St. Mary's Law Journal

Volume 21 | Number 4 Article 12

1-1-1990

The Whole Truth or Nothing but the Truth - Should Attorneys Who Advertise Be Required to Disclose Prior Disciplinary Actions Taken against Them.

Sara Murray

COMMENTS

The Whole Truth or Nothing but the Truth? Should Attorneys Who Advertise be Required to Disclose Prior Disciplinary Actions Taken Against Them?

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EPIGRAPH

"Now, good Sir, our Massachusetts magistracy, . . . have not been bold to put in force the extremity of our righteous law against her. The penalty thereof is death. But, in their great mercy and tenderness of heart, they have doomed Mistress Prynne to stand only a space of three hours on the platform of the pillory, and then and thereafter, for the remainder of her natural life, to wear a mark of shame upon her bosom."
— Nathaniel Hawthorne, *The Scarlet Letter*

I. INTRODUCTION

Against a backdrop of controversy, the United States Supreme Court has delineated the constitutional scope of legal advertising, beginning with *Bates v. State Bar of Arizona*[1] in 1977.[2] In *Bates*, the Court held that truthful, nondeceptive advertisements of routine legal

1. 433 U.S. 350 (1977).

2. For several extensive analyses of the Supreme Court's attorney advertising and solicitation decisions since *Bates* was decided, see, e.g., Bowers & Stephens, *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard*, 17 MEM. ST. U.L. REV. 221 *passim* (1987)(chronology of legal advertising, from English common law through *Zauderer*); Elliot, *Trolling for Clients Under the First Amendment: It's Hard to Keep a Good Solicitor Down*, 60 CONN. B.J. 219 *passim* (1986)(reviews commercial speech doctrine and attorney advertising jurisprudence through *Zauderer*); Johns, *From* Bigelow *to* Shapero: *Steps Along the Way in Attorney Advertising*, 22 AKRON L. REV. 173 *passim* (1988)(chronology of attorney advertising jurisprudence through *Shapero*); Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487 *passim* (1986)(thorough discussion of commercial speech doctrine as applied to attorney advertising cases through *Zauderer*); Pearson & O'Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer*, 9 U. PUGET SOUND L. REV. 293 *passim* (1986)(discusses commercial speech jurisprudence, specifically in attorney advertising context); Wallace & McKelvey, *Regulating Attorney Advertising*, 18 TEX. TECH L. REV. 761 *passim* (1987)(reviews *Bates* and progeny, emphasizing impact upon Texas); Whitman & Stoltenberg, *Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification*, 19 IND. L. REV. 497 *passim* (1986)(traces Court's approach to attorney advertising cases through *Zauderer,* emphasizing emerging patterns); Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses With the* Zauderer *Decision*, 65 N.C.L. REV. 170 *passim* (1986)(reviews Court's attorney advertising jurisprudence); Note, *Constitutional Law—The Liberalization of Attorney Commercial Speech Rights*—Zauderer v. Office of Disciplinary Counsel, 21 WAKE FOREST L. REV. 1019 *passim* (1986)(reviewing Court's attorney advertising jurisprudence).

services[3] are protected commercial speech[4] which cannot be proscribed by the state.[5] However, the Court acknowledged that attorney advertising, like other forms of commercial speech, is not wholly immune to state regulation.[6] Nearly one year after *Bates*, the Court

3. *See Bates*, 433 U.S. at 372 ("routine" legal services include uncontested divorces, uncontested personal bankruptcy procedures, name changes, and simple adoptions).

4. The term "commercial speech" eludes precise definition. For instance, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, "commercial speech" was said to do "no more than propose a commercial transaction." 413 U.S. 376, 385 (1973). Similarly, in *Ohralik v. Ohio State Bar Association*, "commercial speech" was characterized as "[e]xpression concerning purely commercial transactions." 436 U.S. 447, 455 (1978). Later, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Court defined "commercial speech" as "expression related solely to the economic interests of the speaker and its audience." 447 U.S 557, 561 (1980). While these definitions appeal to common-sense notions of commercial speech, they hardly draw a bright line between commercial and noncommercial speech. *See* Note, *Toward a Definition of Commercial Speech*, 23 NEW ENG. L. REV. 595, 602 (1988)(no bright line definition of "commercial speech"). For example, is communication which merely presents the positive attributes of a product, without actually proposing a transaction, commercial speech? *See* National Comm'n on Egg Nutrition v. F.T.C., 570 F.2d 157, 163 (7th Cir. 1977)(positive statements about eggs held commercial speech because they could encourage purchase of product). What about a generic reference to a product or service? *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66 n.13 (1983)(generic reference to condoms held to be commercial speech, even though no brand name mentioned); *see also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764 (1976)(statement merely promoting American product over import would be commercial speech).

The distinction between commercial and noncommercial speech is crucial, however, because noncommercial speech generally receives greater first amendment protection than commercial speech. *See Central Hudson*, 447 U.S. at 563 (noncommercial constitutionally guaranteed speech given greater protection than commercial speech); *Ohralik*, 436 U.S. at 456-57 (certain regulations which would be impermissible for noncommercial speech are permissible for commercial speech); *Bates*, 433 U.S. at 383 (attorney advertising is commercial speech which cannot be absolutely suppressed but can be regulated). Significant exceptions to the general rule that noncommercial speech is more constitutionally protected than commercial speech are obscenity, fighting words, defamation, advocacy of imminent lawless behavior, and fraudulent misrepresentation. *See* Miller v. California, 413 U.S. 376, 388 (1973)(obscenity not protected speech); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969)(advocating imminent lawless behavior not protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)(fighting words not protected speech); *see also* Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial From Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1821-22 n.6 (1988)(some noncommercial speech unprotected by first amendment, including obscenity, advocacy of lawless behavior, fighting words); Note, *Toward a Definition of Commercial Speech*, 23 NEW ENG. L. REV. 595, 602 n.60 (1988)(some noncommercial speech not protected by first amendment, including fighting words, obscenity, defamation). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 1044-45 (11th ed. 1985)(discussing unprotected noncommercial speech, including fighting words, obscenity, defamation, invasions of privacy).

5. *See Bates*, 433 U.S. at 383-84 (lawyer advertising protected commercial speech).

6. *See id.* at 383 (state may limit attorney advertising but cannot ban it altogether).

heard two companion cases[7] involving solicitation[8] of prospective clients and held that in-person solicitation is generally impermissible.[9] By contrast, solicitation by nonprofit organizations seeking to use litigation as political expression is permissible.[10] The Court recently articulated another exception to the prohibition against direct solicitation, holding in *Shapero v. Kentucky Bar Association*[11] that direct-mail solicitation, targeted at potential clients known to have particular legal needs, is constitutionally protected.[12]

Although *Bates* and its progeny all involved balancing the attorneys', states', and consumers' interests,[13] the Court did not adopt a specific (*Central Hudson*) test[14] for evaluating the constitutionality of

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7. *See In re* Primus, 436 U.S. 412, 414 (1978)(involving client solicitation by nonprofit political organization); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978)(involving client solicitation for attorney's own pecuniary gain).

8. The Court has distinguished advertising from solicitation, particularly in-person solicitation. *See* Shapero v. Kentucky Bar Ass'n, __ U.S. __, __, 108 S. Ct. 1916, 1922-23, 100 L. Ed. 2d 475, 484-86 (1988)(distinguishing in-person solicitation from both advertising and written solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 641-42 (1985)(contrasting in-person solicitation with printed ads and written solicitation); *Ohralik*, 436 U.S. at 457-58, 464-65 (in-person solicitation poses inherent risks of overreaching, unlike advertising); *see also* Langan, *Professional Responsibility*, in 1985 ANN. SURV. AM. L. 887 n.63 (advertising brings information to attention of general public; solicitation involves petitioning particular people); Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 495 (1986)(advertising addresses general public; solicitation directly addresses prospective client). In addition, the Model Rules of Professional Conduct distinguish advertising (Rule 7.2) from solicitation (Rule 7.3). MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.2, 7.3 (1989).

9. *See Ohralik*, 436 U.S. at 468 (state may prohibit direct, in-person solicitation for attorney's own pecuniary gain).

10. *See Primus*, 436 U.S. at 437-38 (nonprofit organization's solicitation of potential litigants constitutionally protected because not commercial speech).

11. __ U.S. __, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

12. *See id.* at __, 108 S. Ct. at 1924, 100 L. Ed. 2d at 488 (first amendment protects attorney's truthful, nondeceptive, targeted direct-mail solicitation of potential clients).

13. *See In re* Primus, 436 U.S. 412, 421-22 (1978)(attorney's first amendment freedoms weighed against state's interests in regulating legal profession and protecting public); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 454-55 (1978)(public's right to commercial information insufficient to warrant in-person solicitation by attorney); Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977)(attorney's right to advertise balanced against state's interests); *see also* Johns, *From* Bigelow *to* Shapero: *Steps Along the Way in Attorney Advertising*, 22 AKRON L. REV. 173, 177-78 (1988)(*Bates, Ohralik, and Primus* involve balancing of competing interests).

14. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)(establishing four-pronged, intermediate-level commercial speech test). In *Central Hudson*, Justice Powell, writing for the Court, said:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and

legal advertising regulations[15] until *In re R.M.J.*[16] Initially, this four-pronged test seemed to clarify the standards for deciding attorney advertising cases.[17] Three years later, in *Zauderer v. Office of Disciplinary Counsel*,[18] the Court applied the four-step analysis again, to uphold both the use of illustrations and specific legal advice in an

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not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

15. *See In re* R.M.J., 455 U.S. 191, 203-07 (1982)(discussing four prongs of *Central Hudson* analysis and applying them to facts of *R.M.J.*).

16. 455 U.S. 191 (1982).

