of the proscription against general advertising have gained force in recent years with the increased recognition of the difficulty that low- and middle-income citizens experience in finding counsel willing to serve at reasonable prices. The seriousness of this problem has not been overlooked by the organized bar.

The Court observes, and I agree, that there is nothing inherently misleading in the advertisement of the cost of an initial consultation. Indeed, I would not limit the fee information to the initial conference. Although the skill and experience of lawyers vary so widely as to negate any equivalence between hours of service by different lawyers, variations in quality of service by duly licensed lawyers are inevitable. Lawyers operate, at least for the purpose of internal control and accounting, on the basis of specified hourly rates, and upon request—or in an appropriate case—most lawyers are willing to undertake employment at such rates. The advertisement of these rates, in an appropriate medium, duly designated, would not necessarily be misleading if this fee information also made clear that the total charge for the representation would depend on the number of hours devoted to

the client's problem—a variable difficult to predict. Where the price content of the advertisement is limited to the finite item of rate per hour devoted to the client's problem, the likelihood of deceiving or misleading is considerably less than when specific services are advertised at a fixed price.

III

Although I disagree strongly with the Court's holding as to price advertisements of undefined—and I believe undefinable—routine legal services, there are reservations in its opinion worthy of emphasis since they may serve to narrow its ultimate reach. First, the Court notes that it has not addressed "the peculiar problems associated with advertising claims relating to the quality of legal services." There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants' advertisement as entirely free from quality implications. Nevertheless the Court's reservation in this respect could be a limiting factor.

Second, the Court notes that there may be reasonable restrictions on the time, place, and manner of commercial price advertising. In my view, such restrictions should have a significantly broader reach with respect to professional services than as to standardized products. This Court long has recognized the important state interests in the regulation of professional advertising. And as to lawyers, the Court recently has noted that "the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Although the opinion today finds these interests insufficient to justify prohibition of all price advertising, the state interests recognized in these cases should be weighed carefully in any future consideration of time, place, and manner restrictions.

Finally, the 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.

IV

The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair ba-

sis, consistent with the public interest, is as old as the profession itself. It is one of considerable complexity, especially in view of the constantly evolving nature of the need for legal services. The problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no reason to believe that today's best answers will be responsive to future needs.

I am apprehensive, despite the Court's expressed intent to proceed cautiously, that today's holding will be viewed by tens of thousands of lawyers as an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis. Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers. Some members of the public may benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services "almost infinite in variety and nature." Until today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal First Amendment interests asserted by the Court.

Florida Bar v. Pape, 918 So.2d 240 (Fla. 2005)

Pariente, C.J.

In this case we impose discipline on two attorneys for their use of television advertising devices that violate the Rules of Professional Conduct. These devices, which invoke the breed of dog known as the pit bull, demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice.

We conclude that attorneys Pape and Chandler violated the Rules Regulating the Florida Bar by using the image of a pit bull and displaying the term "pit bull" as part of their firm's phone number in their commercial. Further, because the use of an image of a pit bull and the phrase "pit bull" in the firm's advertisement and logo does not assist the public in ensuring that an informed decision is made prior to the selection of the attorney, we conclude that the First Amendment does not prevent this Court from sanctioning the attorneys based on the rule violations. We determine that the appropriate sanctions for the attorneys' misconduct are public reprimands and required attendance at the Florida Bar Advertising Workshop.

Background and Procedural History

On January 12, 2004, The Florida Bar filed complaints against the attorneys, alleging that their law firm's television advertisement was an improper communication concerning the services provided, in violation of the Rules of Professional Conduct. The advertisement included a logo that featured an image of a pit bull wearing a spiked collar and prominently displayed the firm's phone number, 1-800-PIT-BULL. The Bar asserted that this advertisement violated the 2004 version of Rules Regulating the Florida Bar 4-7.2(b)(3) and 4-7.2(b)(4), which state:

> 3 Descriptive Statements. A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person's request or to information supplied to existing clients. 4 Prohibited Visual and Verbal Portrayals. Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.

The referee found that the attorneys did not violate rule 4-7.2(b)(3), relying on the distinction that the logo and telephone number "describe qualities of the respondent attorneys" but do not describe or characterize "the quality of the lawyer services." The referee also rejected the Bar's assertion that the ad violated rule 4-7.2(b)(4). After noting that pit bulls are perceived as "loyal, persistent, tenacious, and aggressive," the referee found these qualities

> objectively relevant to the selection of an attorney as they are informational, because these are qualities that a consuming public would want in a trial lawyer and the ad is not improperly manipulative. The advertisement is tastefully done, the logo is not unduly conspicuous in its replacement of an ampersand between respondents' names atop the TV screen, and the large print 1-800 number is an effective mnemonic device tailored to maximize responses from potential clients.

The referee also concluded that the ad was protected speech and therefore that an interpretation of rules to prohibit the ad would render the rules unconstitutional as applied.

Analysis

A. Violation of Attorney Advertising Rules

As a preliminary matter, the pit bull logo and 1-800-PIT-BULL telephone number in the ad by the attorneys do not comport with the general criteria for permissible attorney advertisements set forth in the comments to section 4-7 of the Rules of Professional Conduct. The rules contained in section 4-7 are designed to permit lawyer advertisements that provide objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types of cases the lawyer handles. The comment to rule 4-7.1 provides that "a lawyer's advertisement should provide only useful, factual information presented

in a nonsensational manner. Advertisements using slogans fail to meet these standards and diminish public confidence in the legal system." The television commercial at issue here uses both a sensationalistic image and a slogan, contrary to the purpose of section 4-7.

More specifically, the attorneys' ad violated rule 4-7.2(b)(3), which prohibits the use of statements describing or characterizing the quality of the lawyer's services. In *Florida Bar v. Lange*, we approved the referee's finding that an advertisement that stated "When the Best is Simply Essential" violated the predecessor provision to rule 4-7.2(b)(3) because it was self-laudatory and purported to describe the quality of the lawyer's services. In this case, the simultaneous display of the pit bull logo and the 1-800-PIT-BULL phone number conveys both the characteristics of the attorneys and the quality of the services they purport to provide. At the very least, the printed words and the image of a pitbull in the television commercial could certainly be perceived by prospective clients as characterizing the quality of the lawyers' services.

On this question we disagree with the referee, who distinguished the "quality of the lawyer's services" from the qualities (i.e., traits or characteristics) of the lawyer. We conclude that this is an artificial distinction which unduly limits the scope of the rule by interpreting "quality of the lawyer's services" in the narrowest sense. From the perspective of a prospective client unfamiliar with the legal system and in need of counsel, a lawyer's character and personality traits are indistinguishable from the quality of the services that the lawyer provides. A courteous lawyer can be expected to be well mannered in court, a hard-working lawyer well prepared, and a "pit bull" lawyer vicious to the opposition. In the attorneys' advertisement, the pit bull image appears in place of an ampersand between the attorneys' names, and the ad includes the use of the words "pit bull" in the attorneys' telephone number in large capital letters. The combined effect of these devices is to lead a reasonable consumer to conclude that the attorneys are advertising themselves as providers of "pit bull"-style representation. We consider this a characterization of the quality of the lawyers' services in violation of rule 4-7.2(b)(3).

We also conclude that the ad violates rule 4-7.2(b)(4), which requires that visual or verbal depictions be "objectively relevant" to the selection of an attorney, and prohibits depictions that are "deceptive, misleading, or manipulative." The comment to this rule explains that it

> prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. Illustrations permitted are informational and not misleading, and are therefore permissible. As an example, a drawing of a fist, to suggest the lawyer's ability to achieve results, would be barred. Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.

The logo of the pit bull wearing a spiked collar and the prominent display of the phone number 1-800-PIT-BULL are more manipulative and misleading than a drawing of a fist. These advertising devices would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information.

In addition, the image of a pit bull and the on-screen display of the words "PIT-BULL" as part of the firm's phone number are not objectively relevant to the selection of an attorney. The referee found that the qualities of a pit bull as depicted by the logo are loyalty, persistence, tenacity, and aggressiveness. We consider this a charitable set of associations that ignores the darker side of the qualities often also associated with pit bulls: malevolence, viciousness, and unpredictability. Further, although some may associate pit bulls with loyalty to their owners,[2] the manner in which the pit bull is depicted in the attorneys' ad in this case certainly does not emphasize this association. The dog, which is wearing a spiked collar, directly faces the viewer and is shown alone, with no indication that it is fulfilling its traditional role as "man's best friend."

Pit bulls have a reputation for vicious behavior that is borne of experience. According to a study published in the Journal of the American Veterinary Medical Association in 2000, pit bulls caused the greatest number of dog-bite-related fatalities between 1979 and 1998. The dangerousness of pit bulls has also been recognized in a number of court decisions.

In *State v. Peters*, the Third District Court of Appeal upheld a City of North Miami ordinance imposing substantial insurance, registration, and confinement obligations on owners of pit bulls. The City of North Miami ordinance contained findings that pit bulls have a greater propensity to bite humans than all other breeds, are extremely aggressive towards other animals, and have a natural tendency to refuse to terminate an attack once it has begun. The current Miami-Dade County ordinance provides that it is illegal to own a pit bull.

This Court would not condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar, or harm the opposing party, conduct that would violate our Rules of Professional Conduct. Yet this is precisely the type of unethical and unprofessional conduct that is conveyed by the image of a pit bull and the display of the 1-800-PIT-BULL phone number. We construe the prohibitions on advertising statements that characterize the quality of lawyer services and depictions that are false or misleading to prohibit a lawyer from advertising his or her services by suggesting behavior, conduct, or tactics that are contrary to our Rules of Professional Conduct.

Further, we reject the referee's finding that the use of the words "pit bull" in the phone number is merely a mnemonic device to help potential clients remember the attorneys' number. Phrase-based phone numbers are memorable because of the images and associations they evoke. The "1-800-PIT-BULL" phone number sticks in the memory precisely because of the image of the pit bull also featured in the ad, the association of pit bulls with the characteristics discussed herein, and the "go for the jugular" style of advocacy that some persons attribute to lawyers. In short, this is a manipulative and misleading use of what would otherwise be content-neutral information to create a nefarious association.

Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee's finding, images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system, and consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted. We therefore conclude that the 1-800-PIT-BULL ad aired by the attorneys violates rules 4-7.2(b)(3) and 4-7.2(b)(4).

B. First Amendment Protection of Lawyer Advertising

We also disagree with the referee's conclusion that the application of rules 4-7.2(b)(3) and 4-7.2(b)(4) to prohibit this advertisement violates the First Amendment. Lawyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified. This thread runs throughout the pertinent United State Supreme Court precedent.

The seminal lawyer advertising case is *Bates v. State Bar of Arizona*, which involved the advertising of fees for low cost legal services. In *Bates*, the Supreme Court held generally that attorney advertising "may not be subjected to blanket suppression," and more specifically that attorneys have the constitutional right to advertise their availability and fees for performing routine services. The cost of legal services, the Supreme Court concluded, would be "relevant information needed to reach an informed decision."

After *Bates*, in *R.M.J.* the Supreme Court considered a Missouri rule that restricted lawyer advertising to newspapers, periodicals, and the yellow pages, and limited the content of these advertisements to ten categories of information (name, address and telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee charged for specified "routine" services). Even the manner of listing areas of practice was restricted to a prescribed nomenclature. In violation of the state restrictions, the lawyer advertised areas of practice that did not use the prescribed terminology,

listed the states in which the lawyer was licensed, specified that he was admitted to practice before the United States Supreme Court, and did not restrict the recipients of announcement cards to lawyers, clients, former clients, personal friends, and relatives.

Writing for a unanimous Court, Justice Powell summarized the commercial speech doctrine in the context of advertising for professional services:

> Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. 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.

In holding the Missouri restrictions per se invalid as applied to the lawyer, the Supreme Court concluded that the state had no substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he or she was licensed to practice. The Court noted that this "is factual and highly relevant information." Although the Court found the lawyer's listing in large capital letters that he was a member of the Bar of the Supreme Court of the United States to be "somewhat more troubling" and in "bad taste," this alone could not be prohibited without a finding by the Missouri Supreme Court that "such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court."

In *Zauderer*, the Supreme Court addressed whether a state could discipline a lawyer who ran newspaper advertisements containing nondeceptive illustrations and legal advice. One advertisement published the lawyer's willingness to represent women injured from the use of the Dalkon Shield intrauterine device. The parties had stipulated that the advertisement was entirely accurate.

In holding that the lawyer could not be disciplined on the basis of the content of his advertisement, the Supreme Court observed that the advertisement did not promise results or suggest any special expertise but merely conveyed that the lawyer was representing women in Dalkon Shield litigation and was willing to represent other women with similar claims. Turning to the lawyer's use of an illustration of the Dalkon Shield, the Court first held that illustrations are entitled to the same First Amendment protection as that afforded to verbal commercial speech. The Court then concluded that "because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction."

The most recent United States Supreme Court decision to address restrictions on the content of lawyer advertising involved an attorney who held himself out as certified by the National Board of Trial Advocacy. The state supreme court had concluded that the claim of NBTA certification was "misleading because it tacitly attests to the qualifications of petitioner as a civil trial advocate." The state court had not addressed "whether NBTA certification constituted reliable, verifiable evidence of petitioner's experience as a civil trial advocate." After applauding the development of state and national certification programs, a plurality of the Supreme Court concluded that the facts as to NBTA certification were "true and verifiable." The plurality pointed out the important "distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality." A majority of the Court concluded that the letterhead was not actually or inherently misleading, and thus that the attorney could not be prohibited from holding himself out as a civil trial specialist certified by the NBTA.

The pit bull logo and "1-800-PIT-BULL" phone number are in marked contrast to the illustration of the Dalkon Shield intrauterine device at issue in *Zauderer*, which the United States Supreme Court found to be "an accurate representation and have no features that are likely to deceive, mislead, or confuse the reader." The Dalkon Shield illustration informed the public that the lawyer represented clients in cases involving this device. The "pit bull" commercial produced by the attorneys in this case contains no indication that they specialize in either dog bite cases generally or in litigation arising from attacks by pit bulls specifically. Consequently, the logo and phone number do not convey objectively relevant information about the attorneys' practice. Instead, the image and words "pit bull" are intended to convey an image about the nature of the lawyers' litigation tactics. We conclude that an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment.

Conclusion

We disapprove the referee's finding that the television commercial at issue is constitutionally protected speech that does not violate our attorney advertising rules. We find John Robert Pape and Marc Andrew Chandler guilty of violating the Rules Regulating the Florida Bar. We order that each attorney receive a public reprimand, which shall be administered by the Board of Governors of The Florida Bar upon proper notice to appear. We also direct Pape and Chandler to attend and complete the Florida Bar Advertising Workshop within six months of the date of this opinion.

Note on *Pape*

The Florida Bar revisted the "pit bull" issue in 2021. Florida Bar v. Robert Laurence Pelltier, No. 2021-00,159(4A) (March 2, 2021). In his answer to the Bar complaint, Pelletier to the Bar complaint, Pelletier asserted that he "was unaware of said case law until recently. Furthermore, Respondent was unaware that using a nickname such as "Pitbull" was a violation of The Florida Bar Rules." He also contended that "The Florida Bar rule(s) sited [sic] violate the first amendment freedom of speech section." He ultimately entered a guilty plea and received a reprimand.

Hunter v. Virginia State Bar, 744 S.E.2d 611 (Va. 2013)

Opinion by Justice Cleo E. Powell

In this appeal of right by an attorney from a Virginia State Bar ("VSB") disciplinary proceeding, we consider whether an attorney's blog posts are commercial speech, whether an attorney may discuss public information related to a client without the client's consent, and whether the panel ordered the attorney to post a disclaimer that is insufficient under Rule 7.2(a)(3) of the Virginia Rules of Professional Conduct.

I. Facts and Proceedings

Horace Frazier Hunter, an attorney with the law firm of Hunter & Lipton, PC, authors a trademarked blog titled "This Week in Richmond Criminal Defense," which is accessible from his law firm's website, www.hunterlipton.com. This blog, which is not interactive, contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients. Nowhere in these posts or on his website did Hunter include disclaimers.

As a result of Hunter's blog posts on his website, the VSB launched an investigation. During discussions with the VSB about whether his blog constituted legal advertising, Hunter wrote a letter to the VSB offering to post *a disclaimer* on *one page* of his website:

> "*This Week in Richmond Criminal Defense* is not an advertisement[;] it is a blog. The views and opinions expressed on this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case."

However, the negotiations stalled and no disclaimers were posted at that time.

On March 24, 2011, the VSB charged Hunter with violating Rules 7.1, 7.2, 7.5, and 1.6 by his posts on this blog. Specifically, the VSB argued that he violated rules 7.1 and 7.2 because his blog posts discussing his criminal cases were inherently misleading as they lacked disclaimers. The VSB also asserted that Hunter violated Rule 1.6 by revealing information that could embarrass or likely be detrimental to his former clients by discussing their cases on his blog without their consent.

In a hearing on October 18, 2011, the VSB presented evidence of Hunter's alleged violations. The VSB presented a former client who testified that he did not consent to information about his cases being posted on Hunter's blog and believed that the information posted was embarrassing or detrimental to him, despite the fact that all such information had previously been revealed in court. The VSB investigator testified that other former clients felt similarly. The VSB also entered all of the blog posts Hunter had posted on his blog to date. At that time, none of the posts entered contained disclaimers. Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these cases and identified that fact in the posts. In nineteen of these twenty-two posts, Hunter also specifically named his law firm. One of these posts described a case where a family hired Hunter to represent them in a wrongful death suit and the remaining twenty-one of these posts described criminal cases. In every criminal case described, Hunter's clients were either found not guilty, plea bargained to an agreed upon disposition, or had their charges reduced or dismissed.

