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Lawyer Advertising and the First Amendment

Key Concepts

- The First Amendment protects a lawyer's advertising as commercial speech.
- The state may not prohibit a lawyer's advertising absent proof that the prohibition serves an important state interest, such as protecting consumers from deceptive, misleading, or intrusive communications.
- The state may prohibit in-person solicitation altogether, unless political rather than pecuniary interests motivate the solicitation.
- Advertising regulations that serve an important state interest still may be proven unconstitutional if less restrictive means could advance the state's interest, such as a disclaimer requirement.

Introduction

Legal advertisements have become so commonplace and pervasive that many law students may be surprised to learn that lawyer advertising is regulated at all. But states historically have regulated a lawyer's ability to advertise in a variety of ways, including outright bans.

As might be expected with a profession of lawyers, however, the United States Constitution was injected into debates over whether and how lawyers may communicate with the public about themselves and their services. The First Amendment of the Constitution grounds this debate:

> Congress shall make no law … abridging the freedom of speech.

The United States Supreme Court ultimately supported a lawyer's First Amendment right to advertise. This First Amendment framework thus protects lawyer advertising from some regulation and prohibition by the state. But the Supreme Court did not grant lawyers an ab*solute* right to advertise. As a result, states may regulate and even prohibit certain kinds of communications by lawyers that present recognized harms to consumers or the public.

Law students cannot fully appreciate how the Rules of Professional Conduct regulate lawyer advertising without learning the First Amendment framework behind these rules, because the Rules of Professional Conduct track the Supreme Court's First Amendment legal Analysis. This chapter outlines that constitutional framework.

A. Background to Lawyer Advertising

The legal profession has long scorned advertising and solicitation by lawyers, dating back to the English common law.[1] The ban on lawyer advertising may have "originated as a rule of etiquette and not as a rule of ethics."[2] But by 1908, when the American Bar Association ("A.B.A.") codified an advertising ban in the A.B.A.'s original Canons of Professional Ethics, "the attitude toward advertising fostered by this view [of etiquette had] evolved into an aspect of the ethics of the profession."[3] This general prohibition on lawyer advertising continued into the middle of the twentieth century when, in 1969, the A.B.A. updated the Canons of Professional Ethics to the Code of Professional Responsibility, which still banned advertising and solicitation.

Nevertheless, "[t]he traditional ban on lawyer advertising began to weaken and dissolve during the mid-1970s."[4] The profession confronted a tension between bans on advertising and the public's ability to evaluate and access legal services without meaningful information about the services, the cost of the services, and where to find the services. Moreover, the profession's internal agreement to prohibit

competitive advertising raised questions of whether lawyer advertising bans violated the Sherman Antitrust Act.[5]

B. The *Bates* Case

These issues reached the Supreme Court in 1977, in the case of *Bates v. State Bar of Arizona*.[6] The Supreme Court in *Bates* rejected the antitrust challenge to Arizona's ban on lawyer advertising.[7] Nevertheless the Court restricted the state's regulatory monopoly over lawyer advertising by protecting this form of advertising as commercial speech under the First Amendment. This decision laid the framework for the modern rules and practices of legal advertising.

The lawyers in *Bates* advertised modestly enough, purchasing a newspaper advertisement that offered " 'legal services at very reasonable fees,' and list[ing] their fees for certain services."[8] Arizona did not claim that the lawyers' advertisement was untruthful or deceptive, Arizona nevertheless claimed that such lawyer advertising was prohibited through an attorney ethics rule:

> 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 permit others to do so in his behalf.[9]

The lawyers conceded that their newspaper advertisement violated Arizona's ethics rule, but the lawyers argued that Arizona's prohibition violated their First Amendment right to free speech.

In deciding whether lawyers have a First Amendment right to advertise, the Supreme Court observed that lawyer advertising serves important First Amendment

values, including educating the public about socially valuable services and ensuring "informed and reliable decisionmaking."[10] Therefore, legal advertising receives First Amendment protection as "commercial speech." While not the full constitutional protection that political speech would receive, for instance, lawyers are granted more protection than mere commercial *activity* receives. The Court held that to prohibit the lawyers' advertisement, Arizona had to show that the regulation served an important state interest.

Arizona proffered six different rationales to justify its advertising prohibition. Lawyer advertising would: adversely commercialize the profession; inherently mislead consumers; agitate unwarranted litigation; increase the cost of legal services; incentivize shoddy legal work; and prove difficult to enforce. The Supreme Court, however, found that these interests were too generalized, or overly-paternalistic toward the legal market, to prohibit lawyer advertising altogether. Therefore, Arizona's blanket prohibition on legal advertising violated the First Amendment.