17. *See R.M.J.*, 455 U.S. at 192 (unanimous Court decided case). In 1981, a unanimous Court decided *In re R.M.J.*, and with its adoption of the specific four-part analysis of *Central Hudson*, some of the uncertainty surrounding legal advertising seemed to abate. *See id.*; *see also Central Hudson*, 447 U.S. at 566 (establishing specific four-part commercial speech test). By the time the Court decided *Zauderer* in 1985, however, their unanimity had eroded. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 628 (1985)(three separate opinions written, reflecting divided Court); *see also* Wallace & McKelvey, *Regulating Attorney Advertising*, 18 TEX. TECH L. REV. 761, 771 (1987)(*Zauderer* decided by fragmented Court).

In addition, the *Zauderer* holding introduced some doubt about the efficacy of the *Central Hudson* test in resolving all legal advertising issues because in *Zauderer*, the Court applied the *Central Hudson* test to only two of the three regulations in dispute. *See Zauderer*, 471 U.S. at 644, 647, 651 (Court applied *Central Hudson* test to state's prohibitions on specific legal advice and illustrations, but not to state's disclosure requirements); *see also* Whitman & Stoltenberg, *Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification*, 19 IND. L. REV. 497, 555 (1986)(*Central Hudson* test not applied to disclosure requirements in *Zauderer*). The inadequacy of the *Central Hudson* test for resolving all legal advertising issues is further evidenced by the growing realization that the four-pronged analysis applies only *after* the Court determines that it is dealing with commercial speech. *See Central Hudson*, 447 U.S. at 566 (once Court determines case involves commercial speech, four-part analysis applied). The test, however, provides little direction for resolving the more fundamental problem of distinguishing commercial speech from noncommercial speech. *See id.* (no part of test defines "commercial speech"); *see also* Note, *Toward a Definition of Commercial Speech*, 23 NEW ENG. L. REV. 595, 602 (1988)(*Central Hudson* test does not aid in defining "commercial speech").

Furthermore, because the *Central Hudson* test provides only a case-by-case approach for legal advertising regulation review, it offers little assistance to bar associations or advertising attorneys in predicting which regulations will pass constitutional muster. *See* Elliot, *Trolling for Clients Under the First Amendment: It's Hard to Keep a Good Solicitor Down*, 60 CONN. B.J. 219, 236 (1986)(*Central Hudson's* ad hoc analysis of commercial speech cases creates uncertainty about constitutionality of attorney advertising rules); *see also* Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses With the Zauderer Decision*, 65 N.C.L. REV. 170, 194 (1986)(Court's ad hoc approach to commercial speech cases creates uncertainty and makes attorneys reluctant to advertise).

18. 471 U.S. 626 (1985).

attorney's advertisements.[19] In *Zauderer*, however, the apparent clarity of the intermediate-level *Central Hudson* test blurred when the Court applied a lower standard of review to the state's disclosure requirements.[20] Differentiating between a state's power to require and its power to prohibit certain content in legal advertising, the Court upheld the disclosure provisions although they were only *reasonably related* to the state's interest in preventing consumer deception.[21] Because the disclosures required in *Zauderer* were not unduly burdensome,[22] the Court reasoned that using a lower standard of review for disclosures and disclaimers would not have a chilling effect upon lawyer advertising.[23]

In the years since *Zauderer*, several states have imposed disclosure requirements upon attorney ads.[24] This practice raises a question as

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19. *Id.* at 647.

20. *See id.* at 650-53 (state's required disclosure of client's liability for costs comports with first amendment). Commercial speech was granted first amendment protection primarily because of its value in providing consumers with information helpful to making decisions in the marketplace. *See id.* at 651 (commercial speech protected because it imparts valuable information to consumers). The Court found that an attorney's interest in not providing such information did not outweigh the state's interest in assuring that consumers are not misled or deceived by incomplete advertisements. *See id.* (attorney has only minimal first amendment interest in withholding factual information from consumers). Therefore, the Court held that a state can establish disclosure requirements as long as they are *reasonably related* to protecting consumers from deceptive or misleading advertising. *See id.* at 651-52 n.14 (disclosure requirements need not be least restrictive means available to prevent deceptive ads).

21. *See id.* at 651 (Court adopts "reasonably related" standard for disclosure requirement analysis).

22. *See id.* at 653 n.15 (case provides no factual basis for finding disclosure requirements unduly burdensome).

23. *See id.* (disclosure requirements seem reasonable, not burdensome enough to chill speech).

24. *See* SUPREME COURT OF ARIZONA, ARIZONA RULES OF PROFESSIONAL CONDUCT ER 7.3(b) (1989)[hereinafter ARIZONA RULES OF PROFESSIONAL CONDUCT](imposing disclosure requirement); SUPREME COURT OF CALIFORNIA, CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-400(D)(4) (1989)[hereinafter CALIFORNIA RULES OF PROFESSIONAL CONDUCT](imposing disclosure requirement); SUPREME COURT OF FLORIDA, RULES REGULATING THE FLORIDA BAR Rule 4-7.3(d) (West Supp. 1990)[hereinafter FLORIDA BAR RULES](imposing disclosure requirement); SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. X, § 9 (Rules of Professional Conduct) Rule 7.01(c) (1990) [hereinafter TEXAS RULES OF PROFESSIONAL CONDUCT](imposing disclosure requirement). To illustrate, the newly amended Arizona Rules of Professional Conduct, ER 7.3(b) states:

> (b) . . . a lawyer may initiate written communication, not involving personal or telephone contact, with persons known to need legal services of the kind provided by the lawyer in a particular matter, for the purpose of obtaining professional employment. Such written communication shall be clearly marked on the envelope and on the first page of the communication contained in the envelope, as follows:

yet unresolved by the Supreme Court: What are the limits of a state's

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ADVERTISING MATERIAL:
THIS COMMERCIAL SOLICITATION HAS NOT BEEN APPROVED BY THE STATE BAR OF ARIZONA

Said notification shall be printed in red ink, in all capital letters, in type size at least double that used in the body of the communication. If the solicitation advertises representation on a contingent or "no recovery, no fee" basis, it shall also state that the client may be liable for costs and expenses.

ARIZONA RULES OF PROFESSIONAL CONDUCT ER 7.3(b).

Similarly, Rule 1-400(D)(4) of California's Rules of Professional Conduct requires: (D) "A communication or a solicitation . . . shall not . . ." (4) "[f]ail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be . . . ." CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-400(D)(4). For purposes of Rule 1-400, "communication" includes:

(A) . . . any message or offer made by or on behalf of a member [of the state bar] concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or

(2) Any stationery, letterhead, business card, sign, brochure, or other comparably written material describing such member, law firm, or lawyers; or

(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or

(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 1-400(A).

Florida also requires disclosures and disclaimers in certain types of legal advertising:

(1) Television, radio, and all other electronic advertising shall contain a prominent display or announcement which states substantially the following:

"Free Information Concerning Qualifications and Experience Available on Request."

(2) Each page of any telephone or other commercial directory concerning display type advertising shall contain, at the top, the statement: "You may obtain free written information regarding the qualifications and experience of any (this) lawyer or law firm by calling or writing to the lawyer or law firm during regular business hours." . . .

(3) All other print or display advertising of any kind shall prominently contain the statement set forth in the preceding paragraph.

FLORIDA BAR RULES Rule 4-7.3(d).

Texas has a unique disclosure requirement:

(c) A lawyer who advertises through public media with regard to any area of the law in which the lawyer practices shall:

(1) With respect to each area of law so advertised, publish or broadcast the name of the lawyer, licensed to practice in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised.

(2) If the lawyer has been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to each area, "Board Certified, (area of specialization)—Texas Board of Legal Specialization."

(3) If the lawyer has not been awarded a Certificate of Special Competence by the Texas Board of Legal Specialization in the area so advertised, state with respect to each area, "Not Certified by the Texas Board of Legal Specialization," but if the area of law so

power to require certain disclosures or disclaimers in legal advertising?[25] This comment will address that issue by focusing on a more specific question: May a state require an attorney who has previously been publicly disciplined to disclose that fact in subsequent legal advertisements?[26] Before answering this question, two relevant facets of first amendment jurisprudence—the commercial speech doctrine and the negative speech doctrine—warrant examination.

II. BACKGROUND

A. *Commercial Speech Doctrine*

The demise of the commercial speech exception to the first amendment was the key which opened the door to legal advertising.[27] This event occurred in 1976 when the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[28] holding

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advertised has not been designated as an area in which a lawyer may be awarded a certificate of special competence by the Texas Board of Legal Specialization, the lawyer may also state, "No designation has been made by the Texas Board of Legal Specialization for a Certificate of Special Competence in this area."

TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01(c) (1990). These Texas disclosure requirements are part of the newly adopted disciplinary rules; however, they are essentially the same as the DR 2-101(B) & (C) provisions of the former Texas Code of Professional Responsibility. *See generally* Johnson, *Yellow Pages Legal Ads in Texas: The Complexities of DR 2-101(B) & (C)*, 17 ST. MARY'S L.J. 1 (1985)(implications of specialization disclosure provisions analyzed in depth); Rosenberg, *Texas Disciplinary Rule 2-101(C): The Fine Art of Disinformation*, 22 HOUS. L. REV. 909 (1985)(discussing constitutional implications of Texas DR 2-101(C)).

25. *Zauderer* excluded a state's disclosure or disclaimer requirements from the intermediate-level scrutiny required by *Central Hudson*, demanding only that such requirements be "reasonably related" to the state's interest in preventing deceptive ads. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)(disclosure requirement need only be reasonably related to state's interest in insuring nondeceptive advertising). However, the Court in *Zauderer* also recognized that a state's right to make such disclosure or disclaimer requirements is not absolute. *See id.* (some disclosure requirements might implicate advertiser's first amendment rights). Clearly, first amendment protection would not extend to unjustified, unduly burdensome disclosure requirements which would chill commercial speech. *See id.* (disclosure requirements having chilling effect on speech might violate first amendment). The Court did not, however, define "unjustified" or "unduly burdensome" in *Zauderer*, so determining how far a state may go in making disclosure or disclaimer requirements remains uncertain.

