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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

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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

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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=_GKau9iqBiU [https://perma.cc/T5V7-XDTZ] [hereinafter Pete Reid, *I'm the One for You*] (portraying lawyer as strong, smart, and honest).

4. *See* Joe Patrice, *Everyone Needs to Watch This Insane and Awesome Lawyer Ad*, ABOVE L. (Aug. 1, 2014, 5:13 PM), http://abovethelaw.com/2014/08/everyone-needs-to-watch-this-insane-and-awesome-lawyer-ad/ [http://perma.cc/NKM5-E3DP] (describing opening scene as depiction of stereotypical lawyer, which then escalates into unconventional image of lawyer).

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

6. *See Lawyer Advertises Himself as Best Ever Human Being*, ROLLONFRIDAY (Aug. 8, 2014), http://www.rollonfriday.com/TheNews/EuropeNews/tabid/58/Id/3465/fromTab/36/currentIndex/6/Default.aspx [http://perma.cc/K63E-49YE] (noting lawyer "cut off by a blaring punk song" creating atypical lawyer image).

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]

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7. *See* Alex Aldridge, *Edinburgh Uni Law Graduate Cracks America with Hilarious Ad for His New Firm*, LEGAL CHEEK (Aug. 4, 2014, 2:28 PM), http://www.legalcheek.com/2014/08/edinburgh-uni-law-graduate-cracks-america-with-hilarious-ad-for-his-new-firm/ [http://perma.cc/EU6N-Q8Y4] (describing commercial as "YouTube masterpiece"). For the commercial depicting these events, see Pete Reid, *I'm the One for You*, *supra* note 3.

8. *See* Dan Solomon, *Until "Better Caul Saul" Debuts, Watch This Wacky Ad from a Can-Do Austin Lawyer*, FAST COMPANY (Aug. 27, 2014, 1:54 PM), http://www.fastcocreate.com/3034857/until-better-caul-saul-debuts-watch-this-wacky-ad-from-a-can-do-austin-lawyer [http://perma.cc/JV2U-HPMS] (highlighting unique and quirky aspects of legal advertisement relaying message that Pete Reid has ideal qualities public wants in lawyer).

9. *See* Travis Burchart, *Are You Killing Your Blog Readers with Boredom? 4 Tips That'll Make You Anti-Boring*, LEXTALK, http://www.lexisnexis.com/lextalk/getting-ahead/f/7/t/1024.aspx [http://perma.cc/K253-BFZC] (last visited Oct. 27, 2015) (providing tips to increase interest for legal blogs, and arguing Pete Reid's commercial is prime example of effective creativity).

10. *See Attorney Raises Bar on Legal Ads*, AUSTIN EGOTIST (Aug. 4, 2014), http://www.theaustinegotist.com/news/local/2014/august/4/attorney-raises-bar-legal-ads [http://perma.cc/A8TK-AVJ2] (commending Pete Reid for unique spin on legal advertisement); *see also* Pete Reid, *I'm the One for You*, *supra* note 3, at 0:57.

11. *See* Emily Arata, *Lawyer Shows Off Flying Kicks and Rescues a Drowning Man in Epic Commercial*, NOMINAL (Sept. 3, 2014, 5:15 PM), http://www.favorangels.com/lawyer-shows-off-flying-kicks-and-rescues-a-drowning-man-in-epic-commercial/ [http://perma.cc/L995-VAFV] (calling Pete Reid's commercial "an entirely unforgettable ad").

12. *See* Roman Mars, *Call Now!*, 99% INVISIBLE (Mar. 25, 2014), *available at* http://99percentinvisible.org/episode/call-now/ [http://perma.cc/93LR-J9AJ] (downloaded using iTunes) (discussing legal commercials and how some people are "totally confused" by advertisements); *see also* Andrew Chow, *How Not to Be a Laughing Stock: 3 Dos and Don'ts for a Lawyer's TV Ad*, STRATEGIST BLOG (July 17, 2012, 5:01 AM), http://blogs.findlaw.com/strategist/2012/07/how-not-to-be-a-laughing-stock-3-dos-and-donts-for-a-lawyers-tv-ad.html [http://perma.cc/UZ56-5URZ] (providing practical tips for lawyers seeking to increase clientele via television commercials); Stacy West Clark, *Marketing Activities That Will Pay Off the Most in 2015*, LEGAL INTELLIGENCER (Jan. 27, 2015), http://www.thelegalintelligencer.com/home/id=1202716147274?kw=Marketing%20Activities%20That%20Will%20Pay%20Off%20the%20Most%20in%202015&et=editorial&bu=the%20Legal%20Intelligencer&cn=20150128&src=EMC-Email&pt=Recent%20Practice%20Columns&slreturn=20150117110720 (advocating for practitioners to employ certain marketing techniques to increase revenue).

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.[13] Yet, even though the United States Supreme Court voided an absolute ban on lawyer advertising in *Bates v. Arizona*,[14] 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.[15] Consequently, the legal profession struggles to implement legal advertising regulations that do not violate lawyers' First Amendment rights.[16] When lawyers challenge legal advertising rules, courts face the difficult task of deciding which advertising techniques receive constitutional protection.[17]

Jacoby & Meyers commercial aimed at promoting affordable legal fees). For examples of other unconventional advertising tactics, see Aaron J. Russ, Note, *Is Groupon for Lawyers Fraught with Ethical Danger? Why the Legal Community Should Embrace Innovative Internet-Marketing for Lawyers*, 13 U. ILL. J.L. TECH. & POL'Y 393, 418 (2013) (crediting use of television commercials as traditional business tactic to generate business); John Fisher, *The Magic of Facebook Ads for Lawyers*, LAW PRAC. ADVISOR (Nov. 19, 2014), http://www.lawpracticeadvisor.com/magic-facebook/ [http://perma.cc/9FDP-3854] (promoting use of Facebook to attract potential clients to law firm's fan page). *But see* Lee Rosen, *10 Quick Lawyer Advertising Tips*, DIVORCE DISCOURSE, https://divorcediscourse.com/10-quick-lawyer-advertising-tips/ [https://perma.cc/Z7TC-B3EW] (last visited Oct. 27, 2015) (warning lawyers that peers may be critical of marketing efforts).