At the hearing, Hunter testified that he has many reasons for writing his blog—including marketing, creation of a community presence for his firm, combatting any public perception that defendants charged with crimes are guilty until proven innocent, and showing commitment to criminal law. Hunter stated that he had offered to post a disclaimer on his blog, but the offered disclaimer was not satisfactory to the VSB. Hunter admitted that he only blogged about his cases that he won. He also told the VSB that he believed that using the client's name is important to give an accurate description of what happened. Hunter told the VSB that he did not obtain consent from his clients to discuss their cases on his blog because all the information that he posted was public information.

Following the hearing, the VSB held that Hunter violated Rule 1.6 by "disseminating client confidences" obtained in the course of representation without consent to post. Specifically, the VSB found that the information in Hunter's blog posts "would be embarrassing or be likely to be detrimental" to clients and he did not receive consent from his clients to post such information. The VSB further held that Hunter violated Rule 7.1. The VSB's conclusion that Hunter's website contained legal advertising was based on its factual finding that "[t]he postings of [Hunter's] case wins on his webpage advertise[d] cumulative case results." Moreover, the VSB found that at least one purpose of the website was commercial. The VSB further held that he violated Rule 7.2 by "disseminating case results in advertising without

the required disclaimer" because the one that he proposed to the VSB was insufficient. The VSB imposed a public admonition with terms including a requirement that he remove case specific content for which he has not received consent and post a disclaimer that complies with Rule 7.2(a)(3) on all case-related posts.

Hunter appealed to a three judge panel of the circuit court and the court heard argument. The court disagreed with Hunter that *de novo* was the proper standard of review and instead applied the following standard: "whether the decision is contrary to the law or whether there is substantial evidence in the record upon which the district committee could reasonably have found as it did." The court further ruled that the VSB's interpretation of Rule 1.6 violated the First Amendment and dismissed that charge. The court held VSB's interpretation of Rules 7.1 and 7.2 do not violate the First Amendment and that the record contained substantial evidence to support the VSB's determination that Hunter had violated those rules. The court imposed a public admonition and required Hunter to post the following disclaimer: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." This appeal followed.

II. Analysis

A. Whether "[t]he Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States."

Rule 7.1(a)(4), which is the specific portion of the Rule that the VSB argued that Hunter violated, states:

> a. A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> ....
>
> 4. 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.

The VSB also argues that Hunter violated the following subsection of Rule 7.2(a)(3):

> a. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be consid-

> ered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> ....
>
> 3. advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

In response to these allegations, Hunter contends that speech concerning the judicial system is "quintessentially 'political speech'" which is within the marketplace of ideas. Hunter asserts that the Supreme Court of the United States has twice declined to answer whether political speech is transformed into commercial speech simply because one of multiple motives is commercial. Specifically, he argues that his blog posts are not commercial because

> 1. the [Supreme Court of the United States'] formal commercial speech definitions focus heavily on whether the speech does *no more* than propose a commercial transaction; (2) the [Supreme Court of the United States'] commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is *solely* driven by commercial interest; (3) the [Supreme Court of the United States] has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the [Supreme Court of the United States] has warned that when commercial and political elements of speech are inextricably intertwined, the heightened protection applicable to the political the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political.

The VSB responds that Hunter's blog posts are inherently misleading commercial speech.

"Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which ... this Court ... exercise[s] de novo review." An appellate Court must independently examine the entire record in First Amendment cases to ensure that "'a forbidden intrusion on the field of free expression'" has not occurred.

Turning to Hunter's argument that his blog posts are political, rather than commercial, speech, we note that "[t]he existence of 'commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.'" However, when speech that is both commercial and political is combined, the resulting speech is not automatically entitled to the level of protections afforded political speech.

While it is settled that attorney advertising is commercial speech, *Bates* and its progeny were decided in the era of traditional media. In recent years, however, advertising has taken to new forms such as websites, blogs, and other social media forums, like Facebook and Twitter.

Thus, we must examine Hunter's speech to determine whether it is commercial speech, specifically, lawyer advertising.

> Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Simply because the speech is an advertisement, references a specific product, or is economically motivated does not necessarily mean that it is commercial speech. "The combination of *all* these characteristics, however, provides strong support for the ... conclusion that [some blog posts] are properly characterized as commercial speech" even though they also discuss issues important to the public.

Certainly, not all advertising is necessarily commercial, e.g., public service announcements.However, all commercial speech is necessarily advertising. Indeed, the Supreme Court of the United States has said that "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees."

Here, Hunter's blog posts, while containing some political commentary, are commercial speech. Hunter has admitted that his motivation for the blog is at least in part economic. The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client. He unques-

tionably references a specific product, i.e., his lawyering skills as twenty-two of his twenty-five case related posts describe cases that he has successfully handled. Indeed, in nineteen of these posts, he specifically named his law firm in addition to naming himself as counsel.

Moreover, the blog is on his law firm's commercial website rather than an independent site dedicated to the blog. The website uses the same frame for the pages openly soliciting clients as it does for the blog, including the firm name, a photograph of Hunter and his law partner, and a "contact us" form. The homepage of the website on which Hunter posted his blog states only:

> Do you need Richmond attorneys?
>
> Hunter & Lipton, CP [sic] is a law practice in Richmond, Virginia specializing in litigation matters from administrative agency hearings to serious criminal cases. As experienced Richmond attorneys, we bring a genuine desire to help those who find themselves in difficult situations. Our partnership was founded on the idea that everyone, no matter what the circumstance, deserves a zealous advocate to fight on his or her behalf.
>
> People make mistakes, and may even find themselves in situations not of their own making. And for these people, the system can be extraordinarily unforgiving and unjust—but you do not have to face this system alone.
>
> If you find yourself in a difficult legal situation, the Richmond attorneys of Hunter & Lipton, LLP would consider it a privilege to represent you. Please contact our office with any questions or to schedule a consultation.

This non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments. Instead, in furtherance of his commercial pursuit, Hunter invites the reader to "contact us" the same way one seeking legal representation would contact the firm through the website.

Thus, the inclusion of five generalized, legal posts and three discussions about cases that he did not handle on his non-interactive blog, no more transform Hunter's otherwise self-promotional blog posts into political speech, "than opening sales presentations with a prayer or a Pledge of Allegiance would convert them into religious or political speech." Indeed, unlike situations and topics where the subject matter is inherently, inextricably intertwined, Hunter chose to comingle sporadic political statements within his self-promoting blog posts in an attempt to camouflage the true commercial nature of his blog. "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." When considered as a whole, the economically motivated blog overtly proposes a commercial transaction that is an advertisement of a specific product.

Having determined that Hunter's blog posts discussing his cases are commercial speech,

> we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. 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.

The VSB does not contend, nor does the record indicate, that Hunter's posts do not concern lawful activity; rather, the VSB argues that the posts are inherently misleading. While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading. "Because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Of the thirty posts that were on his blog at the time of the VSB hearing, twenty-two posts named himself as counsel and discussed cases that he handled. With one exception, in all of these posts, he described the successful results that he obtained for his clients. While the States may place an absolute prohibition on inherently misleading advertising, "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." Here, the VSB's own remedy of requiring Hunter to post disclaimers on his blog posts demonstrates that the information could be presented in a way that is not misleading or deceptive.

Thus, we must examine whether the VSB has a substantial governmental interest in regulating these blog posts. The Supreme Court of the United States has recognized that "'if the naiveté 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.'" Indeed, the Supreme Court of the United States expressed concern that the public may lack the sophistication to discern misstatements as to the quality of a lawyer's services. Therefore, the VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter.

Because the VSB's governmental interest is substantial, we must now determine "whether the regulation directly advances the governmental interest asserted." The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. Rules 7.1 and 7.2. This requirement directly advances the VSB's governmental interest.

Finally, we must determine whether the VSB's regulations are no more restrictive than necessary. The Supreme Court of the United States has approved the use of disclaimers or explanations. The disclaimers mandated by the VSB

> shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3). This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimers required by the VSB are "not more extensive than is necessary to serve that interest."

Hunter's blog posts discuss lawful activity and are not inherently misleading, but the VSB has asserted a substantial governmental interest to protect the public from potentially misleading lawyer advertising. These regulations directly advance this interest and are not more restrictive than necessary, unlike outright bans on advertising. We thus conclude that the VSB's Rules 7.1 and 7.2 do not violate the First Amendment. As applied to Hunter's blog posts, they are constitutional and the panel did not err.

B. Whether the circuit court erred in holding that the VSB's application of Rule 1.6 to Hunter's blog violated his First Amendment rights.

Rule 1.6(a) states, that with limited exceptions,

> a lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation....

The VSB argues that the circuit court erred in holding that its interpretation of Rule 1.6 violates the First Amendment and that Hunter violated that rule by disclosing potentially embarrassing information about his clients on his blog "in order to advance his personal economic interests." VSB argues that lawyers, as officers of the Court, are prohibited from engaging in speech that might otherwise be constitutionally protected. Thus, the VSB's interpretation of Rule 1.6 involves two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client. Hunter is charged with disseminating the later type of information. In response to these allegations, Hunter argues that the VSB's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as conclud-

ed matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not.

The cases cited by VSB in support of its position differ from this case in a substantial way; the cases relied upon by VSB involve pending proceedings. It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a *pending* case.

"A presumption of openness inheres in the very nature of a criminal trial under our system of justice." Moreover,

> a trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB concedes that all of the information that was contained within Hunter's blog was public information and would have been protected speech had the news media or others disseminated it. In deciding whether the circuit court erred, we are required to make our "own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." The VSB's interpretation of Rule 1.6 fails these standards even when we

> balance "whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved,'"

State action that punishes the publication of truthful information can rarely survive constitutional scrutiny.

The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the ev-

idence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment.

C. Whether the circuit court erred in requiring Hunter to post a disclaimer on his website that does not comply with the requirements of Rule 7.2(3) and therefore does not eliminate the misleading nature of his blog posts.

The VSB argues that the single disclaimer that the circuit court ordered Hunter to post on his blog was insufficient to comport with Rule 7.2(a)(3) because it did not eliminate the misleading nature of the posts.

As we have already concluded, Hunter's blogs are commercial speech and, thus, constitute lawyer advertising. When advertising cumulative or specific case results, Rule 7.2 requires that a disclaimer

> shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Rule 7.2(a)(3).

Here, the VSB required Hunter to post a disclaimer that complies with Rule 7.2(a)(3) on *all* case-related posts. This means that Hunter's disclaimers "shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results." Rule 7.2(a)(3). The circuit court, however, imposed the following disclaimer to be posted once: "Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case."

While the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the circuit court is not itself formatted and presented in that manner. Even so, Hunter does not argue that the disclaimer required by the circuit court is an appropriate, less restrictive means of regulating his speech and, therefore, we decline to so hold. Based on the arguments presented to it, the circuit court erred by imposing a disclaimer that conflicted with the rule.

III. Conclusion

For the foregoing reasons, we hold that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VSB's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule.

Justice LEMONS, with whom Justice McCLANAHAN joins, dissenting in part.

I agree with the majority's resolution of the Rule 1.6 issue. However, I dissent from the majority's determination that Hunter is guilty of violating Rules 7.1(a)(4) and 7.2(a)(3) and that Hunter must post a disclaimer that complies with Rule 7.2(a)(3).

Rule 7.1 governs communications concerning a lawyer's services. Rule 7.1(a)(4) states:

> a. A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
>
> ....
>
> 4. 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.

Rule 7.2 is only applicable to advertisements. Rule 7.2(a)(3) states:

> a. Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
>
> ....
>
> 3. advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or

> predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

The First Amendment

I believe that the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar concedes that if Hunter's blog is political speech, the First Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog.

Speech concerning the criminal justice system has always been viewed as political speech. "It would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." As political speech, Hunter uses his blog to give detailed descriptions of how criminal trials in Virginia are conducted. He notes how the acquittal of some of his clients has exposed flaws in the criminal justice system.

The majority asserts that because Hunter only discusses his victories, his blog is commercial. The majority does not give sufficient credit to the fact that Hunter uses the outcome of his cases to illustrate his views of the system. Hunter testified that one of the reasons he maintained the blog was to combat "the public perception that is clearly on the side that people are guilty until they're proven innocent." For example, when discussing one of the cases where his client was found not guilty, he concludes the post by explaining that this case is an "example of how innocent people are often accused of committing some of the most serious crimes. That is why it is important not to judge the guilt of an individual until all the evidence has been presented both for and against him."

The majority compares Hunter's detailed discussion of criminal trials and how these outcomes illustrate the need to hold government to its burden of proof, with "opening a sales presentation[] with a prayer or a Pledge of Allegiance." The majority proposes that his blog is not transformed into political speech simply be-

cause he included eight posts about legal issues and cases he was not involved in. However, the twenty-two posts discussing criminal trials in Virginia are political speech in their own right, and are not dependent upon the content of the other eight posts.

The majority also focuses on the location of Hunter's blog, and asserts that because the blog is accessed through the law firm's website and is not interactive, that demonstrates the blog is commercial in nature. While going through the law firm's website is one way to access the blog, it is also possible to go directly to the blog without navigating through the firm's website. Further, the fact that the blog is not interactive in no way commercializes the speech.

Many businesses have websites. It is not uncommon for websites to include links to related news articles or editorials. Merely because an article may be accessed through a commercial portal does not change the content of the article. It is the content of speech and the motivation of the speaker that determines the level of protection to which speech is entitled.

Hunter conceded that one of the purposes of the blog was marketing. Although the United States Supreme Court has never clearly decided whether political speech is transformed into commercial speech because one of the multiple motivations of the speaker is marketing and self-promotion, its jurisprudence leads to the conclusion that Hunter's speech is not commercial.

The traditional test for determining whether speech is commercial is if the speech "[does] *no more than* propose a commercial transaction." Hunter's articles clearly do more than propose a commercial transaction. They contain detailed discussions of criminal trials in this Commonwealth, and Hunter's commentary and critique of the criminal justice system.

The United States Supreme Court has held that commercial speech is "expression related *solely* to the economic interests of the speaker and its audience." Marketing is not Hunter's sole motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about "the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens."

Even if marketing was Hunter's sole motivation, economic motivation cannot be the basis for determining whether otherwise political speech is protected. The United States Supreme Court recognized in *Pittsburgh Press Co.* that merely having some economic motivation does not create a basis for regulation. "If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment."

The mere existence of some commercial motivation does not change otherwise political speech into commercial speech. "[S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." In discussing the economic motivations at issue in *Sorrell v. IMS Health, Inc.*, the United States Supreme Court recognized that "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression."

Even if there is some commercial content to Hunter's speech, any commercial content is intertwined with political speech. When commercial and political elements are intertwined in speech, the heightened scrutiny test must apply to all of the speech.

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

In this case, the policies the Bar advances have no persuasive force when applied to Hunter's blog. The purposes of Rules 7.1 and 7.2 are to protect the public from misleading communications and advertisements concerning a lawyer's services. Hunter's articles contain detailed descriptions of the trials, along with his commentary on the criminal justice system. The Bar produced no evidence that anyone has found Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it as advertisement material.

Accordingly, I would hold that Hunter's speech is political, is entitled to the heightened scrutiny test, and that he cannot be forced to include the advertising disclaimer under Rule 7.2 that the Bar seeks to force upon his writings.

2. Solicitation

Model Rules of Professional Conduct

Rule 7.3: Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.6: Political Contributions to Obtain Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

NAACP v. Button, 371 U.S. 415 (1963)

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case originated in companion suits by the National Association for the Advancement of Colored People, Inc. (NAACP), and the NAACP Legal Defense and Educational Fund, Inc. (Defense Fund), brought in 1957 in the United States District Court for the Eastern District of Virginia. The suits sought to restrain the enforcement of Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session, on the ground that the statutes, as applied to the activities of the plaintiffs, violated the Fourteenth Amendment. A three-judge court convened pursuant to 28 U. S. C. § 2281, after hearing evidence and making fact-findings, struck down Chapters 31, 32 and 35 but abstained from passing upon the validity of Chapters 33 and 36 pending an authoritative interpretation of these statutes by the Virginia courts. The complainants thereupon petitioned in the Circuit Court of the City of Richmond to declare Chapters 33 and 36 inapplicable to their activities, or, if applicable, unconstitutional. The record in the Circuit Court was that made before the three-judge court supplemented by additional evidence. The Circuit Court held the chapters to be both applicable and constitutional. The holding was sustained by the Virginia Supreme Court of Appeals as to Chapter 33, but reversed as to Chapter 36, which was held unconstitutional under both state and federal law. Thereupon the Defense Fund returned to the Federal District Court, where its case is presently pending, while the NAACP filed the instant petition. We granted certiorari, and ordered reargument this Term. [T]he only issue before us is the constitutionality of Chapter 33 as applied to the activities of the NAACP.

There is no substantial dispute as to the facts; the dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33, as construed and applied by the Virginia Supreme Court of Appeals to include NAACP's activities within the statute's ban against "the improper solicitation of any legal or professional business."

The NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some 1,000 active unincorporated branches throughout the Nation. The corporation is licensed to do business in Virginia, and has 89 branches

there. The Virginia branches are organized into the Virginia State Conference of NAACP Branches (the Conference), an unincorporated association, which in 1957 had some 13,500 members. The activities of the Conference are financed jointly by the national organization and the local branches from contributions and membership dues. NAACP policy, binding upon local branches and conferences, is set by the annual national convention.

The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

The Conference ordinarily will finance only cases in which the assisted litigant retains an NAACP staff lawyer to represent him. The Conference maintains a legal staff of 15 attorneys, all of whom are Negroes and members of the NAACP. The staff is elected at the Conference's annual convention. Each legal staff member must agree to abide by the policies of the NAACP, which, insofar as they pertain to professional services, limit the kinds of litigation which the NAACP will assist. Thus the NAACP will not underwrite ordinary damages actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal rather than fully desegregated public school facilities. The staff decides whether a litigant, who may or may not be an NAACP member, is entitled to NAACP assistance. The Conference defrays all expenses of litigation in an assisted case, and usually, although not always, pays each lawyer on the case a per diem fee not to exceed $60, plus out-of-pocket expenses. The assisted litigant receives no money from the Conference or the staff lawyers. The staff member may not accept, from the litigant or any other source, any other compensation for his services in an NAACP-assisted case. None of the staff receives a salary or retainer from the NAACP; the per diem fee is paid only for professional services in a particular case. This per diem payment is smaller than the compensation ordinarily received for equivalent private professional work. The actual conduct of assisted litigation is under the control of the attorney, although the NAACP continues to be concerned that the outcome of the lawsuit should be consistent with NAACP's policies already described. A client is free at any time to withdraw from an action.

