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Bragging Rights Restored: The Third Circuit Allows Attorneys to Quote Complimentary Remarks from Judicial Opinions for Advertising in Dwyer v. Cappell

Nicole Holden*

“The [Third] Circuit’s opinion is highly persuasive and likely to gain traction as a significant national precedent.”¹

I. A Quick Pitch: Introduction to Legal Advertising

Picture the following television commercial: a lawyer sits at the stereotypical mahogany boardroom table in a courthouse as he ponders over Law’s Empire,² a classic philosophical book about the theory of law.³ Appearing to reach a revelation, he raises his right hand and is about to speak.⁴ Suddenly, a rock song titled “I’m the One”⁵ by The Ugly Beats begins to blare, and the scene cuts to the lawyer walking through a town, still holding on to Law’s Empire.⁶ Along his journey, the lawyer quickly

* J.D. Candidate, 2016, Villanova University School of Law; B.A. 2013, The Pennsylvania State University. I would like to thank my family and friends, especially William and Karen Holden for their love and encouragement throughout my academic career and Theodore Edwards for his constant support. I would also like to thank the editors of the Villanova Law Review for their helpful guidance throughout the writing and editing process.

¹. See David L. Hudson Jr., 3rd Circuit Ruling Upholds a Lawyer’s Right to Post Glowing Judicial Comments About His Work, ABA J. (Feb. 1, 2015), http://www.abajournal.com/magazine/article/3rd_circuit_ruling_upholds_a_lawyers_right_to_post_glowing_judicial_comment [http://perma.cc/S5WM-WU65] (quoting Rodney A. Smolla, First Amendment Scholar, Univ. of Ga. Sch. of Law) (internal quotation marks omitted); see also id. (describing Dwyer’s reasoning as “spot-on from a First Amendment perspective” (quoting Clay Calvert, Dir. Marion B. Brechner First Amendment Project, Univ. of Fla.) (internal quotation marks omitted)).

². RONALD DWORKIN, LAW’S EMPIRE (1986).

³. The following describes a commercial for Pete Reid Law, PLLC. See Pete Reid Law, PLLC, Pete Reid Law – Austin Attorney – I’m the One for You, YouTube (July 21, 2014), https://www.youtube.com/watch?v=Kt9izqBiU [https://perma.cc/T5V7-XDTZ] (portraying lawyer as strong, smart, and honest).


⁵. THE UGLY BEATS, I’m the One, on BRING ON THE BEATS! (Get Hip Recordings 2004).

solves a Rubik’s Cube, tosses a caber in an open field, breaks a wooden board held by a martial arts instructor, and even scores an overhead-kick goal in a game of soccer.7 Returning to the courthouse, the lawyer gives a closing argument to the jury, walking back and forth with Law’s Empire propped open in his hands.8 The music abruptly stops as the lawyer shuts Law’s Empire.9 Then, the lawyer turns to the camera and says, “I rest my case.”10 As the jury breaks into applause and gives the lawyer a standing ovation, the words Pete Reid Law PLLC flash across the bottom of the screen in giant, bold letters.11 If you saw this commercial, would you be more inclined to hire Pete Reid for his legal services?12


In 1977, the first television commercial for legal services aired as a “thirty-second spot” for legal clinics. See John J. Watkins, Lawyer Advertising, the Electronic Media, and the First Amendment, 49 Ark. L. Rev. 739, 739 n.1 (1997) (describing
Like Pete Reid, many lawyers today use creative advertising tactics as a means to drum up business. Yet, even though the United States Supreme Court voided an absolute ban on lawyer advertising in Bates v. Arizona, the American Bar Association (ABA) and state bar associations continue to regulate legal advertising to preserve the public image of the legal profession and protect against consumer deception. Consequently, the legal profession struggles to implement legal advertising regulations that do not violate lawyers’ First Amendment rights. When lawyers challenge legal advertising rules, courts face the difficult task of deciding which advertising techniques receive constitutional protection.


Recently, in *Dwyer v. Cappell*, the Third Circuit considered whether a challenged New Jersey legal advertising guideline was unconstitutional. Applying a rigorous level of scrutiny to the regulation, the Third Circuit held that the guideline infringed upon one lawyer’s free speech rights. The noteworthy decision in *Dwyer* is emblematic of the recent shift among other federal courts of appeals, where courts are pushing against regulators and deciding in favor of free speech.

This Casebrief discusses how the Third Circuit’s decision in *Dwyer* compromises the ability of state bar associations to regulate legal advertising. Part II provides a brief history of attorney advertising and discusses a line of recent federal appellate court decisions that invalidate legal advertising regulations. Part III examines the Third Circuit’s decision in *Dwyer*. Part IV translates the Third Circuit’s *Dwyer* analysis into practical guidance for Third Circuit practitioners. Finally, Part V concludes by discussing the *Dwyer* decision within the larger context of the attorney advertising debate.

II. **Creating a Platform: Past and Present Legal Advertising in the United States**

The legal profession has experienced a drastic shift in attorney advertising regulation. Less than forty years ago, bar associations prohibited

18. 762 F.3d 275 (3d Cir. 2014).

19. See id. at 279 (discussing nature of plaintiff’s allegations).


21. See Appellants’ Reply Brief at 20–21, *Dwyer v. Cappell* 762 F.3d 275 (3d Cir. 2014) (No. 13-3235), 2013 WL 6054581, at *20–21 (highlighting courts in similar contexts also reject argument that advertisement is inherently misleading); see also Hudson, supra note 1 (“Courts are increasingly skeptical of the invocation by regulators of phrases such as ‘inherently misleading’ or ‘self-evidently misleading’.” (quoting Rodney A. Smolla, First Amendment Scholar, Univ. of Ga. Sch. of Law) (internal quotation marks omitted)).

