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Alan B. Morrison

HOW WE GOT THE COMMERCIAL SPEECH DOCTRINE:
AN ORIGINALIST'S RECOLLECTIONS

Alan B. Morrison[†]

The commercial speech doctrine is today a staple of First Amendment jurisprudence, but it was not always so. Until the mid-1970s, "purely commercial advertising" was considered outside the scope of the First Amendment, and hence entitled to no protection.[1] That changed, quite abruptly, with the *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[2] case in 1976, and the doctrine took on an identity and a four-part test of its own in 1980 with the ruling in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[3] Although there have been questions raised about whether treating commercial speech differently from other speech is a sensible idea, and whether some parts of the *Central Hudson* test and its application should be modified,[4] as of today, at least, commercial speech is entitled to substantial First Amendment protection, albeit less than political, ideological, or artistic speech.

I was asked to write a piece for this Symposium because I had been counsel of record for Public Citizen, as an amicus curiae, in *Nike, Inc. v. Kasky*,[5] a case in which the limits of commercial

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† Mr. Morrison founded the Public Citizen Litigation Group with Ralph Nader in February 1972 and was its director for most of the time until he left in January 2004. He is currently an adjunct professor at New York University Law School.

1 Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (holding a municipal ordinance forbidding street distribution of advertising circulars constitutional).

2 425 U.S. 748 (1976) (holding that "commercial speech" is not wholly outside the protection of the First and Fourteenth Amendments).

3 447 U.S. 557 (1980) (striking down a ban on promotional advertising by an electric utility as an impermissible restraint on the First Amendment freedom of speech).

4 *See generally* David Vladeck, *Lessons from a Story Untold:* Nike v. Kasky *Reconsidered*, 54 CASE W. RES. L. REV. 1049 (2004) (discussing fundamental changes in the application of the commercial speech doctrine since *Central Hudson* was decided).

5 Brief of Amicus Curiae Public Citizen, 123 S. Ct. 2554 (2003) (No. 02-575).

speech were sought to be tested, but in which the Court ultimately elected not to decide the question, given the very preliminary stage at which the case was brought to the High Court. This contribution will not focus on *Nike* or any of the recent cases, but will instead tell the story of how *Virginia Board of Pharmacy*, which I argued for the plaintiffs, became the springboard for the commercial speech doctrine. As such, this essay is more in the way of a historic memoir, rather than an analysis of Supreme Court opinions, and an attempt to reconcile often conflicting statements, if not entire opinions. My modest hope is that this history may cause the courts to think about the doctrine more in terms of why it was created (and for whose benefit) and less as a mechanical application of the four-part test of *Central Hudson*.

I. THE ORIGINS OF THE ORIGINS

The origins of *Virginia Board of Pharmacy*[6] did not involve a situation in which a client either had been sued or wanted to sue over the law that forbade the advertising of prescription drug prices, although eventually there were clients who wanted to challenge that law. The idea for the case began when I was a law student, or perhaps when I was studying for the New York bar exam in the summer of 1966, when I learned that lawyers were forbidden from advertising their services, let alone actively soliciting clients who might be in need of a lawyer for a particular matter. I recall thinking how unnecessarily restrictive the rule was and how it greatly advantaged those lawyers who already had clients and who were probably the ones who wrote the rules to keep the situation that way. I also remember subsequently realizing how silly the rule was because I used to see ads in the New York Law Journal, a publication whose principal subscribers were lawyers, but which anyone could purchase by paying the cover price, along the following lines: "Dominican Republic [or Nevada] divorce services available—lawyers only." Although I never called the number listed, I have no doubt that the person answering the phone would not have insisted on seeing my bar card before agreeing to help obtain a divorce at a time when the only grounds for divorce in New York were adultery.[7]

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[6] 425 U.S. 748 (1976).

