OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2166

TITLE PHILIP Q. ZAUDERER, Appellant v. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO

PLACE Washington, D. C.

DATE January 7, 1985

PAGES 1 thru 49

ALDERSON REPORTING
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

PHILIP C. ZAUDERER, :

Appellant :

V. : No. 83-2166

OFFICE OF DISCIPLINARY :

COUNSEL OF THE SUPREME :

COURT OF OHIO :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, January 7, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

ALAN B. MORRISON, ESQ., Washington, D. C.; on behalf of the Appellant.

H. BARTOW FARR, III, ESQ., Washington, D. C.; on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Morrison, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.,

ON BEHALF OF THE APPELLANT

MR. MORRISON: Mr. Chief Justice, and may it please the Court:

In 1977 in Bates v. the State Bar of Arizona, this Court held that the First Amendment limits the ability of states to prohibit truthful advertisements by lawyers. It then applied the doctrines for commercial speech which had been established the prior year in the Virginia Pharmacy case and set aside the disipline imposed on the lawyers who had advertised in that case.

In 1982 in R.M.J., this Court again was faced with a case of lawyer advertising in the mass media. After reaffirming the four-part test for commercial speech which the Court had enunciated two years earlier in the Central Hudson case, the Court again set aside the discipline imposed on a lawyer which had been based on broad prohibitions against lawyer advertising.

Two years later the Ohio Supreme Court, after paying lip service to both Bates and R.M.J. by stating that they did not prohibit the states from restricting lawyers' advertisements completely, imposed a public

reprimand on the appellant Philip Zauderer because he had run a truthful ad in 36 Ohio newspapers offering to represent women who had been injured as a result of wearing a Dalkon Shield IUD, and he had agreed to represent them on a contingency basis in suits against the manufacturer of the device.

The principal basis for reversal in this Court is that the Ohio Supreme Court failed to prove that any of the charges against him met the stringent requirements for banning truthful ads that this Court has established in commercial speech cases as applied to members of the bar.

In order to demonstrate why none of the three charges against Mr. Zauderer can be sustained, it is first necessary to describe the ad briefly and then in some detail to review the specific charges that were made against him.

The Dalkon Shield ad appears in several places in the record, most prominently at page 5 of the jurisdictional statement. The ad begins by asking in large capital letters "Did you use this IUD?" And then below and to the left of the ad is a picture of the Dalkon Shield IUD, which incidentally is quite a different device from other IUDs that were sold by other manufacturers, and hence the picture was a particularly

important element in the ad, and the picture is admitted by all to be an accurate representation of the Dalkon Shield.

The ad then goes on to discuss specific medical problems that women who use the IUD made by the manufacturer encountered, including problems resulting from unplanned pregnancy as well as other medical disabilities.

The ad then went on to point out that it, quote, may not be too late to sue, even though the injuries may have taken place some time ago, which is a correct statement of the law of Ohio because it has a very liberal statute of limitations with respect to its tolling provisions in injuries of this kind.

Following that there was a discussion of the fact that the Appellant Mr. Zauderer was representing women in cases like this and that he was prepared to represent others on a contingent fee basis, followed by his name, his address, and a telephone number.

Now, in light of the accuracy of this ad, it is not surprising that the Appellee, the Disciplinary Counsel of the Supreme Court of Ohio, stipulated that the ad, and I am now quoting, "does not contain a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." Despite this stipulation,

the Appellee has charged Appellant with multiple violations of the Ohio Code of Professional Responsibility, and the Ohio Supreme Court has sustained those charges in three separate respects.

The first group of these charges were violations of the code's antisolicitation provision. Now, there are two related provisions in the Ohio Code. One prohibits lawyers from recommending themselves for employment to a lay person who has not requested their advice, and that according to the Ohio Supreme Court, that applies even though the solicitation in question here took place solely through newspapers of general circulation in Ohio.

The second and related solicitation charge is that the Appellant here gave unsolicited legal advice, presumably, the advice that it may not be too late to sue, and that the Appellant then accepted employment based upon his advertisement which contained that advice. And once again, the Ohio Supreme Court applied that restriction to newspaper ads of general circulation.

The second set of charges involving the Dalkon Shield ad against Appellant related to the fact that he put in his ad an accurate illustration of the Dalkon Shield. Under the Ohio Code, it is a violation to

include any illustration other than a picture of the lawyer himself or herself, or a portrait of the scales of justice. Since Appellant plainly violated that restriction, the only question with that has been from the start whether that broad prohibition violates the First Amendment.

The third set of charges involving this ad relate to the contingent fee portion of the ad. The Ohio Supreme Court did not criticize Appellant for what he said in the ad but for what he failed to include. According to the Ohio Supreme Court's code of professional responsibility, for those lawyers who advertise in contingent fee cases, there are two affirmative disclosure requirements that must be contained in each ad involving a contingent fee. First, if the lawyer uses the word "contingent fees" at all, the lawyer must include the actual rates or the percentages charged, and that is true regardless of how many rates the lawyer has or whether the lawyer charges different fees under different circumstance. All those rates must be disclosed in the ad itself.

Second, in addition, in all advertisements for contingent fees, the lawyer must state whether the percentage taken by the lawyer is before or after expenses, and that is true even where the lawyer, as in

this case, did not mention any percentages at all.

So in both cases, the mere mention of the term "contingent fees" triggers two affirmative disclosure requirements under the Chic code.