The members of the legal staff of the Virginia Conference and other NAACP or Defense Fund lawyers called in by the staff to assist are drawn into litigation in various ways. One is for an aggrieved Negro to apply directly to the Conference or the legal staff for assistance. His application is referred to the Chairman of the legal staff. The Chairman, with the concurrence of the President of the Conference, is

authorized to agree to give legal assistance in an appropriate case. In litigation involving public school segregation, the procedure tends to be different. Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual, after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund. In effect, then, the prospective litigant retains not so much a particular attorney as the "firm" of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.

These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to "go all the way" in any possible litigation that may ensue. While the Conference in these ways encourages the bringing of lawsuits, the plaintiffs in particular actions, so far as appears, make their own decisions to become such.

Statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849. These provisions outlaw, *inter alia,* solicitation of legal business in the form of "running" or "capping." Prior to 1956, however, no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for many years in substantially the manner described. In 1956, however, the legislature amended, by the addition of Chapter 33, the provisions of the Virginia Code forbidding solicitation of legal business by a "runner" or "capper" to include, in the definition of "runner" or "capper," an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. The Virginia Supreme Court of Appeals held that the chapter's purpose "was to strengthen the existing statutes to further control the evils of solicitation of legal business . . . ." The court held that the activities of NAACP, the Virginia Conference, the Defense Fund, and the lawyers furnished by them, fell within, and could constitutionally be proscribed by, the chapter's expanded definition of improper solicitation of legal business, and also violated Canons 35 and 47 of the American Bar Association's Canons of Professional Ethics, which the court had adopted in 1938. Specifically the court held that, under the expanded defini-

tion, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted "fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control." Finally, the court restated the decree of the Richmond Circuit Court.

II.

Petitioner challenges the decision of the Supreme Court of Appeals on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. More specifically, petitioner claims that the chapter infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. We also think petitioner has standing to assert the corresponding rights of its members.

We reverse the judgment of the Virginia Supreme Court of Appeals. We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.

A.

We meet at the outset the contention that "solicitation" is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right "to engage in association for the advancement of beliefs and ideas." We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. We have said that the Sherman Act does not apply to certain concerted activities of railroads "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws" because "such a construction of the Sherman Act would raise important constitutional questions," specifically, First Amendment questions. And we have refused to countenance compelled disclosure of a person's political associations in language closely applicable to the instant case:

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups . . . ."

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

B.

Our concern is with the impact of enforcement of Chapter 33 upon First Amendment freedoms. We start, of course, from the decree of the Supreme Court of Appeals. Although the action before it was one basically for declaratory relief, that court not only expounded the purpose and reach of the chapter but held concretely that certain of petitioner's activities had, and certain others had not, violated the chapter. These activities had been explored in detail at the trial and were spread out plainly on the record. We have no doubt that the opinion of the Supreme Court of Appeals in the instant case was intended as a full and authoritative construction of Chapter 33 as applied in a detailed factual context. That construction binds us. For us, the words of Virginia's highest court are the words of the statute. We are not left to speculate at large upon the possible implications of bare statutory language.

But it does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful by the Supreme Court of Appeals are constitutionally privileged. If the line drawn by the decree between the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression. Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

We read the decree of the Virginia Supreme Court of Appeals in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia on the second oral argument that the supreme Court of Appeals construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation, or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33. In the second place, the decree does not seem to rest on the fact that the attorneys were organized as a staff and paid by petitioner. The decree expressly forbids solicitation on behalf of "any particular attorneys" in addition to attorneys retained or compensated by the NAACP. In the third place, although Chapter 33 purports to prohibit only solicitation by attorneys or their "agents," it defines agent broadly as anyone who "represents" another in his dealings with a third person. Since the statute appears to depart from the common-law concept of the agency relationship and since the Virginia court did not clarify the statutory definition, we cannot say that it will not be applied with the broad sweep which the statutory language imports.

We conclude that under Chapter 33, as authoritatively construed by the Supreme Court of Appeals, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the decree purports to allow, namely, acquaint "persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit . . . ." For if the lawyers, members or sympathizers also appeared in or had any connection with any litigation supported with NAACP funds contributed under the provision of the decree by which the NAACP is not prohibited "from contributing money to persons to assist them in commencing or further prosecuting such suits," they plainly would risk (if lawyers) disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of "solicitation," to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

It is apparent, therefore, that Chapter 33 as construed limits First Amendment freedoms. As this Court said in *Thomas v. Collins*, "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a "labor organizer." He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. This Court held that the registration requirement as applied to his activities was constitutionally invalid. In the instant case, members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff. Like Thomas, the Association and its members were advocating lawful means of vindicating legal rights.

We hold that Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. In so holding, we reject two further contentions of respondents. The first is that the Virginia Supreme Court of Appeals has guaranteed free expression by expressly confirming petitioner's right to continue its advocacy of civil-rights litigation. But in light of the whole decree of the court, the guarantee is of purely speculative value. As construed by the Court, Chapter 33, at least potentially, prohibits every cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

C.

The second contention is that Virginia has a subordinating interest in the regulation of the legal profession, embodied in Chapter 33, which justifies limiting petitioner's First Amendment rights. Specifically, Virginia contends that the NAACP's activities in furtherance of litigation, being "improper solicitation" under the state statute, fall within the traditional purview of state regulation of professional conduct. However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by Chapter 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court of Appeals has said, that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. In *NAACP v. Alabama ex rel. Patterso,*, we said, "In the domain of these indispensable liberties, whether of speech, press, or association the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." Later, in *Bates v. Little Rock*, we said, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Most recently, in *Louisiana ex rel. Gremillion v. NAACP*, we reaffirmed this principle: ". . . regulatory measures . . . no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against government in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious. Even more modern, subtler regulations of unprofessional conduct or interference with professional relations, not involving malice, would not touch the activities at bar; regulations which reflect hostility to stirring up litigation have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest. Hostility still exists to stirring up private litigation where it promotes the use of legal machinery to oppress: as, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; to harass large companies through a multiplicity of small claims; or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly or through intermediaries, in such misuses of the legal process is conduct traditionally condemned as injurious to the public. And beyond this, for a lawyer to attempt to reap gain by urging another to engage in private litigation has also been condemned: that seems to be the import of Canon 28, which the Virginia Supreme Court of Appeals has adopted as one of its Rules.

Objection to the intervention of a lay intermediary, who may control litigation or otherwise interfere with the rendering of legal services in a confidential relationship, also derives from the element of pecuniary gain. Fearful of dangers thought to arise from that element, the courts of several States have sustained regulations aimed at these activities. We intimate no view one way or the other as to the merits of those decisions with respect to the particular arrangements against which they are directed. It is enough that the superficial resemblance in form between those arrangements and that at bar cannot obscure the vital fact that here the entire arrangement employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants; compare *NAACP v. Alabama ex rel. Patterson*, where we said:

> [the NAACP] and its members are in every practical sense identical. The Association, which provides in its constitution that 'any person who is in accordance with [its] principles and policies . . .' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor proof that any assisted Negro litigants have desired but have been prevented from retaining, the services of other counsel. We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to be the kind of interest or motive which induces criminal conduct.

We conclude that although the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities. *A fortiori,* nothing in this record justifies the breadth and vagueness of the Virginia Supreme Court of Appeals' decree.

A final observation is in order. Because our disposition is rested on the First Amendment as absorbed in the Fourteenth, we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause. That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. This Virginia Act is not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N. A. A. C. P. because it promotes desegregation of the races. Our decision in *Brown v. Board of Education*,, holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, was announced May 17, 1954. The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge.

The bill, here involved, was one of five that Virginia enacted "as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees." Those are the words of Judge Soper, writing for the court in *N.A.A.C.P. v. Patty*. He did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision, starting with the Report of the Gray Commission on November 11, 1955. He mentioned the "interposition resolution" passed by the General Assembly on February 1, 1956, the constitutional amendment made to carry out the recommendation of the Report of the Gray Commission, and the address of the Governor before the General Assembly that enacted the five laws, including the present one. These are too lengthy to repeat here. But they make clear the purpose of the present law—as clear a purpose to evade our prior decisions as was the legislation in *Lane v. Wilson*, another instance of a discriminatory state law. The fact that the contrivance used is subtle and indirect is not material to the question. "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." There we looked to the origins of the state law and the setting in which it operated to find its discriminatory nature. It is proper to do the same here.

Discrimination also appears on the face of this Act. The line drawn in § 54-78 is between an organization which has "no pecuniary right or liability" in a judicial proceeding and one that does. As we said in *N.A.A.C.P. v. Alabama*, the N.A.A.C.P. and its members are "in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views." Under the statute those who protect a "pecuniary right or liability" against unconstitutional invasions may indulge in "the solicitation . . . of business for . . . [an] attorney," while those who protect other civil rights may not. This distinction helps make clear the purpose of the legislation, which, as Judge Soper said, was part of the program of "massive resistance" against *Brown v. Board of Education*.

Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978)

MR. JUSTICE POWELL delivered the opinion of the Court.

In *Bates v. State Bar of Arizona*, this Court held that truthful advertising of "routine" legal services is protected by the First and Fourteenth Amendments against blanket prohibition by a State. The Court expressly reserved the question of the permissible scope of regulation of "in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or 'runners.'" Today we answer part of the question so reserved, and hold that the State—or the Bar acting with state authorization— constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

I

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

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

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

On his way appellant detoured to the scene of the accident, where he took a set of photographs. He also picked up a tape recorder, which he concealed under his raincoat before arriving at the McClintocks' residence. Once there, he re-examined their automobile insurance policy, discussed with them the law applicable to passengers, and explained the consequences of the fact that the driver who struck Carol's car was an uninsured motorist. Appellant discovered that the McClintocks' insurance policy would provide benefits of up to $12,500 each for Carol and Wanda Lou under an uninsured-motorist clause. Mrs. McClintock acknowledged that both Carol and Wanda Lou could sue for their injuries, but recounted to appellant that "Wanda swore up and down she would not do it." The McClintocks also told appellant that Carol had phoned to say that appellant could "go ahead" with her representation. Two days later appellant returned to Carol's hospital room to have her sign a contract, which provided that he would receive one-third of her recovery.

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

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

Both Carol McClintock and Wanda Lou Holbert filed complaints against appellant with the Grievance Committee of the Geauga County Bar Association. The County Bar Association referred the grievance to appellee, which filed a formal complaint with the Board of Commissioners on Grievances and Discipline of the Supreme

Court of Ohio. After a hearing, the Board found that appellant had violated Disciplinary Rules (DR) 2-103 (A) and 2-104 (A) of the Ohio Code of Professional Responsibility. The Board rejected appellant's defense that his conduct was protected under the First and Fourteenth Amendments. The Supreme Court of Ohio adopted the findings of the Board, reiterated that appellant's conduct was not constitutionally protected, and increased the sanction of a public reprimand recommended by the Board to indefinite suspension.

The decision in *Bates* was handed down after the conclusion of proceedings in the Ohio Supreme Court. We noted probable jurisdiction in this case to consider the scope of protection of a form of commercial speech, and an aspect of the State's authority to regulate and discipline members of the bar, not considered in *Bates*. We now affirm the judgment of the Supreme Court of Ohio.

II

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

A

Appellant contends that his solicitation of the two young women as clients is indistinguishable, for purposes of constitutional analysis, from the advertisement in *Bates*. Like that advertisement, his meetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer to pursue their claims. According to appellant, such conduct is "presumptively an exercise of his free speech rights" which cannot be curtailed in the absence of proof that it actually caused a specific harm that the State has a compelling interest in preventing. Brief for Appellant 39. But in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment.

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

Moreover, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity. Neither *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of these kinds of commercial regulation.

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

As applied in this case, the Disciplinary Rules are said to have limited the communication of two kinds of information. First, appellant's solicitation imparted to Carol McClintock and Wanda Lou Holbert certain information about his availability and the terms of his proposed legal services. In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no op-

portunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual. The admonition that "the fitting remedy for evil counsels is good ones" is of little value when the circumstances provide no opportunity for any remedy at all. In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services; it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decisionmaking."

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

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

B

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

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

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

We need not discuss or evaluate each of these interests in detail as appellant has conceded that the State has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct." We agree that protection of the public from these aspects of solicitation is a legitimate and important state interest.

III

Appellant's concession that strong state interests justify regulation to prevent the evils he enumerates would end this case but for his insistence that none of those evils was found to be present in his acts of solicitation. He challenges what he characterizes as the "indiscriminate application" of the Rules to him and thus attacks the validity of DR 2-103 (A) and DR 2-104 (A) not facially, but as applied to his acts of solicitation. And because no allegations or findings were made of the specific wrongs appellant concedes would justify disciplinary action, appellant terms

his solicitation "pure," meaning "soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent each of them," without more. Appellant therefore argues that we must decide whether a State may discipline him for solicitation *per se* without offending the First and Fourteenth Amendments.

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury on Wanda Holbert or Carol McClintock. His assumption flows from the premise that nothing less than actual proved harm to the solicited individual would be a sufficiently important state interest to justify disciplining the attorney who solicits employment in person for pecuniary gain.

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

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

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

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

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

MR. JUSTICE MARSHALL, concurring in part and concurring in the judgment.

I agree with the majority that the factual circumstances presented by appellant Ohralik's conduct "pose dangers that the State has a right to prevent," and accordingly that he may constitutionally be disciplined by the disciplinary Board and the Ohio Supreme Court. I further agree that appellant Primus' activity in advising a Medicaid patient who had been sterilized that the American Civil Liberties Union (ACLU) would be willing to represent her without fee in a lawsuit against the doctor and the hospital was constitutionally protected and could not form the basis for disciplinary proceedings. I write separately to highlight what I believe these cases do and do not decide, and to express my concern that disciplinary rules not be utilized to obstruct the distribution of legal services to all those in need of them.

I

While both of these cases involve application of rules prohibiting attorneys from soliciting business, they could hardly have arisen in more disparate factual settings. The circumstances in which appellant Ohralik initially approached his two clients provide classic examples of "ambulance chasing," fraught with obvious potential for misrepresentation and overreaching. Ohralik, an experienced lawyer in practice for over 25 years, approached two 18-year-old women shortly after they had been in a traumatic car accident. One was in traction in a hospital room; the other had just been released following nearly two weeks of hospital care. Both were in pain and may have been on medication; neither had more than a high school education. Certainly these facts alone would have cautioned hesitation in pressing one's employment on either of these women; any lawyer of ordinary prudence should have carefully considered whether the person was in an appropriate condition to make a decision about legal counsel.

But appellant not only foisted himself upon these clients; he acted in gross disregard for their privacy by covertly recording, without their consent or knowledge, his conversations with Wanda Lou Holbert and Carol McClintock's family. This conduct, which appellant has never disputed, is itself completely inconsistent with an attorney's fiduciary obligation fairly and fully to disclose to clients his activities affecting their interests. And appellant's unethical conduct was further compounded by his pursuing Wanda Lou Holbert, when her interests were clearly in potential conflict with those of his prior-retained client, Carol McClintock.

What is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed that solicitation and the means by which he accomplished it. Appropriately, the Court's actual holding in *Ohralik* is a limited one: that the solicitation of business,

under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State. In this much of the Court's opinion in *Ohralik*, I join fully.

II

The facts in *Primus*, by contrast, show a "solicitation" of employment in accordance with the highest standards of the legal profession. Appellant in this case was acting, not for her own pecuniary benefit, but to promote what she perceived to be the legal rights of persons not likely to appreciate or to be able to vindicate their own rights. The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available "where the litigant is in need of assistance, or where important issues are involved in the case," has long been established. Indeed, Judge Soper in *Ades* was able to recite numerous instances in which lawyers, including Alexander Hamilton, Luther Martin, and Clarence Darrow, volunteered their services in aid of indigent persons or important public issues. The American Bar Association Code of Professional Responsibility itself recognizes that the "responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer," and further states that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged."

In light of this long tradition of public interest representation by lawyer volunteers, I share my Brother BLACKMUN'S concern with respect to Part VI of the Court's opinion, and believe that the Court has engaged in unnecessary and unfortunate dicta therein. It would be most undesirable to discourage lawyers—so many of whom find time to work only for those clients who can pay their fees—from continuing to volunteer their services in appropriate cases. Moreover, it cannot be too strongly emphasized that, where "political expression and association" are involved,"a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." For these reasons, I find particularly troubling the Court's dictum that "a State may insist that lawyers not solicit on behalf of lay organizations that exert control over the actual conduct of any ensuing litigation." This proposition is by no means self-evident, has never been the actual holding of this Court, and is not put in issue by the facts presently before us. Thus, while I agree with much of the Court's opinion in *Primus*, I cannot join in the first paragraph of Part VI.

III

Our holdings today deal only with situations at opposite poles of the problem of attorney solicitation. In their aftermath, courts and professional associations may reasonably be expected to look to these opinions for guidance in redrafting the disciplinary rules that must apply across a spectrum of activities ranging from clear-

ly protected speech to clearly proscribable conduct. A large number of situations falling between the poles represented by the instant facts will doubtless occur. In considering the wisdom and constitutionality of rules directed at such intermediate situations, our fellow members of the Bench and Bar must be guided not only by today's decisions, but also by our decision last Term in *Bates v. State Bar of Arizona*. There, we held that truthful printed advertising by private practitioners regarding the availability and price of certain legal services was protected by the First Amendment. In that context we rejected many of the general justifications for rules applicable to one intermediate situation not directly addressed by the Court today—the commercial, but otherwise "benign" solicitation of clients by an attorney.