[7] During this same time I became aware of another obvious protectionist bar rule: the requirement that one had to be a New York State resident to take the New York bar exam, although after admission a lawyer could move to New Jersey or Connecticut, as did many of the lawyers in New York City law firms once they became partners and could afford it. Lawyers with Public Citizen successfully challenged that law in *In Re Gordon*, 397 N.E.2d 1309 (1979), and the Supreme Court eventually struck down all similar provisions in *Supreme Court v. Piper*,

After a relatively brief stint at a major New York law firm, I went to the Office of the United States Attorney for the Southern District of New York where I was assigned to the Civil Division. I was fortunate enough to work on a major tax case against a prominent firm, as well as a number of other challenging cases, and as I began to think about what I would do when I left the office, I thought I could sell my talents to prospective clients, but knew that I could not advertise or solicit their business (or at least not openly). This seemed wrong, both for me and for the prospective clients who, it seemed, should at least be given a choice among counsel, which meant somehow they had to find out about me, my experience, and what I would charge compared to others. Price competition was permitted; it was just that no one had any way of finding out that some qualified lawyers charged less than others.

My interest in advertising my own services took a backseat to a more general interest in increasing the availability and affordability of legal services when I accepted a job offer in Washington D.C. from Ralph Nader to start the Litigation Group of Ralph's newly formed Public Citizen. I was incredibly fortunate to have Ralph for a boss because he gave me enormous freedom to bring law reform cases in areas in which I was interested, and one of these was the legal profession. Quite by chance, within weeks of starting the job, a federal antitrust case was filed across the river in Alexandria, Virginia, challenging the minimum fee schedules of the Virginia State Bar and three local bar associations. Fairly soon thereafter I was brought in as lead counsel for the plaintiffs in *Goldfarb v. Virginia State Bar*,[8] in which the Supreme Court ruled three years later that the minimum fee system in Virginia and more than thirty other states was price-fixing, forbidden by the antitrust laws. *Goldfarb* was important because it removed one barrier to competition, but it did nothing about the information vacuum caused by the advertising restrictions, which I also planned to attack.

II. THE *VIRGINIA BOARD OF PHARMACY* CASE

We knew that attacking lawyer advertising rules would be difficult, not just because they existed in every state, but also because they were so universally accepted, at least among the elite lawyers who became federal judges and justices. Fortunately for us, a case came along that seemed the perfect prelude to a lawyer advertising challenge. Across the hall from our offices in Dupont Circle, a

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470 U.S. 274 (1985).

[8] 421 U.S. 773 (1975).

group known as Citizen Action, which had a loose Nader affiliation, had discovered that there was an enormous variation in the prices charged for prescription drugs in Virginia and that the principal reason for this was that a Virginia statute prohibited price advertising, even though there was no law setting the prices at which drugs could be sold. The group had done a study documenting the problem, and it wanted to know if we could do anything about it. This seemed to be a situation directly comparable to the lawyer advertising restrictions, but it had several major advantages as a test case: the information to be conveyed was objective and verifiable (unlike some aspects of lawyer advertising); access to the information was obviously very important to consumers, many of whom were senior citizens on limited budgets; there was no other way in which the information could be gathered, short of calling every pharmacy in the area and hoping someone would quote a price over the phone; and, perhaps most important of all, the persons who would be passing on the validity of this law would not be pharmacists, unlike a challenge to lawyer advertising where the judges would all be lawyers.

That made this a good case, but we needed a legal theory other than substantive due process.[9] Although I had never done formal research on the question, I had done some thinking about the issue when I was in the U.S. Attorney's Office, and several principals stood out for me as we tried to formulate an approach. First, these laws all suppressed truthful and useful information, and at their core they seemed to run directly counter to the First Amendment. Indeed, as the courts eventually pointed out, citizens in general may have more interest in getting commercial information that was not then protected by the First Amendment, than in obtaining the kind of information that was traditionally covered. Second, as a direct corollary of the first point, the interests of the readers or listeners of commercial speech are important and entitled to protection on their own, even if the state has an interest in limiting what a commercial speaker might want to say. Or, as the concept came to be developed, the rationale for limiting commercial speech is that a listener (potential consumer) may be harmed by it, and in the absence of some identifiable and legitimate state interest on the consumer side, commercial speech should be allowed to flourish. Third, unleashing commercial speech can have

[9] Our complaint did include such a claim, but while our case was pending in the district court, the Supreme Court rejected that doctrine in a case similar to ours. *See* N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973).

pro-competitive effects, a factor that surely should be considered in any balancing of interests that might take place.