22. For an analysis on *Dwyer*’s effect on legal advertising regulations, see infra notes 87–160 and accompanying text.

23. For a discussion of the development of legal advertising regulations, see infra notes 27–86 and accompanying text.

24. For a discussion on the Third Circuit’s holding and reasoning, see infra notes 87–122 and accompanying text.

25. For an examination on *Dwyer*’s impact on Third Circuit practitioners, see infra notes 123–54 and accompanying text.

26. For a discussion of the implications of *Dwyer* on future legal advertising regulations, see infra notes 155–60 and accompanying text.

nearly all forms of legal advertising. In 1977, the Supreme Court lifted the ban on legal advertising in *Bates*. Still, the Supreme Court stated that the right to advertise is not unlimited and the Court created two tests for commercial speech regulations. Recent circuit court decisions, however, indicate a preference towards limiting the reach of legal advertising regulations by rigorously applying these two tests.

A. The Initial Slogan: No Legal Advertising

For most of the nineteenth century, the legal community refrained from advertising its services because it prided itself as an “elite” practice and saw advertising as a threat to its respectable reputation. Moreover, lawyers viewed their work as a public service. As a result, the profession “believed itself to be free from the market forces that affected other busi-

(William J. Winston ed., Routledge 1993) (commenting on shift in views on legal advertising and how lawyers today are motivated to utilize new marketing techniques).

28. For a discussion on the initial prohibition of legal advertising, see infra notes 32–40 and accompanying text.

29. For a discussion on the *Bates* decision, see infra notes 41–46 and accompanying text.

30. For a discussion on the Supreme Court’s tests for commercial speech regulations, see infra notes 47–65 and accompanying text.

31. For a discussion of the Eleventh, Fifth, and Second Circuits’ approaches to legal advertising regulation challenges, see infra notes 66–86 and accompanying text.


The traditional ban on legal advertising originated in England. See Henry S. Drinker, William Nelson Cromwell Found., Legal Ethics 210 (3d prtg. 1961) (providing historical backdrop on American legal advertising views). In England, barristers came from wealthy, established families; they considered law to be a sophisticated, prestigious profession and regarded their work as a public service. See *id.* (explaining the socioeconomic makeup of traditional lawyers in England). The barristers viewed their profession with “a certain traditional dignity” that created an intimate community, resulting in a disdain of advertising the legal services they provided. See *id.* The young barristers carried this perception into the late eighteenth century and the early part of the nineteenth century and eventually “became the leaders of the American bar.” See *id.*

nesses and industries.”

Beginning around the mid-1800s, however, views of the legal profession shifted from a vocation to a profitable market that created a desire for legal advertising. In reaction, the American Bar Association (ABA) adopted the first national code on legal ethics in 1908—the Canon of Ethics. Reaffirming traditional views, Canon 27 forbade lawyers from advertising and deemed the practice unprofessional. The Model Code of Professional Responsibility (Model Code)

Today, some practitioners still view advertising as an unfavorable practice that contributes to a negative reputation among the American public. See William G. Hyland Jr., Attorney Advertising and the Decline of the Legal Profession, 35 J. LEGAL PROF. 339, 344–45 (2011) (attributing public’s low opinion of legal community as result of advertising).

34. See Lauren Dobrowalski, Comment, Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation, 12 Dick. J. Int’l L. 367, 375 (1994) (discussing traditional legal advertising views in Great Britain). For a further discussion on law as a vocation, see generally Timothy W. Floyd, The Practice of Law as a Vocation or Calling, 66 Fordham L. Rev. 1405 (1998) (advocating for lawyers to embody certain virtues in order to improve character of legal profession).


36. See James M. Altman, Considering the A.B.A.’s 1908 Canons of Ethics, 71 Fordham L. Rev. 2395, 2403–04 (2003) (discussing President Roosevelt’s distaste for legal shift away from focusing on individual client to focusing on elite corporations); see also Warren E. Burger, The Decline of Professionalism, 61 Tenn. L. Rev. 1, 5–7 (1993) (encouraging increase in regulation of legal advertising to avoid “huckster-shyster” advertisements). On June 28, 1905, President Roosevelt criticized the legal profession for its lack of ethics during his commencement address at Harvard University, which sparked a debate about legal ethics, particularly with the ABA. See Theodore Roosevelt, Address at Harvard Commencement: The Harvard Spirit (June 28, 1905), in 14 Harv. Graduates Mag. 7, 8 (1905) (providing transcript of address).

37. Altman, supra note 36, at 2295 (identifying Canon of Ethics as “first national code of legal ethics in [United States]”); see also id. at 2409 (“[T]he Canons Project grew out of President Theodore Roosevelt’s progressive critique of corporation lawyers and the spirit of commercialism pervading legal practice.”): Robert D. Pelz, Legal Advertising—Opening Pandora’s Box?, 19 Stetson L. Rev. 43, 46 (1989) (arguing that current restrictions on legal advertising date back to enactment of Canon 27).

38. See CANONS OF PROF’L ETHICS Canon 27 (1908). According to Canon 27, “[t]he most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust.” Id. Canon 27 emphasized that lawyers should only acquire new business by fostering intimate relationships with others. See id. Once that relationship was established, a lawyer could then provide someone a personal business card. See id. (explaining acceptable methods of advertising). Yet, “[t]his cannot be forced, but must be the outcome of character and conduct.” Id. Canon 27 explained that “advertisement[s] for business by furnishing or inspiring newspaper comments concerning causes in which the law-
superseded the *Canon of Ethics* in 1969 and expressly prohibited legal advertising.39 Because almost all states adopted the Model Code, states could legally prohibit attorneys from advertising—a prohibition that the Supreme Court would analyze soon thereafter.40

B.  **Launching a New Campaign: Bates v. Arizona Lifts the Ban on Legal Advertising**

By the 1970s, members of the legal community came to reject the idea that lawyers should be banned from advertising, reasoning that legal advertisements served as a vital means of educating the American public on the availability of legal services.41 Consequently, in 1977, lawyers challenged this restriction on advertising in *Bates*, where the Supreme Court held a blanket ban on attorney advertising was unconstitutional.42

In *Bates*, the Arizona State Supreme Court imposed a disciplinary rule that prohibited lawyers from advertising.43 Two attorneys challenged this rule because they had been or are engaged . . . and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.” *Id.*

39.  See *Code of Prof’l Responsibility DR 2-103(A)* (1969) (preliminary draft) (“A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize others to do so on his behalf.”) (footnote omitted)). The *Model Code of Professional Responsibility* was created by the ABA to correct certain perceived inadequacies of the Canons.  *See ABA Special Comm. on Evaluation of Prof’l Ethics, Preface to Preliminary Draft of Code of Professional Responsibility, at v* (1969).