13. *See, e.g.*, Jamie Casino, *2014 Jamie Casino – 2 Minute Super Bowl Commercial – Casino's Law*, YOUTUBE (Feb. 2, 2014), https://www.youtube.com/watch?v=jr2gdPY-88w [https://perma.cc/6M94-7KU3] (soliciting business for personal injury victims); Karl Hafer, Jr., *Tackiest Lawyer Commercial. . . Ever*, YOUTUBE (Dec. 13, 2008), https://www.youtube.com/watch?v=Y1Qk6QPzuIc [https://perma.cc/MD2U-FNUQ] (advertising legal services to assist with divorce). *But see* Jordan Furlong, *The Problem with Lawyer Advertising*, STEM LEGAL (Apr. 3, 2012), http://www.stemlegal.com/strategyblog/2012/the-problem-with-lawyer-advertising/ [http://perma.cc/279D-DE4U] (arguing lawyers are not effectively marketing themselves).

14. 433 U.S. 350 (1977).

15. *See* Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 353–56 (2014) (providing overview of ABA and state rules regarding legal advertising); *see also* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326 (1996) (explaining firm marketing is "an opportunity to acquire information" for consumers).

16. *See, e.g.*, Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1292 (M.D. Fla. 2011) (analyzing challenge on Florida Bar rules regulating claims of "quality of service" or "promise results" (internal quotation marks omitted)); Texans Against Censorship, Inc. v. State Bar of Tex., 888 F. Supp. 1328, 1342 (E.D. Tex. 1995) (arguing parts of State Bar of Texas are unconstitutional because they encompasses noncommercial speech), *aff'd*, 100 F.3d 953 (5th Cir. 1996); Spencer v. Supreme Court of Pa., 579 F. Supp. 880, 887 (E.D. Pa. 1984) (analyzing whether Pennsylvania rule prohibits "subjective characterization" of lawyers' credentials and quality of services), *aff'd*, 760 F.2d 261 (3d Cir. 1985).

17. *See, e.g.*, Joan C. Rogers, *Federal Suit Challenges Florida Bar Rules That Restrict Statements in Websites, Blogs*, BLOOMBERG BNA (Dec. 31, 2013), http://www.bna.com/federal-suit-challenges-n17179881059/ [http://perma.cc/R68V-TUK9] (disputing constitutionality of Florida Bar rule requiring advertising to be "objectively verifiable" (internal quotation marks omitted)).

Recently, in *Dwyer v. Cappell*,[18] the Third Circuit considered whether a challenged New Jersey legal advertising guideline was unconstitutional.[19] Applying a rigorous level of scrutiny to the regulation, the Third Circuit held that the guideline infringed upon one lawyer's free speech rights.[20] 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.[21]

This Casebrief discusses how the Third Circuit's decision in *Dwyer* compromises the ability of state bar associations to regulate legal advertising.[22] Part II provides a brief history of attorney advertising and discusses a line of recent federal appellate court decisions that invalidate legal advertising regulations.[23] Part III examines the Third Circuit's decision in *Dwyer*.[24] Part IV translates the Third Circuit's *Dwyer* analysis into practical guidance for Third Circuit practitioners.[25] Finally, Part V concludes by discussing the *Dwyer* decision within the larger context of the attorney advertising debate.[26]

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.[27] 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).

20. *See id.* at 282, 284 (holding New Jersey rule unconstitutional); *see also* Cat DeHart, *Recent Ethics Opinions of Significance*, 39 J. LEGAL PROF. 117, 119–20 (2014) (providing brief overview of Third Circuit's holding).

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.

27. *See* Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 641–60 (2013) (tracing history of legal advertising in United States from 1970s to 1990s); Ransom Riggs, *Should Lawyers Be Allowed to Advertise?*, MENTAL_FLOSS (Sept. 19, 2007, 5:40 AM), http://mentalfloss.com/article/16991/should-lawyers-be-allowed-advertise [http://perma.cc/95EL-QJA9] (contrasting bar associations' initial prohibition on advertising with examples of current legal advertising); *see also* MARKETING FOR ATTORNEYS AND LAW FIRMS xvii

nearly all forms of legal advertising.[28] In 1977, the Supreme Court lifted the ban on legal advertising in *Bates*.[29] Still, the Supreme Court stated that the right to advertise is not unlimited and the Court created two tests for commercial speech regulations.[30] Recent circuit court decisions, however, indicate a preference towards limiting the reach of legal advertising regulations by rigorously applying these two tests.[31]

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.[32] Moreover, lawyers viewed their work as a public service.[33] 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.

32. *See* Daniel Callender, Comment, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 92 (2001) (noting how lawyers have traditionally refrained from advertising their services); *see also* Mortimer A. Rosecan, Dean, Address at International Academy of Trial Lawyers Annual Meeting: Lawyer Advertising and Specialty Certification (1985), transcript *available at* http://www.iatl.net/files/public/85_lawyer_i4a.pdf [http://perma.cc/4TW3-4UQZ] (stating ABA's ban on advertising originates from Inns of Court in London).