The state bar associations in both of these cases took the position that solicitation itself was an evil that could lawfully be proscribed. While the Court's *Primus* opinion does suggest that the only justification for nonsolicitation rules is their prophylactic value in preventing such evils as actual fraud, overreaching, deception, and misrepresentation, I think it should be made crystal clear that the State's legitimate interests in this area are limited to prohibiting such substantive evils.

A

Like rules against advertising, rules against solicitation substantially impede the flow of important information to consumers from those most likely to provide it—the practicing members of the Bar. Many persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem, and, even if they "perceive a need," many "do not obtain counsel . . . because of an inability to locate a competent attorney." Notwithstanding the injurious aspects of Ohralik's conduct, even his case illustrates the potentially useful, information-providing aspects of attorney solicitation: Motivated by the desire for pecuniary gain, but informed with the special training and knowledge of an attorney, Ohralik advised both his clients (apparently correctly) that, although they had been injured by an uninsured motorist, they could nonetheless recover on the McClintocks' insurance policy. The provision of such information about legal rights and remedies is an important function, even where the rights and remedies are of a private and commercial nature involving no constitutional or political overtones.

In view of the similar functions performed by advertising and solicitation by attorneys, I find somewhat disturbing the Court's suggestion in *Ohralik* that in-person solicitation of business, though entitled to some degree of constitutional protection as "commercial speech," is entitled to less protection under the First Amendment than is "the kind of advertising approved in *Bates*." The First Amendment informational interests served by solicitation, whether or not it occurs in a purely commercial context, are substantial, and they are entitled to as much protection as the interests we found to be protected in *Bates*.

B

Not only do prohibitions on solicitation interfere with the free flow of information protected by the First Amendment, but by origin and in practice they operate in a discriminatory manner. As we have noted, these constraints developed as rules of "etiquette" and came to rest on the notion that a lawyer's reputation in his community would spread by word of mouth and bring business to the worthy lawyer. The social model on which this conception depends is that of the small, cohesive, and homogeneous community; the anachronistic nature of this model has long been recognized. If ever this conception were more generally true, it is now valid only with respect to those persons who move in the relatively elite social and educational circles in which knowledge about legal problems, legal remedies, and lawyers is widely shared.

The impact of the nonsolicitation rules, moreover, is discriminatory with respect to the suppliers as well as the consumers of legal services. Just as the persons who suffer most from lack of knowledge about lawyers' availability belong to the less privileged classes of society, so the Disciplinary Rules against solicitation fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporateoriented firms. Indeed, some scholars have suggested that the rules against solicitation were developed by the professional bar to keep recently immigrated lawyers, who gravitated toward the smaller, personal injury practice, from effective entry into the profession. In light of this history, I am less inclined than the majority appears to be, to weigh favorably in the balance of the State's interests here the longevity of the ban on attorney solicitation.

C

By discussing the origin and impact of the nonsolicitation rules, I do not mean to belittle those obviously substantial interests that the State has in regulating attorneys to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy. But where honest, unpressured "commercial" solicitation is involved—a situation not presented in either of these cases—I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment ordinarily protects. While the State's interest in regulating in-person solicitation may be somewhat greater than its interest in regulating printed advertisements, these concededly legitimate interests might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation. For example, the Justice Department has suggested that the disciplinary rules be reworded "so as to *permit* all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous."

To the extent that in-person solicitation of business may constitutionally be subjected to more substantial state regulation as to time, place, and manner than printed advertising of legal services, it is not because such solicitation has "traditionally" been banned, nor because one form of commercial speech is of less value than another under the First Amendment. Rather, any additional restrictions can be justified only to the degree that dangers which the State has a right to prevent are actually presented by conduct attendant to such speech, thus increasing the relative "strength of the State's countervailing interest in prohibition," *ante*, at 455. As the majority notes, and I wholeheartedly agree, these dangers are amply present in the *Ohralik* case.

Accordingly, while I concur in the judgments of the Court in both of these cases, I join in the Court's opinions only to the extent and with the exceptions noted above.

In re Primus, 436 U.S. 412 (1978)

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP v. Button*, we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," and was an officer of and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU). She received no compensation for her work on behalf of the ACLU, but was paid a retainer as a legal consultant for the South Carolina Council on Human Relations (Council), a nonprofit organization with offices in Columbia.

During the summer of 1973, local and national newspapers reported that pregnant mothers on public assistance in Aiken County, S. C., were being sterilized or threatened with sterilization as a condition of the continued receipt of medical assistance under the Medicaid program. Concerned by this development, Gary Allen, an Aiken businessman and officer of a local organization serving indigents, called

the Council requesting that one of its representatives come to Aiken to address some of the women who had been sterilized. At the Council's behest, appellant, who had not known Allen previously, called him and arranged a meeting in his office in July 1973. Among those attending was Mary Etta Williams, who had been sterilized by Dr. Clovis H. Pierce after the birth of her third child. Williams and her grandmother attended the meeting because Allen, an old family friend, had invited them and because Williams wanted "[t]o see what it was all about...." At the meeting, appellant advised those present, including Williams and the other women who had been sterilized by Dr. Pierce, of their legal rights and suggested the possibility of a lawsuit.

Early in August 1973 the ACLU informed appellant that it was willing to provide representation for Aiken mothers who had been sterilized. Appellant testified that after being advised by Allen that Williams wished to institute suit against Dr. Pierce, she decided to inform Williams of the ACLU's offer of free legal representation. Shortly after receiving appellant's letter, dated August 30, 1973—the centerpiece of this litigation—Williams visited Dr. Pierce to discuss the progress of her third child who was ill. At the doctor's office, she encountered his lawyer and at the latter's request signed a release of liability in the doctor's favor. Williams showed appellant's letter to the doctor and his lawyer, and they retained a copy. She then called appellant from the doctor's office and announced her intention not to sue. There was no further communication between appellant and Williams.

On October 9, 1974, the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) filed a formal complaint with the Board, charging that appellant had engaged in "solicitation in violation of the Canons of Ethics" by sending the August 30, 1973, letter to Williams. Appellant denied any unethical solicitation and asserted, *inter alia*, that her conduct was protected by the First and Fourteenth Amendments and by Canon 2 of the Code of Professional Responsibility of the American Bar Association (ABA). The complaint was heard by a panel of the Board on March 20, 1975. The State's evidence consisted of the letter, the testimony of Williams, and a copy of the summons and complaint in the action instituted against Dr. Pierce and various state officials, Following denial of appellant's motion to dismiss, App. 77-82, she testified in her own behalf and called Allen, a number of ACLU representatives, and several character witnesses.

The panel filed a report recommending that appellant be found guilty of soliciting a client on behalf of the ACLU, in violation of Disciplinary Rules (DR) 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) of the Supreme Court of South Carolina, and that a private reprimand be issued. It noted that "[t]he evidence is inconclusive as to whether [appellant] solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages." The panel determined that appellant violated DR 2-103 (D) (5) "by attempting to solicit a client for a non-

profit organization which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization." Appellant also was found to have violated DR 2-104 (A) (5) because she solicited Williams, after providing unsolicited legal advice, to join in a prospective class action for damages and other relief that was to be brought by the ACLU.

After a hearing on January 9, 1976, the full Board approved the panel report and administered a private reprimand. On March 17, 1977, the Supreme Court of South Carolina entered an order which adopted verbatim the findings and conclusions of the panel report and increased the sanction, *sua sponte*, to a public reprimand.

We now reverse.

II

This appeal concerns the tension between contending values of considerable moment to the legal profession and to society. Relying upon *NAACP v. Button* and its progeny, appellant maintains that her activity involved constitutionally protected expression and association. In her view, South Carolina has not shown that the discipline meted out to her advances a subordinating state interest in a manner that avoids unnecessary abridgment of First Amendment freedoms. Appellee counters that appellant's letter to Williams falls outside of the protection of *Button*, and that South Carolina acted lawfully in punishing a member of its Bar for solicitation.

The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" For example, we decide today in *Ohralik v. Ohio State Bar Assn.* that the States may vindicate legitimate regulatory interests through proscription, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons.

Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.

III

In *NAACP v. Button*, the Supreme Court of Appeals of Virginia had held that the activities of members and staff attorneys of the National Association for the Advancement of Colored People (NAACP) and its affiliate, the Virginia State Conference of NAACP Branches (Conference), constituted "solicitation of legal business" in violation of state law. Although the NAACP representatives and staff attorneys had "a right to peaceably assemble with the members of the branches and other groups to discuss with them and advise them relative to their legal rights in matters concerning racial segregation," the court found no constitutional protection for efforts to "solicit prospective litigants to authorize the filing of suits" by NAACP-compensated attorneys.

This Court reversed: "We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of [state law] and the Canons of Professional Ethics." The solicitation of prospective litigants, many of whom were not members of the NAACP or the Conference, for the purpose of furthering the civil-rights objectives of the organization and its members was held to come within the right "'to engage in association for the advancement of beliefs and ideas.'"

Since the Virginia statute sought to regulate expressive and associational conduct at the core of the First Amendment's protective ambit, the *Button* Court insisted that "government may regulate in the area only with narrow specificity." The Attorney General of Virginia had argued that the law merely (i) proscribed control of the actual litigation by the NAACP after it was instituted, and (ii) sought to prevent the evils traditionally associated with common-law maintenance, champerty, and barratry. The Court found inadequate the first justification because of an absence of evidence of NAACP interference with the actual conduct of litigation, or neglect or harassment of clients, and because the statute, as construed, was not drawn narrowly to advance the asserted goal. It rejected the analogy to the common-law offenses because of an absence of proof that malicious intent or the prospect of pecuniary gain inspired the NAACP-sponsored litigation. It also found a lack of proof that a serious danger of conflict of interest marked the relationship between the NAACP and its member and nonmember Negro litigants. The Court concluded that "although the [NAACP] has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from [the NAACP's] activities, which can justify the broad prohibitions which it has imposed."

Subsequent decisions have interpreted *Button* as establishing the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." The Court has held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal representation to their members. And "lawyers accepting employment under [such plans] have a like protection which the State cannot abridge." Without denying the power of the State to take measures to correct the substantive evils of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, and lay interference that potentially are present in solicitation of prospective clients by lawyers, this Court has required that "broad rules framed to protect the public and to preserve respect for the administration of justice" must not work a significant impairment of "the value of associational freedoms."

IV

We turn now to the question whether appellant's conduct implicates interests of free expression and association sufficient to justify the level of protection recognized in *Button* and subsequent cases. The Supreme Court of South Carolina found appellant to have engaged in unethical conduct because she "'solicit[ed] a client for a non-profit organization, which, as its primary purpose, renders legal services, where respondent's associate is a staff counsel for the non-profit organization.'" It rejected appellant's First Amendment defenses by distinguishing *Button* from the case before it. Whereas the NAACP in that case was primarily a "'political'" organization that used "'litigation as an adjunct to the overriding political aims of the organization,'" the ACLU "'has as one of its primary purposes the rendition of legal services.'" The court also intimated that the ACLU's policy of requesting an award of counsel fees indicated that the organization might "'benefit financially in the event of successful prosecution of the suit for money damages.'"

Although the disciplinary panel did not permit full factual development of the aims and practices of the ACLU, the record does not support the state court's effort to draw a meaningful distinction between the ACLU and the NAACP. From all that appears, the ACLU and its local chapters, much like the NAACP and its local affiliates in *Button*, "[engage] in extensive educational and lobbying activities" and "also [devote] much of [their] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [their] declared purposes." The court below acknowledged that "'the ACLU has only entered cases in which substantial civil liberties questions are involved ....'" It has engaged in the defense of unpopular causes and unpopular defendants and has represented individuals in litigation

that has defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoners' rights, military law, amnesty, and privacy. For the ACLU, as for the NAACP, "litigation is not a technique of resolving private differences"; it is "a form of political expression" and "political association."

We find equally unpersuasive any suggestion that the level of constitutional scrutiny in this case should be lowered because of a possible benefit to the ACLU. The discipline administered to appellant was premised solely on the possibility of financial benefit to the organization, rather than any possibility of pecuniary gain to herself, her associates, or the lawyers representing the plaintiffs in the *Walker v. Pierce* litigation. It is conceded that appellant received no compensation for any of the activities in question. It is also undisputed that neither the ACLU nor any lawyer associated with it would have shared in any monetary recovery by the plaintiffs in *Walker v._Pierce*. If Williams had elected to bring suit, and had been represented by staff lawyers for the ACLU, the situation would have been similar to that in *Button*, where the lawyers for the NAACP were "organized as a staff and paid by" that organization.

Contrary to appellee's suggestion, the ACLU's policy of requesting an award of counsel fees does not take this case outside of the protection of *Button*. Although the Court in *Button* did not consider whether the NAACP seeks counsel fees, such requests are often made both by that organization and by the NAACP Legal Defense Fund, Inc. In any event, in a case of this kind there are differences between counsel fees awarded by a court and traditional fee-paying arrangements which militate against a presumption that ACLU sponsorship of litigation is motivated by considerations of pecuniary gain rather than by its widely recognized goal of vindicating civil liberties. Counsel fees are awarded in the discretion of the court; awards are not drawn from the plaintiff's recovery, and are usually premised on a successful outcome; and the amounts awarded often may not correspond to fees generally obtainable in private litigation. Moreover, under prevailing law during the events in question, an award of counsel fees in federal litigation was available only in limited circumstances. And even if there had been an award during the period in question, it would have gone to the central fund of the ACLU. Although such benefit to the organization may increase with the maintenance of successful litigation, the same situation obtains with voluntary contributions and foundation support, which also may rise with ACLU victories in important areas of the law. That possibility, standing alone, offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees.

Appellant's letter of August 30, 1973, to Mrs. Williams thus comes within the generous zone of First Amendment protection reserved for associational freedoms. The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. As *Button* indicates, and as appellant offered to prove at the disciplinary hearing, the

efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," including "advis[ing] another that his legal rights have been infringed and refer[ring] him to a particular attorney or group of attorneys ... for assistance".

V

South Carolina's action in punishing appellant for soliciting a prospective litigant by mail, on behalf of the ACLU, must withstand the "exacting scrutiny applicable to limitations on core First Amendment rights ...." South Carolina must demonstrate "a subordinating interest which is compelling," and that the means employed in furtherance of that interest are "closely drawn to avoid unnecessary abridgment of associational freedoms."

Appellee contends that the disciplinary action taken in this case is part of a regulatory program aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients, and to be present on the record before us. We do not dispute the importance of these interests. This Court's decision in *Button* makes clear, however, that "broad prophylactic rules in the area of free expression are suspect," and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." Because of the danger of censorship through selective enforcement of broad prohibitions, and "because First Amendment freedoms need breathing space to survive, government may regulate in [this] area only with narrow specificity."

A

The Disciplinary Rules in question sweep broadly. Under DR 2-103 (D) (5), a lawyer employed by the ACLU or a similar organization may never give unsolicited advice to a lay person that he retain the organization's free services, and it would seem that one who merely assists or maintains a cooperative relationship with the organization also must suppress the giving of such advice if he or anyone associated with the organization will be involved in the ultimate litigation. Notwithstanding appellee's concession in this Court, it is far from clear that a lawyer may communicate the organization's offer of legal assistance at an informational gathering such as the July 1973 meeting in Aiken without breaching the literal terms of the Rule. Moreover, the Disciplinary Rules in question permit punishment for mere solicitation unaccompanied by proof of any of the substantive evils that appellee main-

tains were present in this case. In sum, the Rules in their present form have a distinct potential for dampening the kind of "cooperative activity that would make advocacy of litigation meaningful," as well as for permitting discretionary enforcement against unpopular causes.

B

Even if we ignore the breadth of the Disciplinary Rules and the absence of findings in the decision below that support the justifications advanced by appellee in this Court, we think it clear from the record—which appellee does not suggest is inadequately developed—that findings compatible with the First Amendment could not have been made in this case. "Considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment [against appellant]. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles [can be] constitutionally applied."

Where political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs. The approach we adopt today in *Ohralik, post*, p. 447, that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity on behalf of the ACLU. Although a showing of potential danger may suffice in the former context, appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed.

The record does not support appellee's contention that undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred in this case. Appellant's letter of August 30, 1973, followed up the earlier meeting—one concededly protected by the First and Fourteenth Amendments— by notifying Williams that the ACLU would be interested in supporting possible litigation. The letter imparted additional information material to making an informed decision about whether to authorize litigation, and permitted Williams an opportunity, which she exercised, for arriving at a deliberate decision. The letter was not facially misleading; indeed, it offered "to explain what is involved so you can understand what is going on." The transmittal of this letter—as contrasted with in-person solicitation—involved no appreciable invasion of privacy; nor did it afford any significant opportunity for overreaching or coercion. Moreover, the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct. The manner of solicitation in this case certainly was no more likely to cause harmful consequences than the activity considered in *Button*.

Nor does the record permit a finding of a serious likelihood of conflict of interest or injurious lay interference with the attorney-client relationship. Admittedly, there is some potential for such conflict or interference whenever a lay organization supports any litigation. That potential was present in *Button*, in the NAACP's solicitation of nonmembers and its disavowal of any relief short of full integration. But the Court found that potential insufficient in the absence of proof of a "serious danger" of conflict of interest, or of organizational interference with the actual conduct of the litigation. As in *Button*, "[n]othing that this record shows as to the nature and purpose of [ACLU] activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application," of the Disciplinary Rules to appellant's activity. A "very distant possibility of harm," cannot justify proscription of the activity of appellant revealed by this record.

The State's interests in preventing the "stirring up" of frivolous or vexatious litigation and minimizing commercialization of the legal profession offer no further justification for the discipline administered in this case. The *Button* Court declined to accept the proffered analogy to the common-law offenses of maintenance, champerty, and barratry, where the record would not support a finding that the litigant was solicited for a malicious purpose or "for private gain, serving no public interest". The same result follows from the facts of this case. And considerations of undue commercialization of the legal profession are of marginal force where, as here, a nonprofit organization offers its services free of charge to individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to tap alternative sources of such aid.