43.  See *Bates*, 433 U.S. at 355 (summarizing rule at issue); Monica R. Richey, *Commentary, Modern Trends of Restrictions on Lawyer Solicitation Laws*, 29 J. LEGAL
rule after they were suspended from practice for advertising their services in a local newspaper. In finding a blanket ban on legal advertising unconstitutional, the Supreme Court “was careful to limit its opinion by stating that certain attorney advertising could be regulated.” While the legacy of Bates prohibits a state from implementing a complete ban on legal advertising, the Court explained that there are “clearly permissible limitations on advertising not foreclosed by our holding.”

C. Developing a Strategy: The Supreme Court Adopts Two Tests for Commercial Speech Regulations

As the Supreme Court addressed various commercial speech issues, it developed two distinct tests for assessing whether a limitation is constitutionally permissible. For restriction regulations, the Supreme Court set forth the four-prong Central Hudson test. For disclosure requirement regulations, the Court alternatively created the Zauderer test.


45. Kyle Lawrence Perkins, Comment, Attorney Advertising: The Marketing of Legal Services in the Twenty-First Century, 35 GONZ. L. REV. 99, 105 (2000) (explaining how Supreme Court acknowledged that legal advertising can still be subject to some regulations); see also Mars, supra note 12 (explaining Florida has restrictions for advertising).

46. See Bates, 433 U.S. at 383 (stating legal advertising protection is not boundless).


48. For a discussion of the four-prong test for disclosure requirements, see infra notes 51–56 and accompanying text.

49. For a discussion on the test for disclosure requirements, see infra notes 57–62 and accompanying text.

50. For a discussion on the different levels of scrutiny for regulations relating to commercial speech and disclosures, see infra notes 63–65 and accompanying text.
1. **Restriction Regulations**

In 1980, the Supreme Court created the test for commercial speech restrictions in *Central Hudson Gas & Electric Corp. v. Public Services Commission*, articulating a four-prong approach to determine the constitutionality of commercial speech restrictions now known as the *Central Hudson test*. First, the court must determine whether the speech at issue is protected, meaning it is both lawful and not misleading. Second, if the speech is protected, the court must then determine whether the government asserts a substantial interest for the restriction. Third, the restriction must advance this governmental interest. Fourth, the restriction cannot be more extensive than necessary to serve the government’s interest.

51. *447 U.S. 557* (1980); see Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1635–41 (1997) (providing overview of cases following *Central Hudson* that applied four-prong analysis to commercial speech regulations); see also United States v. Caronia, 703 F.3d 149, 164 (2d Cir. 2012) (applying *Central Hudson* analysis to rule prohibiting “off-label promotion” of pharmaceuticals); Coyote Pub’g, Inc. v. Miller, 598 F.3d 592, 602–03 (9th Cir. 2010) (applying *Central Hudson* to Nevada rule that limits “commodification of sex” in advertising); El Día, Inc. v. P.R. Dep’t of Consumer Affairs, 413 F.3d 110, 115–18 (1st Cir. 2005) (analyzing government restriction regulation under *Central Hudson* test).

52. *See Central Hudson*, 447 U.S. at 564, 566 (creating new test to assess commercial speech restrictions).

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 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.

53. *See id.* at 567 (acknowledging that utility advertisement is accurate and does not relate to any unlawful activity, thereby falling under commercial speech protection); see also Stephen M. Worth, Article, “Do Not Call” Laws and the First Amendment: Testing the Limits of Commercial Free Speech Protection, 7 J. SMALL & EMERGING BUS. L. 467, 482 (2005) (explaining first prong of *Central Hudson* through analysis of telemarking regulations).


55. *See Central Hudson*, 447 U.S. at 570 (finding interest of conserving energy not justified by ban on advertisements); see also Andrew S. Gollin, Comment, Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort, 81 MARQ. L. REV. 873, 890 (1998) (discussing ways courts have strengthened application of third prong).

56. *See Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993) (concluding law fails fourth prong because law was more extensive than necessary.
2. Disclosure Requirements

Five years after the Central Hudson test for restriction regulations was announced, the Supreme Court evaluated another commercial speech regulation, this time regarding a factual disclosure requirement.57 In Zauderer v. Office of Disciplinary Counsel,58 an attorney advertised that any client who lost at trial would not owe legal fees, but the attorney neglected to disclose that even losing clients would still owe court costs.59 Addressing whether a state can require attorneys to disclose this additional expense, the Supreme Court upheld the disclosure requirement and set forth a new test.60 Adopting a more deferential standard than the Central Hudson intermediate scrutiny test, the Court stated that disclosure requirements are constitutionally permissible “as long as [they are] reasonably related to the State’s interest in preventing deception of consumers” and the disclosure requirements are not “unduly burdensome.”61 Addition-


60. Compare Dorothy Virginia Kibler, Note, Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision, 65 N.C. L. REV. 170, 184 (1986) (“The Supreme Court in Zauderer for the first time directly addressed the constitutionality of compelled speech as part of a state’s regulation of commercial speech, and held that compelled speech regulations need only bear a rational relationship to a legitimate state interest.”), with Cory Andrews, Second Circuit Overturns Law that Compelled Businesses to Advertise Their Competitors’ Services, WLF LEGAL PULSE (Sept. 23, 2014), http://wlflegalpulse.com/2014/09/23/second-circuit-overturns-law-that-compelled-businesses-to-advertise-their-competitors-services/ [http://perma.cc/W0BJ-HUNS] (“Nowhere in Zauderer does the Court refer to the scrutiny it was applying as ‘rational review,’ and it clearly stated that the government must be advancing a substantial interest even if the mandated speech was ‘purely factual and uncontroversial.’”).