Despite the 1942 decision in *Valentine v. Chrestensen*[10] finding the commercial speech there to be unprotected by the First Amendment, the merits of the claim—that a blanket ban on all dissemination of truthful information violated the First Amendment—seemed strong. Nonetheless, there was still another important ingredient to the theory, and for that, two recent Supreme Court cases seemed very helpful. The first of these was *Stanley v. Georgia*,[11] a case in which the Court held that it was unconstitutional to criminalize the possession of pornography in one's own home, even though the government could lawfully prohibit its sale. The decision seemed useful because the Court had looked at the particular interests of the person claiming the constitutional violation and did not simply say that, if a sale were unlawful, then possession of the sold item can also be forbidden without more.[12] The second case, *Kleindienst v. Mandel*,[13] was even more directly on point. There, a Belgian communist wanted to come to the United States to give a lecture, and the Government did not want to let him for reasons that the plaintiffs contended violated the First Amendment. The Court held that Professor Mandel, as a noncitizen who was not physically in the United States, had no cognizable First Amendment rights, but that his audience, all of whom were in the United States, had standing to assert their First Amendment rights as potential listeners, and thus the Court reached the merits.[14] These cases, and others found during our research, led us to conclude that a challenge to the Virginia law could be brought on behalf of consumers, who were being deprived of valuable information, and that such a challenge might well receive a more sympathetic reception than if the pharmacists who wanted to advertise their prices were the plaintiffs.[15]

The lead lawyer on the case was my colleague Raymond Bonner, who has since left the law and become a journalist and writer. Together we drafted the complaint, assembled the evidence, reached agreement on a stipulation of facts with the defendants, and prepared the papers to support our summary judgment motion,

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[10] Valentine v. Chrestensen, 316 U.S. 52 (1942).

[11] 394 U.S. 557 (1969).

[12] *Id.* at 564-68.

[13] 408 U.S. 753 (1972).

[14] *Id.* at 762.

[15] Indeed, an earlier challenge to the Virginia law by pharmacists on due process and equal protection grounds was unsuccessful. Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969).

which he argued before a three judge district court, which in those days was the means by which constitutional challenges to state statutes were adjudicated. Several months later, the court unanimously agreed with us that the law violated the First Amendment rights of the consumer group plaintiffs who wanted access to the price information for prescription drugs.[16] After some delays, the state took an appeal directly to the Supreme Court, which agreed in the spring of 1975 to hear the case in the fall. By that time, Bonner had left the office, and so it fell to me as his co-counsel to argue it. In the meantime, however, two developments occurred that bore on achieving our ultimate goal of striking down the lawyer advertising prohibitions.

One arose from the work of the Health Research Group at Public Citizen. Like lawyers, the medical profession had a ban on doctor advertising of any kind, which made it very difficult for consumers to find a doctor who specialized in their need, who accepted their insurance (or Medicaid or Medicare), spoke their language, accepted credit cards, and charged what they could afford, among many other items of information that a person seeking a doctor might want to know. The Health Group decided to deal with the problem by creating a directory of doctors in particular locations, which would be made available to the public. In other words, if doctors could not advertise, the Health Group would provide the information instead.

A problem arose after the survey was sent out when both the State and some local medical societies figured out that this was a potential end-run on their no advertising rules, even with a consumer group as an intermediary to police the statements made. Some doctors declined to cooperate on their own, which was their right to do, just as many doctors and lawyers have chosen not to advertise long after the ban has been eliminated. But when the official state body told doctors that they could be disciplined if they cooperated—even by telling us such mundane facts as where they went to Medical School and whether they were board-certified—that was a different matter.

Once again we decided to file a First Amendment case, this time representing both consumers who wanted the information and the Health Research Group that wanted to disseminate it.[17] The case had some procedural complexities, and we had some bad luck with the judges who were assigned to the case, plus defense coun-

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[16] Va. Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974).