At bottom, the case against appellant rests on the proposition that a State may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman. Under certain circumstances, that approach is appropriate in the case of speech that simply "propose[s] a commercial transaction". In the context of political expression and association, however, a State must regulate with significantly greater precision.

VI

The State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar. The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading, overbearing, or involves other features of deception or improper influence. As we decide today in *Ohralik*, a State also may forbid in-person solicitation for pecuniary gain under circumstances likely to result in these evils. And a State may insist that lawyers not solicit on behalf of lay or-

ganizations that exert control over the actual conduct of any ensuing litigation. Accordingly, nothing in this opinion should be read to foreclose carefully tailored regulation that does not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU.

We conclude that South Carolina's application of DR 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) to appellant's solicitation by letter on behalf of the ACLU violates the First and Fourteenth Amendments. The judgment of the Supreme Court of South Carolina is

Reversed.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

JUSTICE WHITE delivered the opinion of the Court.

[W]e have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases and that his clients' "[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING." The advertisement appeared in the Journal for two days; on the second day, Charles Kettlewell, an attorney employed by the Office of Disciplinary Counsel of the Supreme Court of Ohio (appellee) telephoned appellant and informed him that the advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis, a practice prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility. Appellant immediately withdrew the advertisement and in a letter to Kettlewell apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.

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

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

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

The advertisement was successful in attracting clients: appellant received well over 200 inquiries regarding the advertisement, and he initiated lawsuits on behalf of 106 of the women who contacted him as a result of the advertisement. The ad, however, also aroused the interest of the Office of Disciplinary Counsel. On July 29, 1982, the Office filed a complaint against appellant charging him with a number of disciplinary violations arising out of both the drunken driving and Dalkon Shield advertisements.

The complaint, as subsequently amended, alleged that the drunken driving ad violated Ohio Disciplinary Rule 2-101(A) in that it was "false, fraudulent, misleading, and deceptive to the public") because it offered representation on a contingent-fee basis in a criminal case—an offer that could not be carried out under Disciplinary Rule 2-106(C). With respect to the Dalkon Shield advertisement, the complaint alleged that in running the ad and accepting employment by women responding to it, appellant had violated the following Disciplinary Rules: DR 2-101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires that ads by attorneys be "dignified," and limits the information that may be included in such ads to a list of 20 items; DR 2-103(A), which prohibits an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer"; and DR 2-104(A), which provides (with certain exceptions not applicable here) that "a lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

The complaint also alleged that the advertisement violated DR 2-101(B)(15), which provides that any advertisement that mentions contingent-fee rates must "discloslels whether percentages are computed before or after deduction of court costs and expenses," and that the ad's failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement "deceptive" in violation of DR 2-101(A). The complaint did not allege that the Dalkon Shield advertisement was false or deceptive in any respect other than its omission of information relating to the contingent-fee arrangement; indeed, the Office of Disciplinary Counsel stipulated that the information and advice regarding Dalkon Shield litigation was not false, fraudulent, misleading, or deceptive and that the drawing was an accurate representation of the Dalkon Shield.

The charges against appellant were heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Appellant's primary defense to the charges against him was that Ohio's rules restricting the content of advertising by attorneys were unconstitutional. In support of his contention that the State had not provided justification for its rules sufficient to withstand the First Amendment scrutiny called for by those decisions, appellant proffered the testimony of expert witnesses that unfettered advertising by attorneys was economically beneficial and that appellant's advertising in particular was socially valuable in that it served to inform members of the public of their legal rights and of the potential health hazards associated with the Dalkon Shield. Appellant also put on the stand two of the women who had responded to his advertisements, both of whom testified that they would not have learned of their legal claims had it not been for appellant's advertisement.

The panel found that appellant's use of advertising had violated a number of Disciplinary Rules. The panel accepted the contention that the drunken driving advertisement was deceptive, but its reasoning differed from that of the Office of Disciplinary Counsel: the panel concluded that because the advertisement failed to mention the common practice of plea bargaining in drunken driving cases, it might be deceptive to potential clients who would be unaware of the likelihood that they would both be found guilty (of a lesser offense) *and* be liable for attorney's fees (because they had not been convicted of drunken driving). The panel also found that the use of an illustration in appellant's Dalkon Shield advertisement violated DR 2-101(B), that the ad's failure to disclose the client's potential liability for costs even if her suit were unsuccessful violated both DR 2-101(A) and DR 2-101 (B)(15), that the advertisement constituted self-recommendation in violation of DR 2-103(A), and that appellant's acceptance of offers of employment resulting from the advertisement violated DR 2-104(A).

The panel rejected appellant's arguments that Ohio's regulations regarding the content of attorney advertising were unconstitutional as applied to him. The panel noted that neither *Bates* nor *In re R. M. J.* had forbidden all regulation of attorney advertising and that both of those cases had involved advertising regulations substantially more restrictive than Ohio's. The panel also relied heavily on *Ohralik v. Ohio State Bar Assn.*, in which this Court upheld Ohio's imposition of discipline on an attorney who had engaged in in-person solicitation. The panel apparently concluded that the interests served by the application of Ohio's rules to advertising that contained legal advice and solicited clients to pursue a particular legal claim were as substantial as the interests at stake in *Ohralik*. Accordingly, the panel rejected appellant's constitutional defenses and recommended that he be publicly reprimanded for his violations. The Board of Commissioners adopted the panel's findings in full, but recommended the sanction of indefinite suspension from the practice of law rather than the more lenient punishment proposed by the panel.

The Supreme Court of Ohio, in turn, adopted the Board's findings that appellant's advertisements had violated the Disciplinary Rules specified by the hearing panel. 10 Ohio St. 3d 44, 461 N. E. 2d 883 (1984). The court also agreed with the Board that the application of Ohio's rules to appellant's advertisements did not offend the First Amendment. The court pointed out that *Bates* and *In re R. M. J.* permitted regulations designed to prevent the use of deceptive advertising and that *R. M. J.* had recognized that even non-deceptive advertising might be restricted if the restriction was narrowly designed to achieve a substantial state interest. The court held that disclosure requirements applicable to advertisements mentioning contingent-fee arrangements served the permissible goal of ensuring that potential clients were not misled regarding the terms of the arrangements. In addition, the court held, it was "allowable" to prevent attorneys form claiming expertise in particular fields of law in the absence of standards by which such claims might be assessed, and it was "reasonable" to preclude the use of illustrations in advertisements and to prevent attorneys from offering legal advice in their advertisements, although the court did not specifically identify the interests served by these restrictions. Having determined that appellant's advertisements violated Ohio's Disciplinary Rules and that the First Amendment did not forbid the application of those rules to appellant, the court concluded that appellant's conduct warranted a public reprimand.

Contending that Ohio's Disciplinary Rules violate the First Amendment insofar as they authorize the State to discipline him for the content of his Dalkon Shield advertisement, appellant filed this appeal. Appellant also claims that the manner in which he was disciplined for running his drunken driving advertisement violated his right to due process. We noted probable jurisdiction, 469 U. S. 813 (1984), and now affirm in part and reverse in part.

II

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

Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest. Our application of these principles to the commercial speech of attorneys has led us to conclude that blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible, but that rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible. To resolve this appeal, we must apply the teachings of these cases to three separate forms of regulation Ohio has imposed on advertising by its attorneys: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.

III

We turn first to the Ohio Supreme Court's finding that appellant's Dalkon Shield advertisement (and his acceptance of employment resulting from it) ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice. Because all advertising is at least implicitly a plea for its audience's custom, a broad reading of the rules applied by the Ohio court (and particularly the rule against self-recommendation) might suggest that they forbid all advertising by attorneys—a result obviously not in keeping with our decisions in

Bates and *In re R. M. J.* But the Ohio court did not purport to give its rules such a broad reading: it held only that the rules forbade soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem.

The interest served by the application of the Ohio self-recommendation and solicitation rules to appellant's advertisement is not apparent from a reading of the opinions of the Ohio Supreme Court and its Board of Commissioners. The advertisement's information and advice concerning the Dalkon Shield were, as the Office of Disciplinary Counsel stipulated, neither false nor deceptive: in fact, they were entirely accurate. The advertisement did not promise readers that lawsuits alleging injuries caused by the Dalkon Shield would be successful, nor did it suggest that appellant had any special expertise in handling such lawsuits other than his employment in other such litigation. Rather, the advertisement reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits and advised readers that appellant was currently handling such lawsuits and was willing to represent other women asserting similar claims. In addition, the advertisement advised women that they should not assume that their claims were time-barred—advice that seems completely unobjectionable in light of the trend in many States toward a "discovery rule" for determining when a cause of action for latent injury or disease accrues. The State's power to prohibit advertising that is "inherently misleading," thus cannot justify Ohio's decision to discipline appellant for running advertising geared to persons with a specific legal problem.

Because appellant's statements regarding the Dalkon Shield were not false or deceptive, our decisions impose on the State the burden of establishing that prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest. The extensive citations in the opinion of the Board of Commissioners to our opinion in *Ohralik* suggest that the Board believed that the application of the rules to appellant's advertising served the same interests that this Court found sufficient to justify the ban on in-person solicitation at issue in *Ohralik*. We cannot agree. Our decision in *Ohralik* was largely grounded on the substantial differences between face-to-face solicitation and the advertising we had held permissible in *Bates*. In-person solicitation by a lawyer, we concluded, was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. In addition, we noted that in-person solicitation presents unique regulatory difficulties because it is "not visible or otherwise open to public scrutiny." *Id.*, at 466. These unique features of in-person solicitation by lawyers, we held, justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain, but we were careful to point out that "in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services."

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

Nor does the traditional justification for restraints on solicitation—the fear that lawyers will "stir up litigation"—justify the restriction imposed in this case. In evaluating this proffered justification, it is important to think about what it might mean to say that the State has an interest in preventing lawyers from stirring up litigation. It is possible to describe litigation itself as an evil that the State is entitled to combat: after all, litigation consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness. "As a litigant," Judge Learned Hand once observed, "I should dread a lawsuit beyond almost anything else short of sickness and death."

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

The State does not, however, argue that the encouragement of litigation is inherently evil, nor does it assert an interest in discouraging the particular form of litigation that appellant's advertising solicited. Rather, the State's position is that although appellant's advertising may itself have been harmless—may even have

had the salutary effect of informing some persons of rights of which they would otherwise have been unaware—the State's prohibition on the use of legal advice and information in advertising by attorneys is a prophylactic rule that is needed to ensure that attorneys, in an effort to secure legal business for themselves, do not use false or misleading advertising to stir up meritless litigation against innocent defendants. Advertising by attorneys, the State claims, presents regulatory difficulties that are different in kind from those presented by other forms of advertising. Whereas statements about most consumer products are subject to verification, the indeterminacy of statements about law makes it impractical if not impossible to weed out accurate statements from those that are false or misleading. A prophylactic rule is therefore essential if the State is to vindicate its substantial interest in ensuring that its citizens are not encouraged to engage in litigation by statements that are at best ambiguous and at worst outright false.

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

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

The State's argument proceeds from the premise that it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful, much more so than is the case with other goods or services. This notion is belied by the facts before us: appellant's statements regarding Dalkon Shield litigation were in fact easily verifiable and completely accurate. Nor is it true that distinguishing deceptive from nondeceptive claims in advertising involving products other than legal services is a comparatively simple and straightforward process. A brief survey of the body of case law that has developed as a result of the Federal Trade Commission's efforts to carry out its mandate under § 5 of the Federal Trade Commission Act to eliminate "unfair or deceptive acts or practices in . . . commerce," 15 U. S. C. § 45(a)(1), reveals that distinguishing deceptive from nondeceptive advertising in virtually any field

of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics. In short, assessment of the validity of legal advice and information contained in attorneys' advertising is not necessarily a matter of great complexity; nor is assessing the accuracy or capacity to deceive of other forms of advertising the simple process the State makes it out to be. The qualitative distinction the State has attempted to draw eludes us.

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

IV

The application of DR 2-101(B)'s restriction on illustrations in advertising by lawyers to appellant's advertisement fails for much the same reasons as does the application of the self-recommendation and solicitation rules. The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to impart information directly. Accordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test. Because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction as applied to appellant and to demonstrate that the restriction vindicates that interest through the least restrictive available means.

The text of DR 2-101(B) strongly suggests that the purpose of the restriction on the use of illustrations is to ensure that attorneys advertise "in a dignified manner." There is, of course, no suggestion that the illustration actually used by appellant was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys. More fundamentally, although the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights. Even if that were the case, we are unpersuaded that undignified behavior would tend to recur so often as to warrant a prophylactic rule. [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

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

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

Thus, acceptance of the State's argument would be tantamount to adoption of the principle that a State may prohibit the use of pictures or illustrations in connection with advertising of any product or service simply on the strength of the general argument that the visual content of advertisements may, under some circum-

stances, be deceptive or manipulative. But as we stated above, broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of visual media in advertising is so intrinsically burden-some that the State is entitled to forgo that task in favor of the more convenient but far more restrictive alternative of a blanket ban on the use of illustrations. The experience of the FTC is, again, instructive. Although that agency has not found the elimination of deceptive uses of visual media in advertising to be a simple task, neither has it found the task an impossible one: in many instances, the agency has succeeded in identifying and suppressing visually deceptive advertising. Given the possibility of policing the use of illustrations in advertisements on a case-by-case basis, the prophylactic approach taken by Ohio cannot stand; hence, appellant may not be disciplined for his use of an accurate and nondeceptive illustration.

V

Appellant contends that assessing the validity of the Ohio Supreme Court's decision to discipline him for his failure to include in the Dalkon Shield advertisement the information that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful entails precisely the same inquiry as determining the validity of the restrictions on advertising content discussed above. In other words, he suggests that the State must establish either that the advertisement, absent the required disclosure, would be false or deceptive or that the disclosure requirement serves some substantial governmental interest other than preventing deception; moreover, he contends that the State must establish that the disclosure requirement directly advances the relevant governmental interest and that it constitutes the least restrictive means of doing so. Not surprisingly, appellant claims that the State has failed to muster substantial evidentiary support for any of the findings required to support the restriction.

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present. We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech. Indeed, in *West Virginia State Bd. of Ed. v. Barnette*, 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." The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available. Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."

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

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

VI

Finally, we address appellant's argument that he was denied procedural due process by the manner in which discipline was imposed on him in connection with his drunken driving advertisement. Appellant's contention is that the theory relied on by the Ohio Supreme Court and its Board of Commissioners as to how the advertisement was deceptive was different from the theory asserted by the Office of Disciplinary Counsel in its complaint. We cannot agree that this discrepancy violated the constitutional guarantee of due process.

Under the law of Ohio, bar discipline is the responsibility of the Ohio Supreme Court. Ohio Const., Art. IV, § 2(B)(1)(g). The Board of Commissioners on Grievances and Discipline formally serves only as a body that recommends discipline to the Supreme Court; it has no authority to impose discipline itself. See Govt. Bar Rule V(2), (16)-(20). That the Board of Commissioners chose to make its recommendation of discipline on the basis of reasoning different from that of the Office of Disciplinary Counsel is of little moment: what is important is that the Board's recommendations put appellant on notice of the charges he had to answer to the satisfaction of the Supreme Court of Ohio. Appellant does not contend that he was afforded no opportunity to respond to the Board's recommendation; indeed, the Ohio rules appear to provide ample opportunity for response to Board recommendations, and it appears that appellant availed himself of that opportunity. The notice and opportunity to respond afforded appellant were sufficient to satisfy the demands of due process.

VII

The Supreme Court of Ohio issued a public reprimand incorporating by reference its opinion finding that appellant had violated Disciplinary Rules 2-101(A), 2-101(B), 2-101 (B)(15), 2-103(A), and 2-104(A). That judgment is affirmed to the extent that it is based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement. But insofar as the reprimand was based on appellant's use of an illustration in his advertisement in violation of DR 2-101(B) and his offer of legal advice in his advertisement in violation of DR 2-103(A) and 2-104(A), the judgment is reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part, concurring in the judgment in part, and dissenting in part.

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." I therefore join Part I-IV of the Court's opinion, and I join the Court's judgment set forth in Part VII to the extent it reverses the Supreme Court of Ohio's public reprimand of the appellant Philip Q. Zauderer for his violations of Disciplinary Rules 2-101(B), 2-103(A), and 2-104(A).

With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Ante*, at 651. I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore concur in part and dissent in part from Part V of the Court's opinion, dissent from Part VI, and dissent from the judgment set forth in Part VII insofar as it affirms the Supreme Court of Ohio's public reprimand "based on appellant's advertisement involving his terms of representation in drunken driving cases and on the omission of information regarding his contingent-fee arrangements in his Dalkon Shield advertisement."

I

A

The Court concludes that the First Amendment's protection of commercial speech is satisfied so long as a disclosure requirement is "reasonably related" to preventing consumer deception, and it suggests that this standard "might" be violated if a disclosure requirement were "unjustified" or "unduly burdensome." *Ante*, at 651. I agree with the Court's somewhat amorphous "reasonable relationship" inquiry only on the understanding that it comports with the standards more precisely set forth in our previous commercial-speech cases. Under those standards, regulation of commercial speech—whether through an affirmative disclosure requirement or through outright suppression—is "reasonable" only to the extent that a State can demonstrate a legitimate and substantial interest to be achieved by the regulation. Moreover, the regulation must directly advance the state interest and "may

extend only as far as the interest it serves." Where the State imposes regulations to guard against "the potential for deception and confusion" in commercial speech, those regulations "may be no broader than reasonably necessary to prevent the deception."

Because of the First Amendment values at stake, courts must exercise careful scrutiny in applying these standards. Thus a State may not rely on "highly speculative" or "tenuous" arguments in carrying its burden of demonstrating the legitimacy of its commercial-speech regulations. Where a regulation is addressed to allegedly deceptive advertising, the State must instead demonstrate that the advertising either "is inherently likely to deceive" or must muster record evidence showing that "a particular form or method of advertising has in fact been deceptive," and it must similarly demonstrate that the regulations directly and proportionately remedy the deception. Where States have failed to make such showings, we have repeatedly struck down the challenged regulations.