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.*

33. *See* John S. Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451, 451–52 (1989) (book review) (recounting how past legal professionals viewed public service as central ideal and how spirit of public service is most essential characteristic in legal profession); *see also* ANTHONY D. CASTELLI, ATTORNEY ADVERTISING REVEALED: HOW TO GET THROUGH THE HYPE AND HIRE A GREAT PERSONAL INJURY LAWYER 8, 15 (2011), *available at* http://www.castellilaw.com/sites/www.castellilaw.com/files/castelli_ebook_0.pdf [http://perma.cc/GT9T-8D53] (arguing some lawyers believed that through advertising, legal "profession would, in plain and simple words, not be so highfalutin'").

nesses and industries."[34] 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.[35]

Many viewed this movement as a danger to legal ethics.[36] In reaction, the American Bar Association (ABA) adopted the first national code on legal ethics in 1908—the *Canon of Ethics*.[37] Reaffirming traditional views, Canon 27 forbade lawyers from advertising and deemed the practice unprofessional.[38] 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).

35. *See* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 756 (1992) (exploring shift of legal community from being purely advocacy-oriented in late 1800s to early 1900s). *But see* Eugene R. Gaetke, *Lessons in Legal Ethics from Reading About the Life of Lincoln*, 97 KY. L.J. 583, 592 n.79 (2009) (stating Chief Justice Warren Burger viewed advertising as contributing factor to decline 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 2395 (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. Peltz, *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

yer has been or is 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).

In 1983, the ABA created new guidelines for legal professionalism, the *Model Rules of Professional Conduct*. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 135–37 (2011) (tracing history of professional conduct rules promulgated by ABA). Currently, all states except California have adopted some version of the ABA's *Model Rules of Professional Conduct*. *See* ABA COMM. on CPR POLICY IMPLEMENTATION, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf [http://perma.cc/7Y6G-3PKP] (listing states that adopted ABA Model Rules).

40. *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 702 (1977) (highlighting that ABA's Code of Professional Responsibility created "battle in the courts" over legal advertising restrictions).

41. *See* Callender, *supra* note 32, at 94–95 (arguing middle class not hiring lawyers due to deficiency in information available to public on legal services). *But see* Anne Bond Emrich, *Legal Profession Is Low on Public Confidence Scale*, GRAND RAPIDS BUS. J. (May 3, 2002), http://www.grbj.com/articles/59976 [http://perma.cc/LP2A-XGM2] (reporting that lawyers contribute to low public confidence through advertising).

42. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977); *see also* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 256–57 (2007) (explaining how Supreme Court rejected claims that advertising would lead to commercialization of legal industry).

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.[44] 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."[45] 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."[46]

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.[47] For restriction regulations, the Supreme Court set forth the four-prong *Central Hudson* test.[48] For disclosure requirement regulations, the Court alternatively created the *Zauderer* test.[49] In creating these separate tests, the Supreme Court applies a lower standard of review to disclosure requirements, allowing them to pass constitutional muster with more ease than restriction regulations.[50]

PROF. 281, 284 (2005) (same); *see also* Ted Schneyer, *"Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 101 (2012) (explaining why Supreme Court rejected Arizona Bar's basis for ban).

44. *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 284 (8th ed. 2013) (emphasizing "risky" nature of John Bates and Van O'Steen's advertisement in Arizona newspaper); David L. Hudson Jr., Bates *Participants Reflect on Landmark Case*, FIRST AMENDMENT CTR. (Nov. 18, 2004), http://www.firstamendmentcenter.org/bates-participants-reflect-on-landmark-case [http://perma.cc/KQ3A-5Q6J] (stating Bates and O'Steen placed advertisement in the *Arizona Republic* on February 22, 1976 and describing subsequent events).

45. Kyle Lawrence Perkins, Comment, *Attorney Advertising: The Marketing of Legal Services in the Twenty-First Century*, 35 GONZ. L. REV. 99, 103 (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).

47. *See* Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 VA. J. SOC. POL'Y & L. 205, 217–21 (2011) (distinguishing tests for restrictions and disclosures); Jonathan H. Adler, *What Are the Constitutional Limits on Compelled Commercial Speech?*, WASH. POST, Apr. 7, 2014, http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/07/what-are-the-constitutional-limits-on-compelled-commercial-speech/ [http://perma.cc/SAG2-QTVE] (asserting both tests originate from same doctrine).

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*,[51] articulating a four-prong approach to determine the constitutionality of commercial speech restrictions now known as the *Central Hudson* test.[52] First, the court must determine whether the speech at issue is protected, meaning it is both lawful and not misleading.[53] Second, if the speech is protected, the court must then determine whether the government asserts a substantial interest for the restriction.[54] Third, the restriction must advance this governmental interest.[55] Fourth, the restriction cannot be more extensive than necessary to serve the government's interest.[56]

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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 Publ'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 (2003) (explaining first prong of *Central Hudson* through analysis of telemarking regulations).

54. *See Central Hudson*, 447 U.S. at 569–70 (finding that promotion of energy conservation is substantial state interest); *see also* David L. Williamson, *The* Central Hudson *Four Part Test*, SIGN & DIGITAL GRAPHICS (Dec. 3, 2009), http://sdgmag.com/article/business-marketing/central-hudson-four-part-test [http://perma.cc/4FN9-QC9E] (discussing burden on government to demonstrate substantial interest for restriction regulation).

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-

to serve government interest). *But see* Kayla R. Burns, Note, *Reducing the Inherent Malleability of Mid-Level Scrutiny in Commercial Speech: A Proposed Change to the Second, Third, and Fourth Prongs of the* Central Hudson *Test*, 44 LOY. L.A. L. REV. 1579, 1596 (2011) (asserting fourth prong fails to remedy courts' disproval of paternalistic regulations).