Before proceeding to the specific charges, I want to say a word about the benefits that this advertisement conferred because as this Court has recognized in the Virginia Pharmacy case, Bates, and many other cases involving commercial speech, that benefits are an important element, and that the benefits accrue not only to the speaker but also to the listener or the reader, and here in that case it is principally women who had used Dalkon Shield IUDs at some prior time.

Here, we need not speculate about potential benefits because the record at the trial in this proceeding amply demonstrates that there were real benefits to real people that directly resulted from this ad.

Now, among those who benefitted are the nearly 100 women who contacted Appellant after they had read the ad and after conferring with him agreed to have him represent them in their lawsuit to recover for these very damaging injuries from the manufacturer of the IUD. For some, like Beverly Carr, the advertisement was

the first time that she learned of the connection between the Dalkon Shield and the injuries that she had suffered. And for her, the key element in the ad was the picture of the Dalkon Shield because she testified that she ordinarily does not read the words in written advertisements, and it was the illustration that got her attention.

That is perfectly consistent with Mr. Zauderer's own testimony where he told the tribunal that he had previously run an ad for Dalkon Shield plaintiffs in which he had --

QUESTION: Mr. Morrison, do you -- would you make the same argument if the illustration in an ad by a lawyer trying to represent personal injury victims showed a -- the face of a happy person carrying home bags of money?

MR. MORRISON: Well, I certainly would say that the analysis would have to be the same, that the commercial speech test would have to be the same. We would have to identify the interest being asserted. We would then have to determine whether that interest is directly advanced by a prohibition, and third, whether there are less restrictive alternatives.

I know that it won't satisfy Your Honor's question, but I don't think that the public is going to

accept those kind of ads, that the public expects something different from a lawyer.

My own view without having heard what the state's interest would be other than the fact that the ad was not dignified -- and I certainly would agree that it wasn't a dignified ad, but don't believe that the First Amendment would allow the state to make that kind of determination -- in the absence of hearing some rather strong determination and strong interest, I would say the state could not prohibit that ad, principally because I don't think there is much harm likely to occur.

Yes, it is not very good for the legal profession, and I as a lawyer might resent some member of the bar running an ad like that. But I don't think that is a reason that our Constitution allows the suppression of speech even in a commercial context.

Now, in addition to people like Beverly Carr who learned about the connection for the first time, there were others who benefitted in similar but somewhat different ways, and that is Kaye Carver, who also testified as a client of Mr. Zauderer's. For her this ad meant the difference between good legal advice and bad legal advice. She had previously been to a lawyer who had told her that it was too late to sue the

manufacturer, that the statute had already run and that her only remedy was a medical malpractice against her doctor, which she didn't want to bring because the problem was not from the doctor.

She went to see Mr. Zauderer after reading his ad and learning that it may not be too late, and she has thus been able to go to court and vindicate her rights as a direct result of this ad.

Now, beyond the individuals whom Mr. Zauderer represented, there is another larger group of persons who were benefitted from this ad, and those were women who, like Beverly Carr, learned for the first time that the Dalkon Shield may be a dangerous product and maybe --

QUESTION: Mr. Morrison, may I ask, have there been recoveries in any of these cases?

MR. MORRISON: Yes, there have been recoveries and there have been settlements, also.

QUESTION: Okay.

MR. MORRISON: If Your Honor is referring to Mr. Zauderer --

QUESTION: Yes.

MR. MORRISON: -- I believe that he has had no case go to judgment yet, but he has had -- some of his cases have been settled. But there have been judgments

in other cases involving the Dalkon Shield.

Now, the second group of beneficiaries are the women who as a result of seeing this ad have gone to their physicians, have had -- have been examined to determine whether they are wearing a Dalkon Shield IUD, and this is necessitated by the fact that the manufacturer stopped producing the product and selling it in 1974, but many women, according to plaintiff's expert obstetrician, continue to have Dalkon Shields in them and are continuously at risk from the dangers that the Shield can produce. And it is very important that women who have them go to their doctors and see whether, if they are there, and if so, they should be taken out.

And many women today that Dr. Hallet sees do not know about the danger, and many women who saw this ad learned about the danger, and as a result, are in a better position to protect their personal healths and probably avoid lawsuits over the device.

QUESTION: Does Ohio law prohibit a physician from putting essentially the same ad in the paper saying come and see me?

MR. MORRISON: I do not know the answer to that question. Dr. Hallet testified that physicians couldn't do what Mr. Zauderer did here. From that I took the inference that he may believe that that law

prohibits it, but it would seem to me that that law, if there is such a law in Ohio, would be as unconstitutional as the prohibitions are here, that there are real public benefits for people knowing about it.

In addition, I would point out now, Mr. Chief Justice, that the A. H. Robbins Company has recently run an advertisement not simply for doctors but in the general publication, which is attached as an addendum to our reply brief, urging all women who believe that they may have a Dalkon Shield in them, to see their physicians, and Robbins is prepared to pay for the cost of doing the work. In addition, you will note that the ad contains an illustration of a Dalkon Shield virtually identical to the illustration contained in Mr. Zauderer's ad.

Given those discernible, provable benefits, as well as other less direct benefits that may incidentally have led to the Robbins ad and the ultimate recall, it is important to note that the Appellee at the trial offered no evidence whatsoever of any harms that resulted or indeed that could result from the running of this Dalkon Shield ads. None of Appellant's clients ever came forward with a complaint. No one complained about him or his services. And indeed, all of the harms

that Appellee even suggests in his brief in this Court are hypothetical and admitted by Appellee not to apply to the facts of this case.