Bates did not leave states powerless to regulate lawyer advertising. The Supreme Court noted in *Bates* that the decision did not undermine states' ability to regulate advertising that is false, deceptive, or misleading.[11] The Court also recognized the state's legitimate concerns over in-person solicitation in contrast to general advertising. Furthermore, time, place, and manner restrictions may be justified, and states may prohibit advertising of illegal transactions.[12] Finally, the Court observed that "the special problems of advertising on the electronic broadcast media will warrant special consideration."[13] The Supreme Court, however, worked through some of these First Amendment regulations in subsequent cases.

C. The *Ohralik* Case

Shortly after the *Bates* decision, the Supreme Court enforced state power to restrict attorney communications with prospective clients in *Ohralik v. Ohio State Bar Association*.[14] The lawyer in *Ohralik* visited two car accident victims and their families in the hospital and in their home to secure a contingent fee agreement to represent the accident victims. When the accident victims attempted to proceed without Ohralik as their attorney, Ohralik sued to enforce the fee agreement, and

the accident victims complained to the bar. The state disciplined Ohralik for his in-person solicitation of the two accident victims.

On appeal to the Supreme Court, Ohralik conceded that the state has a sufficient regulatory interest to discipline in-person solicitation to protect lay consumers from high-pressure tactics by trained attorneys. But Ohralik argued the state had to prove that the individual attorney's solicitation caused actual harm as a condition precedent to discipline. This case-specific standard would leave conscientious attorneys immune from discipline for in-person solicitation.

The Supreme Court rejected this position. Instead, the Court authorized states to prohibit in-person solicitation *categorically*, regardless of whether the individual lawyer coerced or harassed the prospective client. The Court embraced this prophylactic rule because of the greater risk of undue influence inherent with in-person solicitation. Moreover, unlike other forms of advertising, in-person solicitation occurs in private with little to no record, making effective regulation exceedingly difficult.

Bates and *Ohralik* thus establish two ends of the regulatory spectrum regarding legal advertisements: general advertising and in-person solicitation. Under *Bates*, the state may not discipline attorneys for advertising to the public without proving a real risk of harm to consumers from that advertisement. But under *Ohralik*, the state may ban in-person solicitation categorically without any individualized proof of harm to the consumer because of the risks presented by that conduct.

D. Further Lawyer Advertising Decisions

Falling in between these First Amendment bookends were the cases of *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*,[15] and *Shapero v. Kentucky Bar Ass'n*[16] In *Zauderer*, an attorney advertised in a newspaper to a targeted audience of prospective clients—people who had been injured by the Dalkon Shield, an intrauterine contraceptive device. The Supreme Court held that the First Amendment prohibited the state from disciplining the attorney for targeting a specific audience through general advertising, so long as the advertising did not mislead the target audience.

At the same time, however, the Supreme Court distinguished a state's regulation that bans lawyer communications from a regulation that imposes a disclosure

requirement. Ohio required lawyers who advertised a willingness to represent clients on a contingent-fee basis to disclose that the client still may be liable for certain expenses if the client loses. Because this disclosure requirement did not prevent lawyers from communicating their commercial message, the requirement needed only to relate reasonably to the state's legitimate interest in preventing consumer deception.[17]

The Supreme Court extended *Zauderer's* holding in *Shapero*. The lawyer in *Shapero* mailed solicitations directly to individuals facing foreclosure of their home. The Supreme Court concluded that these targeted mailings proved more analogous to *Zauderer's* targeted newspaper advertisements than to *Ohralik's* in-person solicitation, because the lawyer did not communicate directly and privately with the prospective client, and the advertisement created a record of the communication. Therefore, the state could not ban these direct mail solicitations. The Court, however, again emphasized that the state often may regulate these communications to advance the state's important interest in protecting consumers from deceptive or intrusive communications.

The Supreme Court further identified a regulation of lawyer communications that properly extended to a *temporary* ban in *Florida Bar v. Went For It, Inc*.[18] Florida's ethics rules prohibited lawyers from sending a targeted, direct-mail solicitation to an accident victim or the victim's relatives for 30 days following an accident or disaster. After reviewing the state's detailed study supporting this regulation, the Court concluded that the Bar had an interest 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."[19] *Went For It* thus supports meaningful regulatory oversight of lawyer advertising, even if a regulation temporarily prevents a lawyer from communicating to a desired market. The Court in Went For It, however, emphasized that the outcome might prove different "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."[20]

Finally, the Supreme Court made clear in *In re Primus*[21] that not every solicitation by a lawyer to a prospective client should be treated as commercial speech under

the First Amendment. In *Primus*, the state reprimanded a lawyer for soliciting women who had allegedly been sterilized, or threatened with sterilization, as a condition to receive Medicaid benefits. The lawyer approached the women as a member of the local American Civil Liberties Union ("ACLU") chapter, working in conjunction with another advocacy group. The lawyer offered for the ACLU to supply free legal counsel to the women as part of the ACLU's anti-sterilization legal campaign.