57. *See* Cory L. Andrews, *Graphic Tobacco Warning Case Can Present SCOTUS Opportunity on Commercial Speech Doctrine*, FORBES (Sept. 14, 2012, 9:46 AM), http://www.forbes.com/sites/wlf/2012/09/14/graphic-tobacco-warning-case-can-present-scotus-opportunity-on-commercial-speech-doctrine/ [http://perma.cc/SG5C-ARZE] (explaining how Supreme Court applies "relaxed" test for disclosures instead of rigorous *Central Hudson* test).

58. 471 U.S. 626 (1985).

59. *See id.* at 633 (describing nature of rule at issue). Currently, circuits differ on whether *Zauderer* is limited to disclosure requirements aimed at consumer protection disclosure or if *Zauderer* extends beyond consumer protection. *See* Thomas C. Means, *To Label or Not to Label? Companies May Have No Choice*, LAW 360 (Sept. 30, 2014, 10:32 AM), https://www.crowell.com/files/To-Label-Or-Not-To-Label-Companies-May-Have%20No-Choice.pdf [http://perma.cc/474P-UJZW] (discussing recent D.C. decision that expanded *Zauderer*).

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/W6BJ-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

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[http://perma.cc/7WHA-QR3C] (last visited Oct. 27, 2015) (arguing that courts do not correctly apply *Zauderer* test).

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 Supreme Court has repeatedly acknowledged that a lack of evidence showing how the regulation prevents consumer deception is not fatal, explaining that states can show this prevention of deception by "history, consensus, and simple common sense" or the state interest can be "self-evident." *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250–51 (2010) (emphasizing that states can regulate "inherently misleading advertising, particularly through disclosure requirements"); Fla. Bar v. Went for It, Inc., 515 U.S. 618, 628 (1995) (stating restrictions can be upheld by "history, consensus, and 'simple common sense'" (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992))); *In re* R. M. J., 455 U.S. 191, 202 (1982) ("[T]he Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.").

63. *See* Bianca Nunes, Case Note, *The Future of Government-Mandated Health Warnings After* R.J. Reynolds *and* American Meat Institute, 163 U. PA. L. REV. ONLINE 177, 183 (2014) (explaining that Supreme Court "declined to extend *Central Hudson*['s]" intermediate scrutiny to disclosure requirements and instead applied rational basis); Cydney Posner, *En Banc Opinion of D.C. Circuit Upholds* American Meat Institute *Case — What Does It Mean for the* Conflict Minerals *Case?*, PUBCO @ COOLEY (July 29, 2014, 4:21 PM), http://cooleypubco.com/2014/07/29/en-banc-opinion-of-d-c-circuit-upholds-american-meat-institute-case-what-does-it-mean-for-the-conflict-minerals-case/ [http://perma.cc/9NAD-MRGY] (stating Supreme Court's intent was "to establish a lower standard of scrutiny" for disclosures).

64. *Zauderer*, 471 U.S. at 651 n.14 (providing rationale for lower standard of review); Julie C. LaVille, Note, *A Warning Worth a Thousand Words: First Amendment Challenges to the FDA's Graphic Warning Label Requirements*, 58 ST. LOUIS U. L.J. 243, 262–63 (2013) (discussing *Zauderer* rational basis review in context of graphic images in tobacco warning labels).

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).

66. *See* R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 1010–11 (2007) (commenting on how some circuit courts seem to blend *Zauderer* test and *Central Hudson* test); Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 166 n.151 (2011) ("[T]hough the Eleventh Circuit also cites *Zauderer*, it appears to think *Central Hudson* is the proper test where a disclosure is at issue because the court finds that the mandatory disclosure violates *Central Hudson*."). *Compare* Hayes v. Zakia, No. 01-CV-0907E(SR), 2002 WL 31207463, at *4 (W.D.N.Y. Sept. 17, 2002) (deciding to apply *Central Hudson* test to disclosure requirement regulation), *with* Tillman v. Miller, No. 1:95-CV-1594-CC, 1996 WL 767477, at *2 (N.D. Ga. Sept. 30, 1996) (applying *Zauderer* test to disclosure requirement regulation), *aff'd*, 133 F.3d 1402 (11th Cir. 1998).

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.[71] Without referencing the *Zauderer* test for disclaimer regulations, the Eleventh Circuit applied *Central Hudson*.[72] 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.[73] 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."[74]

Similarly, in *Hayes v. New York Attorney Grievance*,[75] the Second Circuit struck down provisions in New York's legal advertising rules about disclosure requirements for legal specializations.[76] Like the Eleventh Circuit,

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The Florida Bar created Rule 4-7.2(j), which stated that "[a] lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication . . . ." *Id.* (second alteration in original). In this case, the plaintiff, Steven G. Mason, violated Rule 4-7.2(j) by including that he was "'AV' Rated, the Highest Rating Martindale-Hubbell National Law Directory" in a yellow pages advertisement. *See id.* (internal quotation marks omitted). The Florida Bar informed Mason that he must provide a "full explanation as to the meaning of the [Martindale-Hubbell] AV rating and how the publication chooses the participating attorneys." *See id.* (alteration in original) (internal quotation marks omitted).

71. *See id.* at 954–55 (explaining Florida Bar believed Mason's advertisement "would mislead the unsophisticated public"); *see also* David L. Hudson Jr., *Firm Challenges Florida Bar over Website Ad Limits*, ABA J. (Mar. 1, 2014), http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits [http://perma.cc/45G6-BU2L] (explaining Mason challenged "Florida Bar over a Yellow Pages ad").