61. Zauderer, 471 U.S. at 651; see The Supreme Court, 1984 Term—Leading Cases, 99 HARV. L. REV. 193, 201 (1985) (internal quotation marks omitted) (noting Supreme Court’s holding asserts unduly burdensome requirements can violate constitutional rights); see also Josh King, Disclaimer Requirements, SOCIALLY AWKWARD, http://sociallyawkwardlaw.com/attorney-advertising-regulation/disclaimers/
ally, the Supreme Court noted that because the deception in Zauderer was self-evident, the state was not required to produce supportive evidence.62

3. Implications of Zauderer and Central Hudson for Legal Advertising Regulations

By creating two separate tests dependent on the type of commercial speech regulation, the Supreme Court deliberately subjects disclosure requirements to Zauderer’s lower standard of review.63 Unlike an outright prohibition on speech imposed by a restriction regulation, the Supreme Court explained “the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed . . . .”64 Accordingly, lower courts have traditionally upheld legal advertising disclosure requirements under Zauderer, equating


62. See Zauderer, 471 U.S. at 652–53 (“When the possibility of deception is as self-evident . . . we need not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’” (second, third, and fourth alterations in original) (quoting FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965))); see also Kristen A. Hosack, Note, Holy Smokes! Can the Government Compel Tobacco Companies to Engage in Inflammatory Commercial Speech?, 2014 U. ILL. L. REV. 881, 896 (2014) (“In deciding whether a state has an interest in preventing consumer deception, the Supreme Court analyzes whether the commercial speech’s potential for deceit is self-evident.”).


the test to a rational basis analysis, but have remained skeptical of legal advertising restriction regulations under Central Hudson.65

D. A New Trend in Legal Advertising: Recent Circuit Court Rulings Invalidating Advertising Regulations

Although the Supreme Court adopted two separate tests for commercial speech regulations based on the content regulated, the federal courts of appeals have inconsistently applied Central Hudson and Zauderer.66 Some circuits apply Central Hudson to disclosure requirements when they should apply Zauderer.67 Additionally, some circuits applying Zauderer require concrete evidence that the advertisement is misleading, despite the Supreme Court’s recognition that the misleading nature of an advertisement can be self-evident.68

1. Improper Application of the Central Hudson Test

In Mason v. Florida Bar,69 the Eleventh Circuit held unconstitutional a Florida Bar Association disclosure regulation prohibiting an attorney from including the phrase “‘AV Rated,’ the Highest Rating Martindale-Hubbell National Law Directory.”70 Though truthful, the statement violated a Flor-

65. See, e.g., Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 264 (2d Cir. 2014) (rejecting Zauderer rational basis and applying Central Hudson intermediate scrutiny because disclosure requirement was not geared towards “company’s own products or services,” instead requiring company to disclose competitor’s name); Pharm. Care Mgmt. Ass’n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (concluding Zauderer’s test is “so obviously met” in case under rational basis review); see also Leonard Gordon, First Amendment Challenge Grounded, VENABLE LLP (Aug. 1, 2012), http://www.allaboutadvertisinglaw.com/2012/08/first-amendment-challenge-grounded-1.html [http://perma.cc/8GU9-EJR6] (discussing different standards of review for First Amendment challenges).


67. For a discussion on the misapplication of Central Hudson in the Eleventh and Second Circuits, see infra notes 69–79 and accompanying text.

68. For a discussion on the recent shift towards requiring concrete evidence under Zauderer, see infra notes 80–86 and accompanying text.

69. 208 F.3d 952 (11th Cir. 2000).

70. See id. at 954 (internal quotation marks omitted) (explaining Florida Bar rule prohibiting self-laudatory statements).
ida Bar Association rule requiring the attorney to add a disclaimer to explain the AV rating system. Without referencing the Zauderer test for disclaimer regulations, the Eleventh Circuit applied Central Hudson. Focusing on Central Hudson’s third prong, which requires that the restriction “target an identifiable harm and . . . mitigate against such harm in a direct and effective manner,” the court concluded that the Florida Bar Association could not meet this burden because it did not present any “concrete evidence” that the attorney’s advertisement was misleading. Furthermore, the court rejected the Florida Bar Association’s argument that it was “simple common sense” that the attorney’s advertisement was misleading, commenting, “the Supreme Court has not accepted ‘common sense’ alone to prove the existence of a concrete, non-speculative harm.”