The question then becomes does the First Amendment permit the State of Ohio to discipline a lawyer for running this truthful ad, and to analyze that question, we must go through the analysis in Central Hudson of determining whether the interest is substantial, whether the interest of the state is directly advanced by these prohibitions, and are the prohibitions more restrictive than necessary.

Turning first to the solicitation charges, we agree with the Appellee that advertising is simply one means by which lawyers solicit clients. But that, of course, is only the beginning of the inquiry for advertising is precisely what was done in Bates and R.M.J., advertising in the mass media as it was true here, and in those cases the Court said that the advertisements could not be prohibited consistent with the First Amendment.

The only difference between those cases and this is that here the advertisement is directed toward clients who are interested in potentially suing a particular company over a particular medical device.

But we believe that that principle has no

basis for distinguishing this case from the others, principally because the state has been unable to identify any legitimate interest that it has in protecting an individual defendant as opposed to the public at large. At trial it offered no evidence in support of this restriction at all.

In this brief in this Court, it suggests that the purpose of this restriction is to deter frivolous or malicious lawsuits. We agree, of course, that deterring that kind of litigation is a proper end for the state in various forms of regulation. But there is no reason to believe that the antisolicitation prohibitions, as they are applied to mass media in this case, has any likelihood of decreasing that kind of improper activity, particularly because in contingent fee cases such as this, the lawyer will be paid only if he can prevail.

Now, in addition, there are substantial reasons to believe that there are other alternatives far less restrictive than the prohibitions here that would enable the state to protect its interest. I point to three in this particular context: malicious prosecution and abuse of process lawsuits; sanctions under Ohio Rule 11, which is the counterpart of Federal Rule 11 of the Federal Rules of Civil Procedure; and of course, and most important of all, direct discipline against the

attorney who persisted in bringing malicious or unwarranted actions.

Now, there is another aspect of this matter that undercuts the point that the Appellees rely on. As this Court recognized in Bates, the major problem for individuals who seek the services of a lawyer is that they are unable to find the right lawyer to do their case at a price that they can afford. And here, Appellee has bridged that gap by telling prospective clients, I am available, I am doing these kind of cases, and I am willing to do them for you on a contingent fee basis.

Yet Ohio seems to be saying that it would be proper to advertise for product liability suits in general but that it is improper to be more specific and to be more helpful. To us that turns the First Amendment and Bates on its head, and we submit that neither authority nor logic supports that kind of distinction.

QUESTION: Mr. Morrison, may I interrupt you with a question?

What is your position if this had been done in face-to-face meetings orally? Say he knew that there were 20 women who had purchased this device, and he went to call on each one of them and gave precisely the same

message?

MR. MORRISON: That, of course, is one step this side of the Ohralik case where the Court was faced with in-person solicitation by a lawyer of a recent accident victim while in the hospital.

My own view is that in person solicitation is not necessarily something that can be prohibited or that ought to be prohibited. Nonetheless, I recognize that there are substantial potential dangers from in-person solicitation in the form of overreaching, in the form of persuading a person to sign a piece of paper that would retain the lawyer at that particular time

My own view would be that it would be very important for the Court to explore other alternatives in determining whether the absolute prohibition applied, but I think that there is a clear line both in terms of evidentiary basis for determining what the lawyer said as opposed to -- as opposed to a written matter where there is no problem.

QUESTION: With respect to the clear line, which side of the line would the case fall on if instead of a general ad like this you had a mailing list and you had about 25 people's names on it?

MR. MORRISON: I believe that a mailing list is constitutionally protected.

QUESTION: It is clearly like this case?

MR. MORRISON: It is, but indeed, if Mr. Zauderer had Xeroxed the ad which he had here and he knew, for instance, or he simply -- he knew, for instance, that there were people who had used Dalkon Shield IUDs, although in this case it is not clear how he would do that, but he simply engaged in test mailing, he sent it to Occupant at such and such an address, it seems to me hard to understand how the fact that it was a -- it came in a Xeroxed envelope, in an envelope as opposed to coming in the newspaper to the door, would have any bearing on it.

Nonetheless, there are some cases which suggest that there may be potential conflicts of interest, that is, when the solicitation came out, for instance, through a real estate broker for a lawyer advertising for real estate services, that might cause some concern. But under the facts and circumstances here, I don't think that that would be a problem. And I think there is a very important lesson from Bates that pushes you in the direction of not insisting that lawyer limit the means by which they make initial contact with the clients, and that is, as the Court recognized in Bates, the advertisement or the in-person solicitation or the letter is simply the first step in the process by

which a lawyer-client relationship is established, and that most people today do not hire lawyers on the basis of ads, on the basis of a letter in the paper, or just because a friend had referred them to. They are much more sophisticated, and they will take the time to find out whether this is the right lawyer.

In addition, it seems to me -- and this is a point that I want to make in connection with the contingent fee disclosure requirements, that the state's interest ought to focus on the time when the lawyer-client relationship is crystallized in the form of an agreement, and if the state is truly concerned about misrepresentations, not clear about what the terms of the agreement are, the best and surest way to avoid that and the way most consistent with the First Amendment is for the state to require that fee agreements be in writing and that in contingent fee areas they clearly disclose the kind of factors which the State of Ohio insists must go in the initial contact, in the ad.