The Supreme Court overturned the state's discipline. The Court distinguished this case from *Ohralik* because in *Primus* the lawyer did not engage in "in-person solicitation for pecuniary gain." Rather, the lawyer communicated an offer of legal help from a civil rights organization. Indeed, this fact enhanced the First Amendment protection of the lawyer's communications, because the lawyer's motive involved political advocacy, which the state may regulate only in the narrowest of circumstances. To restrict this kind of political communication by lawyers, the state would need to prove *actual* abuse by the lawyer, such as misrepresentation, harassment, or invasion of privacy.

These cases have created the basic First Amendment framework that lower courts apply.[22] If an attorney advertisement concerns unlawful activity, is untruthful, or "is inherently likely to deceive or … has in fact been deceptive,"[23] the state may prohibit the advertisement entirely. By contrast, the state may restrict advertising that may potentially mislead, but is not inherently deceptive, only if the state meets two standards: (1) the regulation advances a substantial government interest; and (2) the regulation is no broader than necessary to serve that interest. Finally, if the state merely imposes a disclosure obligation on potentially misleading advertising, courts will uphold the regulation if it reasonably relates to the state's interest in preventing consumer deception.

Example. The State of Exasperation grew weary of complaints about increasingly aggressive advertising by lawyers. In particular, lawyers in Exasperation advertised that they could ensure specific results, employed fake testimonials and reenactments, using actors to portray former clients, judges, and jurors, and adopted suggestive advertising monikers, such as

"555-CASH"[24] and "Total Bad-Ass Trial Lawyer."[25] After surveying the public and the Bar about the effects of this advertising on consumer confidence and clarity about legal services, Exasperation's Supreme Court issued new regulations that: (1) prohibited communications that promise results; (2) prohibited communications identifying past results in actual cases; (3) prohibited communications that include portrayals of clients by actors, or a portrayal of events or scenes that are not authentic, without a disclaimer; (4) prohibited communications that utilize a nickname, moniker, or trade name that states or implies an ability to obtain results; and (5) prohibited communications that include a portrayal of a judge or a jury. Several lawyers sued in federal court to enjoin these new regulations on the ground that the regulations violated their First Amendment rights.[26]

Analysis. The State of Exasperation lawfully prohibited attorney communications that *promise* results. As one federal court concluded in upholding a similar prohibition: "A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results."[27] These advertisements therefore receive no First Amendment protection and may be banned.

Several of the other regulations, however, do not involve advertising that inherently deceives. These regulations instead address advertising that only potentially could mislead. As a result, these advertisements are protected as commercial speech under the First Amendment. The State of Exasperation thus must justify these regulations by showing that they advance a substantial state interest no more broadly than necessary to protect that interest.

The State of Exasperation's regulation categorically prohibiting reports of past results restricts communications that include factually accurate, verifiable information. The State of Exasperation's concern that lay consumers may rely too heavily on this information is not a sufficient basis for prohibiting this speech altogether if the advertisement does not deceive or mislead consumers. Consequently, the state is limited to banning communications of past results that cannot be objectively verified or that create unjustified expectations of future results, such as, "I have won the unwinnable cases." Alternatively, a

required disclaimer, such as "past results do not ensure success in your case," could address the state's concerns without the need for a blanket prohibition on speech.[28]

The State of Exasperation also regulated too broadly in prohibiting all portrayals of judges and juries in advertising. A state may argue that consumers may interpret the reenactments as literal depictions of judges or juries or as a display of the lawyer's influence over judges and juries. This argument, however, presumes that all consumers are so unsophisticated that they can be misled by depictions of normal courtroom participants. Moreover, a method short of a broad prohibition, such as a disclaimer could alleviate any potential for confusion with these portrayals.[29]

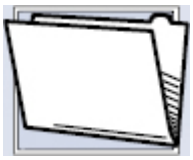
The State of Exasperation's prohibition of nicknames, monikers, and trade names that *imply* an ability to obtain results presents a tougher question. One federal court rejected the state's argument that "common sense" demonstrates that these communications inherently confuse or mislead consumers. Instead, the court claimed that "a dearth of evidence" supporting a "prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and indeed expected, in commercial advertising generally."[30] Exasperation, however, did not rely on the unsupported intuition that these communications inherently confuse or mislead. Rather, the state surveyed the public and the Bar to verify the effects of this advertising. Another federal court upheld this kind of regulation when it is supported with a similar survey and focus group data. In this court's view, this kind of evidence demonstrated that "[t]his rule is narrowly drawn to materially advance the substantial government interest in protecting the public from misleading lawyer advertising."[31]