26. This question is more than hypothetical. An actual proposal of this nature was made to the Texas State Bar Advertising Committee. Telephone interview with Bob Thomas, Chairman of the Texas State Bar Advertising Committee (Feb. 15, 1990).

27. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 363-65 (1977)(lawyer advertising is commercial speech protected by first amendment).

28. 425 U.S. 748 (1976).

that pure commercial speech comes within the ambit of the first amendment.[29] The basis for extending protection to previously unprotected commercial speech[30] was the citizens' "right to know" and their interests as consumers in the free flow of information regarding commerce.[31] Because this rationale emphasized the value of encouraging competition and the consumers' interests over the advertisers' right to free expression,[32] commercial speech was not granted the same level of protection as noncommercial speech.[33] The states' interests in guarding against deceptive or confusing advertising allowed them to regulate commercial speech, but not to prohibit it altogether.[34] The Court reasoned that an advertiser's profit-making motivation would counterbalance any chilling effects of state regulations.[35] In deciding commercial speech cases, then, the Court permits certain content-based restrictions and prior restraints.[36] By contrast, in most noncommercial speech cases, such interference with free expression is unconstitutional.[37]

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29. *See id.* at 773 (state may not forbid dissemination of truthful information about prescription drug pricing without violating first amendment).

30. *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)(government may restrain commercial speech). The Court continued to exclude commercial speech from first amendment protection until *New York Times v. Sullivan*, which treated a paid advertisement soliciting money for the Civil Rights Movement as first amendment speech. *See* 376 U.S. 254, 266 (1964). A more significant blow to the commercial speech exception came in 1975, when the Court held that a newspaper advertisement regarding the availability of abortions was protected speech, despite its quasi-commercial nature. *See* Bigelow v. Virginia, 421 U.S. 809, 822 (1975). *Bigelow* extended constitutional protection to speech which had both commercial and noncommercial attributes, saying that speech does not lose all first amendment protection merely because it has some commercial aspects. *See id.* at 818.

31. *See Virginia Pharmacy*, 425 U.S. at 765 (first amendment protects consumers' interest in free access to commercial information needed for informed consumer decision-making).

32. *Id.* at 756-57.

33. *See id.* at 771 n.24 (commercial speech needs less protection because profit-making motivation of advertisers will offset any chilling effect of regulations).

34. *See id.* at 771-72 (state may regulate commercial speech to further certain substantial state interests).

35. *Id.* at 771 n.24.

36. *See id.* at 771 (state may regulate commercial speech to insure truthfulness). In fact, a state may prohibit untruthful advertising altogether. *See id.* In addition, a state may regulate other aspects of content to assure that the ad does not promote an illegal activity. *See id.* at 772. A state also may regulate the time, place, and manner of advertising, although such regulations must be content-neutral, not based upon the content of the particular speech being regulated. *See id.* at 771-72.

37. *See, e.g.*, Texas v. Johnson, __ U.S. __, __ 109 S. Ct. 2533, 2546-48, 105 L. Ed. 2d 342, 361-64 (1989)(burning American flag is protected political expression which state may not prohibit); Metromedia, Inc. v. San Diego, 453 U.S. 490, 506-07 (1981)(state may not regulate

Although *Virginia Pharmacy* did not determine the rights of lawyers to advertise their nonfungible services,[38] the opinion led the

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content of noncommercial, protected speech); Cohen v. California, 403 U.S. 15, 25-26 (1971)("Fuck the Draft" message on back of jacket is protected political speech which state may not punish). Generally, when the Court considers content-based regulation of speech, it first decides whether the speech is a type protected by the first amendment. *See* M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT ch. 2 (1984)(discussing limits of first amendment protection). Any regulation of protected types of speech is presumptively unconstitutional. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971)(prior restraints of speech presumptively unconstitutional); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)(prior restraints of speech presumed unconstitutional); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)(prior restraints presumed invalid); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952)(state bears heavy burden to justify speech regulation); *see also* M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.05[8] (1984)(discussing presumptive unconstitutionality of speech restrictions); *id.* § 4.02 (both prior restraints and subsequent punishments of speech presumed unconstitutional). If the speech is within the protected category, the Court will strictly scrutinize any regulation, requiring that it be narrowly drawn to advance a compelling state interest. *See* Widmar v. Vincent, 454 U.S. 263, 276 (1981)(content-based restrictions of expression subjected to strict scrutiny). On the other hand, if the speech is in the unprotected category (e.g., fighting words, obscenity, defamation, etc.), the regulation need only be rationally related to a legitimate state interest. *See* New York v. Ferber, 458 U.S. 747, 756 (1982)(child pornography not protected speech); Roth v. United States, 354 U.S. 476, 485 (1957)(obscenity not protected speech); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)("fighting words" not protected speech). *See generally* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978)(discussing three different approaches used in Court's free expression jurisprudence).

Commenting on the various levels of review used in first amendment cases, Melville Nimmer wrote:

> In balancing speech and anti-speech interests, the courts sometimes import from equal protection jurisprudence formulae such as "compelling state interests," and "exacting scrutiny," as compared with "an intermediate level of scrutiny." These are not so much prescriptive directions as they are shorthand labels for unarticulated balancing. They simply rationalize the balance once it has been achieved. They do not constitute a substitute for the need to analyze the components of the respective speech and anti-speech interests, and then to exercise the value judgments implicit in formulating the appropriate definitional balance.

M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.05[B](4) (1984)(citations omitted).

38. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 n.25. (1976). Specifically, the Court said:

> We stress that we have considered in this case the regulation of commercial advertisements by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Id.

Supreme Court to lift the ban on legal advertising one year later.[39] The principles of *Virginia Pharmacy* have guided every subsequent attorney advertising or solicitation case.[40] In addition, since 1981, the specific four-part commercial speech test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[41] has been applied to legal advertising regulations as well.[42]

B. *Negative Speech Doctrine*

Just as a citizen has a first amendment right to speak freely and to hear certain information, he also has a right not to speak.[43] The jurisprudence regarding this right to refrain from expression is called the "negative speech doctrine,"[44] and it applies whether one is being compelled to express his own[45] or someone else's views.[46] The negative

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39. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 363-65 (1977) (constitutional protection for attorney advertising flows directly from reasoning undergirding *Virginia Pharmacy*).

40. *See* Shapero v. Kentucky Bar Ass'n, __ U.S. __, __, 108 S. Ct. 1916, 1927, 100 L. Ed. 2d 475, 491 (1988)(O'Connor, J., dissenting)(discussing *Virginia Pharmacy*'s influence on legal advertising jurisprudence); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 629, 651 (1985)(citing *Virginia Pharmacy*'s contribution to legal advertising jurisprudence); *In re* R.M.J., 455 U.S. 191, 199-201 (1982)(recounting *Virginia Pharmacy*'s impact upon legal advertising jurisprudence); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-57, 461 n.17 (1978)(applying *Virginia Pharmacy*'s principles to in-person solicitation issue); *In re* Primus, 436 U.S. 412, 431, 438 (1978)(citing *Virginia Pharmacy* to determine constitutionality of political organization's legal solicitation).

41. 447 U.S. 557, 566 (1980).

42. *See Shapero*, __ U.S. at __, 108 S. Ct. at 1921, 100 L. Ed. 2d at 483 (applying *Central Hudson* test); *Zauderer*, 471 U.S. at 638, 644, 647, 651-52 (applying *Central Hudson* test to all issues except disclosure requirements); *R.M.J.*, 455 U.S. at 203-04, 206 (applying *Central Hudson* test).

43. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)(freedom to refrain from speaking serves same purpose as freedom to speak); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985)(compelled speech can violate first amendment); Wooley v. Maynard, 430 U.S. 705, 714 (1977)(first amendment protects both right to speak and right not to speak); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-58 (1974)(forcing newspapers to publish political candidates' reply letters violates first amendment); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34, 637 (1943)(first amendment protects right not to speak).

44. The phrase "negative speech" is somewhat anachronistic because it first appeared after many of the "negative speech" cases were decided. *See* Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 32 (1986)(Rehnquist, J., dissenting).

45. *See id.* at 11 (state cannot require individual to respond to others' ideas, nor restrict speech to particular topics).

46. *See Wooley*, 430 U.S. at 715 (state cannot require display of its motto on citizen's license plate); *Miami Herald*, 418 U.S. at 258 (state cannot require newspaper to publish views it does not espouse); *Barnette*, 319 U.S. at 642 (mandatory pledge of allegiance violates first amendment).

speech doctrine necessitates balancing an individual's first amendment right to remain silent against the state's interest in forcing the speech.[47] However, the Court has not yet adopted a specific test, comparable to commercial speech's four-pronged test,[48] for weighing the relative merit of these competing interests.[49] Unlike the commercial speech doctrine's focus upon the citizens' (audience's) right to know,[50] the right not to speak is based upon the individual's (speaker's) right to autonomy, liberty, and self-realization.[51] Like the protection of commercial speech, the negative speech doctrine reflects the long-held belief that truth is most likely to flourish when speech is unfettered[52] and when compulsion to speak is not permitted to violate

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47. *See Zauderer*, 471 U.S. at 650-51 (establishing "reasonably related" standard for balancing competing state and individual interests regarding disclosure requirements); *Wooley*, 430 U.S. at 715-16 (even if statute affects protected speech, balancing needed to determine sufficiency of state's interest); *Barnette*, 319 U.S. at 640-41 (state's interest in mandatory pledge of allegiance weighed).

48. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)(establishing four-pronged commercial speech analysis).

49. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651-52 n.14 (1985)(*Central Hudson* test inapplicable in disclosure requirements analysis). *But see id.* at 657 n.1 (Brennan, J., concurring in part and dissenting in part)(citing *Central Hudson* that disclosure requirements must be "reasonably necessary" to "substantial state interest").