72. *See* Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 641–42 (6th Cir. 2010) (noting that Eleventh Circuit failed to explain why it used *Central Hudson* test instead of *Zauderer* test).

73. *See* Farrin v. Thigpen, 173 F. Supp. 2d 427, 438 (M.D.N.C.) (explaining Eleventh Circuit found disclosure requirement did not serve state's interest in protecting against deception and providing public with relevant information), *amended in part*, 173 F. Supp. 2d 427 (M.D.N.C. 2001).

74. *See Mason*, 208 F.3d at 957 (internal quotation marks omitted in first quotation) (concluding Florida Bar did not meet burden of proving that Mason's advertisement was misleading or potentially misleading). For further information concerning *Mason*, see generally Stacy Borisov, Case Comment, *Commercial Speech: Mandatory Disclaimers in the Regulation of Misleading Attorney Advertising*, 12 U. FLA. J.L. & PUB. POL'Y 377 (2001) (arguing Florida Bar violated Mason's First Amendment rights).

75. 672 F.3d 158 (2d Cir. 2012).

76. *See id.* at 170 (summarizing holding that certain disclaimer requirements are unconstitutional). The plaintiff, J. Michael Hayes, received a Board Certification in Trial Advocacy award. *See id.* at 161. Thereafter, Hayes began using the phrase "Board Certified Civil Trial Specialist" for advertising purposes. *See id.* at 162 (internal quotation marks omitted) (describing conduct that violated Rule 7.4 of NEW YORK'S RULES OF PROFESSIONAL CONDUCT).

the Second Circuit did not reference the less-stringent *Zauderer* test for disclosure requirements and instead applied the *Central Hudson* test.[77] The court rejected the New York Bar's argument that the alleged harm by the advertisement was "self-evident."[78] 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."[79]

2. *Circuit Court Properly Recognizes the Two Tests*

In *Public Citizen v. Louisiana Attorney Disciplinary Board*,[80] the Fifth Circuit analyzed two disclosure requirement rules, one concerning "[p]ortrayal of [c]lients, [s]cenes, [and] [p]ictures" and the other concerning "font size and speed of speech."[81] 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.[82] Accordingly, the Fifth Circuit applied the *Zauderer* test to Louisiana's disclosure requirements.[83] The court upheld the first disclosure requirement for portrayals of clients, scenes, and pictures because regulators provided evidence of consumer deception.[84] However, the court struck down the second disclosure requirement on font size and the speed of speech because the record lacked

77. *See id.* at 165 (applying four-part test to regulation); *see also* Brief for Appellees, Hayes v. N.Y. Att'y 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").

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).

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*, 43 U. MEM. L. REV. 319, 374–76 (2012) (providing detailed analysis of *Hayes* and resulting implications for attorney advertising).

80. 632 F.3d 212 (5th Cir. 2011).

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").

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)).

83. *See Public Citizen*, 632 F.3d at 219 (noting proper standard of review).

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).

evidence of consumer deception.[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."[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.[87] The Third Circuit considered whether a New Jersey guideline banning the use of excerpts or quotations from judicial opinions was unconstitutional.[88] In holding that the guideline infringed upon the lawyer's First Amendment rights, the Third Circuit demonstrated judicial pushback on legal advertising regulations.[89]

A. *Background Facts and Procedure*

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

85. *See id.* at 229 (concluding evidence insufficient to demonstrate rule prevented consumer deception); *see also* Carolyn Elefant, *Lawyer Advertising: Louisiana State Regulations and the First Amendment*, MYSHINGLE (Mar. 1, 2011), http://myshingle.com/2011/03/articles/marketing-making-money/lawyer-advertising-louisiana-state-regulations-and-the-first-amendment/ [http://perma.cc/R3SR-3Q7P] (relating court's holding to solo and small firm practitioners).

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 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).

87. *See* Dwyer v. Cappell, 762 F.3d 275, 284 (3d Cir. 2014) (ruling New Jersey guideline unconstitutional in as-applied challenge).

88. For a discussion on Dwyer's violation under New Jersey's Guideline 3, see *infra* notes 90–104 and accompanying text.

89. For a discussion of the Third Circuit's recent application of the *Zauderer* and *Central Hudson* test, see *infra* notes 105–22 and accompanying text.

90. *See* Dwyer v. Cappell, 951 F. Supp. 2d 670, 671 (D.N.J. 2013) (stating Dwyer had "live website" for his law firm, The Dwyer Law Firm, L.L.C.), *rev'd and remanded*, 762 F.3d 275 (3d Cir. 2014).

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*, 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.[92] 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.[93]

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.[94] In his letter, Judge Wertheimer explained his unease that potential clients may interpret the quote as a judicial endorsement.[95] Dwyer, however, refused to take down the quote, stating that it was not "false or misleading."[96]

Both letters were forwarded to the New Jersey Bar's Committee on Attorney Advertising (the Committee).[97] In response, the Committee enacted Guideline 3: a new attorney-advertising rule.[98] Under Guideline 3, lawyers were banned from advertising with quotes from judicial opinions but were allowed to include the full text of the opinion.[99]

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tions used on Dwyer's website were from opinions where the judges, by statute, had to comment on Dwyer's abilities. *See id.*

92. *See Dwyer*, 951 F. Supp. 2d at 671–72 (internal quotation marks omitted).

93. *Id.* (alterations in original) (internal quotation marks omitted).

94. *See id.* at 672.

95. *See* Dwyer v. Cappell, 762 F.3d 275, 277 (3d Cir. 2014) (stressing Judge Wertheimer's concern that remarks would be interpreted as "a blanket endorsement" (internal quotation marks omitted)).

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.").