As the Court acknowledges, it is "somewhat difficult" to apply these standards to Ohio's disclosure requirements "in light of the Ohio court's failure to specify precisely what disclosures were required." *Ante*, at 653, n. 15. It is also somewhat difficult to determine precisely what disclosure requirements the Court approves today. The Supreme Court of Ohio appears to have imposed three overlapping requirements, each of which must be analyzed under the First Amendment standards set forth above. First, the court concluded that "a lawyer advertisement which refers to contingent fees" should indicate whether "additional costs . . . might be assessed the client." The report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court explained that such a requirement is necessary to guard against "the impression that if there were no recovery, the client would owe nothing." App. to Juris. Statement 14a. I agree with the Court's conclusion that, given the general public's unfamiliarity with the distinction between fees and costs, a State may require an advertising attorney to include a costs disclaimer so as to avoid the potential for misunderstanding, *ante*, at 653—provided the required disclaimer is "no broader than reasonably necessary to prevent the deception".

Second, the report and opinion provide that an attorney advertising his availability on a contingent-fee basis must "specifically expres[s]" his rates. The Court's analysis of this requirement—which the Court characterizes as a "suggest[ion],"—is limited to the passing observation that the requirement does not "see[m] intrinsically burdensome". The question of burden, however, is irrelevant unless the State can first demonstrate that the rate-publication requirement directly and proportionately furthers a "substantial interest." Yet an attorney's failure to specify a particular percentage rate when advertising that he accepts cases on a contingent-fee basis can in no way be said to be "inherently likely to deceive," and the voluminous record in this case fails to reveal a single instance suggesting that such a failure has in actual experience proved deceptive. Nor has Ohio at any

point identified any other "substantial interest" that would be served by such a requirement. Although a State might well be able to demonstrate that rate publication is necessary to prevent deception or to serve some other substantial interest, it must do so pursuant to the carefully structured commercial-speech standards in order to ensure the full evaluation of competing considerations and to guard against impermissible discrimination among different categories of commercial speech. Ohio has made no such demonstration here.

Third, the Supreme Court of Ohio agreed with the Board of Commissioners that Zauderer had acted unethically "by failing *fully* to disclose the terms of the contingent fee arrangement which was intended to be entered into at the time of publishing the advertisement." The record indicates that Zauderer enters into a comprehensive contract with personal injury clients, one that spells out over several pages the various terms and qualifications of the contingent-fee relationship. If Ohio seriously means to require Zauderer "fully to disclose the[se] terms," this requirement would obviously be so "unduly burdensome" as to violate the First Amendment. *Ante*, at 651. Such a requirement, compelling the publication of detailed fee information that would fill far more space than the advertisement itself, would chill the publication of protected commercial speech and would be entirely out of proportion to the State's legitimate interest in preventing potential deception. Given the Court's explicit endorsement of Ohio's other disclosure provisions, I can only read the Court's telling silence respecting this apparent requirement as an implicit acknowledgment that it could not possibly pass constitutional muster.

B

Ohio's glaring failure "to specify precisely what disclosures were required," is relevant in another important respect. Even if a State may impose particular disclosure requirements, an advertiser may not be punished for failing to include such disclosures "unless his failure is in violation of valid state statutory or decisional law requiring the [advertiser] to label or take other precautions to prevent confusion of customers." Whether or not Ohio *may* properly impose the disclosure requirements discussed above, it failed to provide Zauderer with sufficient notice that he was expected to include such disclosures in his Dalkon Shield advertisement. The State's punishment of Zauderer therefore violated basic due process and First Amendment guarantees.

Neither the published rules, state authorities, nor governing precedents put Zauderer on notice of what he was required to include in the advertisement. As the Court acknowledges, Ohio's Disciplinary Rules do not "on [their] face require any disclosures except when an advertisement mentions contingent-fee *rates*—which appellant's advertisement did not do." In light of the ambiguity of the rules, Zauderer contracted the governing authorities *before* publishing the advertisement and unsuccessfully sought to determine whether it would be ethically objectionable. He met with representatives of the Office of Disciplinary Counsel, reviewed

the advertisement with them, and asked whether the Office had any objections or recommendations concerning the form or content of the advertisement. The Office refused to advise Zauderer whether "he should or should not publish the advertisement," informing him that it "does not have authority to issue advisory opinions nor to approve or disapprove legal service advertisements." And even after full disciplinary proceedings, Ohio still has failed, as the Court acknowledges, "to specify precisely what disclosures were required," and therefore to specify precisely how Zauderer violated the law and what reasonable precautions he can take to avoid future disciplinary actions.

A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." This requirement "applies with particular force in review of laws dealing with speech,"

These guarantees apply fully to attorney disciplinary proceedings. Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." But where "[t]he appraisal of [an attorney's] conduct is one about which reasonable men differ, not one immediately apparent to any scrupulous citizen who confronts the question," and where the State has not otherwise proscribed the conduct in reasonably clear terms, the Due Process Clause forbids punishment of the attorney for that conduct.

I do not believe that Zauderer's Dalkon Shield advertisement can be said to be so obviously misleading as to justify punishment in the absence of a reasonably clear contemporaneous rule requiring the inclusion of certain disclaimers. The advertisement's statement that "if there is no recovery, no legal fees are owed by our clients" was accurate on its face, and "[t]here is nothing in the record to indicate that the inclusion of this information was misleading" in actual practice because of the failure to include a costs disclaimer. Moreover, although the statement might well be viewed by many attorneys as carrying the potential for deception, the Office of Disciplinary Counsel itself *stipulated* that "[t]he Dalkon Shield advertisement published by [Zauderer] does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Several other States have approved the publication of Dalkon Shield advertisements containing the *identical* no-legal-fees statement, without even a suggestion that the statement might be deceptive. And the Office of Disciplinary Counsel's refusal to respond to Zauderer's prepublication inquiries concerning the propriety of the advertisement wholly undermines one of the basic justifications for allowing pun-

ishment for violations of imprecise commercial regulations—that a businessperson can clarify the meaning of an arguably vague regulation by consulting with government administrators. Although I agree that a State may upon a proper showing require a costs disclaimer as a prophylactic measure to guard against potential deception, and may thereafter discipline attorneys who fail to include such disclaimers, Ohio had imposed no such requirement at the time Zauderer published the advertisement, as the Court acknowledges. The State instead has punished Zauderer for violating requirements that did not exist prior to this disciplinary proceeding.

The Court appears to concede these serious problems, noting that "it may well be that for Ohio actually to *disbar* an attorney on the basis of its disclosure requirements as they have been worked out to this point would raise significant due process concerns." The Court "see[s] no infirmity" in this case, however, because the Supreme Court of Ohio publicly reprimanded Zauderer rather than disbarring him. This distinction is thoroughly unconvincing. When an attorney's constitutional rights have been violated, we have not hesitated in the past to reverse disciplinary sanctions that were even less severe than a public reprimand. Moreover, a public reprimand in Ohio exacts a potentially severe deprivation of liberty and property interests that are fully protected by the Due Process Clause. The reprimand brands Zauderer as an unethical attorney who has violated his solemn oath of office and committed a "willful breach" of the Code of Professional Responsibility, and it has been published in statewide professional journals and the official reports of the Ohio Supreme Court. This Court's casual indifference to the gravity of this injury inflicted on an attorney's good name demeans the entire legal profession. In addition, under Ohio law "a person who has been . . . publicly reprimanded for misconduct, upon being found guilty of subsequent misconduct, shall be suspended for an indefinite period from the practice of law or permanently disbarred. . . ." In light of Ohio's vague rules, the governing authorities' refusal to provide clarification and guidance to Zauderer, and the Ohio Supreme Court's "failure to specify precisely what disclosures [are] required," Zauderer will hereafter publish advertisements mentioning contingent fees only at his peril. No matter what disclaimers he includes, Ohio may decide after the fact that further information should have been included and might, under the force of its rules, attempt to suspend him indefinitely from his livelihood. Such a potential trap for an unwary attorney acting in good faith not only works a significant due process deprivation, but also imposes an intolerable chill upon the exercise of First Amendment rights.

II

The Office of Disciplinary Counsel charged that Zauderer's drunken driving advertisement was deceptive because it proposed a contingent fee in a criminal case—an unlawful arrangement under Ohio law. Zauderer defended on the ground that the offer of a refund did not constitute a proposed contingent fee. This

was the sole issue concerning the drunken driving advertisement that the Office complained of, and the evidence and arguments presented to the Board of Commissioners were limited to this question. The Board, however, did not even mention the contingent-fee issue in its certified report. Instead, it found the advertisement "misleading and deceptive" on the basis of a completely new theory—that as a matter of "general knowledge" as discerned from certain "Municipal Court reports," drunken driving charges are "in many cases . . . reduced and a plea of guilty or no contest to a lesser included offense is entered and received by the court," so that in such circumstances "the legal fee would not be refundable." Although Zauderer argued before the Supreme Court of Ohio that this theory had never been advanced by the Office of Disciplinary Counsel, that he had never had any opportunity to object to the propriety of judicial notice or to present opposing evidence, and that there was no evidence connecting him to the alleged practice, the court adopted the Board's findings without even acknowledging his objections.

Zauderer of course might not ultimately be able to disprove the Board's theory. The question before the Court, however, is not one of prediction but one of process. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence." Under the Due Process Clause, "reasonable notice" must include disclosure of "the *specific* issues [the party] must meet," and appraisal of "the factual material on which the agency relies for decision so that he may rebut it". These guarantees apply fully to attorney disciplinary proceedings because, obviously, "lawyers also enjoy first-class citizenship." Where there is an "absence of fair notice as to the reach of the grievance procedure and the *precise* nature of the charges," so that the attorney is not given a meaningful opportunity to present evidence in his defense, the proceedings violate due process.

The Court acknowledges these guarantees, but argues that the Board's change of theories after the close of evidence was "of little moment" because Zauderer had an opportunity to object to the Board's certified report before the Supreme Court of Ohio. This reasoning is untenable. Although the Supreme Court of Ohio made the ultimate determination concerning discipline, it held no *de novo* hearing and afforded Zauderer no opportunity to present evidence opposing the Board's surprise exercise of judicial notice. Under Ohio procedure, the court's role was instead limited to a record review of the Board's certified findings to determine whether they were "against the weight of the evidence" or made in violation of legal and procedural guarantees. All that Zauderer could do was to argue that the Board's report was grounded on a theory that he had never been notified of and that he never had an opportunity to challenge with evidence of his own, and to request that proper procedures be followed.

The court completely ignored these objections. To hold that this sort of procedure constituted a meaningful "chance to be heard in a trial of the issues," is to make a mockery of the due process of law that is guaranteed every citizen accused of wrongdoing.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part, concurring in the judgment in part, and dissenting in part.

I join Parts I, II, V, and VI of the Court's opinion, and its judgment except insofar as it reverses the reprimand based on appellant Zauderer's use of unsolicited legal advice in violation of DR 2-103(A) and 2-104(A). I agree that appellant was properly reprimanded for his drunken driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in Part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban. I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

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

These risks are of particular concern when an attorney offers unsolicited advice to a potential client in a personal encounter. In that context, the legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered. For these reasons, most States expressly bar lawyers from accepting employment resulting from *in person* unsolicited advice. Some States, like the American Bar Association in its Model Rules of Professional Conduct, extend the prohibition to employment resulting from unsolicited ad-

vice in telephone calls, letters, or communications directed to a specific recipient. Ohio and 14 other States go a step further. They do not limit their rules to certain methods of communication, but instead provide that, with limited exceptions, a "lawyer who has given unsolicited legal advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice."

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

Given these holdings, the Court rejects Ohio's ban on the legal advice contained in Zauderer's Dalkon Shield advertisement: "do not assume it is too late to take legal action against the . . . manufacturer." Surveying Ohio law, the majority concludes that this advice "seems completely unobjectionable". Since the statement is not misleading, the Court turns to the asserted state interests in restricting it, and finds them all wanting. The Court perceives much less risk of overreaching or undue influence here than in *Ohralik* simply because the solicitation does not occur in person. The State's interest in discouraging lawyers from stirring up litigation is denigrated because lawsuits are not evil, and States cannot properly interfere with access to our system of justice. Finally, the Court finds that there exist less restrictive means to prevent attorneys from using misleading legal advice to attract clients: just as the Federal Trade Commission has been able to identify unfair or deceptive practices in the marketing of mouthwash and eggs, the States can identify unfair or deceptive legal advice without banning that advice entirely. *Ante*, at 645-646. The majority concludes that "[t]he qualitative distinction the State has attempted to draw eludes us."

In my view, state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit. In its prior decisions, the Court was better able to perceive both the importance of state regulation of professional conduct, and the distinction between professional services and standardized consumer products. The States understandably require more of attorneys than of others engaged in commerce. Lawyers are *professionals*, and as such they have greater obligations. As Justice Frankfurter

once observed, "[f]rom a profession charged with [constitutional] responsibilities there must be exacted . . . qualities of truth-speaking, of a high sense of honor, of granite discretion." The legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain. While some assert that we have left the era of professionalism in the practice of law, substantial state interests underlie many of the provisions of the state codes of ethics, and justify more stringent standards than apply to the public at large.

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

In my view, a State could reasonably determine that the use of unsolicited legal advice "as bait with which to obtain agreement to represent [a client] for a fee," poses a sufficient threat to substantial state interests to justify a blanket prohibition. As the Court recognized in *Ohralik*, the State has a significant interest in preventing attorneys from using their professional expertise to overpower the will and judgment of laypeople who have not sought their advice. While it is true that a printed advertisement presents a lesser risk of overreaching than a personal encounter, the former is only one step removed from the latter. When legal advice is employed within an advertisement, the layperson may well conclude there is no means to judge its validity or applicability short of consulting the lawyer who placed the advertisement. This is particularly true where, as in appellant's Dalkon Shield advertisement, the legal advice is phrased in uncertain terms. A potential client who read the advertisement would probably be unable to determine whether "it is too late to take legal action against the . . . manufacturer" without directly consulting the appellant. And at the time of that consultation, the same risks of undue influence, fraud, and overreaching that were noted in *Ohralik* are present.

The State also has a substantial interest in requiring that lawyers consistently exercise independent professional judgment on behalf of their clients. Given the exigencies of the marketplace, a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential

clients into the office, rather than that advice which it is most in the interest of potential clients to hear. In a recent case in New York, for example, an attorney wrote unsolicited letters to victims of a massive disaster advising them that, in his professional opinion, the liability of the potential defendants is clear. Of course, under the Court's opinion claims like this might be reached by branding the advice misleading or by promulgating a state rule requiring extensive disclosure of all relevant liability rules whenever such a claim is advanced. But even if such a claim were completely accurate—even if liability were in fact clear and the attorney actually thought it to be so—I believe the State could reasonably decide that a professional should not accept employment resulting from such unsolicited advice. Ohio and other States afford attorneys ample opportunities to inform members of the public of their legal rights. Given the availability of alternative means to inform the public of legal rights, Ohio's rule against legal advice in advertisements is an appropriate means to assure the exercise of independent professional judgment by attorneys. A State might rightfully take pride that its citizens have access to its civil courts, *ante*, at 643, while at the same time opposing the use of self-interested legal advice to solicit clients.

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

Shapero v. Kentucky State Bar Assn., 486 U.S. 466 (1988)

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

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

I

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

> It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them. You may call my office anytime from 8:30 a. m. to 5:00 p. m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.

The Commission did not find the letter false or misleading. Nevertheless, it declined to approve petitioner's proposal on the ground that a then-existing Kentucky Supreme Court Rule prohibited the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public." The Commission registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment—specifically the principles enunciated in *Zauderer*—and recommended that the Kentucky Supreme Court amend its Rules. Pursuing the Commission's suggestion, petitioner petitioned the Committee on Legal Ethics of the Kentucky Bar Association for an advisory opinion as to the Rule's validity. Like the Commission, the Ethics Committee, in an opinion formally adopted by the Board of Governors of the Bar Association, did not find the proposed letter false or misleading, but nonetheless upheld Rule 3.135(5)(b) (i) on the ground that it was consistent with Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct.

On review of the Ethics Committee's advisory opinion, the Kentucky Supreme Court felt "compelled by the decision in Zauderer to order Rule 3.135(5)(b)(i) deleted," and replaced it with the ABA's Rule 7.3.

The court did not specify either the precise infirmity in Rule 3.135(5)(b)(i) or how Rule 7.3 cured it. Rule 7.3, like its predecessor, prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. We granted certiorari to resolve whether such a blanket prohibition is consistent with the First Amendment and now reverse.

II

Lawyer advertising is in the category of constitutionally protected commercial speech. The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted on-

ly in the service of a substantial governmental interest, and only through means that directly advance that interest." Since state regulation of commercial speech "may extend only as far as the interest it serves," state rules that are designed to prevent the "potential for deception and confusion may be no broader than reasonably necessary to prevent the" perceived evil.

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

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

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

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

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

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

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

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

But merely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech. The State can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses. The "regulatory difficulties" that are "unique" to in-person lawyer solicitation—solicitation that is "not visible or otherwise open to public scrutiny" and for which it is "difficult or impossible to obtain reliable proof of what actually took place"—do not apply to written solicitations. The court below offered no basis for its "belief that submission of a blank form letter to the Advertising Commission does not provide a suitable protection to the public from overreaching, intimidation or misleading private targeted mail solicitation." Its concerns were presumably those expressed by the ABA House of Delegates in its comment to Rule 7.3:

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

The record before us furnishes no evidence that scrutiny of targeted solicitation letters will be appreciably more burdensome or less reliable than scrutiny of advertisements. As a general matter, evaluating a targeted advertisement does not require specific information about the recipient's identity and legal problems any more than evaluating a newspaper advertisement requires like information about all readers. If the targeted letter specifies facts that relate to particular recipients, the reviewing agency has innumerable options to minimize mistakes. It might, for example, require the lawyer to prove the truth of the fact stated; it could require the lawyer to explain briefly how he or she discovered the fact and verified its accuracy; or it could require the letter to bear a label identifying it as an advertisement, or directing the recipient how to report inaccurate or misleading letters. To be sure, a state agency or bar association that reviews solicitation letters might have more work than one that does not. But "our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."