[17] Pub. Citizen v. Comm'n on Med. Discipline, 573 F.2d 863 (4th Cir. 1978).

sel who fought us at every step of the way. In the end, we did not get a decision on the merits, but by the time the case was dismissed, the Supreme Court had leap-frogged over the medical profession's advertising rules, and struck down the sacred cow of the ban on lawyer advertising.[18]

The second development was abortion-related. In January 1973, the Court issued its decision in *Roe v. Wade*,[19] striking down the various state laws that banned all abortions. Shortly thereafter, the Court was presented with a petition for a writ of certiorari from the Virginia Supreme Court involving a newspaper publisher who had been convicted for running an advertisement in his Virginia paper that told readers how they could obtain an abortion in New York, where it was legal, because, when the "crime" was committed, abortions in Virginia were still completely banned.[20] Instead of accepting the case, the High Court sent it back for further consideration in light of *Roe*,[21] a not-so-gentle hint that perhaps the Virginia court should rethink its decision. The Virginia Supreme Court was unmoved and reaffirmed its prior ruling,[22] and another petition was filed, which the Court granted in July 1974.[23]

It was at this time that the Litigation Group became involved. We had no particular interest in the abortion issue as such, but the case seemed to present another opportunity to press the First Amendment issue from the perspective of those who were being denied access to important, perhaps even lifesaving, information. The defendant was being ably represented by the ACLU, but the focus of that brief was on the editorial freedom of the press and the rights of the speaker. We decided to file an amicus brief that would try to direct the Court's attention to the interests of those who were being denied the information that the ad contained—precisely the same interests that we were asserting in the *Virginia Board of Pharmacy* and doctors' directory cases.

To help me with the brief, I asked a brand new Harvard Law School graduate, Gerry Spann (who now teaches at Georgetown Law Center), to do a first draft, relying heavily on our work in the *Virginia Board of Pharmacy* case and citing our interest in that case and the doctor's directory challenge as the reasons for our

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[18] We also considered including an antitrust claim in the doctors' directory case, but decided against doing so because at least one of the defendants was a state agency, and we believed, correctly as it turned out, that the antitrust laws would not apply to rules issued by state agencies or courts. *See* Bates v. State Bar, 433 U.S. 350, 359-63 (1977).

[19] 410 U.S. 113 (1973).

[20] Bigelow v. Virginia, 413 U.S. 909 (1973).

[21] *Id.*

[22] Bigelow v. Virginia, 200 S.E.2d 680 (1973).

[23] Bigelow v. Virginia, 418 U.S. 909 (1974).

interest in *Bigelow*. The case was argued in the fall, but months went by with no decision. In the meantime, we had lost *Goldfarb*[24]—the minimum fee schedule antitrust case—in the Fourth Circuit, but we had persuaded the Supreme Court, with the Department of Justice supporting us, to hear the case. *Goldfarb*[25] was argued in March, and quite by chance, the opinions in both it and *Bigelow* came down the same day, both adverse to the State of Virginia. The antitrust ruling—a unanimous decision that minimum fee schedules violated the antitrust laws[26]—was of no direct help in the *Virginia Board of Pharmacy* case, which the Court had agreed to hear three months earlier. However, *Bigelow* had exactly what we had hoped it would contain: a ringing affirmation of the applicability of the First Amendment to the right of consumers to gain access to truthful information about a service that was lawful where it was to be performed.[27] The decision written by Justice Blackmun did not overrule *Valentine*, but it was clear that much of its force was gone since the abortion advertisement in *Bigelow* was paid, and not a public service announcement. To be sure, the Court in *Roe* had constitutionalized the right to an abortion, but no one disputed the rights of pharmacists in Virginia or the thirty-four other states that had similar laws to engage in price competition—they just could not tell anyone about it. When *Goldfarb* came down, I was asked about its possible impact on lawyer advertising rules, and I said that I thought it would have very little because the rules were issued by state supreme courts, not bar associations, but that I thought that *Bigelow* would likely have a profound effect on those rules. No one quoted me, and probably no one bothered to write down what I had said.

Armed with *Bigelow* and the favorable decision below, Gerry and I went about writing our brief. The State's brief had been filed before *Bigelow* came down, but not before ours was due, and when we filed it, we paraded *Bigelow* front and center. Much to our surprise, the State said nothing about *Bigelow* in its reply, and when Justice Blackmun asked the State's lawyer at oral argument about the *Bigelow* opinion which he had authored, the answer was that it had no relevance.