Similarly, in Hayes v. New York Attorney Grievance, the Second Circuit struck down provisions in New York’s legal advertising rules about disclosure requirements for legal specializations. Like the Eleventh Circuit,
the Second Circuit did not reference the less-stringent Zauderer test for disclosure requirements and instead applied the Central Hudson test.\footnote{77. See id. at 165 (applying four-part test to regulation); see also Brief for Appellees, Hayes v. N.Y. Atty's Grievance Comm., 672 F.3d 158 (2d Cir. 2012) (No. 10-1587-CV), 2011 WL 858609, at *24–28 (arguing rule should be analyzed under Zauderer because that test “applies when disclaimer requirements, rather than outright speech prohibitions, are in issue”).} The court rejected the New York Bar’s argument that the alleged harm by the advertisement was “self-evident.”\footnote{78. See Hayes, 672 F.3d at 168 (“No such demonstration is present in the record before us. And the alleged harm is surely not self-evident.”); James T. Townsend, Professional Responsibility, 63 Syracuse L. Rev. 897, 913 (2013) (articulating court’s reasoning for holding rule unconstitutional).} Instead, the court held that the rule failed the third prong of the Central Hudson test because the New York Bar relied on “mere speculation or conjecture.”\footnote{79. See Hayes, 672 F.3d at 168 (internal quotation marks omitted) (finding New York Rule 7.4 failed third prong of Central Hudson test); see also Peter Margulies, Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers’ Free Speech, 45 U. Mem. L. Rev. 319, 374–76 (2012) (providing detailed analysis of Hayes and resulting implications for attorney advertising).}

2. Circuit Court Properly Recognizes the Two Tests

In Public Citizen v. Louisiana Attorney Disciplinary Board,\footnote{80. 632 F.3d 212 (5th Cir. 2011).} the Fifth Circuit analyzed two disclosure requirement rules, one concerning “[p]roportional [c]laims, [s]cenes, and [p]ictures and the other concerning “font size and speed of speech.”\footnote{81. See id. at 227–29 (applying Zauderer to factual disclosure requirements); see also Roy E. Pulvers, Fifth Circuit Strikes Certain Rules Governing Attorney Advertising in Louisiana, Martindale-Hubbell (Feb. 17, 2011), http://www.martindale.com/legal-management/article_Hinshaw-Culbertson-LLP_1241582.htm [http://perma.cc/SXJ4-9BQ7] (explaining significance of opinion in that “[i]t highlights the difficulties of proof faced by the state when trying to justify stringent regulations”).} Unlike the Eleventh and Second Circuits, which applied the Central Hudson test to disclosure requirements, the Fifth Circuit acknowledged the Supreme Court’s two different tests for commercial speech regulations.\footnote{82. See Public Citizen, 632 F.3d at 227 (describing Supreme Court’s Zauderer standard as “rational basis” review); see also Andrew C. Budzinski, Note, A Disclosure-Focused Approach to Compelled Commercial Speech, 112 Mich. L. Rev. 1305, 1318 n.82 (2014) (noting that state had two interests in Public Citizen: “preventing consumer deception” and “promoting the ethical integrity of the legal profession” (citation omitted) (internal quotation marks omitted)).} Accordingly, the Fifth Circuit applied the Zauderer test to Louisiana’s disclosure requirements.\footnote{83. See Public Citizen, 632 F.3d at 219 (noting proper standard of review).} The court upheld the first disclosure requirement for portrayals of clients, scenes, and pictures because regulators provided evidence of consumer deception.\footnote{84. See id. at 227–28 (accepting evidence from survey responses that indicated public was sometimes mislead when testimonials were provided by actors and not actual clients).} However, the court struck down the second disclosure requirement on font size and the speed of speech because the record lacked...
evidence of consumer deception.\textsuperscript{85} Moreover, the court held that the font size and speed of speech requirement was unduly burdensome, reasoning it “effectively rule[d] out the ability of Louisiana lawyers to employ short advertisements of any kind.”\textsuperscript{86}

III. Promoting Judicial Pushback: The Third Circuit’s Invalidation of New Jersey’s Regulation in Dwyer v. Cappell

In the wake of recent litigation surrounding legal advertising regulations, the Third Circuit is the most recent appellate court to address legal advertising jurisprudence.\textsuperscript{87} The Third Circuit considered whether a New Jersey guideline banning the use of excerpts or quotations from judicial opinions was unconstitutional.\textsuperscript{88} In holding that the guideline infringed upon the lawyer’s First Amendment rights, the Third Circuit demonstrated judicial pushback on legal advertising regulations.\textsuperscript{89}

\textbf{A. Background Facts and Procedure}

In 2007, Andrew Dwyer, a practicing attorney, created a website for his law firm.\textsuperscript{90} Potential clients visiting his homepage would automatically encounter two quotations excerpted from judicial opinions where judges praised Dwyer’s legal abilities.\textsuperscript{91} The first excerpt quoted the remarks of the Honorable Jose L. Fuentes, who deemed Dwyer an “exceptional” and

\begin{footnotes}
\item\textsuperscript{86} See Public Citizen, 632 F.3d at 229; see also Keith Swisher, Disciplinary Authority and Choice of Law in Online Advertising: Disclaimers or Double Deontology, 21 \textit{Prof. Law.}, no.1, 2011, at 8, 10 n.47 (predicting that if court’s reasoning applied to “Internet banner ads or Twitter” courts may find disclosure requirements unduly burdensome).
\item\textsuperscript{87} See Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014) (ruling New Jersey guideline unconstitutional in as-applied challenge).
\item\textsuperscript{88} For a discussion on Dwyer’s violation under New Jersey’s Guideline 3, see infra notes 90–104 and accompanying text.
\item\textsuperscript{89} For a discussion of the Third Circuit’s recent application of the \textit{Zauderer} and \textit{Central Hudson} test, see infra notes 105–22 and accompanying text.
\item\textsuperscript{91} See id. at 671–73 (providing judicial language quoted). Both quotes were from unpublished opinions about employment discrimination cases under the New Jersey Law Against Discrimination, specifically addressing fee applications. See id. at 671 (describing source of quotations). In fee application proceedings, a prevailing party may apply to have the other side pay for attorney fees. See Samuel J. Samaro, Dwyer v. Cappell: No More Judicial PDAs, \textit{Past Middle} (Aug. 15, 2014), http://pastthemiddle.com/2014/08/15/dwyer-v-cappell-no-more-judicial-pdas/ [http://perma.cc/3P4T-3A89]. In such cases, the judge is required to evaluate the quality and abilities of the prevailing party’s lawyer. See id. Therefore, both quota-
“passionate” attorney. The second quotation relayed the sentiments of Judge William L. Wertheimer:

The inescapable conclusion is . . . that plaintiffs achieved a spectacular result when the file was in the hands of Mr. Dwyer. . . . Mr. Dwyer was a fierce, if sometimes not disinterested advocate for his clients, and through an offensive and defensive motion practice and through other discovery methods molded the case to the point where it could be successfully resolved.