50. *See Zauderer*, 471 U.S. at 651 (commercial speech's first amendment protection based upon value of commercial information to consumers); Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977)(commercial speech valuable to its listeners); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-65 (1976)(commercial speech provides information consumers need to make informed commercial decisions); Bigelow v. Virginia, 421 U.S. 809, 822 (1975)(commercial speech might include important information relevant to current issues).

51. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985)(right not to speak an aspect of free thought and expression); Wooley v. Maynard, 430 U.S. 705, 714 (1977)(freedom not to speak is subcategory of individual's right to think freely); *Wooley*, 430 U.S. at 715 (first amendment assures individuals cannot be forced to promote others' views); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)(first amendment protects individual's "sphere of intellect and spirit" from governmental control).

52. *See* Whitney v. California, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring)(free speech crucial to democracy). Justice Brandeis' opinion contains an eloquent statement about unfettered speech:

> Those who won our independence believed that . . . freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repres-

individual autonomy.[53]

Generally, the government may require an individual to provide certain information only if such a revelation would not be unduly burdensome.[54] Without a clear definition of "unduly burdensome," predicting which governmental requirements violate the first amendment is difficult.[55] Often the government's right to compel speech is measured by the likelihood that such forced speech will have a chilling effect on free expression.[56] A separate issue arises when the govern-

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sion breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id.

53. While forcing people to speak does make more information available, the concomitant violation of personal autonomy sometimes interferes with freedom of expression, which has led the Court to strike down compulsory disclosure laws in several noncommercial speech and associational contexts. *See* Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971)(state may not require bar applicant to disclose membership in organization advocating revolution); *In re* Stolar, 401 U.S. 23, 31 (1971)(bar applicant may not be rejected for refusing to answer question about membership in organization advocating revolution); Talley v. California, 362 U.S. 60, 65 (1960)(statute forbidding anonymity for authors or distributors of handbills unconstitutional); Shelton v. Tucker, 364 U.S. 479, 485-87 (1960)(state may not require public school teacher to disclose all organizational memberships and contributions); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958)(state may not demand disclosure of all state's NAACP members). *But see* Buckley v. Valeo, 424 U.S. 1, 143 (1976)(disclosure of campaign contributions can be required). In these cases of compelled disclosures, the Court has applied strict scrutiny, upholding such statutes only when they are the least restrictive means of advancing a compelling state interest. *See* Bates v. City of Little Rock, 361 U.S. 516, 524-25 (1960)(striking down disclosure requirement and applying strict scrutiny because personal liberty at stake); NAACP v. Alabama, 357 U.S. 449, 464-66 (1958)(no compelling state interest warranted disclosure of all Alabama NAACP members).

54. *See Zauderer*, 471 U.S. at 651 (disclosure requirements violate first amendment if unduly burdensome). *But see id.* at 651-52 n.14 (no fundamental right for commercial speaker to withhold accurate information necessary to prevent misleading consumers about his services).

55. The Court has not defined "unduly burdensome" but has suggested some criteria. *See Zauderer*, 471 U.S. at 653 (state requirement that contingency-fee ads must disclose client's liability for costs not unduly burdensome). *But see id.* at 651 (disclosure requirement which chills protected speech unduly burdensome); *id.* at 663 (Brennan, J., concurring in part and dissenting in part)(requiring detailed disclosure of contingency-fee arrangements would chill protected commercial speech).

56. *See Zauderer*, 471 U.S. at 651 (disclosure requirement unduly burdensome if chills protected speech); *id.* at 663 (Brennan, J., concurring in part and dissenting in part)(detailed disclosure of contingency-fee arrangements unduly burdensome due to chilling effect on protected commercial speech). Concern about chilling protected speech also underlies the overbreadth doctrine used in some free speech and free association cases. *See* Thornhill v.

ment requires individuals to provide access to certain private forums—such as a shopping center or radio station—for other citizens' speech.[57] In these cases, the facility with which a person can disassociate himself from the speakers' message[58] and the inherently limited nature of the broadcast media justify forcing the forum owner to convey someone else's message.[59]

III. ARGUMENTS FOR A PRIOR-DISCIPLINE DISCLOSURE REQUIREMENT

A. *Would Provide Significant Relevant Information to Public*

The main reason for extending first amendment protection to legal advertising is the public's interest in the free flow of information.[60]

Alabama, 310 U.S. 88, 97-98 (1940)("overbroad" statute proscribes both forbidden and protected speech). Overbroad statutes are harmful because they intimidate or discourage people from engaging in the constitutionally protected speech encompassed erroneously and unconstitutionally by such statutes. *See* Arnett v. Kennedy, 416 U.S. 134, 230 (1974)(Marshall, J., dissenting)(overbroad statutes chill constitutionally protected speech). If a statute is overbroad and the Court cannot sever protected speech from unprotected speech, it will allow the unprotected speech in order to safeguard the protected speech. *See* Maryland v. Joseph H. Munson Co., 467 U.S. 947, 964-70 (1984)(Court used overbreadth analysis because constitutionally proscribable conduct could not be separated from constitutionally protected conduct).

57. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980)(state constitutional requirement that private owner permit other citizens to speak in his shopping center did not violate first amendment); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)(viewers' right to know justifies requiring private broadcasters to provide some right of access to limited number of radio and television airwaves).

58. *See PruneYard*, 447 U.S. at 87-88 (shopping center owner could easily disassociate himself from others' speech).

59. *See Red Lion*, 395 U.S. at 386 (scarcity of broadcast frequencies warrants requiring private broadcasters to provide limited right of access for others' speech).

60. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 363-64 (1977)(legal advertising protected because provides valued information to public). Basically, a prospective client must rely on three sources of information about legal services: (1) his own experience or knowledge (personal); (2) what he hears from others (reputational); and (3) what he learns from advertising (promotional). Hazard, Pearce & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1094, 1094 (1984). Personal knowledge is unlikely to be extensive enough to provide an adequate basis for selecting a lawyer because few people consult an attorney more than twice in their lives. *Id.* at 1094-95. Reputation is a significant source of information about lawyers and legal services, though not necessarily reliable nor readily available to all segments of the population. *Id.* Advertising, while a low-cost source of information allowing consumers to compare lawyers and legal services, is often inadequate because of its bias and brevity. *Id.* Consequently, most prospective clients do not rely solely upon advertising when selecting an attorney, but rather use personal knowledge and reputational information to corroborate the claims made in advertisements. *Id.* at 1095-97.

Such information should help a person select an appropriate lawyer or law firm.[61] Comment 2 to Rule 7.2 of the Model Rules of Professional Conduct recommends

> public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.[62]

The Model Code of Professional Responsibility presents a similar list of types of information which would help prospective clients obtain legal services.[63]

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61. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1978)(addresses lawyer's responsibility to provide information necessary to facilitate public access to legal services). In general:

> [t]he need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Id.

Specifically, advertising should be truthful and relevant to a layperson's need for information in selecting appropriate legal services. *See id.* at EC 2-8, 2-9, 2-10.

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 comment 2 (1983).

63. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1978)(lists types of information permissible in legal advertisements). According to the Code, the following information in attorney ads might facilitate access to legal services:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;

What else might a person in search of a lawyer need to know before making his selection?[64] Would it be relevant, perhaps, to know that

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(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106 (C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(25) Fixed fee for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Id.

64. About three years before *Bates v. State Bar of Arizona* was decided, the American Bar Association and the American Bar Foundation initiated a survey in thirty-three states to determine what the American public knew about their legal system and lawyers. *See* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 1, 93-98 (Preliminary Report 1974)(discusses methodology and results of ABA/ABF legal needs study); *see also* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (1980)(introduces ABA/ABF study and general results). The results of this survey, some of which were cited by the Supreme Court in *Bates*, indicated that there was widespread ignorance regarding when legal services might be needed, what they might cost, and how to find a lawyer to provide them. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 370-71 n.23 (1977)(ABA/ABF study indicates public ignorance about lawyers' competence and fees obstructs access to legal services); *see also* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1, 4-5 (1980)(discussing results of ABA/ABF legal needs study and Court's reference to it in *Bates*); B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 93-98 (Preliminary Report 1974)(actual report of ABA/ABF study showing ignorance obstructs public access to legal services). In fact, many people sought no legal assistance whatsoever in situations where a lawyer's services could have proven helpful, valuable, or both. *See Bates*, 433 U.S. at 370-71 (citing ABA/ABF study that public's ignorance interferes with access to legal services); *see also* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 95 (Preliminary Report 1974)(nearly 80% agreed to some extent that ignorance obstructs access to legal services); L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 4

the lawyer one is considering retaining was publicly reprimanded and put on probation for two years because he charged an excessive fee?[65] Would a prospective criminal client want to know that the lawyer he is about to hire is on three-year probation because he pleaded nolo contendere to a charge of possession of marijuana, did not handle a criminal appeal on time, improperly criticized the court, and violated professional advertising ethics?[66] How about a woman seeking a divorce attorney—would she like to know that the lawyer she is planning to retain was once suspended because he sexually assaulted a client?[67] Should a client know, prior to retaining a lawyer, that he has been suspended twice for neglecting legal matters and being uncooperative with the disciplinary commission?[68] Reprimanded for kicking a judge in the groin?[69] Suspended for converting $30,000 to $40,000 in client funds?[70] Even without detailing how or why the attorney was disciplined, a general disclosure to the effect that the lawyer has

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(1980)(citing same ABA/ABF statistics regarding impact of public ignorance upon access to legal services). More recent studies indicate much the same public naivete about the nature of, the need for, and the availability and costs of, legal services. *See, e.g.*, ABA COMMISSION ON ADVERTISING, LEGAL ADVERTISING: THE ILLINOIS EXPERIMENT 12 (1985)(1981 Connecticut study showed public knowledge about lawyers virtually unchanged since earlier ABA/ABF study).