96. *See Dwyer*, 762 F.3d at 277 (noting Dwyer's refusal to adhere to Judge Wertheimer's request).

97. *See id.* (explaining how Committee became involved in dispute). The Committee is appointed by the New Jersey Supreme Court and has "exclusive authority to consider requests for advisory opinions and ethics grievances concerning the compliance of advertisements and other related communications . . . ." *See* N.J. CT. R. 1:19A, *available at* http://www.judiciary.state.nj.us/rules/r1-19a.htm [http://perma.cc/RM8Y-W69L] (explaining appointment and organization of committee).

98. *See Dwyer*, 762 F.3d at 277 (describing New Jersey's reaction to disagreement between Dwyer and Judge Wertheimer).

99. *See id.* at 277–78 (tracing Committee's enactment of Guideline 3). 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*

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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").

101. *See* Dwyer v. Cappell, 951 F. Supp. 2d 670, 674–75 (D.N.J. 2013), *rev'd and remanded*, 762 F.3d 275 (3d Cir. 2014); *see also* Dane S. Ciolino, *A Judge's Kind Words About a Lawyer Can't be Quoted Out of Context*, LA. LEGAL ETHICS (Sept. 26, 2013), http://lalegalethics.org/judges-kind-words-lawyer-cant-quoted-context/ [http://perma.cc/P7Y3-FLPG] (advising Louisiana lawyers to avoid using judicial quotations in light of New Jersey district court's ruling); Donald Scarinci, *New Jersey Lawyers Can't Use Judicial Testimonials in Ads*, NJ.COM (Nov. 14, 2013, 9:04 AM), http://blog.nj.com/njv_donald_scarinci/2013/11/new_jersey_lawyers_cant_use_ju.html [http://perma.cc/B7WF-ATL5] (summarizing district court's reasoning).

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/V5YU-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 . . . . unconstitutional under even the less-stringent *Zauderer* standard of scrutiny.").

test for restrictions and the *Zauderer* test for disclosures.[106] The Third Circuit, however, refrained from deciding which test was the appropriate analysis and remarked that Guideline 3 contained characteristics from both categories.[107] Instead, the court held Guideline 3 infringed upon attorneys' First Amendment free speech rights because "the Guideline [wa]s not reasonably related to preventing consumer deception and [wa]s unduly burdensome."[108]

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.[109] The Committee reasoned that a nonprofessional would interpret these excerpts as judicial endorsements.[110] In a footnote, the Third Circuit stated that the Committee did not produce any evidence that Dwyer's quotes had actually misled consumers.[111] Moreover, the Third Circuit refused to find that accurate statements made by judges qualified as obvious deception.[112]

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.[113] The court expressed doubt that providing a full judicial opinion would reveal to a potential client that such language was not a judicial endorsement.[114] Alternatively, the court reasoned that this requirement could potentially create further confusion.[115] The Third Circuit suggested that a reasona-

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 deceptiveness 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).

ble disclosure requirement might be: "'This is an excerpt of a judicial opinion from a specific legal dispute. It is not an endorsement of my abilities.'"[116]

2. *Unduly Burdensome*

The Third Circuit also held Guideline 3 was unduly burdensome, meaning the "required disclosure [wa]s so lengthy it 'effectively rule[d] 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.").

123. *See* Joseph A. Corsmeier, *U.S. Third Circuit Appeals Court Rejects New Jersey's Prohibition of Lawyer's Website Posts of Excerpts of Judicial Opinions Praising His Legal Work*, LAW. ETHICS ALERT BLOGS (Feb. 2, 2015, 4:11 PM), https://jcorsmeier.wordpress.com/2015/02/02/u-s-third-circuit-appeals-court-rejects-new-jerseys-prohibi-

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

A. *Advice for Practitioners Regulating Legal Advertising*

For practitioners regulating legal advertising, the Third Circuit's holding in *Dwyer* creates new difficulties when faced with constitutional challenges.[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.[127] As a result, many regulators are left with uncertainty because they can no longer predict whether disclosure requirements will receive *Zauderer*'s less stringent standard of review or whether courts will impose *Central Hudson*'s intermediate scrutiny.[128]

However, even if a court does apply the *Zauderer* analysis, regulators should be cautious when articulating restrictions on attorney speech.[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] *Zauderer* review with more rigor."[130] The Third Circuit, along with other circuit courts, is giving less deference to regulators by requiring hard evidence to defend legal advertising regulations.[131]

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tion-of-lawyers-website-posts-of-excerpts-of-judicial-opinions-praising-his-legal-work/ [https://perma.cc/S52U-SSRR] (labeling *Dwyer* decision "a significant First Amendment decision related to lawyer advertising").

124. For a discussion of *Dwyer*'s impact on legal advertising regulators, see *infra* notes 126–41 and accompanying text.

125. For a discussion of *Dwyer*'s impact on practitioners who advertise their services, see *infra* notes 142–54 and accompanying text.

126. *See* LESLIE A.T. HALEY WITH THOMAS E. SPAHN, LAWYER COMMUNICATIONS AND MARKETING: AN ETHICS PRIMER, HYPOTHETICALS AND ANALYSES 10 (2014), *available at* http://63.247.140.129/~vbbarassoc/wp-content/uploads/2015/02/Lawyer-Marketing_An-Ethics-Primer-H-A-Spahn.pdf [http://perma.cc/5DHK-TYXL] ("In what might be a trend, a number of courts in the last few years have invalidated as unconstitutional portions of states' ethics rules.").