That seems to me far more closely tailored to satisfy the ends of the state and far more consistent with the approach of the First Amendment, that information by and large is something we should want to get out. We should want the initial contact --

QUESTION: Mr. Morrison, your time is running.

There was another violation found here, that against misleading advertisements, not related to the Dalkon Shield, and the only sanction here was a reprimand, was it not?

MR. MORRISON: That is correct.

QUESTION: Well, if that reprimand must be sustained under the charge of violation against misleading advertisements, why do we have to get into any of the Dalkon Shield arguments?

MR. MORRISON: Well, that of course assumes that the ad relating to drunk driving could also be sustained, and as I have indicated in my brief and am prepared to discuss, there are very serious due process problems relating to notice and the opportunty to be heard.

But even there, I would say I think a fair reading of the history of this case indicates that the proceeding would never have been brought against Mr. Zauderer but for the Dalkon Shield ad, and that the ads relating to -- the ad relating to the drunk driving matters was a throw-in

QUESTION: Suppose we conclude that the misleading advertisement conclusion has to stand? Then

what do we do?

MR. MORRISON: I would say that in any event --

QUESTION: Affirm the discipline?

MR. MORRISON: I would say it ought to be -- the case ought to be remanded to the Ohio Supreme Court for it to exercise its discretion to determine whether they wish to impose a public reprimand on the Appellant given the circumstances of this case.

QUESTION: Isn't that the mildest form of sanction they can impose?

MR. MORRISON: It is, but it is important --

QUESTION: Well, if we send it back, you can't do better than has been done.

MR. MORRISON: They could -- I believe they have the authority to dismiss the entire proceeding, but in any event, I would point out, Your Honor, that under Ohio law, even though a public reprimand sounds relatively modest, it is a serious matter to Mr. Zauderer, first, and second and probably more important is that if he were ever to be subjected again to the slightest infraction, he would automatically lose his license for a year, and that is a very serious matter, so that it seems to me under the circumstances that it would be singularly appropriate for the Court to remand

the matter to the Ohio Supreme Court for it to review it in light of what the Ccurt disposition with respect to the Dalkon Shield ad.

QUESTION: Well, in effect, I suppose, the effect of the judgment is to prevent him from publishing ads like this.

MR. MORRISON: It is prevent him from doing anything that he -- that may be arguably close to the line, even when he believes that it is in his best interest of the client because he cannot risk having another proceeding brought against him.

QUESTION: So you think realistically that there is something more involved in this case than the suspension.

MR. MORRISON: Oh, yes.

QUESTION: In the sense that -- in the sense that he's -- he will be prevented from --

MR. MORRISON: Absolutely, and so will other lawyers in the State of Ohio --

QUESTION: Well, there's no suspension, Mr. Morrison.

MR. MORRISON: I'm sorry, I --

QUESTION: It's only a reprimand.

MR. MORRISON: You are --

QUESTION: I mean a reprimand.

MR. MORRISON: Yes. I was agreeing with Justice White. I was not focusing on the more than one. I beg your pardon on that.

QUESTION: I'm sorry.

But there is more involved than just a reprimand.

MR. MORRISON: There certainly is, and there is a continuing matter for him as to whether he can take out ads of this kind in similar situations, so that he does have that, and that is quite correct.

With respect to the drunk driving ad, it seems to me it is very important to note that he was charged on one theory. Appellee now agrees that the theory on which he was convicted was another one, and that the change involved an entirely different basis for --

QUESTION: There was no change in the rule he was --

MR. MORRISON: There was no change in the rule, there was no change in the ad. It is almost an analogy of somebody who was charged with a tax violation, an income tax violation, and the case is brouught on a net worth basis, and they suddenly find out that they are trying it on a cash basis, and he says, wait a second, I was all prepared to put evidence in on this. He never had a chance to say what he would

have done in this case if in fact somebody had pled to the lesser of --

QUESTION: Well, the drunk driving charge, it appears to me very funny that you can without any prohibition advertise that if you lose the case you would give back the fee.

MR. MORRISON: Well, the state initially said that that was an offer for a contingent fee in a criminal case. We disputed that and said as a matter of Ohio law that there is a difference. Both the Board of Grievances and the Ohio Supreme Court in our view implicitly rejected the equation of the two by going on the other theory, the theory which had not been urged by Appellee despite the fact that the case had been brought and tried on that basis. And we think at the very least he is entitled to go back and put on, to find out what these municipal reports are, to go back and see what they show, to have them identified, and to be able to take the stand and explain what he would have done in the event of that situation.

QUESTION: Well, I am only talking about the language.

MR. MORRISON: Mr. Zauderer has written a letter of apology to the Board saying that he believes that that language was infelicitous. That wasn't his

word, but it is surely the sense of his letter. He had not focused on the matter when he put the ad out. He has expressed his regret.

That appeared to be enough until the Dalkon Shield ad came along and he was charged with violations based on that.

Thank you, Your Honor. I will reserve the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Farr?

ORAL ARGUMENT OF H. BARTOW FARR, III, ESQ.,

ON BEHALF OF THE APPELLEE

MR. FARR: Thank you, Mr. Chief Justice, and may it please the Court:

This case is very differet from the lawyer advertising cases previously before this Court. It does not involve a ban on advertising itself, as did Bates, or a ban on advertising easily verifiable information, as did R.M.J. Ohio allows such advertising and more.