The public's confusion, moreover, is only more likely to grow in the future, as both society and the practice of law become increasingly complex. *See* Goldberg, *Then and Now: 75 Years of Change*, 76 A.B.A. J. 56, 58-61 (January 1990)(citing statistics indicating legal profession's tremendous growth since 1915). In the year 2001, for example, the number of lawyers in this country is predicted to increase by 30 percent, to one million. Gibbons, *Law Practice in 2001*, 76 A.B.A. J. 69, 69 (January 1990). Some of the largest firms ten years from now will have over 3000 lawyers. *Id.* The public's need for adequate, truthful, instructive information about these lawyers and megafirms will increase commensurately with the growth of the profession, forcing more aggressive advertising and marketing among those competing for clients' business. *See id.* at 73 (predicting future need for increased marketing aggressiveness).

65. *See* Florida Bar v. Johnson, 530 So. 2d 306, 307 (Fla. 1988)(lawyer disciplined for failing to apprise client that excessive $3500 fee covered only preliminary matters, not trial representation).

66. *See* Florida Bar v. Pascoe, 526 So. 2d 912, 913-14 (Fla. 1988)(lawyer's ethically improper ad, arrest for drug possession, improper criticism of court, and neglect of criminal appeal resulted in public reprimand and three-year probation).

67. *See In re* Woodmansee, 434 N.W.2d 94, 95-96 (Wis. 1989)(lawyer's license suspended for three years because he sexually assaulted client).

68. *See In re* Guilford, 505 N.E.2d 342, 342-43, 347 (Ill. 1987)(lawyer given two-year suspension for third instance of neglecting matters entrusted by client and being uncooperative with disciplinary committee).

69. *See* Kentucky Bar Ass'n v. Jernigan, 737 S.W.2d 693, 694 (Ky. 1987)(lawyer publicly reprimanded for kicking judge in groin and publishing scurrilous article about judge).

70. *See* Louisiana State Bar Ass'n v. Scariano, 523 So. 2d 834, 835, 838 (La. 1988)(attorney given two-year suspension for commingling and converting funds).

previously been disciplined might put prospective clients on notice to check public records for additional information.[71]

Proponents of a prior-discipline disclosure requirement argue that prospective clients should know about an attorney's previous discipline because if he has violated disciplinary rules in the past, he might do so again.[72] Even without such recidivism, the ignominy and di-

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71. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 2.6.6, at 65-66, §§ 3.5.2 to .3, at 126-27 (1986)(information regarding disciplinary actions publicly available). The ABA/BNA Lawyers' Manual On Professional Conduct, official and unofficial case law reporters, state bar journals, and publicity surrounding the disciplinary hearings are some public sources of information about disciplinary proceedings. *See id.* A client seeking such information could also get it from the state bar, although the details of the disciplinary proceedings often are confidential until some public action against the attorney is taken. *See* Attorney Grievance Comm'n v. A.S. Abell, Co., 452 A.2d 656, 660 (Md. 1982)(newspaper has no right to demand disclosure of grievance commission's disposition notices); Philadelphia Newspapers, Inc. v. Disciplinary Bd., 363 A.2d 779, 780 (Pa. 1976)(board did not abuse discretion in barring press from attorney's reinstatement hearing); McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 383 (Pa. 1975)(barring newspaper access to disciplinary hearing records not first amendment violation). *But see* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 10(D) (1989)(once imposed, attorney sanctions shall be made public).

The American Bar Association's position is that proceedings should be made public once formal charges are filed or some waiver of confidentiality occurs. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.2 (after formal charges filed, disciplinary proceedings and dispositions should be public); ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 8.24 -.25 (1979) *reprinted in* WEST PUBLISHING CO., SELECTED STATUTES, RULES AND STANDARDS OF THE LEGAL PROFESSION 195, 201 (1984)(once formal charges filed or exception occurs, disciplinary proceedings should be public); MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 16(B) (1989)(once formal charges filed, disciplinary proceedings usually public). As of 1989, more than 67 percent of the states hold public disciplinary hearings. *See Public Perception of Lawyer Discipline*, 5 Law. Man. on Prof. Conduct (ABA/BNA) No. 2, at 35-36 (Feb. 15, 1989)(reporting recent improvements in professional disciplinary procedures). Some jurisdictions have made all phases of the disciplinary process public, inasmuch as the system itself is intended for the public's protection. *See* Attorney Grievance Comm'n v. Strathen, 411 A.2d 102, 104, 107 (Md. 1980)(information about disciplinary hearing may be revealed to plaintiff in legal malpractice suit); Sadler v. Oregon State Bar, 550 P.2d 1218, 1221 (Or. 1976)(disciplinary proceedings records may be disclosed to public); *see also* C. WOLFRAM, MODERN LEGAL ETHICS § 3.4.4, at 107 (1986)(citing exceptions to disciplinary hearings confidentiality policy).

72. Generally, people tend to believe that behavior manifests persistent character traits. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.2, at 122-23 (1986). This belief underlies the tendency of the disciplinary process to treat single offenses more leniently than repeated or multiple ones. *See In re* Francovich, 575 P.2d 931, 932 (Nev. 1978)(neglecting client's affairs on single occasion warrants public reprimand, not suspension or disbarment); State *ex rel.* Oklahoma Bar Ass'n v. Hensley 560 P.2d 567, 569 (Okla. 1977)(attorney's prior disciplinary record relevant to determining appropriate sanction); *see also* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.2, at 122-23 (1986)(absence of prior disciplinary record affects sanctions imposed). *But see* Finch v. State Bar, 621 P.2d 253, 257 n.3 (Cal. 1981)(absence of prior discipline does not mitigate discipline for new lawyers); Bar Ass'n v. Siegel, 340 A.2d 710, 714

minished credibility often associated with the disciplinary process might adversely affect an attorney's effectiveness.[73] A lawyer who has lost the respect of his peers might find it difficult to get favorable judgments on pretrial motions or discretionary evidentiary rulings,[74] cooperation from opponents in the discovery process,[75] or amicable or

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(Md. 1975)(prior unblemished record not mitigating factor when misconduct by experienced lawyer is severe). The unreliability of prior conduct as a predictor of future conduct is indicated by the paucity of evidence showing any significant correlation between past and future transgressions, despite repeated research efforts by social scientists to uncover such evidence. *See* Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 556-62 (1985)(prior behavior poor predictor of future behavior). Specific contextual pressures affect moral conduct more than any general character traits or predispositions do. *See id.* at 557-58. The American Bar Association does not compile statistics on recidivism among attorneys. Telephone interview with Taryn Kelly, ABA Center for Professional Responsibility (Feb. 9, 1990).

73. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.2, at 126 (1986)(disciplinary process often results in adverse publicity, negative responses from professional colleagues and friends, and economic hardships for attorney's family); *see also* Marks & Cathcart, *Discipline Within the Legal Profession*, in ETHICS AND THE LEGAL PROFESSION 70 (M. Davis & F. Elliston, eds. 1986)(lawyer's reputation among peers directly affects professional success and effectiveness).

74. *See* R. HAYDOCK, D. HERR & J. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION § 13.2.4, at 575, 577 (1985)(judge's rulings on motions and discretionary matters often influenced by attorney's demeanor and reputation). More specifically, if an attorney has a reputation for pushing the limits of the law or rules, for being rude or disrespectful, or for deliberately making litigation more costly, judges may consider such factors in deciding how to rule on motions. *See id.* at 575. Similarly, a judge might look unfavorably upon an attorney's motion for continuance if an attorney has a reputation for neglecting clients' affairs, particularly when the attorney has seemingly had ample time to prepare. *See id.* at 517-18.

75. *See* R. HAYDOCK & D. HERR, DISCOVERY PRACTICE 1-2 (2d ed. 1988)(discussing importance of attorney cooperation in discovery). Modern discovery operates most efficiently when attorneys cooperate with one another, and the rules encourage such cooperation. *See id.*; *see also* R. HAYDOCK, D. HERR & J. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION § 1.1.3, at 5 (1985)(discussing current rules' emphasis upon cooperation between attorneys). However, such cooperation often depends upon perceived mutual benefit and the *desire* to cooperate with one another; and while sanctions exist for abuse of the discovery process and failure to cooperate, there is still considerable latitude, short of rule violations, wherein one attorney can make the process needlessly burdensome and costly for a disliked or disreputable attorney and his client. *See* G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 196-98 (1985)(cataloging dilatory discovery tactics and discovery abuses); *see also* Frankel, *Partisan Justice*, in G. HAZARD & D. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 191-92 (1985)(discovery process largely depends upon attitudes of participating lawyers toward one another and importance of winning suit). It would appear, then, that in discovery, as in all other aspects of legal practice, an attorney's reputation among his peers can critically affect his overall effectiveness. *See* Marks & Cathcart, *Discipline Within the Legal Profession*, in ETHICS AND THE LEGAL PROFESSION 70 (M. Davis & F. Elliston, eds. 1986)(discussing importance of peer opinion and professional reputation to attorney's effectiveness).

productive settlement negotiations when his client prefers not to litigate.[76] Additionally, the sanctions for repeated violations of disciplinary rules are usually harsher than those for first offenses.[77] Consequently, a previously disciplined attorney might become unduly cautious, fearing further discipline, even though such tentativeness would undermine his effectiveness and credibility.[78]

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76. *See* P. SPERBER, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS § 4.01, at 46 (1985)(cooperation extremely important in negotiations). Without cooperation in negotiations, compromise "win/win" resolutions to disputes could never be reached. *See id.* In some negotiations, a spirit of cooperation is more crucial than logic to success. *See id.* at 47 n.1. Moreover, a good reputation for honesty, sincerity and credibility strengthens a negotiator's position by forcing others to respect him, and the limits and deadlines he sets. R. WENKE, THE ART OF NEGOTIATION FOR LAWYERS 17 (1985). Conversely, a reputation for dishonesty, unreliability, rudeness, and disrespectful behavior destroys credibility and often guarantees negotiating failures. *See id.* at 25.