I have always done moot courts in preparation for my oral arguments, and as I was preparing for this one, there were two questions for which I knew I needed answers. The first was expected

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[24] Goldfarb v. Va. State Bar, 497 F.2d 1 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).
[25] Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).
[26] *Id.* at 791-93.
[27] Bigelow v. Virginia, 421 U.S. 809 (1975).

to be something like, "If we rule for you in this case, what will happen to the rules forbidding lawyers from advertising?" The answer we worked out was something along the lines of "The First Amendment would apply and the analysis would be the same. Whether the rules would be sustained would depend on which ones were being challenged and what rationales the state offered to defend them." If pressed, I was prepared to answer that the blanket prohibition on all lawyer advertising could not stand, but whether some more limited restrictions could be upheld would be impossible to say without much more information than was then available.

As expected, Justice White posed the First Amendment question, albeit in a form that I had not anticipated: "Well, Mr. Morrison, I suppose your next case will be against the bar's rules on lawyer advertising?" As happens far more often than most people realize, the audience broke into laughter, and as I was preparing to answer, Justice White, quite uncharacteristically, let me off the hook: "That's OK, you don't have to answer," presumably because he was pretty sure he thought I would either answer yes, or be evasive, or claim I did not know what our next case would be, or even whether there would be a next case. I am not sure whether I was pleased or not to be relieved of answering because I had determined to say, as we had already acknowledged in our amicus brief in *Bigelow*, something to the effect that "no, our next case involves doctors and the rules forbidding them from supplying truthful information to a consumer group that wanted to compile a doctor's directory." But regardless, Justice White's point was clear: this case would set the stage for a lawyers' advertising case, and the Court should expect one very soon.[28]

The second question involved tobacco, and more particularly laws banning the advertising of cigarettes. Congress had passed such a law in 1970, although it applied only to radio and television advertisements. The Court in *Red Lion*[29] rejected a First Amendment challenge to the fairness doctrine on the ground that the airways were limited by physical constraints. Whatever merits that decision had, it could not justify a ban that applied to newspapers and magazines, and so I had to prepare another answer. Unlike the lawyer question that I was almost pleased to have been asked, I did

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[28] Justice White asked me a similar question about advertising during the *Goldfarb* oral argument. I told him that most advertising rules were not issued by State Bars, but if they were, they would be subject to the same rules that applied to agreements not to advertise in other businesses. He asked me what rules applied, and I replied that this Court had not passed on them, and once again he asked me what rules I thought would apply, finally letting go when I said that I thought any such agreement not to advertise would violate the antitrust laws.

[29] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400-01 (1969).

not look forward to having to respond on tobacco advertising, but much to my surprise, I was spared having to take a position. Had I been asked, I was prepared to say a state might be able to defend such a restriction on the theory that it could discourage use of a product (or at least take steps to limit efforts to encourage its use) without having to make it illegal. That answer would have been safe in this case because no one argued that Virginia was trying to discourage price competition, although those who studied these laws and their origins were convinced that the pharmacists, who did not want price competition and who were the main supporters of these laws, *did* want to limit price shopping. However, no one ever tried to defend these laws in court on that ground, relying instead on purported consumer protective rationales.[30]

Again, after a long wait, the Court affirmed the decision below, striking down the Virginia law on First Amendment grounds, holding for the first time that commercial speech was entitled to some measure of protection under the First Amendment.[31] Although not directly overruling the decision in *Valentine* that conduct which does "no more than propose a commercial transaction" (as the Court had put it in *Pittsburgh Press Co. v. Human Relations Commission*)[32] was not entitled to First Amendment protection, it left the rationale virtually in shambles. Justice Blackmun's opinion, which was joined by everyone except Justice Rehnquist, bought our argument based on the interests of those who would receive the information and relied on the evidence that we had amassed about how elimination of this restriction would help consumers.[33]

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[30] Initially, the Court accepted the rationale that I was prepared to offer, upholding a Puerto Rican law forbidding the advertising of casinos to locals, but not to outsiders, based in part on the theory, as then-Justice Rehnquist put it:

> It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand.

Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 346 (1986). Several years later, first in a liquor case, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down a ban on liquor price advertising), and then with cigarettes, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (striking down point-of-sale advertising regulations on tobacco products), the Court rejected that rationale as inconsistent with the First Amendment. Thus, with the benefit of hindsight, my rationale would not have carried the day, but it almost certainly would have been enough to allow me to escape unscathed and would not have altered the outcome of the *Virginia Board of Pharmacy* decision.