What Ohio does not allow, and what this case is about, is for lawyers to entice clients with three particular selling tools. The first is unsolicited legal advice given as part of a direct appeal for business. The second is incomplete information about contingent fees. And the third are pictures and illustrations

And as I shall discuss, each of these choices protects the public from lawyers overreaching and possible misleading appeals in a narrow and reasonable way.

Now, I would like to turn --

QUESTION: Mr. Farr, do you think we have to get into all of this if we have to sustain the violation on misleading advertising?

MR. FARR: The judgment may be sustained on any of the violations found by the Ohio Supreme Court.

QUESTION: All right, why should we get into all of this iof we have to sustain it on misleading information?

MR. FARR: If you agree with us on the drunk driving ad or on any one of these points, you need not get into the rest.

QUESTION: Mr. Farr, is that quite right?

Let me just ask you this question. Public reprimand, has it been given yet?

MR. FARR: Yes, it has. It has been published in the Ohio Reports, I believe.

QUESTION: And does it -- does not the reprimand condemn him for more than one misdead?

MR. FARR: The reprimand discloses the various bases of the violation, that is correct.

QUESTION: And doesn't it say that he did wrong in more than one respect, and if --

MR. FARR: The opinion goes into that discussion.

QUESTION: And if part of what he did was constitutionally protected and therefore not wrong, would it not be necessary to reduce the scope of the reprimand?

MR. FARR: Well, I believe that the public reprimand is simply a generic discipline, and that the Ohio Supreme Court would not have to, for example, write another opinion if this Court remanded in the belief that one of the grounds of discipline was unconstitutional. I think they could give a public reprimand, as that is generically known, for discipline on any one of these violations, regardless of the others, and I think the opinion is just a general explanation of their reasons.

QUESTION: And you think it is a matter of law that the reprimand for committing 97 different offenses is no more serious than a reprimand for just the drunk driving?

MR. FARR: I think that's correct, Your Honor.

I would like to turn first to the restriction

on giving legal advice as part of a direct appeal for business, and that is the restriction that is found in Rule 2-104 at page 29a of the Appendix to the Jurisdictional Statement.

Now, it is important to understand just what Section 104 involves. What it prohibits and what Appellant concededly did here is for a lawyer to accept employment resulting from the giving of unsolicited legal advice to a layman. It does not bar the giving of advice to a layman who asks for it, and because of exception (4) to the same rule, it does not bar writing or speaking publicly on legal matters so long as the lawyer doesn't tout himself in the bargain.

It is only the combination of, first, giving the unsolicited legal advice, and second, making it part of a direct appeal for business, that Ohio prohibits, and even then, it only prohibits the conduct of accepting employment, not the speech itself.

Now, we -- excuse me -- we submit that the state has a vital interest in barring the use of legal advice as part of a selling pitch. First of all, at the core of any attorney-client relationship is the expectation that the lawyer will give objective, disinterested legal advice. Advertising by its very nature is not disinterested. The purpose of advertising

is to make the product -- here, the bringing of litigation by Appellant -- seem as attractive as possible, if not more so.

So when a lawyer gives legal advice, not part of his general obligation to inform the public on legal subjects by writing or speaking publicly, but when he gives it as part of a direct appeal for business, it is the goal of that legal advice to excite an interest in litigation or whatever legal services the lawyer is offering.

Under those circumstances, there is a serious and unacceptable risk that the lawyer will tailor the legal advice more for his own benefit than for the benefit of the clients.

Now, I would like to point out that this use of legal advice, if allowed, is hard to defend against. We are not talking about a standardized product or one which consumers use frequently on a retail basis. Legal advice is hard to understand, particularly where it involves, as it does here, complex matters of product liability, medical malpractice and the sort.

Few readers will have the kind of expertise that will help them sort out what might be puffing in the legal advice and the core of correct legal advice.

Furthermore, this is not the kind of

information that consumers can readily test for themselves. Trial and error does not work in the context of legal advice as it does with shampoos or other products. And even if it did, it would be an unattractive and unpleasant way for people to find out that lawyers' advertising claims were false or potentially misleading.

QUESTION: Well, do you feel, Mr. Farr, that state regulation of this type of thing on the ground that it is misleading, then, would not accomplish the state's objective?

MR. FARR: No, I think that you cannot -- you are also aiming at the areas where the risk of approaches to the consumers to the high, where the risk that they are misleading or overreaching or overly optimistic is high. I don't think that the information itself has to be found to be misleading.

QUESTION: You say the First Amendment allows some prophylactic range for the state?

MR. FARR: I believe it does, and in fact, I think that is what the Court said in Ohralik where it recognized that there may be cases, of course, where even in-person solicitation provides the benefits of advising somebody about their rights, but I think the Court made very clear that the state could nonetheless

aim at the potential risks by a prophylactic rule, and I think the Court did the same thing in Friedman with the Texas optometry statute, trade names may in some cases be informative, but the First Amendment allows some play for the state to regulate in the area of commercial speech.

I would also like to point out that this is not the kind of information that can be readily cured by a stream of the same sort of information. Because of the complexity of legal advice and the subjectivity of legal advice, a barrage of competing legal ads, each one making more representations about the subject which is involved in the ad, is only likely to confuse potential consumers, and that is, of course, the result that is exactly opposite from what we are trying to do, which is to better inform the public about how to choose a lawyer.

Now, Appellant has argued, of course, that legal advice is necessary in advertisements to keep the public informed of their rights, and my first answer for that is, as I have just stated, that the cure is worse than the disease.