Dissatisfied about being quoted on Dwyer’s homepage, Judge Wertheimer sent Dwyer a letter in 2008 requesting that the quote attached to his name be removed. In his letter, Judge Wertheimer explained his unease that potential clients may interpret the quote as a judicial endorsement. Dwyer, however, refused to take down the quote, stating that it was not “false or misleading.”

Both letters were forwarded to the New Jersey Bar’s Committee on Attorney Advertising (the Committee). In response, the Committee enacted Guideline 3: a new attorney-advertising rule. Under Guideline 3, lawyers were banned from advertising with quotes from judicial opinions but were allowed to include the full text of the opinion.

According to the New Jersey State Bar Association, judges are not allowed to endorse lawyers. See Christine S. Filip, Esq., Carol Johnston, Esq. & Raymond M. Brown, Esq., Presentation at the New Jersey Bar Association Annual Meeting and Convention: Marketing and Ethics 2014: Maximizing Results While Avoiding Liability (May 15, 2014) (“Mostly a problem for the judge under judicial ethics canons, judges cannot endorse lawyers and being friend [sic] on a professional oriented website is close to an endorsement.”).

The Committee created a proposed attorney-advertising guideline in 2009 that “banned [lawyers from] advertising with quotes from judges or judicial opinions” and thereafter published a Notice to the Bar seeking comments on the proposed guideline. See id. at 277. The New Jersey Supreme Court amended the proposed
“The day before Guideline 3 went into effect, Dwyer filed [an] action challenging the constitutionality of the new regulation.100 The district court held Guideline 3 was a valid disclosure requirement under Zauderer.101 Concluding Guideline 3 was a disclosure regulation, the district court explained that “[i]t allows publication of all the content sought to be published within a judicial quotation, albeit within its full context.”102 Additionally, the district court reasoned, “[a] judicial quotation’s potential to mislead a consumer is self-evident.”103 Dissatisfied with the district court’s ruling, Dwyer appealed to the Third Circuit.104

B. The Third Circuit’s Analysis

The Third Circuit held that Guideline 3 violated Dwyer’s First Amendment rights by requiring him to include the entire judicial opinion on his firm’s webpage.105 The court acknowledged the two possible frameworks applicable to legal advertising regulations: the Central Hudson guideline, and it was approved in May 2012. The proposed Guideline, known as Guideline 3, read as follows:

An attorney or law firm may not include, on a website or other advertisement, a quotation or excerpt from a court opinion (oral or written) about the attorney’s abilities or legal services. An attorney may, however, present the full text of opinions, including those that discuss the attorney’s legal abilities, on a website or other advertisement.

Id. at 278. The Comment created to accompany the final version of Guideline 3 indicated that this guideline was enacted to directly target Dwyer’s law firm website. See id.

100. See id. (stating Dwyer filed action “in the District Court of New Jersey seeking injunctive and declaratory relief under 42 U.S.C. § 1983”).


102. See Dwyer, 951 F. Supp. 2d at 674 (declining to rule guideline was ban on speech); see also Joseph A. Corsmeier, New Jersey Federal District Court States That Lawyers May Not Post Excerpts from Judicial Opinions Complimenting the Quality [sic] the Lawyers’ Work on Their Websites, LAW. ETHICS ALERT BLOGS (Nov. 14, 2013, 1:18 PM), https://jcorsmeier.wordpress.com/2013/11/14/new-jersey-federal-district-court-states-that-lawyers-may-not-post-excerpts-from-judicial-opinions-complimenting-the-quality-the-lawyers-work-on-their-websites/ [https://perma.cc/VSYU-JHF9] (arguing district court “seems to stretch meaning of disclosure” requirement (internal quotation marks omitted)).

103. See Dwyer, 951 F. Supp. at 674–75 (reasoning quotes could “easily be misconstrued as improper judicial endorsement”).

104. See Dwyer, 762 F.3d at 279 (stating procedural history).

105. See id. at 282 (“Yet we need not decide whether it is a restriction on speech or a disclosure requirement. This is because the Guideline is . . . unconstitutio-nal under even the less-stringent Zauderer standard of scrutiny.”).
test for restrictions and the Zauderer test for disclosures. The Third Circuit, however, refrained from deciding which test was the appropriate analysis and remarked that Guideline 3 contained characteristics from both categories. Instead, the court held Guideline 3 infringed upon attorneys’ First Amendment free speech rights because “the Guideline [was] not reasonably related to preventing consumer deception and [was] unduly burdensome.”

1. Not Reasonably Related to Preventing Consumer Deception

Assessing Guideline 3 under the Zauderer analysis, the Third Circuit first addressed the Committee’s argument that the judicial statements on Dwyer’s homepage were inherently misleading. The Committee reasoned that a nonprofessional would interpret these excerpts as judicial endorsements. In a footnote, the Third Circuit stated that the Committee did not produce any evidence that Dwyer’s quotes had actually misled consumers. Moreover, the Third Circuit refused to find that accurate statements made by judges qualified as obvious deception.

Furthermore, even if the excerpts could conceivably mislead consumers, the Third Circuit noted that the Committee failed to explain how a complete judicial opinion was an appropriate remedy. The court expressed doubt that providing a full judicial opinion would reveal to a potential client that such language was not a judicial endorsement. Alternatively, the court reasoned that this requirement could potentially create further confusion.