[31] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).

[32] *Id.* at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

[33] *Id.* at 753-57 (discussing the benefits to and the rights of receivers of information and

The Court did not fully accept our approach, which would have been to give full protection to commercial speech. Instead, it observed that commercial speech was less likely to be chilled and hence did not need the full panoply of First Amendment protections.[34] We had not argued that all forms of commercial speech needed full First Amendment protection, nor had we urged the Court to take any other intermediate positions, because the State never truly engaged us on the issue and never argued that our position would lead to unacceptable results in other cases. Moreover, this case did not involve a claim of overbreadth, vagueness, or prior restraint, areas in which the sweep of First Amendment protections are often most valuable. Even with the Court's admonition that commercial speech might have some additional hurdles to overcome, we saw our victory as one that would surely sustain us in our doctors' directory case and in the lawyer advertising cases that we immediately began to plan.

III. THE FIRST WAVE OF LAWYERS' CASES

Once again, outside events intruded, but this time in a way that moved us off center stage. The doctors' case got bogged down, and Consumers Union, with whom we had worked on these issues, filed a lawyers' directory case in Virginia that appeared to be moving ahead.[35] But the major activity came from Arizona, in a matter of which we had no inkling, let alone any influence. Two young lawyers, John Bates and Van O'Steen, decided to do what I had once contemplated doing—advertise. They did not ask the bar for permission, nor did they file suit challenging the restrictions in an effort to get federal court approval in advance. They formed the low cost legal clinic of Bates & O'Steen, whose constituency was middle income individuals, and they simply started to advertise their services and their low prices.

To the surprise of no one, the Arizona bar immediately began disciplinary proceedings against them, which resulted only in a sanction of a public censure because the Arizona Supreme Court concluded that the advertising was undertaken in good faith to test the constitutionality of the advertising rules.[36] The decision came down in July 1976, just weeks after the Supreme Court decided the *Virginia Board of Pharmacy* case. The Arizona attorneys had de-

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First Amendment protection).

[34] *See id.* at 771-72 n.24 (discussing some appropriate limitations on commercial speech).

[35] That case also became largely moot after *Bates v. State Bar*, although it eventually went to the Supreme Court on an issue of attorneys fees. Supreme Court v. Consumers Union, 446 U.S. 719, 739 (1980) (vacating award of attorney's fees to Consumers Union).

[36] Bates v. State Bar, 433 U.S. 350, 358 (1977).

fended on both First Amendment and antitrust grounds, and on October 4, 1976, the Court agreed to hear their claims on both issues. In some respects, this was a good test case because the lawyers were obviously sincere, they were trying to fill an information void that particularly harmed lower and middle income Americans, and their ads were plain vanilla, with no claims of special results of any kind; just the facts about the kinds and costs of legal services they were prepared to provide. On the other hand, the challengers were lawyers, trying to make a buck, and not consumers, trying to get access to information, or, as in the directory cases, trying to publish information for the benefit of others. And they had deliberately flaunted the law, instead of asking for a court to decide that the Constitution or the antitrust laws allowed them to make known their services to the public. But at least this was not a put-up case, and the Court would see the consequences to two young and seemingly idealistic lawyers if it upheld the rules.

It was not our case, and the timing and the lack of consumers as challengers were small worries, but we felt we had no choice but to file an amicus brief in support of Bates and O'Steen. We joined with Consumers Union and their lawyer, Peter Schuck (now a professor at Yale Law School), in urging the Court to uphold the First Amendment claims, but taking no position on the antitrust issue. Once again, we emphasized the importance of making the information available to the consuming public and pointed out that the State bar never claimed that anything in the ads was false, although we recognized that the same level of verifiability that we had on the prices of prescription drugs was not present here. This time we had another argument to help us: the Court did not have to hold that every rule governing lawyer advertising was unconstitutional, but the across-the-board prohibitions relied on here swept in truthful, valuable information, along with claims by lawyers that can most charitably be described as puffing, and might well be misleading, or potentially so. Thus, even though commercial speech was entitled to less than complete First Amendment protection, we argued that these broad restrictions could not stand and the state bars and their Supreme Courts should have to write their rules with a more nuanced approach to regulating lawyers' advertising.