But there is a second answer, for the Appellant in Ohralik made exactly the same argument attacking exactly the same rule, Ohio's Rule 2-104, and

the Court flatly rejected it. What the Court pointed out was that Rule 2-104 does not stop any lawyer from advising the public about its rights. What it does prohibit, in the words of the Court, is from -- it prohibits him from using the information, that is, the unsolicited legal advice, as bait with which to obtain employment for a fee.

Now, the evils of using this kind of bait do not start and stop with in-person solicitation. There are, of course, other evils associated with in-person solicitation such as invasion of privacy, certain forms of coersion. But the purpose of legal advice in advertisements is to get the lawyer to the stage of in-person solicitation. And how he does that is something that the state has a separate and fully substantial interest in regulating.

Given his purpose, a lawyer cannot be expected to give advice in advertisements that will drive people away from his office, for example, pointing out the often very substantial costs and hardships involved with litigation. I might point out in Appellant's brief, pages 31 and 32, he discusses the difficulties of bringing a suit under the Dalkon Shield, the invasion of privacy the discovery and the trial may involve. Those, of course, were not in his advertisement, but

particularly, I submit, you are never going to see information like that in an advertisement because that is not the kind of realistic assessment that is going to bring somebody into your office.

Furthermore, if this advertising is generally allowed and becomes a common competitive tool, you are not going to see any lawyers give legal advice which is less optimistic about people's claims than the advice given by other lawyers in their advertisements. There is an example in New York for a recent case which New York in fact upheld, although it was attacked on a different basis, where someone wrote to victims of a particular accident and said the liability of the defendants is clear.

Now, I submit that the next lawyer who writes to the same potential groups of plaintiffs, group of potential plaintiffs, is not going to say no, you should sign on with me, I am doubtful about the liability of the defendants.

This use, therefore, will not only have an effect on the legal advice itself, but it will make it harder for a lawyer, having enticed the client in in the first place, then to later inform him that perhaps the claims are not meretorious and should be dropped.

Now, in combatting these evils, Ohio, as I

have said, has chosen a narrow path. Lawyers, to begin with, are free to sell their services on the basis of their qualifications and their experience. They are free to give unsolicited legal advice to anyone who wants it, they are free to write publicly, they are free to speak publicly, and none of those activities has any effect on their right to accept employment that results from it.

QUESTION: Well, let me get back to a question I asked you a little while ago about whether the state couldn't have proceeded against this on a theory of misleading in the same sense that the SEC uses the word "misleading," that is, it is misleading not only if it affirmatively misrepresents something but if it fails to state a material fact which would have been required to make it completely true. Couldn't you say that the failure to disclose some of the burdens as well as the benefits of litigation might not make this particular advertisement misleading in that rather strict sense?

MR. FARR: I think in that strict sense it may, Your Honor, and I think that of course the state does have an interest in particular in attacking ads which are misleading, even if they are misleading in exactly that sense.

What I am suggesting, however, is that the

state's interest does not stop there, that the state can go ahead and regulate by a prophylactic rule in areas where the risk that information will be misleading is very high.

QUESTION: Well, Mr. Farr, would this ad be equally obnoxious in your view under the rule if this Dalkon Shield ad had stopped just before it mentioned "Our law firm?" Suppose it just left off the last three sentence of that paragraph?

MR. FARR: So that the ad itself did not mention any particular law firm?

QUESTION: Oh, no, it was signed but it just didn't say "Our law firm is presently representing women in such cases."

MR. FARR: No, that would make no difference to me. I mean, I think the context of this ad clearly shows that it is dealing with legal claims of a particular class against a particular defendant, and that the implicit message, even if it weren't explicit --

QUESTION: Well, what about -- what about writing a guest editorial in a newspaper, signed by a lawyer, and he discusses the Dalkon Shield?

MR. FARR: That would be fully permitted under Ohio Rules under Exception (4).

QUESTION: But what if it, what if it prevented it? Would it be constitutional or not?

MR. FARR: If you had a rule that said that you could not write publicly on any --

QUESTION: Well, all this --

MR. FARR: In an editorial.

QUESTION: Without those three sentences, all it is is, it is a statement about -- it is some legal advice given by a lawyer, unsolicited legal advice, but he doesn't say come and see me.

MR. FARR: Well, I think -- I don't think that the constitution could ban all unsolicited legal advice in all circumstances. I mean -- I'm sorry, that the state could ban all unsolicited legal advice in all circumstances. What I am saying here is that --

QUESTION: So here is -- in a newspaper here too, here is a column, guest editorial by a lawyer, discuss -- and he says essentially what this ad says in the first few sentences, except at greater length. But he -- and then there is a little sign down at the bottom, Mr. So and So is a practitioner in the city. And right below it is this ad, this expurgated ad signed by Mr. Zuaderer saying exactly the same thing, just briefer.

But you say the one is bad and the other is

good.

MR. FARR: I said the one is bad and the one is good.

QUESTION: Under the rule.

MR. FARR: Under the rules and for this particular reason, that the risks associated with general writing on legal topics are not the same as the risks involved in putting legal advice into an ad whose sole purpose is to draw people into your office. I just think there is a clear difference in those risks, and the fact that they might occur in the same newspaper --

QUESTION: So any advertisement that gives any -- that contains any kind of legal advice and has the lawyer's name in it is solicitation, forbidden by the rule.