77. *See* ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 9.1-.2 (1986)(enumerating aggravating circumstances). Specifically, the ABA Standards for Imposing Lawyer Sanctions state:

9.1 GENERALLY

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 AGGRAVATION

9.21 *Definition.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 *Factors which may be considered in aggravation.* Aggravating factors include:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

Id.

By contrast, "absence of prior disciplinary record" or "remoteness of prior offenses" are mitigating circumstances which would "justify a reduction in the degree of discipline to be imposed." *Id.* §§ 9.31, 9.32(a), (m).

78. *See* R. ANTHONY, DR. ROBERT ANTHONY'S MAGIC POWER OF SUPER PERSUASION 3-4 (1988)(persuasiveness begins with self-confidence). One of the prerequisites of effective communication in any field is credibility, and competence and confidence are components of credibility. B. BRADLEY, FUNDAMENTALS OF SPEECH COMMUNICATION: THE CREDIBILITY OF IDEAS 3 (1981)(successful communication depends upon credibility); R. VERDERBER, COMMUNICATE! 326 (4th ed. 1984)(credibility is crucial to persuasion). A lawyer who is fearful of making a mistake, plagued by self-doubt, or tentative in his approach to his client's needs

B. *Would Serve Public Interest in Truthful Advertising*

A prior-discipline disclosure requirement could also serve the public interest in preventing deceptive advertising because omitting material information from an ad can prove as misleading as including untruthful or inaccurate information.[79] The Supreme Court has made it clear that first amendment protection only extends to truthful, nondeceptive advertisements.[80] Proponents of disclosure requirements argue that the public should not be deceived by self-laudatory ads that fail to tell the *whole* truth, even though they tell *nothing but* the truth.[81]

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is likely to be unconvincing. *See* A. JULIEN, JULIEN ON SUMMATION 10 (1986)(discussing importance of lawyer's demeanor and confidence in convincing jury or judge); *see also* T. SANNITO & P. MCGOVERN, COURTROOM PSYCHOLOGY FOR TRIAL LAWYERS 168, 181 (1985)(juries persuaded by confident attorneys; tentative attorneys adversely affect juries); T. Sannito, *Psychological Courtroom Strategies*, in THE TRIAL MASTERS: A HANDBOOK OF STRATEGIES AND TECHNIQUES THAT WIN CASES 437 (B. Warshaw ed. 1984)(attorney's tentativeness hurts client's case; attorney's confidence crucial to success).

79. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652 (1985)(advertisement for contingent-fee services must not omit facts concerning client's liability for costs); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1(a) (1983)(omission of necessary facts can render advertisement misleading or false). State bar ethics opinions also reflect the position that omissions can result in misleading advertisements. *See, e.g.*, Maryland State Bar Ass'n Comm. on Ethics, Opinion 88-65 (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) No. 5, at 88 (Mar. 30, 1988)(omitting mention of client's liability for costs in contingent-fee ad found misleading); Virginia State Bar Standing Comm. on Legal Ethics, Opinion 1029 (1988), *summarized in* 4 Law. Man. on Prof. Conduct (ABA/BNA) No. 5, at 88 (Mar. 30, 1988)("No recovery—No fee" ad misleading absent mention of client liability for costs); Colorado Bar Ass'n Ethics Comm., Opinion 76 (1987), *summarized in* 3 Law Man. on Prof. Conduct (ABA/BNA) No. 25, at 433-34 (Jan. 6, 1988)(Colorado bar's advertising guidelines prohibit misleading omissions).

80. *See Zauderer*, 471 U.S. at 638 (reviewing Court's previous opinions permitting restriction of deceptive, untruthful commercial speech); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980)(inaccurate commercial speech may be suppressed); Friedman v. Rogers, 440 U.S. 1, 13, 15-16 (1979)(false, misleading commercial speech may be prohibited); Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977)(deceptive commercial speech may be restricted); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976)(no first amendment protection for false, misleading, deceptive ads).

81. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1978)(self-laudatory publicity forbidden). The Model Rules are less specific about self-laudatory ads, prohibiting instead any ads comparing one lawyer's services with another's, except when the comparison is factually verifiable. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 7.1(c) (1983). However, even though an ad is not self-laudatory per se, it most likely will contain only positive information about the attorney, since attorneys advertise to attract more clients. *See* L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 74 (1980)(attorneys advertise to expand practice). An ad which creates the impression of an attorney's trustworthiness, competence, honesty, concern for clients' welfare, and profes-

C. *Would Aid In Deterring Attorney Misconduct*

A prior-discipline disclosure requirement might discourage misconduct by confronting a previously disciplined attorney with a dilemma. On the one hand, if the attorney advertises, making the disclosure, he risks losing business because clients might hesitate to retain him.[82] On the other hand, if he does not advertise,[83] avoiding the disclosure requirement, he foregoes the financial rewards of advertising, leaving more business for competitors.[84] Because either alternative would have deleterious consequences, it would augment both the punitive and deterrent effects already inherent in the disciplinary process.[85]

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sionalism could be misleading if the attorney, in fact, has neglected clients' needs in the past, been dishonest, mishandled client funds, simultaneously represented clients with conflicting interests, or committed acts of moral turpitude. *See In re* Petrie, 742 P.2d 796, 804 (Ariz. 1987)(attorney censured for representing opposing parties in adoption proceeding without full disclosure and consent); *In re* Washington, 541 A.2d 1276, 1276-77 (D.C. 1988)(four-year suspension for repeated neglect of client matters and disrespect for disciplinary process); Florida Bar v. McLawhorn, 535 So. 2d 602, 602-03 (Fla. 1988)(attorney publicly reprimanded for lying to client's creditors and mishandling client funds); *In re* Herman, 527 A.2d 868, 870-71 (N.J. 1987)(male attorney suspended after sexually assaulting 10-year-old boy).

82. *See* McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 381 n.9 (Pa. 1975)(discussing disciplinary process' deleterious effect upon attorney's reputation); *see also* ABA, LEGAL ADVERTISING: THE ILLINOIS EXPERIMENT 35-36 (1985)(client's confidence in lawyer significantly influences which attorney he retains); McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 105 (1985)(lawyer's business adversely affected by reputation for deception).

83. *See* Brown, *A Profession Losing Its Soul*, 72 A.B.A. J. 38, 40 (April 1, 1986)(advertising not mandatory; attorneys may choose not to advertise); Reskin, *Lawyer Advertising Is On The Rise*, 72 A.B.A. J. 44, 44 (April 1, 1986)(1985 ABA statistics showed only 24% of attorneys advertised).

84. *See* Oliver, *Lawyer Advertising: The New Debate*, 7 CAL. LAW. 29, 68 (July 1987)(advertising attorneys get 600-800% return per dollar invested in advertising); *see also* Winter, *Lawyer Ads Yield $8 Per Dollar Spent: Survey*, 66 A.B.A. J. 705, 705 (June 1980)(advertising attorneys get 800% return per dollar spent on advertising).

85. *See In re* Carroll, 602 P.2d 461, 467 (Ariz. 1979)(sanctions aid in deterring misconduct by other lawyers); Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983)(sanctions intended to promote profession-wide deterrence of misconduct); Committee on Prof. Ethics v. Gross, 326 N.W.2d 272, 273 (Iowa 1982)(sanctions deter future misconduct by other attorneys); *In re* McInerney, 451 N.E.2d 401, 405 (Mass. 1983)(sanctions intended to deter future misconduct by all bar members).

Although punishment per se is not one of the purposes of the disciplinary process, sanctions do have a punitive effect which most attorneys would prefer to avoid, especially if the stigma attached to discipline must endure in the form of advertisement disclosures. *See In re* Grimes, 326 N.W.2d 380, 382 (Mich. 1982)(sanctions' punitive effect not main purpose); Levi Denham v. Mississippi State Bar, 436 So. 2d 781, 786 (Miss. 1983)(punishing attorney not purpose of disciplinary proceedings); *In re* Maragos, 285 N.W.2d 541, 545 (N.D. 1979)(punishment not main purpose of disciplinary process); *see also* 3 Law. Man. on Prof. Conduct (ABA/BNA) No. 20, at 358 (Oct. 28, 1987)(citing results of ABA nationwide lawyer discipline survey). The

D. *Other Advertisers Must Make Similar Types of Disclosures*

Requiring advertising attorneys to disclose prior discipline is analogous to statutory demands on other advertisers to reveal certain material information about their products or services.[86] For example, advertisers of cigarettes, drugs, dangerous toys and other hazardous substances, among others, must reveal material information about their products and provide warnings to the public.[87] Such disclosure requirements would seem to serve either one of two purposes:

> (1) to clarify or qualify a representation which, although truthful, has the capacity to mislead, or
> (2) to supply a material fact which previously has been omitted . . . . The problem to be dealt with . . . is the deliberate concealment of certain aspects of the product or offer which, though less appealing than the ones already revealed, are considered to be highly important—that is, "material"—as affecting the likelihood of purchase.[88]

These same interests in preventing public deception and promoting public protection would similarly justify requiring an advertising attorney to disclose prior disciplinary actions taken against him, for such information would be material to a prospective client's

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survey disclosed that relatively few attorneys are publicly sanctioned, compared to the total number of complaints filed against attorneys, suggesting that most attorneys not only prefer to avoid public discipline, but actually succeed in avoiding it:

> Overall, the jurisdictions responding to the survey [47] reported an estimated 54,605 complaints for 1986. The number of privately sanctioned lawyers totaled 1,693, while 1,146 were publicly sanctioned. The average number of complaints of all reporting jurisdictions was 1,213; an average of 38 lawyers were publicly sanctioned and 25 privately sanctioned.