III

The validity of Rule 7.3 does not turn on whether petitioner's letter itself exhibited any of the evils at which Rule 7.3 was directed. Since, however, the First Amendment overbreadth doctrine does not apply to professional advertising, we address respondent's contentions that petitioner's letter is particularly overreaching, and therefore unworthy of First Amendment protection. In that regard, respondent identifies two features of the letter before us that, in its view, coalesce to convert the proposed letter into "high pressure solicitation, overbearing solicitation," which is not protected. First, respondent asserts that the letter's liberal use of underscored, uppercase letters "fairly shouts at the recipient that he should employ Shapero." Second, respondent objects that the letter contains assertions that "state no affirmative or objective fact," but constitute "pure salesman puffery, enticement for the unsophisticated, which commits Shapero to nothing."

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

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

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

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

I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds. The resulting interference with important and valid public policies is so destructive that I believe the analytical framework itself should now be reexamined.

I

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

III

The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations.

Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles. Restrictions on truthful

advertising, which artificially interfere with the ability of suppliers to transmit price information to consumers, presumably reduce the efficiency of the mechanisms of supply and demand. Other factors being equal, this should cause or enable suppliers (in this case attorneys) to maintain a price/quality ratio in some of their services that is higher than would otherwise prevail. Although one could probably not test this hypothesis empirically, it is inherently plausible. Nor is it implausible to imagine that one effect of restrictions on lawyer advertising, and perhaps sometimes an intended effect, is to enable attorneys to charge their clients more for some services (of a given quality) than they would be able to charge absent the restrictions.

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

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

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a "learned profession." Such knowledge by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends. Such manipulation can occur in at least two obvious ways. One results from overly zealous representation of the client's interests; abuse of the discovery

process is one example whose causes and effects (if not its cure) is apparent. The second, and for present purposes the more relevant, problem is abuse of the client for the lawyer's benefit. Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arm's-length manner that may be appropriate when buying an automobile or choosing a dry cleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.

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

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

In my judgment, however, fairly severe constraints on attorney advertising can continue to play an important role in preserving the legal profession as a genuine profession. Whatever may be the exactly appropriate scope of these restrictions at a given time and place, this Court's recent decisions reflect a myopic belief that "consumers," and thus our Nation, will benefit from a constitutional theory that

refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

DaimlerChrysler Corp. v. Kirkhart, 561 S.E.2d 276 (N.C. App. 2002)

Campbell, J.

This appeal arises from the trial court's grant of a preliminary injunction which restricts the manner in which Defendants, a licensed attorney and his law practice, may use information obtained from DaimlerChrysler through discovery in a separate action in which Defendants represented Peter and Frances Pleskach ("the Pleskaches") in a lawsuit against DaimlerChrysler ("the Pleskach case"). Specifically, the trial court's preliminary injunction restrains Defendants from using information obtained through discovery in the Pleskach case to solicit clients and generate further litigation against DaimlerChrysler. Defendants bring forward numerous assignments of error challenging the trial court's findings and conclusions, and also challenging the constitutionality of the preliminary injunction. Upon careful consideration of the briefs, oral argument, transcript, and record, we dissolve the preliminary injunction entered against Defendants.

I. Background

Defendant H.C. Kirkhart ("Kirkhart") is licensed to practice law in North Carolina and does business as The Law Offices of H.C. Kirkhart. On or about 19 April 1999, Kirkhart, as attorney for the Pleskaches, filed a complaint against DaimlerChrysler ("Plaintiff") asserting that Plaintiff had violated the New Motor Vehicles Warranties Act ("Lemon Law Statute"), by failing to make certain disclosures to the Pleskaches required by [the Lemon Law statute], namely: that the Dodge Caravan ("Caravan") the Pleskaches had purchased from Plaintiff had previously been repurchased by Plaintiff from its original owners as a result of the Caravan's defective condition.[1] Based on this alleged violation of the Lemon Law Statute, the Pleskaches asserted claims for fraud and unfair and deceptive trade practices. On or about 28 April 1999, DaimlerChrysler filed its answer denying the material allegations of the Pleskach complaint.

Subsequent to filing the complaint in the Pleskach case, Kirkhart served DaimlerChrysler with a set of interrogatories and a request for production of documents, seeking, inter alia, the vehicle identification numbers of all vehicles that DaimlerChrysler had repurchased since 1994, the names and addresses of the original owners of these vehicles, the names and addresses of all subsequent purchasers

1 (n.1 in Opinion) Kirkhart had previously represented the original owners of the Caravan, Leslie and Tiffany Clark, in an action against DaimlerChrysler which resulted in DaimlerChrysler's repurchase of the Caravan.

of these buy-back vehicles, and the disclosure statements for all the buy-back vehicles that had been repurchased since 1994. DaimlerChrysler refused to produce the requested information, objecting on grounds that the request was vague, overly broad, unduly burdensome, and propounded for an improper purpose.

On 21 October 1999, Judge Gregory A. Weeks, ruling on a motion to compel discovery that had been filed by Kirkhart, ordered DaimlerChrysler to produce the materials and information requested by Kirkhart. On or about 26 November 1999, DaimlerChrysler responded to the discovery requests, but provided incomplete information, choosing to disclose only partial vehicle identification numbers, and failing to provide the names and addresses of the original and subsequent purchasers of buy-back vehicles. However, DaimlerChrysler did provide approximately 850 disclosure statements, the majority of which were not signed by the subsequent purchasers. Using these disclosure statements, which contained complete vehicle identification numbers, Kirkhart was able to determine the identity of current owners of vehicles that had previously been repurchased by DaimlerChrysler pursuant to the Lemon Law Statute. Kirkhart contacted these subsequent purchasers by letter to determine whether they had been advised that their vehicles were manufacturer's buy-backs. Several of the owners contacted by Kirkhart subsequently requested that he represent them in their own lawsuits against DaimlerChrysler for violations of the Lemon Law Statute. In March 2000, Kirkhart filed five additional lawsuits against DaimlerChrysler.

DaimlerChrysler filed a motion for a temporary restraining order which was granted ex parte by Judge Stafford G. Bullock ("Judge Bullock"). Finding that Kirkhart had been "soliciting business in violation of the discovery rules and ethical rules applicable to all attorneys," Judge Bullock restrained him "from any actions that use discovery material to generate litigation," specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants." On 13 January 2000, DaimlerChrysler filed a motion for a temporary restraining order which was granted ex parte by Judge Stafford G. Bullock ("Judge Bullock"). Finding that Kirkhart had been "soliciting business in violation of the discovery rules and ethical rules applicable to all attorneys," Judge Bullock restrained him "from any actions that use discovery material to generate litigation," specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants." On 3 February 2000, Judge Henry V. Barnette ("Judge Barnette") converted this temporary restraining order into a preliminary injunction specifically prohibiting Kirkhart "from sending letters of solicitation to potential litigants whose names were discovered during discovery in [the Pleskach] case." On 2 March 2000, Judge Barnette granted the Pleskaches' motion to set aside the preliminary injunction and ordered that the injunction be withdrawn on the grounds that the trial court did not have person-

al jurisdiction over Kirkhart since he was not a party in the Pleskach case. On 3 March 2000, Judge Henry W. Hight, Jr., denied DaimlerChrysler's previously filed motion for a protective order, by which DaimlerChrysler sought the exact relief that had been granted by Judge Barnette's dissolved preliminary injunction.

On 6 March 2000, DaimlerChrysler filed its complaint in the instant case against Defendants alleging that Kirkhart's use of the information obtained through discovery in the Pleskach case to solicit potential clients violated N.C. Gen.Stat. § 84–38, which prohibits the solicitation of legal business, and the rules of civil discovery and ethics applicable to all attorneys. In addition to seeking a permanent injunction prohibiting Defendants from using discovery material from the Pleskach case to solicit potential litigants, DaimlerChrysler asserted the following five causes of action: (1) barratry, (2) libel, (3) prospective interference with contractual relationship, (4) tortious interference with business enterprise, and (5) unfair and deceptive trade practices.

On 2 May 2000, Judge Barnette entered a temporary restraining order identical to the injunction that had previously been entered and dissolved in the Pleskach case. On 16 May 2000, Judge Bullock entered an order converting this temporary restraining order into a preliminary injunction. On 2 June 2000, Defendants filed a motion to dissolve or rescind the injunction, arguing (1) that no discovery rule prohibited attorneys from using information obtained through discovery in one case as the basis for instituting one or more new cases, (2) that the ethical rules of the legal profession did not prohibit the solicitation of clients, but, in fact, expressly permitted it, subject to certain restrictions, and (3) that the injunction violated Defendants' free speech rights under the First Amendment to the United States Constitution.

Defendants' motion to dissolve or rescind the injunction was heard by Judge Bullock on 12 June 2000. At the conclusion of the hearing, Judge Bullock stated:

> The motion to dissolve the injunction is denied; however, the injunction may be modified to the extent that it does not violate Rule 7.3, direct contact with prospective clients[,] and to the extent that it does not violate any of the ethical rules.

Both sides submitted proposed orders to Judge Bullock reflecting their respective interpretations of his ruling. On 27 June 2000, Judge Bullock entered the order prepared by Plaintiff's counsel, which read as follows:

> It is ORDERED that the defendants be and are hereby restrained from using information that the defendants obtained from the plaintiff through discovery requests to generate unrelated litigation against the plaintiff, and may not use such materials for illegal solicitation.
>
> It is also ORDERED that the defendants in their solicitation must obey laws relating to unfair and deceptive trade practices, common law barratry, G.S. Section 84–38, which prohibits the solicitation of legal business, and Rule 26(b)(1) of the North Carolina Rules of Civil Procedure.

Defendants appealed from the injunction entered on 16 May 2000 and the modification entered on 27 June 2000.

IV. Analysis of Plaintiff's Claims

A. Barratry

Plaintiff alleged that Defendants had committed barratry by willfully, intentionally, and wantonly soliciting or attempting to solicit a large number of claims against Plaintiff in return for forty percent (40%) of the recovery from those claims. At common law, barratry was defined as "'the offense of frequently exciting or stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.'" *State v. Batson*, 17 S.E.2d 511, 512 (N.C. 1941) (quoting 4th Blackstone, p. 134). The common law offense of barratry has also "'been applied independently of statute to one soliciting a large number of claims of the same nature, and charging a fee for his services in connection with the claim contingent on the amount recovered.'". In *Batson*, our Supreme Court held that the common law offense of barratry was still in full force and effect in this State, stating, in pertinent part:

> Barratry being a common law offense, and having never been the subject of legislation in North Carolina, and not being destructive nor repugnant to, nor inconsistent with, the form of government of the State, is in full force therein.

Subsequent to the Court's decision in *Batson*, the General Assembly enacted N.C. Gen.Stat. § 84–38, which codified in part the common law offense of barratry. N.C.G.S. § 84–38 remains in effect, and reads in pertinent part:

> It shall be unlawful for any person ... to solicit or procure through solicitation either directly or indirectly, any legal business whether to be performed in this State or elsewhere, or to solicit or procure through solicitation either directly or indirectly, a retainer or contract, written or oral, or any agreement authorizing an attorney ... to perform or render any legal services, whether to be performed in this State or elsewhere.

While the General Assembly has chosen to codify the common law offense of barratry in the context of the solicitation of legal business, we find no decision of the Supreme Court or this Court recognizing the existence of a civil cause of action based on the common law principle of barratry.

However, the courts of this State have applied the related common law principles of champerty and maintenance in the context of a civil action. The term "maintenance" has been defined by our courts as "an officious intermeddling in a suit, which in no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it." "Champerty" is a form of maintenance whereby a stranger makes a "bargain with a plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." While recognizing their continued force and effect in this State, our Supreme Court in

Smith noted that many exceptions to the principles of champerty and maintenance have been recognized, "so that they may be adapted to the new order of things in the present highly progressive and commercial age." Among the exceptions recognized by the Court in Smith is that the relationship of attorney and client will often justify parties in giving each other assistance in lawsuits.

Based on our reading of the Supreme Court's decision in *Batson*, and other learned authorities on the subject, we conclude that the common law offense of barratry was a crime against the Crown (i.e, the State), but did not support a civil cause of action against a private individual, whereas the related principles of champerty and maintenance did create a civil cause of action that could be brought against another person. Therefore, our Supreme Court's recognition of the common law offense of barratry in *Batson*, and the General Assembly's subsequent codification of barratry in the context of the solicitation of legal business, do not support the existence of a civil cause of action for barratry. In addition, a mere violation of N.C.G.S. § 84–38 does not form the basis for a civil cause of action against the alleged violator.[2] Therefore, we conclude that there does not exist in this State a civil cause of action for barratry. Further, to the extent that Plaintiff's first cause of action is an attempt to state a claim for champerty and maintenance, we conclude that Defendants' conduct is covered by the recognized exception for the relationship between attorney and client. For the foregoing reasons, we conclude that Plaintiff has failed to show a likelihood of success on the merits of its first cause of action.

2 (n.2 in Opinion) We also note that application of N.C.G.S. § 84–38 to prohibit licensed attorneys from soliciting legal business through targeted, direct-mail solicitations would raise serious constitutional questions in light of the United States Supreme Court's decision in *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988).

VI. Conclusion

We conclude that Plaintiff has failed to show a reasonable likelihood of success on the merits of its case, and has failed to show a reasonable probability of substantial injury if the injunction does not stand. Thus, we hold that it was error to grant the preliminary injunction and it is hereby dissolved. Having so concluded, we need not consider the First Amendment arguments advanced by Defendants concerning the nature and scope of the injunctive relief.

Florida Bar v. Went for It, 515 U.S. 618 (1995)

Justice O'CONNOR delivered the opinion of the Court.

Rules of the Florida Bar prohibit personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. This case asks us to consider whether such Rules violate the First and Fourteenth Amendments of the Constitution. We hold that in the circumstances presented here, they do not.

I

In 1989, the Florida Bar completed a 2-year study of the effects of lawyer advertising on public opinion. After conducting hearings, commissioning surveys, and reviewing extensive public commentary, the Bar determined that several changes to its advertising rules were in order. In late 1990, the Florida Supreme Court adopted the Bar's proposed amendments with some modifications. Two of these amendments are at issue in this case. Rule 4-7.4(b)(1) provides that "a lawyer shall not send, or knowingly permit to be sent, a written communication to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication." Rule 4-7.8(a) states that "a lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no communication with the public and in no direct contact with prospective clients in a manner that would violate the Rules of Professional Conduct if the communication or contact were made by the lawyer." Together, these Rules create a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business.

In March 1992, G. Stewart McHenry and his wholly owned lawyer referral service, Went For It, Inc., filed this action for declaratory and injunctive relief in the United States District Court for the Middle District of Florida challenging Rules 4-7.4(b)(1) and 4-7.8(a) as violative of the First and Fourteenth Amendments to the Constitution. McHenry alleged that he routinely sent targeted solicitations to accident victims or their survivors within 30 days after accidents and that he wished to continue doing so in the future. Went For It, Inc., represented that it wished to contact accident victims or their survivors within 30 days of accidents and to refer potential clients to participating Florida lawyers. In October 1992, McHenry was disbarred for reasons unrelated to this suit. Another Florida lawyer, John T. Blakely, was substituted in his stead.

The District Court referred the parties' competing summary judgment motions to a Magistrate Judge, who concluded that the Bar had substantial government interests, predicated on a concern for professionalism, both in protecting the personal privacy and tranquility of recent accident victims and their relatives and in ensuring that these individuals do not fall prey to undue influence or overreaching. Citing the Bar's extensive study, the Magistrate Judge found that the Rules directly serve those interests and sweep no further than reasonably necessary. The Magistrate recommended that the District Court grant the Bar's motion for summary judgment on the ground that the Rules pass constitutional muster.

The District Court rejected the Magistrate Judge's report and recommendations and entered summary judgment for the plaintiffs, relying on *Bates v. State Bar of Ariz.* and subsequent cases. The Eleventh Circuit affirmed on similar grounds. The panel noted, in its conclusion, that it was "disturbed that *Bates* and its progeny require the decision" that it reached. We granted certiorari, and now reverse.

II

A

Nearly two decades of cases have built upon the foundation laid by *Bates*. It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection. Such First Amendment protection, of course, is not absolute. We have always been careful to distinguish commercial speech from speech at the First Amendment's core. "Commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." We have observed that "to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Mindful of these concerns, we engage in "intermediate" scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson*. Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. Commercial speech that falls into neither of those categories, like the advertising at issue here, may be regulated if the government satisfies a test consisting of three related prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be "narrowly drawn."

B

The Bar asserts that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers. This interest obviously factors into the Bar's paramount (and repeatedly professed) objective of curbing activities that "negatively affect the administration of justice." Because direct-mail solicitations in the wake of accidents are perceived by the public as intrusive, the Bar argues, the reputation of the legal profession in the eyes of Floridians has suffered commensurately. The

regulation, then, is an effort to protect the flagging reputations of Florida lawyers by preventing them from engaging in conduct that, the Bar maintains, "is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families."

We have little trouble crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that "States have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." Our precedents also leave no room for doubt that "the protection of potential clients' privacy is a substantial state interest." In other contexts, we have consistently recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Indeed, we have noted that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."

Under *Central Hudson*'s second prong, the State must demonstrate that the challenged regulation "advances the Government's interest in a direct and material way." That burden, we have explained, "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

The Bar submitted a 106-page summary of its 2-year study of lawyer advertising and solicitation to the District Court. That summary contains data—both statistical and anecdotal—supporting the Bar's contentions that the Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession. As of June 1989, lawyers mailed 700,000 direct solicitations in Florida annually, 40% of which were aimed at accident victims or their survivors. A survey of Florida adults commissioned by the Bar indicated that Floridians "have negative feelings about those attorneys who use direct mail advertising." Fifty-four percent of the general population surveyed said that contacting persons concerning accidents or similar events is a violation of privacy. A random sampling of persons who received direct-mail advertising from lawyers in 1987 revealed that 45% believed that directmail solicitation is "designed to take advantage of gullible or unstable people"; 34% found such tactics "annoying or irritating"; 26% found it "an invasion of your privacy"; and 24% reported that it "made you angry." Significantly, 27% of direct-mail recipients reported that their regard for the legal profession and for the judicial process as a whole was "lower" as a result of receiving the direct mail.