Unlike the preceding regulations, the State of Exasperation's requirement of a disclaimer when advertising with actor-delivered client testimonials and portrayals of fictitious scenes or events does not restrict the content of speech itself. Therefore, the state must show only that the disclaimer requirement reasonably relates to a legitimate state interest. The state's interest in assuring that consumers accurately can distinguish reality from reenactment when evaluating lawyer advertising is legitimate. Under the more deferential test

> for state regulations requiring only lawyer disclaimers, survey data or even common-sense intuition can establish a legitimate state interest. A disclaimer reasonably relates to the state's interest in ensuring that consumers can judge the communication as actor-delivered or fictitious, so this regulation should survive First Amendment scrutiny.[32]

As this example shows, states, lawyers, and the public all have legitimate interests in the state regulation of lawyer advertising. These sometimes competing interests thus can require nuanced constitutional Analysis. These First Amendment issues remain very much in play, as lawyers continue to challenge various states' efforts to regulate what and how lawyers may communicate about their legal services.[33]

Quick Summary



The Supreme Court's First Amendment jurisprudence itself does not govern how lawyers may advertise. But, the Supreme Court's decisions heavily inform modern lawyer advertising ethics rules because the decisions identify advertising restrictions that states may *not* impose without violating the constitutional rights of lawyers. These decisions give states much more leeway to regulate advertising in the name of consumer protection, and very little discretion to regulate lawyer advertising to protect or promote a particular image or reputation for the profession. Following this framework, the Rules of Professional Conduct on lawyer advertising read in many respects like a First Amendment script for codifying lawyer ethics.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 *See generally* Gregory H. Bowers & Otis H. Stephens, Jr., *Lawyer Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U. L. REV. 221, 223–233 (1987) (reviewing lawyer advertising regulations prior to the mid-1970s).

2 *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977).

3 *Id.*

4 Bowers & Stephens, *Lawyer Advertising and the First Amendment*, *supra* note 1, at 235.

5 Indeed, in 1976, the U.S. Department of Justice sued the A.B.A. for an alleged conspiracy to restrain trade. *See United States v. American Bar Association*, Civil No. 76–1182 (D.D.C. 1976). This suit was not resolved prior to the *Bates* decision, which settled the antitrust issue.

6 *Bates*, 433 U.S. 350.

7 The Supreme Court decided that the Sherman Act exempted Arizona's lawyer advertising ban because the ban was promulgated by the Arizona government and states

traditionally have regulated attorney conduct. *See id.* at 359–63. Students, however, should note the strong free-market themes in *Bates* underlying the Court's First Amendment Analysis.

8 *Bates*, 433 U.S. at 354.

9 *Id.* at 355 (*quoting* Arizona Disciplinary Rule 2–101(B) (1976)).

10 *Id.* at 364.

11 *See id.* at 383.

12 *See id.* at 366.

13 *Id.* at 384.

14 436 U.S. 447 (1978).

15 471 U.S. 626 (1985).

16 486 U.S. 466 (1988).

17 *See Zauderer*, 436 U.S. at 460–62.

18 515 U.S. 618 (1995).

19 *Id.* at 635.

20 *Id.* at 633.

21 436 U.S. 412 (1978).

22 *See generally Public Citizen Inc. v. Louisiana Attorney Disciplinary Board*, 632 F.3d 212 (5th Cir. 2011); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010).

23 *Public Citizen, Inc.*, 632 F.3d at 218; *see also In re R.M.J.*, 455 U.S. 191, 202–203 (1982).

24 *Cf. e.g.*, https://www.theinjurylawyer.com

25 *Cf. e.g.*, http://www.dwibadass.com/

26 *See Public Citizen, Inc.*, 632 F.3d 212.

27 *Id.* at 218.

28 *See Public Citizen, Inc.* 632 F.3d 212.

29 *See id.*

30 *Alexander*, 598 F.3d at 95.

31 *Public Citizen, Inc.*, 632 F.3d at 225–26.

32 *See id.*

33 *See e.g.*, Jan Pudlow, *Lawyer Advertising Rules Challenged in Federal Court*, Florida Bar News (Jan. 15, 2014) (reporting on First Amendment lawsuit challenging 2013 Florida advertising rule requiring that online lawyer advertising be "objectively verifiable").