MR. FARR: Under this rule.

Now, I concede here --

QUESTION: It doesn't make any difference whether any reasonable lawyer would say that is perfectly sound advice. A a matter of fact, a lawyer couldn't give any other advice.

MR. FARR: I think there are situations conceivably where the advice is so general that it wouldn't really fall into the category of dealing with --

QUESTION: Well, let's say it is very specific, say it is very specific and every lawyer in town would say that is absolutely sound legal advice. So this rule, as lyou say, is a prophylactic rule --

MR. FARR: That's correct.

QUESTION: -- covers sound as well as bad advice.

MR. FARR: That is correct. In fact, let me give you an example based on what is involved in this particular ad.

This ad says don't assume that it is too late, and one of the examples that Appellant uses for why this is beneficial is that one of the plaintiffs whom he has signed on went to another lawyer who said, well, it was too late, and this has now enabled her to bring a lawsuit., That may in fact be true in this particular case, but you can easily turn the situation around.

What if, in fact, people had been going to lawyers and they had been saying it is too late to bring these cases, and someone puts an ad in saying don't assume it is too late, bring them, and what happens is they are brought, people invest time, they take depositions, they spend money on costs, and then they are dismissed under the statute of limitations.

QUESTION: So the rule would also forbid a

lawyer putting an ad in the paper and saying notice to everybody who might be interested, here is recently what the Supreme Court of Ohio has held with respect to the Dalkon Shield, and there is a quote. Nobody can possibly say that it is false or misleading or that it is puffing or anything else. But the rule would prevent that.

MR. FARR: I think the rule, as I interpret it, would --

QUESTION: Or would it -- it would prevent that, wouldn't it?

MR. FARR: As I interpret it, it would.

Now, I would like to just take one moment to talk about the rule regarding disclosures on contingent fees, which is primarily contained in Rule 2-101(B)(15). This, of course, is a separate basis for discipline, and I submit there that the state has done exactly what this Court has encouraged in other cases. It has identified an area where incomplete disclosures can be misleading and has required more disclosure to lessen the risk.

Basically the rule requires that lawyers advertising contingent fee arrangements also disclose certain information about rates and costs, particularly whether the costs are deducted before or after the

computation of the fee.

QUESTION: Couldn't you get all of that with one telephone call?

MR. FARR: Yes, you could, Your Honor.

QUESTION: So 20 cents is enough for the government to be interested in it?

MR. FARR: No, I think what the government's interest here is preventing people from using incomplete information to bring people into the lawyer's office, and what they are saying here is that if you are going to get into this subject as part of a lure to get people -- and contingent fee arrangements, of course, are part of the lure -- that you simply have to give them more information --

QUESTION: But he doesn't have to come into the office. He can do it by telephone.

MR. FARR: Well, that's possible, he can go to the telephone, but a lot of clients presumably will come in.

QUESTION: It's not possible, it's true, isn't it?

MR. FARR: That he can go -- yes, it is. But I think the risk that they are aiming at is something different than that, and I think this rule can provide at least three kind of information. First of all, it

puts potential clients on notice that there is such a thing as fees and costs that they may be responsible for, and I think this is particularly important because it will undercut the notion that litigation at its worst is just a free ride. This ad, for example, says I think quite craftily, if no recovery is had, no legal fees are owed by our clients. But of course, the fact is that costs, maybe substantial costs, may be owed.

Secondly, it puts people on notice that even if you win your lawsuit, what you recover may be eaten up largely, entirely or more than entirely, by contingent fees and costs, and that is particularly true, of course, if the contingent fee is calculated before the costs are deducted.

And finally, it allows consumers to compare more readily among people who advertise contingent fee rates.

Now, here, because it is possible to do so, the state has aimed at the problem not by banning discussion of contingent fees in advertisements, but simply by requiring more speech.

So Appellant here was not faced with the problem that faced the appellants in Bates, which is a choice between no speech and some speech. Here, Ohio expressly gave the option of more speech, and as the

Court said in Bates, that is the preferred remedy.

QUESTION: Mr. Farr, Ohio has a separate rule prohibiting illustrations other than those named, does it not?

MR. FARR: That is correct, Justice O'Connor.

QUESTION: And what do you assert is the state's interest in prohibiting illustrations that are accurate, which don't fall within the two or three that are permitted, the legal scales and the photograph of the lawyer?

MR. FARR: I think what the state is aiming at in those cases or what the state is doing in those cases is based on two assumptions: first of all, that as far as lawyer advertising goes, that it is the rare case that a photograph or an illustration adds any necessary information about legal services, and I think --

QUESTION: Well, of course, it is alleged that this is that rare case.

MR. FARR: That's correct.

QUESTION: Now, what is the state's interest in prohibiting an accurate illustration of this type?

MR. FARR: I think the state's interest is that it cannot look at every illustration on a case-by-case basis. I don't think that the state has the administrative mechanism to do that, and I think it

would get into the kinds of subjective judgments that are difficult, and I think in fact unfortunate for a state tc make.

So I think what the state is saying is it is the rare case where this will be necessary information. In many cases, use of pictures will be abused, and we do not have to make a case by case examination. But we can have a rule --

QUESTION: How is the administrative burden any different than it would be in reviewing ads generally? I just don't see how that adds to the burden in a way that would justify the restriction?