106. See id. at 279–82 (tracing Supreme Court’s treatment of disclosure requirements and restriction regulations).
107. See id. at 282 (noting Guideline 3 may be disclosure requirement or restriction requirement).
108. See id. (providing court’s holding).
109. See id. (discussing Committee’s argument that Dwyer’s quotes will mislead potential clients); Brief in Opposition to the Appeal on Behalf of Defendants-Appellees at 7, Dwyer v. Cappell, 762 F.3d 275 (3d Cir. 2014) (No. 13-3235), 2013 WL 5797511, at *7–8 (“When a judge discusses an attorney’s legal abilities in an opinion, such as in a fee-shifting or division-of-fee case, the judge is setting forth findings of fact and conclusions of law pertinent to the decision in the matter. The judge is not personally endorsing the attorney . . . .” (quoting N.J. R. PROF’L CONDUCT 7.1(a) cmt.).)
110. See Dwyer, 762 F.3d at 282 (“The Committee hyperbolizes that the excerpts prohibited by Guideline 3 are inherently misleading because laypersons reading such quotes would understand them to be judicial endorsements.”).
111. See id. at 282–83 n.5 (assessing whether Dwyer’s use of judicial quotes was potentially misleading).
112. See id. at 283 n.5 (“[T]he deceiveness of accurately transcribed statements made by judges in judicial opinion excerpts is far from ‘self-evident.’”).
113. See id. at 282–83 (scrutinizing ability of full judicial opinion to prevent consumer deception).
114. See id. at 282 (reasoning guideline was not proper remedy for alleged deception).
115. See id. at 283–84 (commenting on impracticality of Guideline 3).
2. **Unduly Burdensome**

The Third Circuit also held Guideline 3 was unduly burdensome, meaning the “required disclosure [wa]s so lengthy it ‘effectively rule[ds] out’ advertising by the desired means.”\(^{117}\) Citing the Fifth Circuit’s decision in *Public Citizen*, where the court held that a lengthy attorney disclosure requirement for television advertisements was unduly burdensome, the Third Circuit determined that Guideline 3 was even more burdensome than the disclosure requirement stricken down in that case.\(^{118}\) The court explained, “providing a full-text judicial opinion is so cumbersome that it effectively nullifies the advertisement.”\(^{119}\)

In its final remarks, the Third Circuit stated that because Guideline 3 was particularly unduly burdensome, the Committee might have intended an outright ban on the use of judicial excerpts in advertising.\(^{120}\) If so, the proper analysis for Guideline 3 would shift from *Zauderer*’s less stringent analysis to *Central Hudson*’s intermediate scrutiny.\(^{121}\) Because it had failed the *Zauderer* test, the Third Circuit reasoned Guideline 3 would also not withstand *Central Hudson* scrutiny.\(^{122}\)

**IV. Knowing Your Target Audience: Legal Advertising in the Third Circuit After Dwyer**

In light of the Third Circuit’s decision in *Dwyer*, the legal community experienced both a victory and a loss.\(^{123}\) In one respect, due to the self-

\(^{116}\) See id. at 283 (suggesting alternative disclosure requirement that would properly inform potential clients that judicial quotation is not judicial endorsements).

\(^{117}\) Id. (quoting Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation, 512 U.S. 136, 146 (1994)).

\(^{118}\) See id. at 284 (explaining lawyers would only be able to adhere to guideline via internet webpages because providing entire judicial opinion in other mediums is impractical).

\(^{119}\) Id.

\(^{120}\) See id. (“While the intention behind Guideline 3 may be to make it so burdensome to quote judicial opinions that attorneys will cease doing so, that type of restriction—an outright ban on advertising with judicial excerpts—would properly be analyzed under the heightened *Central Hudson* standard of scrutiny.”).

\(^{121}\) See id. (discussing proper analysis if Guideline 3 is considered restriction requirement).

\(^{122}\) See id. (“Although such a ban would fail as applied to Dwyer given our holding under the less stringent *Zauderer* standard, we need not decide whether such a ban would be valid in other cases.”).

regulated nature of the legal system, those attempting to restrict legal advertising will now face constitutional challenges under a heightened level of review.\textsuperscript{124} In another respect, the Third Circuit expanded protection for legal advertising.\textsuperscript{125}

A. Advice for Practitioners Regulating Legal Advertising

For practitioners regulating legal advertising, the Third Circuit’s holding in \textit{Dwyer} creates new difficulties when faced with constitutional challenges.\textsuperscript{126} The Third Circuit declined to resolve whether Guideline 3 was a restriction regulation or a disclosure requirement, thus leaving out the appropriate level of scrutiny.\textsuperscript{127} As a result, many regulators are left with uncertainty because they can no longer predict whether disclosure requirements will receive \textit{Zauderer}’s less stringent standard of review or whether courts will impose \textit{Central Hudson}’s intermediate scrutiny.\textsuperscript{128}

However, even if a court does apply the \textit{Zauderer} analysis, regulators should be cautious when articulating restrictions on attorney speech.\textsuperscript{129} As a First Amendment scholar stated: “[W]e are in the midst of a movement away from this ‘free pass’ assumption, as courts seem increasingly [willing] to apply [the] \textit{Zauderer} review with more rigor.”\textsuperscript{130} The Third Circuit, along with other circuit courts, is giving less deference to regulators by requiring hard evidence to defend legal advertising regulations.\textsuperscript{131}
The Third Circuit demonstrated this resistance by dismissing the Committee’s claims that Dwyer’s quotes were “inherently misleading” and that deception was “self-evident.” Accordingly, practitioners seeking to implement disclosure regulations will increase their chances of withstanding constitutional challenges if they are able to demonstrate, with a strong supporting record, the regulation corrects potentially misleading speech. A strong record may be comprised of statistics, surveys, or focus group results that support the finding that a certain advertising technique is potentially misleading.