Id. ABA statistics on the frequency with which various jurisdictions impose sanctions indicate that thirty states imposed sanctions less than 1 percent of the time between 1980-1984. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Appendix 3 (1986). One additional state, North Dakota, imposed sanctions less than 1 percent of the time in the ten-year period 1974-1984. *See id.* Another eight states imposed sanctions less than 2 percent of the time between 1980-1984. *See id.* Only two states, California (22.8%) and Florida (11.6%) reported imposing sanctions more than 10 percent of the time between 1974-1984. *See id.*

86. *See, e.g.*, E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 104-14 (1971)(FTC may prohibit false advertising and may require certain disclosures to prevent consumer deception).

87. *See* 15 U.S.C.A. § 1333 (West Supp. 1989)(requirement that cigarette labeling include Surgeon General's warning); 21 U.S.C.A. § 352(n)(3) (West Supp. 1989)(disclosures about side effects and contraindications must accompany prescription drugs); 15 U.S.C.A. § 1261(p)(1) (West Supp. 1989)(listing various types of warnings which must accompany a hazardous substance, including dangerous toys).

88. E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 104 (1971).

"purchase" of legal services.[89]

IV. Arguments Against a Prior-Discipline Disclosure Requirement

A. *Would Be An Unduly Burdensome First Amendment Violation*

The strongest argument against imposing a prior-discipline disclosure requirement is that such a regulation of attorney advertising would be unjustifiably burdensome and, therefore, violative of the first amendment.[90]

1. Would Impose Unjustified Additional Punishment

To begin with, a previously disciplined attorney has already been punished in the manner deemed appropriate by the disciplinary authorities.[91] Requiring an additional punishment of disclosing the prior transgression in all subsequent advertising would be unjustified, particularly since punishment is not the primary purpose of the disciplinary process.[92] If an attorney's behavior is truly dangerous enough to justify warning prospective clients, then harsher sanctions, such as

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89. *See supra* notes 65-79 and accompanying text.

90. *See Zauderer*, 471 U.S. at 651 (unduly burdensome or unjustifiable disclosure requirement could violate first amendment).

91. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 3.0 (1986)(four factors should be considered before imposing sanction). Once the disciplinary authorities find that a lawyer has engaged in professional misconduct, they determine the appropriate sanction. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.1, at 117-18 (1986). This process requires weighing various factors like those established by the ABA: "a) the duty violated; b) the lawyer's mental state; and c) the potential or actual injury caused by the lawyer's misconduct; and d) the existence of aggravating or mitigating factors." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 3.0 (1986). *See generally* C. WOLFRAM, MODERN LEGAL ETHICS §§ 3.5.1 to .2, at 117-26 (1986)(discusses process by which disciplinary authorities determine appropriate sanctions).

92. *See In re* Rubi, 652 P.2d 1014, 1016 (Ariz. 1982)(public protection is purpose of lawyer discipline); *In re* Chapman, 448 N.E.2d 852, 855 (Ill. 1983)(protecting public and maintaining profession's integrity are purposes of lawyer discipline); *In re* Levin, 395 N.E.2d 1374, 1376 (Ill. 1979)(lawyers disciplined to protect public and profession); *In re* Grimes, 326 N.W.2d 380, 382-83 (Mich. 1982)(attorney discipline sometimes punitive, but punishment not main purpose); *In re* Maragos, 285 N.W.2d 541, 545 (N.D. 1979)(punishment not primary purpose of disciplinary process); *In re* Stout, 382 A.2d 630, 632 (N.J. 1978)(lawyers disciplined for public's protection); *see also* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 (1986)(enumerating purposes of lawyer discipline). As the ABA Standards state, lawyer discipline is not primarily to punish, but to "protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." *Id.*

indefinite suspension or disbarment, should be imposed initially so as to better protect the public.[93] If, however, an attorney's behavior warrants only a milder form of discipline, including limited suspension, disclosure should not be required because presumably the lawyer remains fit to practice law.[94]

2. Would Impose Additional Financial Burden

A prior-discipline disclosure requirement would also be financially burdensome because the additional information required in the ads would cost extra.[95] Furthermore, such a disclosure is likely to raise doubts about a previously disciplined attorney's professional credentials and result in loss of business.[96] This loss could easily become

93. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.2 (1986)(defining disbarment). Disbarment protects the public and the integrity of the legal profession by prohibiting the disbarred attorney from further practicing law. *See id.* § 2.2 comment (discussing purposes of disbarment). Suspension also prevents an attorney from practicing law for a period of time. *See id.* § 2.3 (defining suspension). Some jurisdictions impose lengthy or indefinite suspensions, making it improbable that the attorney will be competent to return to his practice once the suspension is ended. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.4, at 129-30 (discussing indefinite suspensions). By contrast, the ABA recommends that a suspension be for a "definite period of time not to exceed three years. If the conduct is so egregious that a longer suspension seems warranted, the sanction of disbarment should be imposed." ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.3 comment (1986).

94. *See id.* § 2.3 (defining suspension). A suspension permits an attorney to return to practice after a prescribed period of time elapses. *See id.* § 2.3 comment (discussing reinstatement process and criteria). Unlike a suspension, which temporarily removes a lawyer from practice, a reprimand just publicly declares the attorney's misconduct improper. *See id.* § 2.5 comment (discussing purposes of reprimand). An admonition is even milder than a reprimand and is private. *See id.* § 2.6 (defining admonition). Probation also permits the attorney to continue practicing law, provided he complies with specific conditions. *See id.* § 2.7 (defining probation).

95. Interview with Leonard Herrera, Telemarket Administrator, Southwestern Bell Telephone Co., San Antonio, Texas (Feb. 13, 1990). An attorney with a working business phone is not charged for listing his name, address, and phone number in regular type in the white and yellow pages of the phone book. *Id.* Such a listing would not truly be advertising. However, should the attorney decide to advertise, the charge for the yellow pages entry begins at $21 per month for the simplest ad and would increase $10 per month for every additional five words beyond his name, address, and phone number. Should the ad require a two-inch square of space in the San Antonio yellow pages, it would currently cost $92.25 per month. A quarter-column ad would currently cost $227.25 per month. *Id.*

96. *See* ABA LEGAL ADVERTISING: THE ILLINOIS EXPERIMENT 35 (1985)(discussing factors influencing clients' choices of lawyers). The ABA has discovered that most people select an attorney they believe will provide quality services and in whom they have confidence. *Id.* at 35-36. These factors more significantly influence attorney selection than low prices. *Id.* Logic dictates that advertisements indicating prior misconduct are less likely to instill confidence than ads which make no mention of prior discipline. *See* McLaughlin v. Philadelphia

disproportionate to the offense, for unless the attorney specified the type of sanction imposed upon him, the public would be unable to differentiate severe from minor misconduct.[97] Consequently, although an offense sanctioned by reprimand is undoubtedly less serious than one sanctioned by suspension, the financial loss resulting from a nonspecific disclosure might be the same for both offenses.[98] A more specific disclosure, however, might also cause problems because it would require the public to decipher the often-ambiguous terminology of the disciplinary process.[99]

Newspapers, Inc., 348 A.2d 376, 381 n.9 (Pa. 1975)(discussing disciplinary process' effect upon attorney's reputation). The *McLaughlin* court cited the 1970 report of the ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement [Clark Report]. *Id.* at 380 n.7. The Clark Report showed that when an attorney is even accused of misconduct,

> "disclosure of the existence of that accusation may itself result in irreparable harm to the attorney. His practice may be diminished, if not substantially destroyed, by the resulting lack of confidence of old and new clients, judges before whom he has to appear and fellow attorneys with whom he must negotiate . . . . [T]he attorney never can recoup the financial loss caused by public disclosure of charges against him, even if he is subsequently exonerated. In fact, since later exoneration is never as newsworthy as the prior accusation, it is likely that the damage visited on him will continue even after the charges have been found not to have been sustained."

Id. at 381 n.9 (quoting from Clark Report); *see also* McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 105 (1985)(lawyer's reputation for deception will adversely affect business).

97. *See generally* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986)(standards for matching appropriate sanctions to particular misconduct). A generic prior-discipline disclosure, such as "This attorney has previously been sanctioned by the Texas State Bar," would treat all sanctions equally. However, not all sanctions are, or should be, equal. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.1, at 118 (1986)(sanctions range in severity, depending upon level of misconduct).

98. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.5 (1986)(reprimand appropriate for less serious misconduct, not warranting suspension). However, upon reading two general disclosures ("This attorney has previously been sanctioned by the Texas State Bar"), a prospective client would be unable to distinguish the reprimanded attorney from the suspended one. To the extent that the disclosure discouraged the client from hiring a previously sanctioned attorney, the loss of business could be the same for both lawyers despite the differences in their misconduct.

99. *See* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Preface (1986)(more comprehensive discipline standards needed to rectify inconsistencies and confusion). To illustrate the problems plaguing the attorney discipline process:

> In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year, while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured. Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment, suspension, and censure. The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

3. Would Chill Protected Commercial Speech

A prior-discipline disclosure requirement could impermissibly chill protected commercial speech by making the risks of disclosure so great that the attorney does not advertise at all.[100] The Supreme Court already has indicated that such a chilling effect would make a disclosure requirement unduly burdensome and constitutionally unacceptable.[101]

4. Would Violate Attorney's Negative Speech Interests

To date, the Court only has examined disclosure requirements involving basic factual information about the legal services being promoted.[102] However, a prior-discipline disclosure requirement would force an attorney literally to advertise one of the most embarrassing, if not personally traumatic, events of his life.[103] Although the Court has

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Id. Public confusion about attorney discipline is understandable because the process is "selective, episodic, subject to constraints of fluctuating budgets and personnel ability, influenced by political instability, and subject to like influences that grossly distort the extent to which lawyer discipline reflects levels of deviance and compliance among lawyers." C. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 80 (1986).

100. *See* Pickering v. Board of Educ., 391 U.S. 563, 574 (1968)(threatening person's job could unconstitutionally chill speech); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967)(state cannot condition employment upon surrender of first amendment rights); Speiser v. Randall, 357 U.S. 513, 518 (1958)(state cannot penalize citizen for exercising first amendment rights).

101. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985)(disclosure requirement which chills protected commercial speech would violate first amendment); *see also* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 13-14 (1976)(disclosure laws often impair free speech). Professor Emerson concludes that when the public's right to know clashes with the individual's freedom to communicate, "the system of freedom of expression is better served by protecting the right to communicate, rather than the right to know. With the exception of campaign finance and lobbying laws, the Supreme Court has tended to adopt this position." *Id.*

102. *See Zauderer*, 471 U.S. at 651 (required disclosures involved only accurate, factual, uncontroversial information).

103. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 81 (1986)(disbarment or suspension quite harmful to attorney). As Professor Wolfram explains:

> From the lawyer's point of view, disbarment or suspension, while it lasts, deprives the lawyer of the substantial asset of a professional license gained through long and costly education and experience and throws a lawyer back into the search for employment officially stamped with disgrace and dishonor.

Id. Nearly every lawyer who is disciplined must endure psychologically painful public accusations and threats to his license, his income, and his family's continued well-being. *See id.* at 126; *see also* Taylor, *Defending Lawyers in Disciplinary Proceedings*, 31 AM. JUR. TRIALS 633, 648, 775 (1984)(discussing traumatic nature of disciplinary proceedings). Some disciplined attorneys even attempt suicide rather than face the public shame associated with sanctions.

not specifically adopted a test for analyzing negative speech cases, presumably such an onerous intrusion upon the attorney's privacy interests would demand more than the low-level scrutiny used in *Zauderer*.[104] Arguably, a state should not impose an unduly burdensome speech regulation upon a citizen unless it is necessary to advance a compelling state interest.[105]

B. *Would Not Prevent Misleading Public*

In addition to the significant constitutional concerns involved, a prior-discipline disclosure requirement would not preclude public deception.[106] While the state's interest in preventing misleading adver-

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See Taylor, *Defending Lawyers in Disciplinary Proceedings*, 31 AM. JUR. TRIALS 633, 775 (1984)(attorney suicide sometimes accompanies public sanctions).

104. *See Zauderer*, 471 U.S. at 651 (establishing "reasonable relationship" review for disclosure requirements).

105. *See* Wooley v. Maynard, 430 U.S. 705, 716 (1977)(absent compelling interest, state may not require speech); Shelton v. Tucker, 364 U.S. 479, 488 (1960)(despite compelling interest in requiring disclosure of information, state must use least intrusive means when personal liberties involved); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)(government regulation affecting protected first amendment rights must be narrowly drawn to advance substantial state interest).

The terms "compelling state interest," "least intrusive means," "least restrictive means," and "narrowly drawn" all indicate that the Court is strictly scrutinizing the governmental behavior at issue. *See* G. GUNTHER, CONSTITUTIONAL LAW 627-28 n.3 (11th ed. 1985)(discussing Court's definition of "strict scrutiny" in individual rights context). However, as Justice Blackmun once wrote, it is difficult to "fully . . . appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome,' upon any balancing process, then, of course, the test merely announces the inevitable result, and the test is no test at all." Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 188 (1979)(Blackmun, J., concurring). *See generally* M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 2.05[B](4) (1984)(discussing meaning of "compelling state interest"). In general, the more substantial the individual's right, the more "compelling" the state's interest in the regulation must be to pass constitutional review. *Id.* In addition, even a compelling state interest may only be advanced by means least intrusive upon an individual's fundamental rights. *Id.*

106. *See* Rosenberg, *Texas Disciplinary Rule 2-101(C): The Fine Art of Disinformation*, 22 HOUS. L. REV. 909, 918 (1985)(discussing potentially misleading disclaimer). A prior-discipline disclosure requirement's potential to mislead might be compared to that of Texas' "Not certified by the Texas Board of Legal Specialization" disclaimer. *See* TEXAS RULES OF PROFESSIONAL CONDUCT Rule 7.01(c) (1990). In discussing DR 2-101(C), the verbatim predecessor of Rule 7.01(c), Professor Yale Rosenberg illustrates some incorrect assumptions the Rule might engender:

> A member of the public reading the "conspicuous" certification disclaimer in an advertisement might infer that, although the attorney in question had satisfied the minimum requirements for general practice of law, he or she had not yet met the prerequisites for practicing in the area or areas mentioned in the advertisement. That inference would be

tising is substantial, an ad which unduly stigmatizes an attorney is no less misleading than one which distorts the truth with praise.[107] Furthermore, the disciplinary system is far from perfect, and sanctions are often modified or overturned on appeal.[108] Requiring an attorney to label himself "previously disciplined," only to have him absolved of all wrongdoing on appeal, ultimately could be more misleading than allowing him to advertise without such a disclosure.[109]

C. *Would Be Harmful to the Profession Overall*

Creating professional pariahs out of previously disciplined attorneys would hurt the profession overall by reinforcing the public's already negative perceptions of lawyers.[110] Although the legal

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incorrect. Or a lay person might conclude that, while the particular lawyer possessed the minimum qualifications for the advertised field, he or she was not one of the top attorneys in the area, since the latter would surely be Board certified. That conclusion might be incorrect. Or a consumer might decide that any attorney including a certification disclaimer in an advertisement was "obviously not up to snuff. Would you invest money to advertise a negative?" Again incorrect.

Rosenberg, *Texas Disciplinary Rule 2-101(C): The Fine Art of Disinformation*, 22 HOUS. L. REV. 909, 918 (1985). Disclosure requirements do not necessarily prevent deception, and may actually promote misleading advertising. *See id.* at 921.

107. *See id.* at 918 (discussing disclaimer's potential to undermine uncertified attorney's credibility); *see also* Galton, *The New Advertising Rules: Accentuating the Negative?* 45 TEX. B.J. 1420, 1421 (1982)(discussing disclaimer's potential to create inaccurate expectations about attorney's credentials).

108. *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 655-56 (1985)(attorney's public reprimand reversed in part); *In re* R.M.J., 455 U.S. 191, 206-07 (1982)(attorney's private reprimand reversed); *In re* Primus, 436 U.S. 412, 438-39 (1978)(lawyer's public reprimand reversed); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977)(state's grounds for disciplining attorneys reversed in part). While the United States Supreme Court vindicated the disciplined attorneys in the aforementioned cases, the more common procedure is for state supreme courts to review the recommendations of disciplinary boards. *See* C. WOLFRAM, MODERN LEGAL ETHICS § 3.5.1, at 118 (1986). In this process, the state supreme courts may disregard inappropriate disciplinary board recommendations. *See id.* However, the method is far from precise, and the decisions of the state supreme courts often reflect the justices' leniency or strictness, rather than the severity of the attorney's misconduct. *See id.*

109. *See R.M.J.*, 455 U.S. at 206-07 (lawyer's discipline reversed, no misconduct found); *see also Primus*, 436 U.S. at 438-39 (lawyer's discipline reversed, no misconduct found). As these two cases demonstrate, even state supreme courts err in imposing sanctions. Had the attorneys in these cases been subject to a prior-discipline disclosure requirement, they would have been forced either to disclose ultimately unwarranted sanctions or refrain from advertising until the appellate process was completed. Neither option serves the public's interest in accurate advertising.

110. *See* Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CALIF. L. REV. 379 (1987)(discussing negative public perception of attorneys); *Public Perception of Lawyer Discipline*, 5 Law. Man. on Prof. Conduct (ABA/BNA) No. 2, at 35-36 (Feb.

profession must regulate its own members effectively,[111] such a duty is best handled by properly functioning disciplinary processes, not by branding transgressing attorneys forever with the "Scarlet D" of discipline.[112]

V. CONCLUSION

Should advertising attorneys be required to disclose prior disciplinary actions taken against them? The American public certainly deserves access to accurate information about legal services, and lawyers have a duty to provide such information, whether by advertising or other means. However, when the public's right to know clashes with an individual's right not to speak, the competing interests must be balanced carefully. Although an attorney might legitimately be required to disclose basic factual information about the legal services he offers, the public's right to know does not justify demanding an attorney to make unduly burdensome disclosures. Attorneys, like all citizens, have a constitutional right not to speak. Absent a showing that forced speech is necessary to advance a compelling state interest, an attorney's negative speech rights should not be abridged. The Court's prior application of mere rationality review to lawyer advertising disclosure requirements should be confined to only the most mundane disclosures. Unduly burdensome disclosures, such as a prior-discipline disclosure requirement, should be subject to strict scrutiny.

While abjectly misleading lawyer advertising should not be permitted, the paternalistic notion that the state must guard against any pos-

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15, 1989)(public perception of legal profession negative); Strickland, *The Lawyer As Modern Medicine Man*, 11 S. ILL. U.L. REV. 203, 205 (1986)(public lacks confidence in lawyers).

111. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Item 11 (1983)(legal profession must regulate itself). Specifically, item 11 of Preamble states:

> The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Id.; *see also* TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT preamble, item 9 (1990)(legal profession must regulate itself in public's interest); Bernardin, *The Dark Side of the Legal Profession*, 14 HUM. RTS. 20, 23 (Spring 1987)(legal profession must effectively regulate itself).

112. *See* N. HAWTHORNE, THE SCARLET LETTER 43 (1978)(describing Hester's scarlet "A," punishment for adultery).

sibility of public deception is unreasonable. An advertising attorney could never practicably include the *whole truth* about his services in every ad, though he must tell *nothing but the truth*. At some point, the American people must take responsibility for gathering their own information upon which to base their choices. Intuitively, as a people, we know this is true, for we do not require lawyers to advertise. In fact, approximately three out of four attorneys do not advertise, and yet clients find appropriate lawyers daily.

Finally, the legal profession must be wary of becoming too myopic and self-righteous in ostracizing attorneys who violate their professional responsibilities. Making previously disciplined attorneys into professional pariahs jeopardizes their fundamental constitutional rights and merely substitutes one wrong for another.