In June 1977, the Court, in a 5-4 decision with Justice Blackmun again writing for the majority, set aside the discipline imposed against Bates and O'Steen.[37] Once again, the focus was on the importance of the information to the consumer, not on the

[37] *Id.* at 384.

rights of the lawyers to garner business for themselves, and this time the breadth of the prohibition was an important basis for the Court's conclusions.[38] Others have and will debate the merits of the decision and of Chief Justice Burger's impassioned dissent, but the outcome was clear: the blanket prohibition could no longer stand, and the organized bar had to go back to the drawing board.

The ink was barely dry on *Bates* when the Court became entangled once again in First Amendment battles on October 3, 1977, by accepting for review two cases involving lawyer solicitations.[39] In contrast to advertising, which is not directed at a specific client, solicitation involves what lawyers are allowed to say in order to persuade a client to engage that lawyer for a particular matter, and in the eyes of many in the bar, it is far more pernicious than advertising. The two cases arose out of disciplinary proceedings in Ohio and South Carolina, with facts and visceral appeal (or revulsion) at opposite ends of the spectrum. Despite the unsavory conduct of one of the lawyers, we felt we had no choice but to file an amicus brief defending them both, a task that fell to Gerry Spann and me.[40]

The facts of the Ohio case could not have been worse. A young woman, who was injured in a car accident with an uninsured motorist, was solicited by attorney Ohralik while she was still in traction in the hospital.[41] She tried to withdraw from the representation, to which she had orally consented, and her lawyer objected, relying on a secretly taped in-hospital interview to establish the validity of the agreement. Ohralik also solicited the passenger in her car to be his client, in what was a probable conflict of interest because the only likely source of funds was a $12,500 uninsured motorists provision in the driver's policy, which would have to be divided between the driver and the passenger. Both clients thereafter filed complaints with the bar, which brought charges against Ohralik, whom they had discharged by then.

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[38] *Id.* at 368-82.

[39] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978).

[40] During this general time period, I was invited to give a speech at a Tennessee Bar meeting, which I entitled "The Joy of Solicitation." My point was that if one believed in the free enterprise system, and that consumers should have a choice of counsel, and that more information was better than less, then solicitation, which involved communications from a lawyer about a specific legal need that he knew the consumer had, was more valuable than general advertising and should be entitled to greater First Amendment protection. I did not really believe that solicitation should be more protected, but I did believe that it was as protected as the advertisements in *Bates*. Not surprisingly, my audience did not agree with my approach, to the point where one attendee remarked to the effect that "I was a very brave man to come down here and say these things in public before a gathering of lawyers."

[41] *Ohralik*, 436 U.S. at 450.

Ohralik responded by suing both former clients for breach of contract. In the bar proceedings, his main defense was that he had a First Amendment right to solicit the clients. In our brief, we argued that the bar had relied on a plainly overbroad rule that forbade all solicitation, which, we contended after *Bates,* was overbroad and unconstitutional for that reason. Without passing on whether all lawyer solicitation rules were valid, the opinion by Justice Powell upheld the discipline, ruling that, as applied to these facts, the State could legitimately sanction the lawyer for his in-person solicitation, of a vulnerable person, for purely economic gain.[42]

The other case, *In re Primus*,[43] involved a lawyer who worked for the ACLU in South Carolina. Indigent women were being threatened with sterilization as a condition of receiving Medicaid, and Ms. Primus met with them and provided information about their legal rights, but did not solicit any of them as clients. Subsequently she learned that the ACLU was willing to take on their cases, and so she wrote to offer the women free legal assistance. This offer came squarely within what the South Carolina bar officials thought was solicitation, and so they brought charges against her. She too defended on First Amendment grounds.

We at Public Citizen had a particular interest in assisting Ms. Primus because our lawyers had frequently solicited clients, both orally and in writing, and we had believed that the First Amendment rights of Public Citizen to engage in such activities shielded our lawyers. Thus, the portion of our amicus brief devoted to the *Primus* case focused on the pro-bono nature of the representation, the fact that the solicitation was in writing, that there was no arguable coercion, and that the lawsuits were being brought to advance the goals of the ACLU, as well as to help the women who would otherwise be without counsel. Justice Powell also wrote the *Primus* opinion, holding that, largely for the reasons we had urged, she could not be disciplined.[44] Taken together, the outer edges of the solicitation rules were established, but there was vast middle ground that was uncertain, and would require future litigation to resolve, some of which our office handled.[45]

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[42] *Id.* at 464.