In addition to establishing that a regulation is aimed at potentially misleading speech, regulators must also show that the actual regulation corrects the proven deception. In Dwyer, the court stated that the Committee failed to establish how including an entire judicial opinion instead of just an excerpt would decrease a layperson’s likelihood of perceiving the advertisement as a judicial endorsement. Under this framework, practitioners will need to prove there is a closer nexus between the alleged deception and the proposed remedy in order to withstand the more demanding Zauderer review.

Moreover, the Third Circuit presented new concerns for regulators with its unduly burdensome analysis. Although other courts have
found disclosure requirements unduly burdensome, the Third Circuit explained that such a requirement could potentially shift the regulation from a Zauderer analysis to a Central Hudson analysis if the purpose of the regulation was to ban a form of advertising. To avoid being subject to Central Hudson’s heightened scrutiny, regulators should limit the extent of disclosure requirements necessary to correct the potentially misleading speech. Yet, due to the Third Circuit’s more rigorous scrutiny under Zauderer, even a disclosure-requirement analysis is no longer an easy victory for regulators.

B. Advice for Practitioners Seeking to Advertise

The Third Circuit’s analysis in Dwyer allows practitioners who advertise to take comfort in one assurance provided by the court’s recent decision: now, advertising regulations may no longer be imposed haphazardly. By rejecting the Committee’s unfounded claims that Andrew Dwyer’s use of judicial quotes was misleading, the circuit court affirmed that legal advertising regulations must be strictly confined to correct advertising with a substantiated misleading effect. Therefore, practitioners within the Third Circuit who wish to challenge overreaching advertising regulations can now use regulators’ lack of supportive evidence as an effective tool for invalidation. Additionally, in the aftermath of Dwyer, some practitioners plan to restore judicial quotations to their law firm websites. In fact, Dwyer him-


140. See E-mail Interview with Rodney A. Smolla, supra note 129 (stating court holding Guideline was unduly burdensome was important aspect of decision).


142. See E-mail Interview with Josh King, Vice President, Bus. Dev. & Gen. Counsel, Avvo, Inc. (Jan. 26, 2015) (on record with author) (“The key takeaway is that regulators can’t simply say ‘this disclosure is necessary to prevent the potential for an advertising message to be misleading’ and expect to get away with it.”).

143. See Toutant, supra note 132 (highlighting Committee’s lack of evidence to support claims).

144. See E-mail Interview with Rodney A. Smolla, supra note 129 (explaining courts are showing resistance to “inherently misleading” arguments and are requiring proof (internal quotation marks omitted)).

self plans to repost the complimentary quotes that were once displayed on his homepage. However, practitioners who intend to employ this advertising technique need to be aware of the New Jersey Committee’s recent changes in light of the Third Circuit’s decision. On October 15, 2014, the New Jersey Supreme Court approved a new version of Guideline 3, effective immediately. This revised version requires lawyers to include a disclaimer with quotations or excerpts from judicial opinions. In accordance with the Third Circuit’s recommendation from *Dwyer*, the disclaimer must state, “This comment, made by a judge in a particular case, is not an endorsement of my legal skill or ability.”

Other jurisdictions falling within the Third Circuit have not implemented regulations of this kind. In fact, the Pennsylvania Disciplinary Board of the Supreme Court of Pennsylvania stated, “Pennsylvania does not have a provision comparable to Guideline 3, so the decision does not directly affect Pennsylvania lawyers. The Third Circuit’s opinion is a use-

146. See M.P. Gallagher, *supra* note 145 (“Dwyer stated on Oct. 17 that the revised guideline makes it clear the [sic] he can use the quotes, and he plans to restore them in the coming month.”).


An attorney or law firm may include, on a website or other advertisement, an accurate quotation or excerpt from a court opinion (oral or written) about the attorney’s abilities or legal services. The following disclaimer must be prominently displayed in proximity to such quotation or excerpt: “This comment, made by a judge in a particular case, is not an endorsement of my legal skill or ability.”

Id.

149. See id. (explaining that lawyers should include disclaimer requirement with commentary judicial quotations used for advertising).


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[146](#)

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ful refresher on First Amendment issues relating to lawyer advertising, however.”152

Still, lawyers who practice in Third Circuit jurisdictions outside of New Jersey should use caution when displaying quotations or excerpts without a disclaimer.153 Advertising a simple complimentary quotation may cause further unrest among state regulators, and the use of such quotations may also stifle judges from giving complimentary remarks, fearing a lawyer may later exploit their language for commercial purposes.154

V. Conclusion

The court’s ruling in Dwyer has made it clear that the Third Circuit is restricting legal advertising regulators’ reach by applying a rigorous level of scrutiny.155 While Dwyer aligns with recent circuit court decisions, the Third Circuit’s analysis has gained recognition in the legal community.156 As one commentator stated, “Dwyer is important because it finally gives judicial pushback to an example of sweeping governmental overreach and suggests there is a boundary beyond which Zauderer cannot be stretched.”157


153. See Samaro, supra note 91 (asserting that use of judicial quotations is “a quick way to irritate a judge” and may embarrass judges).


155. See E-Mail Interview with Rodney A. Smolla, supra note 129 (explaining court was “chiding bar authorities on their lack of any proof that the quotes were misleading”).


157. See Hudson, supra note 1 (quoting Rodney A. Smolla, First Amendment Scholar) (internal quotation marks omitted).
Although the New Jersey Committee reacted to *Dwyer* by imposing a new disclaimer requirement for judicial quotes, this new rule could possibly fail a constitutional challenge under the Third Circuit’s application of *Zauderer*.\(^{158}\) In light of the court’s rationale in *Dwyer*, regulators will need to provide supportive evidence to withstand judicial pushback.\(^{159}\) While it is still too early to see the full effect of the Third Circuit’s holding, the Third Circuit is expanding a practitioner’s right to advertise beyond the confines of the pre-*Bates* era.\(^{160}\)


159. See Hudson, *supra* note 1 (discussing “judicial hostility” towards over-reaching regulations (internal quotation marks omitted)).