The anecdotal record mustered by the Bar is noteworthy for its breadth and detail. With titles like "Scavenger Lawyers" and "Solicitors Out of Bounds," newspaper editorial pages in Florida have burgeoned with criticism of Florida lawyers who send targeted direct mail to victims shortly after accidents. The study summary also includes page upon page of excerpts from complaints of direct-mail recipients. For example, a Florida citizen described how he was "appalled and angered by the brazen attempt" of a law firm to solicit him by letter shortly after he was injured and his fiancee was killed in an auto accident. Another found it "despicable and inexcusable" that a Pensacola lawyer wrote to his mother three days after his father's funeral. Another described how she was "astounded" and then "very angry" when she received a solicitation following a minor accident. Still another described as "beyond comprehension" a letter his nephew's family received the day of the nephew's funeral. One citizen wrote, "I consider the unsolicited contact from you after my child's accident to be of the rankest form of ambulance chasing and in incredibly poor taste. I cannot begin to express with my limited vocabulary the utter contempt in which I hold you and your kind."

In light of this showing—which respondents at no time refuted, save by the conclusory assertion that the Rule lacked "any factual basis"—we conclude that the Bar has satisfied the second prong of the *Central Hudson* test. In dissent, Justice Kennedy complains that we have before us few indications of the sample size or selection procedures employed by Magid Associates (a nationally renowned consulting firm) and no copies of the actual surveys employed. As stated, we believe the evidence adduced by the Bar is sufficient. In any event, we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense." After scouring the record, we are satisfied that the ban on directmail solicitation in the immediate aftermath of accidents targets a concrete, nonspeculative harm.

In reaching a contrary conclusion, the Court of Appeals determined that this case was governed squarely by *Shapero*. Making no mention of the Bar's study, the court concluded that "a targeted letter does not invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." In many cases, the Court of Appeals explained, "this invasion of privacy will involve no more than reading the newspaper."

While some of *Shapero*'s language might be read to support the Court of Appeals' interpretation, *Shapero* differs in several fundamental respects from the case before us. First and foremost, *Shapero*'s treatment of privacy was casual. Contrary to the dissent's suggestions, the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests. Rather, the State focused exclusively on the special dangers of overreaching inhering in targeted solicitations. Second, in contrast to this case, *Shapero* dealt with a broad ban on all direct-mail solicitations, whatever the time frame and whoever the recipient. Finally, the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail. The Court rejected the State's effort to justify a prophylactic ban on the basis of blanket, untested assertions of undue influence and overreaching. Because the State did not make a privacy-based argument at all, its empirical showing on that issue was similarly infirm.

We find the Court's perfunctory treatment of privacy in *Shapero* to be of little utility in assessing this ban on targeted solicitation of victims in the immediate aftermath of accidents. While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion. The Bar has argued, and the record reflects, that a principal purpose of the ban is "protecting the personal privacy and tranquility of Florida's citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." The intrusion targeted by the Bar's regulation stems not from the fact that a lawyer has learned about an accident or disaster, but from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business. In this respect, an untargeted letter mailed to society at large is different in kind from a targeted solicitation; the untargeted letter involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession unearthed by the Bar's study.

The purpose of the 30-day targeted direct-mail ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered. The Bar is concerned not with citizens' "offense" in the abstract, but with the demonstrable detrimental effects that such "offense" has on the profession it regulates. Moreover, the harm posited by the Bar is as much a function of simple receipt of targeted solicitations within days of accidents as it is a function of the letters' contents. Throwing the letter away shortly after opening it may minimize the latter intrusion, but it does little to combat the former.

Passing to *Central Hudson*'s third prong, we examine the relationship between the Bar's interests and the means chosen to serve them. With respect to this prong, the differences between commercial speech and noncommercial speech are manifest. The "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a fit between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective." Of course, we do not equate this test with the less rigorous obstacles of rational basis review; in *Cincinnati v. Discovery*, for example, we observed that the existence of "numerous and obvious less-burdensome alternatives to the restriction on commercial speech is certainly a relevant consideration in determining whether the fit between ends and means is reasonable."

Respondents levy a great deal of criticism, at the scope of the Bar's restriction on targeted mail. "By prohibiting written communications to all people, whatever their state of mind," respondents charge, the Rule "keeps useful information from those accident victims who are ready, willing and able to utilize a lawyer's advice." This criticism may be parsed into two components. First, the Rule does not distinguish between victims in terms of the severity of their injuries. According to respondents, the Rule is unconstitutionally overinclusive insofar as it bans targeted mailings even to citizens whose injuries or grief are relatively minor. Second, the Rule may prevent citizens from learning about their legal options, particularly at a time when other actors—opposing counsel and insurance adjusters—may be clamoring for victims' attentions. Any benefit arising from the Bar's regulation, respondents implicitly contend, is outweighed by these costs.

We are not persuaded by respondents' allegations of constitutional infirmity. We find little deficiency in the ban's failure to distinguish among injured Floridians by the severity of their pain or the intensity of their grief. Indeed, it is hard to imagine the contours of a regulation that might satisfy respondents on this score. Rather than drawing difficult lines on the basis that some injuries are "severe" and some situations appropriate (and others, presumably, inappropriate) for grief, anger, or emotion, the Bar has crafted a ban applicable to all postaccident or disaster solicitations for a brief 30-day period. Unlike respondents, we do not see "numerous and obvious less-burdensome alternatives" to Florida's short temporal ban. The Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.

Respondents' second point would have force if the Bar's Rule were not limited to a brief period and if there were not many other ways for injured Floridians to learn about the availability of legal representation during that time. Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative

ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media. They may rent space on billboards. They may send untargeted letters to the general population, or to discrete segments thereof. There are, of course, pages upon pages devoted to lawyers in the Yellow Pages of Florida telephone directories. These listings are organized alphabetically and by area of specialty. These ample alternative channels for receipt of information about the availability of legal representation during the 30-day period following accidents may explain why, despite the ample evidence, testimony, and commentary submitted by those favoring (as well as opposing) unrestricted direct-mail solicitation, respondents have not pointed to—and we have not independently found—a single example of an individual case in which immediate solicitation helped to avoid, or failure to solicit within 30 days brought about, the harms that concern the dissent. In fact, the record contains considerable empirical survey information suggesting that Floridians have little difficulty finding a lawyer when they need one. Finding no basis to question the commonsense conclusion that the many alternative channels for communicating necessary information about attorneys are sufficient, we see no defect in Florida's regulation.

III

Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer. This case, however, concerns pure commercial advertising, for which we have always reserved a lesser degree of protection under the First Amendment. Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States, it is all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the "subordinate position" of commercial speech in the scale of First Amendment values.

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

Justice Kennedy, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting.

Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the First and Fourteenth Amendments. The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance. With all respect for the Court, in my view its solicitude for the privacy of victims and its concern for our profession are misplaced and self-defeating, even upon the Court's own premises.

I take it to be uncontroverted that when an accident results in death or injury, it is often urgent at once to investigate the occurrence, identify witnesses, and preserve evidence. Vital interests in speech and expression are, therefore, at stake when by law an attorney cannot direct a letter to the victim or the family explaining this simple fact and offering competent legal assistance. Meanwhile, represented and better informed parties, or parties who have been solicited in ways more sophisticated and indirect, may be at work. Indeed, these parties, either themselves or by their attorneys, investigators, and adjusters, are free to contact the unrepresented persons to gather evidence or offer settlement. This scheme makes little sense. As is often true when the law makes little sense, it is not first principles but their interpretation and application that have gone awry.

Although I agree with the Court that the case can be resolved by following the three-part inquiry we have identified to assess restrictions on commercial speech, a preliminary observation is in order. Speech has the capacity to convey complex substance, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communications may be vital to the recipients' right to petition the courts for redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures. If our commercial speech rules are to control this case, then, it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interests of the speaker.

I

As the Court notes, the first of the *Central Hudson* factors to be considered is whether the interest the State pursues in enacting the speech restriction is a substantial one. The State says two different interests meet this standard. The first is the interest "in protecting the personal privacy and tranquility" of the victim and

his or her family. As the Court notes, that interest has recognition in our decisions as a general matter; but it does not follow that the privacy interest in the cases the majority cites is applicable here. The problem the Court confronts, and cannot overcome, is our recent decision in *Shapero*. In assessing the importance of the interest in that solicitation case, we made an explicit distinction between direct, in-person solicitations and direct-mail solicitations. *Shapero*, like this case, involved a direct-mail solicitation, and there the State recited its fears of "overreaching and undue influence." We found, however, no such dangers presented by direct-mail advertising. We reasoned that "a letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded. We pointed out that"the relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." In assessing the substantiality of the evils to be prevented, we concluded that "the mode of communication makes all the difference." The direct mail in *Shapero* did not present the justification for regulation of speech presented in *Ohralik*.

To avoid the controlling effect of *Shapero* in the case before us, the Court seeks to declare that a different privacy interest is implicated. As it sees the matter, the substantial concern is that victims or their families will be offended by receiving a solicitation during their grief and trauma. But we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener. On the contrary, we have said that these "are classically not justifications validating the suppression of expression protected by the First Amendment." And in *Zauderer*, where we struck down a ban on attorney advertising, we held that "the mere possibility that some members of the population might find advertising offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity."

We have applied this principle to direct-mail cases as well as with respect to general advertising, noting that the right to use the mails is protected by the First Amendment. In *Bolger*, we held that a statute designed to "shield recipients of mail from materials that they are likely to find offensive" furthered an interest of "little weight," noting that "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." It is only where an audience is captive that we will assure its protection from some offensive speech. Outside that context, "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." The occupants of a household receiving mailings are not a captive audience, and the asserted interest in preventing their offense should be no more controlling here than in our prior cases. All the recipient of objectionable mailings need

do is to take "the short, though regular, journey from mail box to trash can." As we have observed, this is "an acceptable burden, at least so far as the Constitution is concerned." If these cases forbidding restrictions on speech that might be offensive are to be overruled, the Court should say so.

In the face of these difficulties of logic and precedent, the State and the opinion of the Court turn to a second interest: protecting the reputation and dignity of the legal profession. The argument is, it seems fair to say, that all are demeaned by the crass behavior of a few. The argument takes a further step in the amicus brief filed by the Association of Trial Lawyers of America. There it is said that disrespect for the profession from this sort of solicitation (but presumably from no other sort of solicitation) results in lower jury verdicts. In a sense, of course, these arguments are circular. While disrespect will arise from an unethical or improper practice, the majority begs a most critical question by assuming that direct-mail solicitations constitute such a practice. The fact is, however, that direct solicitation may serve vital purposes and promote the administration of justice, and to the extent the bar seeks to protect lawyers' reputations by preventing them from engaging in speech some deem offensive, the State is doing nothing more (as amicus the Association of Trial Lawyers of America is at least candid enough to admit) than manipulating the public's opinion by suppressing speech that informs us how the legal system works. The disrespect argument thus proceeds from the very assumption it tries to prove, which is to say that solicitations within 30 days serve no legitimate purpose. This, of course, is censorship pure and simple; and censorship is antithetical to the first principles of free expression.

II

Even were the interests asserted substantial, the regulation here fails the second part of the *Central Hudson* test, which requires that the dangers the State seeks to eliminate be real and that a speech restriction or ban advance that asserted state interest in a direct and material way. The burden of demonstrating the reality of the asserted harm rests on the State. Slight evidence in this regard does not mean there is sufficient evidence to support the claims. Here, what the State has offered falls well short of demonstrating that the harms it is trying to redress are real, let alone that the regulation directly and materially advances the State's interests. The parties and the Court have used the term "Summary of Record" to describe a document prepared by the Florida Bar (Bar), one of the adverse parties, and submitted to the District Court in this case. This document includes no actual surveys, few indications of sample size or selection procedures, no explanations of methodology, and no discussion of excluded results. There is no description of the statistical universe or scientific framework that permits any productive use of the information the so-called Summary of Record contains. The majority describes this anecdotal matter as "noteworthy for its breadth and detail," but when examined, it is noteworthy for its incompetence. The selective synopses of

unvalidated studies deal, for the most part, with television advertising and phone book listings, and not direct-mail solicitations. Although there may be issues common to various kinds of attorney advertising and solicitation, it is not clear what would follow from that limited premise, unless the Court means by its decision to call into question all forms of attorney advertising. The most generous reading of this document permits identification of 34 pages on which direct-mail solicitation is arguably discussed. Of these, only two are even a synopsis of a study of the attitudes of Floridians towards such solicitations. The bulk of the remaining pages include comments by lawyers about direct mail (some of them favorable), excerpts from citizen complaints about such solicitation, and a few excerpts from newspaper articles on the topic. Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech.

It is telling that the essential thrust of all the material adduced to justify the State's interest is devoted to the reputational concerns of the Bar. It is not at all clear that this regulation advances the interest of protecting persons who are suffering trauma and grief, and we are cited to no material in the record for that claim. Indeed, when asked at oral argument what a "typical injured plaintiff gets in the mail," the Bar's lawyer replied: "That's not in the record, and I don't know the answer to that question." Having declared that the privacy interest is one both substantial and served by the regulation, the Court ought not to be excused from justifying its conclusion.

III

The insufficiency of the regulation to advance the State's interest is reinforced by the third inquiry necessary in this analysis. Were it appropriate to reach the third part of the *Central Hudson* test, it would be clear that the relationship between the Bar's interests and the means chosen to serve them is not a reasonable fit. The Bar's rule creates a flat ban that prohibits far more speech than necessary to serve the purported state interest. Even assuming that interest were legitimate, there is a wild disproportion between the harm supposed and the speech ban enforced. It is a disproportion the Court does not bother to discuss, but our speech jurisprudence requires that it do so.

To begin with, the ban applies with respect to all accidental injuries, whatever their gravity. The Court's purported justification for the excess of regulation in this respect is the difficulty of drawing lines between severe and less serious injuries, but making such distinctions is not important in this analysis. Even were it significant, the Court's assertion is unconvincing. After all, the criminal law routinely distinguishes degrees of bodily harm, and if that delineation is permissible and workable in the criminal context, it should not be "hard to imagine the contours of a regulation" that satisfies the reasonable fit requirement.

There is, moreover, simply no justification for assuming that in all or most cases an attorney's advice would be unwelcome or unnecessary when the survivors or the victim must at once begin assessing their legal and financial position in a rational manner. With regard to lesser injuries, there is little chance that for any period, much less 30 days, the victims will become distraught upon hearing from an attorney. It is, in fact, more likely a real risk that some victims might think no attorney will be interested enough to help them. It is at this precise time that sound legal advice may be necessary and most urgent.

Even as to more serious injuries, the State's argument fails, since it must be conceded that prompt legal representation is essential where death or injury results from accidents. The only seeming justification for the State's restriction is the one the Court itself offers, which is that attorneys can and do resort to other ways of communicating important legal information to potential clients. Quite aside from the latent protectionism for the established bar that the argument discloses, it fails for the more fundamental reason that it concedes the necessity for the very representation the attorneys solicit and the State seeks to ban. The accident victims who are prejudiced to vindicate the State's purported desire for more dignity in the legal profession will be the very persons who most need legal advice, for they are the victims who, because they lack education, linguistic ability, or familiarity with the legal system, are unable to seek out legal services.

The reasonableness of the State's chosen methods for redressing perceived evils can be evaluated, in part, by a commonsense consideration of other possible means of regulation that have not been tried. Here, the Court neglects the fact that this problem is largely self-policing: Potential clients will not hire lawyers who offend them. And even if a person enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed. The State's restriction deprives accident victims of information which may be critical to their right to make a claim for compensation for injuries. The telephone book and general advertisements may serve this purpose in part; but the direct solicitation ban will fall on those who most need legal representation: for those with minor injuries, the victims too ill informed to know an attorney may be interested in their cases; for those with serious injuries, the victims too ill informed to know that time is of the essence if counsel is to assemble evidence and warn them not to enter into settlement negotiations or evidentiary discussions with investigators for opposing parties. One survey reports that over a recent 5-year period, 68% of the American population consulted a lawyer. The use of modern communication methods in a timely way is essential if clients who make up this vast demand are to be advised and informed of all of their choices and rights in selecting an attorney. The very fact that some 280,000 direct-mail solicitations are sent to accident victims and their survivors in Florida each year is some indication of the efficacy of this device. Nothing in the Court's opinion demonstrates that these efforts

do not serve some beneficial role. A solicitation letter is not a contract. Nothing in the record shows that these communications do not at the least serve the purpose of informing the prospective client that he or she has a number of different attorneys from whom to choose, so that the decision to select counsel, after an interview with one or more interested attorneys, can be deliberate and informed. And if these communications reveal the social costs of the tort system as a whole, then efforts can be directed to reforming the operation of that system, not to suppressing information about how the system works. The Court's approach, however, does not seem to be the proper way to begin elevating the honor of the profession.

IV

It is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech in order to shield its own profession from public criticism. Obscuring the financial aspect of the legal profession from public discussion through direct-mail solicitation, at the expense of the least sophisticated members of society, is not a laudable constitutional goal. There is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects. If public respect for the profession erodes because solicitation distorts the idea of the law as most lawyers see it, it must be remembered that real progress begins with more rational speech, not less. I agree that if this amounts to mere "sermonizing," the attempt may be futile. The guiding principle, however, is that full and rational discussion furthers sound regulation and necessary reform. The image of the profession cannot be enhanced without improving the substance of its practice. The objective of the profession is to ensure that "the ethical standards of lawyers are linked to the service and protection of clients."

Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. "The general rule is that the speaker and the audience, not the government, assess the value of the information presented." By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.