[43] 436 U.S. 412 (1978).

[44] *Id.* at 439.

[45] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (sustaining a reprimand for attorney advertisements that were potentially misleading or that omitted contingent-fee information, but finding that a reprimand imposed for giving legal advice which was neither false nor deceptive violated the First Amendment); Edenfield v. Fane, 507 U.S. 761 (1993) (holding that prohibition of CPA solicitation of clients in a business context violated the First and Fourteenth Amendments).

IV. REFLECTIONS

In less than six years from the inception of our work on the prescription drug advertising case, the Court had abolished the old rule on commercial speech and erected a new doctrine that would be refined two years later in the *Central Hudson* case. It had recognized the value of commercial speech to those who want to receive it, including recognizing their right to sue under the First Amendment when the government passed laws restricting access to important information. The Court had also used the First Amendment to strike down broad lawyer advertising restrictions that existed in every state, and it had made clear that at least some direct solicitations could not be banned outright, although it upheld the rule, at least as applied to inherently coercive activities. Our plan had been to open up the legal profession to advertising and solicitation, but no one imagined that we could have come so far so fast.

Our plan, and in particular the order in which we decided to proceed was important, but fortune was also on our side. The timing of *Bigelow* was exquisite, and no one could have expected *Bates* and the two solicitation cases to come along so rapidly, let alone present fact patterns that enabled the Court to make so large a mark in the law of commercial speech for lawyers so rapidly. Although not legally relevant to the First Amendment issues, the antitrust ruling in *Goldfarb* also moved the Court's thinking to the point where the commercial nature of bar activities was brought into clearer focus, thus lessening the effect of the justifications offered for continuing the broad prohibitions. Finally, it did not hurt that these events played out following Watergate, when lawyers were found to be at the heart of that terrible scandal, again making it more difficult for the Court to sustain special treatment for the bar.

I have no illusion that, even if we had never brought any of these cases, others would not have successfully challenged these rules at some time. But what would have happened if *Bates* did not have *Virginia Board of Pharmacy* as a precedent? Despite having ruled 8-1 that pharmacists could advertise drug prices, there were still four Justices, including Chief Justice Burger, who believed that lawyers could be barred from saying anything about the availability of their services, no matter how truthful or useful the information might be.[46] In the end, the law on lawyer advertising and solicitation would probably have come to about the place it

[46] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 773-74 (1976) (Burger, C.J., concurring).

is now, but who knows when that would have happened and by what route.

From time to time, I have been asked, "are you pleased with what you have done, and in particular, do you like seeing lawyers hawking their services on late night television, as if they were selling knives, vacation time shares, used cars, or weight loss programs?" Do I wish that some lawyers had better taste? Of course. But if the price of eliminating some unsavory ads were the return to an age where consumers were kept in the dark about highly relevant information that might help them choose the right lawyer for their particular problem, then I can live with those objectionable ads.

Finally, I have yet to come to grips with a problem more serious than bad taste—the advertising of tobacco products that addict millions of young people each year and kill 400,000 Americans annually. In the only First Amendment case in which the Court has dealt with tobacco, *Lorillard Tobacco Co. v. Reilly*,[47] it found the Massachusetts rules under attack there unconstitutionally broad, to the extent that they were not already preempted by a federal statute. Fortunately, the tobacco industry, as a result of the lawsuits brought by every state, agreed to end the most pernicious of its practices directed at inducing minors to begin smoking, but there are still too many advertisements aimed at impressionable youth. The Court seems to be clear that it will not allow bans on ads directed at adults, so long as cigarettes are legal, but there does seem to be some room for laws that are narrowly tailored toward ending promotion of tobacco that reaches young people who are legally not entitled to buy them. But even if I am wrong, and even if the First Amendment would not allow states to force the industry to do what it has agreed to do to settle those lawsuits, I would swallow hard and say, on balance I still prefer that result to what came before 1972.

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[47] *See supra* note 31 and accompanying text.