127. *See* Gabriella Khorasanee, *Lawyer Wins 1st Amendment Claim in Attorney Advertising Case*, FINDLAW (Aug. 13, 2014, 5:01 PM), http://blogs.findlaw.com/third_circuit/2014/08/lawyer-wins-1st-amendment-claim-in-attorney-advertising-case.html [http://perma.cc/T6GX-5QNS] (discussing how Third Circuit did not decide whether Guideline 3 was disclosure or prohibition).

128. *See* Royal, *supra* note 47 (providing standard and protections for speech restrictions and describing factual disclosure requirements).

129. E-mail Interview with Rodney A. Smolla, First Amendment Scholar & Professor, Univ. of Ga. Sch. of Law (Feb. 1, 2015) (on file with author) (discussing Third Circuit's current approach to *Zauderer*). According to Professor Smolla, "[*Dwyer*] is important in the court's chiding bar authorities on their lack of any proof that the quotes were misleading, and seeming to warn that it won't accept the phrase 'inherently misleading' as an automatic pass for bar authorities." *See id.*

130. *See id.* (commenting on recent application of *Zauderer* test).

131. *See* Ruthann Robson, *Third Circuit: Attorney Advertising Rule Regarding Excerpts from Judicial Opinions Violates First Amendment*, CONST. L. PROFESSORS BLOG

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."[132] 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.[133] 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.[134]

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.[135] 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.[136] 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.[137]

Moreover, the Third Circuit presented new concerns for regulators with its unduly burdensome analysis.[138] Although other courts have

(Aug. 12, 2014), http://lawprofessors.typepad.com/conlaw/2014/08/third-circuit-attorney-advertising-rule-regarding-excerpts-from-judicial-opinions-violates-first-ame.html [http://perma.cc/6UL3-2MK8] (emphasizing decision aligns with First Amendment rights on speech protection).

132. *See* Charles Toutant, *Third Circuit Oks Judges' Accolades in Attorneys' Ads*, N.J. L.J. (Aug. 11, 2014), http://www.njlawjournal.com/id=1202666491263/Third-Circuit-OKs-Judges-Accolades-in-Attorneys-Ads [http://perma.cc/4W4L-T5C3] (noting Third Circuit decision is consistent with Second, Fifth, and Eleventh Circuits).

133. *See* Hudson, *supra* note 1 (stating record did not contain "a shred of evidence" that guideline protected against consumer deception (internal quotation marks omitted)).

134. *See, e.g.*, Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 224–25 (5th Cir. 2011) (deeming surveys and comments from focus groups sufficient evidence).

135. *See* Dwyer v. Cappell, 762 F.3d 275, 283 (3d Cir. 2014) ("Guideline 3 does not require disclosing anything that could reasonably remedy conceivable consumer deception stemming from Dwyer's advertisement. Providing a full judicial opinion does not reveal to a potential client that an excerpt of the same opinion is not an endorsement.").

136. *See id.* (explaining impracticability of requiring attorneys to display entire judicial opinion).

137. *See* Michael Heatherly, Dwyer v. Cappell*: Court Upholds Lawyer's Right to Quote Judges' Praise in Website Advertising*, NWSIDEBAR (Jan. 14, 2015), http://nwsidebar.wsba.org/2015/01/14/dwyer-cappell-web-advertising/ [http://perma.cc/D9JF-Z3TS] (stating rule does "not require disclosure of anything that would dispel confusion").

138. *See* David L. Hudson Jr., *Attorney Can Quote Judicial Opinions in Advertising*, NEWSEUM INST. (Aug. 18, 2014), http://www.newseuminstitute.org/attorney-can-quote-judicial-opinions-in-advertising/ [http://perma.cc/NV2H-QPEA] (commenting that court found Guideline 3 unduly burdensome).

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.[139] 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.[140] 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.[141]

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.[142] 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.[143] 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.[144]

Additionally, in the aftermath of *Dwyer*, some practitioners plan to restore judicial quotations to their law firm websites.[145] In fact, Dwyer him-

139. *See* Susan L. DeJarnatt, Dwyer v. Cappell—*Third Circuit*, AM. BAR ASS'N (Aug. 12, 2014, 2:01 PM), http://apps.americanbar.org/ababoards/blog/blogpost.cfm?threadid=31007&catid=14911 [http://perma.cc/YTR9-U86T] (discussing Third Circuit's analysis that disclosure requirements may be subject to *Central Hudson* based on court's intent of Guideline).

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

141. *See generally* Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 589 (2012) (discussing confusion among lower courts about the scope of *Zauderer*).

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)).

145. *See* Mary Pat Gallagher, *Revised Guideline Allows Judges' Quotes in Lawyer Ads*, N.J. L.J. (Oct. 17, 2014) [hereinafter M.P. Gallagher], http://www.njlawjournal.com/id=1202673775912/Revised-Guideline-Allows-Judges-Quotes-in-Lawyer-Ads?slreturn=20150031204602 [http://perma.cc/L4JU-FY8U] (discussing practitioners who plan to use judicial quotations on website to attract potential clients). *But see* Peter J. Gallagher, *"Judges Think I Am Awesome!" Third Circuit Approves Use of Judicial Endorsement on Lawyer's Website*, LEXISNEXIS LEGAL NEWSROOM (Oct. 16, 2014, 11:05 AM), http://www.lexisnexis.com/legalnewsroom/constitution/b/con-

self plans to repost the complimentary quotes that were once displayed on his homepage.[146] 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.[147] On October 15, 2014, the New Jersey Supreme Court approved a new version of Guideline 3, effective immediately.[148] This revised version requires lawyers to include a disclaimer with quotations or excerpts from judicial opinions.[149] 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."[150]

Other jurisdictions falling within the Third Circuit have not implemented regulations of this kind.[151] 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-

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stitutional-civil-rights/archive/2014/10/16/quot-judges-think-i-am-awesome-quot-third-circuit-approves-use-of-judicial-endorsement-on-lawyer-39-s-website.aspx [http://perma.cc/SSE6-RELR] (suggesting that using judicial quotes with disclaimer may not be effective for advertising).