MR. FARR: Well, I think it adds to the burden in the sense that first of all, to the extent that information in ads simply contains the material that is included and that is allowed by the Ohio ads, I don't think there is a great burden in reviewing that. But I think -- so what you are saying in the area of the photographs I believe is that the possibility that we may have a photograph that actually does communicate useful information necessitates our going through all photographs in order tc identify which ones those are. And I think that is the kind of -- that's the reason that ycu have prophylactic rules in the first place, so that you don't have to make those kinds of case-by-case

choices.

I think, for example, what you had in Friedman, the case invclving the Texas cptometrist, was a ban on a certain form of communicating information. They said ycu can't use trade names, even though conceivably trade names would not in a particular case mislead the public. I think that what Texas had decided, and this Court said it could legitimtely decide, is that in those cases, the risk is high enough and the need is low encugh because there are other ways of communicating the same information, that we are going to have a general ban on trade names, and the Court upheld it.

And I think you could make the same argument about Chralik. Admittedly, the administrative burden is different.

QUESTION: So you say that in the area of professional regulation, we just have to abandon the ordinary speech cases and the commercial speech cases.

MR. FARR: Oh, no, I exactly do not say that, Justice White.

QUESTION: Well, how can you have prophylactic rules even in commercial speech? You are supposed to use the narrowest effective tool, aren't you?

MR. FARR: Well, I think the narrowest

effective tool --

QUESTION: Is a prophylactic rule.

MR. FARR: -- will often be a prophylactic rule because that is --

QUESTION: Well, in this case, in these cases?

MR. FARR: I think absolutely. I mean --

QUESTION: And the illustrations, and the illustrations just purely administrative convenience.

MR. FARR: The illustrations, the illustrations is admittedly a more difficult issue. On the solicitation I have no question.

QUESTION: Well, but the only justification you have as far as I can see is administrative convenience.

MR. FARR: The fact that you cannot review every photograph and make an ad hoc determination as to whether this particular photograph is all right and this particular photograph is not, and that the burden is just unnecessary when the likelihood that the photograph will communicate necessary information about legal services is virtually zero.

QUESTION: Mr. Farr, I can't resist asking you about the series of exhibits that the Ohio State Bar Association itself put out with all the illustrations

and legal advice and solicitation. There are gross violations of the rule.

MR. FARR: That's right, and I think if the Ohio Bar -- if an individual practitioner in order to draw business to himself put those ads in, you would have a different set of risks, and that that would be legitimate.

QUESTION: You would have a much more serious violation, I suppose, than we do even in this case, but are you really persuaded that those ads that are put there are really contrary to public interest, that whole --

MR. FARR: I'm sorry, which ads?

QUESTION: The ones at the back of the joint appendix, the whole series that the Ohio State Bar put out. Each has a picture, each has some isolated bit of legal advice and a suggestion that one needs a lawyer in various circumstances and all.

Do you think those are really extremely harmful ads that should be prohibited?

MR. FARR: What I do believe, which I think is responsive to your question, Justice Stevens, is that ads giving legal advice as part of a selling pitch for individual lawyers are definitely harmful to the public interest, yes.

QUESTION: And all of these do that.

MR. FARR: I think it is possible that there may be a -- some ads --

QUESTION: Even advice such as if you get arrested for a drunk driving charge, consult a lawyer before you go to court? That's contrary to the public interest?

MR. FARR: What I am suggesting is that there may be some ads which do provide a benefit to the public interest, but the overwhelming burden is the other way, that in general, once this particular use of legal advice is allowed to be used as the selling tool, that the public interest will definitely be harmed on balance, and even the cases might prove helpful are outweighed by it.

QUESTION: I think your most persuasive argument on that point is that the advice is apt to become -- it is no longer disinterested and therefore apt to be misleading advice because you are going to give the more optimistic rather than the pessimistic view of the case.

But supposing that the legal advice, as Justice White suggested, is confined to matters as to which there can be no doubt -- and I am not suggesting this ad is in that category, but say if the Ohio Supreme

Court had held that the Dalkon Shield cases can still be brought, for example, just cite, just a reference to the holding itself that couldn't possibly be debated, would you make the same argument then?

QUESTION: Well, you just did a while ago.

(General laughter.)

QUESTION: At least your -- at least part of your argument doesn't apply.

MR. FARR: You want to know if I would make it again, is that right?

(General laughter.)

QUESTION: Well, I guess it -- the part about the touting doesn't really apply there, that touting might cause the advice to be misleading.

MR. FARR: That's right, that's right.

Now, what I am saying is that I think that the risks are there in any ad. Now, it may be possible that there is an area that could be carved out definitionally for ads, the legal advice about which nobody could dispute.

One, I question how you would define that, and secondly, I very much question how you could ever administratively enforce it. You certainly don't want to have a series of trials in front of bar commissioners trying to decide whether advice is misleading or not or

potentially misleading or not. And therefore, it seems to me that you are not going to be able to move on a case-by-case analysis and say this one is over the line and this one is on the other side of the line.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Morrison? You have one minute.

MR. MORRISON: I would just, to respond to Justice Stevens' point, the order involving the reprimand is set forth in Appendix C to the Joint Appendix, and it does refer -- to the Jurisdictional Statement, and it does refer specifically to the Board of Grievances as well as the opinion of the Ohio Supreme Court. So that would be a public document.

Other than that, I have nothing further, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in the above-entitled action was submitted.)

CERTIFICATION

lderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#83-2166 - PHILIP Q. ZAUDERER, Appellant v. OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)