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.").

147. *See* George Conk, *New Jersey Supreme Court Compels Disclaimer by Lawyers Citing Judges' Praise*, BLACKSTONETODAY.BLOGSPOT.COM (Oct. 17, 2014), http://blackstonetoday.blogspot.com/2014/10/new-jersey-supreme-court-compels.html [http://perma.cc/HJ6H-9J6M] (warning lawyers who want to advertise with quotes by judges must now include disclaimer).

148. *See* GLENN A. GRANT, ADMIN. OFFICE OF N.J. COURTS, NOTICE TO THE BAR: REVISED ATTORNEY ADVERTISING GUIDELINE 3 (Oct. 15, 2014), *available at* http://www.judiciary.state.nj.us/notices/2014/n141015c.pdf [http://perma.cc/GW4H-GL6D] (providing text to new revised guideline).

> 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).

150. *See id.* (internal quotation marks omitted) (providing language that attorney should include on legal advertisements that contain court opinion excerpts); *see also* Bruce D. Greenberg, *Supreme Court Guideline Barring Lawyers from Posting Accurate Quotes from Judges on Law Firm Websites Is Invalid*, N.J. APP. L. (Aug. 15, 2014), http://appellatelaw-nj.com/supreme-court-guideline-barring-lawyers-from-posting-accurate-quotes-from-judges-on-law-firm-websites-is-invalid/ [http://perma.cc/3YUF-ULPS] (predicting this new guideline could also be challenged in court on constitutional grounds).

151. *See* E. Regine Francois, *A Judicial Endorsement?*, DAILY REC. (Feb. 4, 2015), http://thedailyrecord.com/2015/02/04/a-judicial-endorsement/ [http://perma.cc/62KG-SGXT] (suggesting issue "not unique to New Jersey" and "likely will make its way to other jurisdictions").

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]

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152. *See Attorney E-Newsletter: Third Circuit Strikes Down New Jersey Prohibition on Advertising Judicial Praise*, DISCIPLINARY BD. SUP. CT. PA. (Aug. 2014), http://www.padisciplinaryboard.org/attorneys/newsletter/2014/august.php [http://perma.cc/LWR4-K7AT] (explaining *Dwyer*'s impact on Pennsylvania).

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

154. *See Third Circuit Got It Wrong on Lawyer Advertising*, N.J. L.J. (Sept. 26, 2014), http://www.njlawjournal.com/id=1202671540728/Third-Circuit-Got-it-Wrong-on-Lawyer-Advertising?slreturn=20141123201906 [http://perma.cc/S5HZ-DG8L] (expressing concern that judges may be "chilled in their compliments of and comments about lawyers" if such remarks are used for advertising purposes); *see also* David L. Hudson Jr., *Federal District Court Cautions Lawyers to Be Careful About Repeating Judges' Compliments*, ABA J. (Oct. 1, 2013), http://www.abajournal.com/magazine/article/federal_district_court_cautions_lawyers_to_be_careful_about_repeating_judge/ [http://perma.cc/24Q3-L9LJ] (noting practitioners using judicial experts for advertising could threaten integrity of legal field).

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").

156. *See Attorney Advertisement Guideline Requiring Full Judicial Opinions Unconstitutional: Third Circuit*, PRAC. L. (Aug. 12, 2014), http://us.practicallaw.com/6-578-0325 [http://perma.cc/QBC4-M829] (discussing Third Circuit's analysis and holding in *Dwyer*); Allison C. Shields, *Advertising Rules in Conflict with First Amendment*, LEGAL EASE BLOG (Aug. 15, 2014), http://legalease.blogs.com/legal_ease_blog/2014/08/advertising-rules-in-conflict-with-first-amendment.html [http://perma.cc/CP5D-FUBZ] (same). An attorney from Washington even suggested that similar facts in a Washington court may "boil down to similar issues as those addressed in *Dwyer v. Cappell*." *See* Heatherly, *supra* note 137, (considering application of *Dwyer* in future litigation).

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]

158. *See* Greenberg, *supra* note 150 (predicting future challenge to disclaimer requirement for judicial excerpts). *But see* Corsmeier, *supra* note 123 (stating *Dwyer* decision approved of use of disclaimer).

159. *See* Hudson, *supra* note 1 (discussing "judicial hostility" towards overreaching regulations (internal quotation marks omitted)).

160. *See* Debra Cassens Weiss, *Restriction on Judicial Quotes in Lawyer Ads Violates First Amendment, 3rd Circuit Rules*, ABA J. (Aug. 12, 2014), http://www.abajournal.com/mobile/article/restriction_on_judicial_quotes_in_lawyer_ads_violates_first_amendment_3rd_c [http://perma.cc/FW37-NBGT] (denoting that Dwyer believes opinion will be very influential because "a lot of the regulations of attorney advertising in New Jersey are antiquated and somewhat unconstitutional" (quoting Andrew Dwyer) (internal quotation marks omitted)); *see also* Stephen Fairley, *Federal Appeals Court Rules Attorneys Have Right to Publish Praise from Judges*, RAINMAKER BLOG (Aug. 12, 2014), http://www.therainmakerblog.com/2014/08/articles/law-firm-marketing/federal-appeals-court-rules-attorneys-have-right-to-publish-praise-from-judges/ [http://perma.cc/GFL8-P28J] (suggesting *Dwyer* "could have farther-reaching effects in terms of how attorneys use testimonials in their advertising").