

# The Burger Court Opinion Writing Database

## *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*

471 U.S. 626 (1985)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

M  
CHAMBERS OF  
THE CHIEF JUSTICE

January 20, 1985

MEMORANDUM TO THE CONFERENCE

Re: 83-2166 -Zauderer v. Office of Disciplinary Counsel

I believe Bill Brennan and I each agreed with part of Byron's view which attracted a majority at Conference.

If my memory and notes are correct, the assignment falls to Byron.

Regards,

WRB

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 14, 1985

Re: No. 83-2166 - Zauderer v. Office of Disciplinary Counsel

Dear Sandra:

I join your opinion circulated May 2.

I may add a word or two of my own on the shysterism increasingly manifested by lawyers. I will meanwhile try to restrain myself.

Regards,



Justice O'Connor

Copies to the Conference

ALL INFORMATION FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

February 28, 1985

No. 83-2166

Zauderer v. Office of Disciplinary Counsel

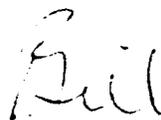
Dear Byron:

Please join me in Parts I, II, III and IV of your opinion for the Court.

I agree with your analysis in Part V with respect to the State's authority to impose reasonable disclosure requirements. I am not yet at rest, however, with the question whether Zauderer received fair notice that his advertisement violated any disclosure obligation. For the moment, I'd like to give this further thought.

With respect to Part VI, my position at Conference was that the procedures leading up to the State's reprimand for the drunk driving advertisement did not comport with due process. I'll circulate something to this effect in due course.

Sincerely,



Justice White

Copies to the Conference



To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

May 13, 85

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

**PHILIP Q. ZAUDERER, APPELLANT v. OFFICE  
OF DISCIPLINARY COUNSEL OF THE  
SUPREME COURT OF OHIO**

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." *Ante*, at 18, 21. I therefore join Parts I-IV of the Court's opinion. With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Ante*, at 23. I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of the appellant Philip Q. Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore dissent from Parts V-VII of the Court's opinion.

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To: The Chief Justice  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice Brennan**

Circulated: \_\_\_\_\_

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MAY 21 1985

May 22, 1985

1-2

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

PHILIP Q. ZAUDERER, APPELLANT *v.* OFFICE  
OF DISCIPLINARY COUNSEL OF THE  
SUPREME COURT OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I fully agree with the Court that a State may not discipline attorneys who solicit business by publishing newspaper advertisements that contain "truthful and nondeceptive information and advice regarding the legal rights of potential clients" and "accurate and nondeceptive illustration[s]." *Ante*, at 19, 21. I therefore join Parts I-IV of the Court's opinion, and I join the Court's judgment set forth in Part VII to the extent it reverses the Supreme Court of Ohio's public reprimand of the appellant Philip Q. Zauderer for his violations of Disciplinary Rules 2-101(B), 2-103(A), and 2-104(A).

With some qualifications, I also agree with the conclusion in Part V of the Court's opinion that a State may impose commercial-advertising disclosure requirements that are "reasonably related to the State's interest in preventing deception of consumers." *Ante*, at 23. I do not agree, however, that the State of Ohio's vaguely expressed disclosure requirements fully satisfy this standard, and in any event I believe that Ohio's punishment of Zauderer for his alleged infractions of those requirements violated important due process and First Amendment guarantees. In addition, I believe the manner in which Ohio has punished Zauderer for publishing the "drunk driving" advertisement violated fundamental principles of procedural due process. I therefore concur in

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice White

Circulated: FEB 21 1985

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

PHILIP Q. ZAUDERER, APPELLANT *v.* OFFICE  
OF DISCIPLINARY COUNSEL OF THE  
SUPREME COURT OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

[February —, 1985]

JUSTICE WHITE delivered the opinion of the Court.

Since the decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U. S. 748 (1976), in which the Court held for the first time that the First Amendment precludes certain forms of regulation of purely commercial speech, we have on a number of occasions addressed the constitutionality of restraints on advertising and solicitation by attorneys. See *In re R. M. J.*, 444 U. S. 191 (1982); *In re Primus*, 436 U. S. 412 (1978); *Ohralik v. Ohio State Bar Assn.*, 436 U. S. 447 (1978); *Bates v. State Bar of Arizona*, 433 U. S. 350 (1977). This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a state may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a state may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.

I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in *The Columbus Citizen Journal* advising its readers that his law firm would represent de-

To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

Stylistic & pp. 12, 27-28.

Circulated: \_\_\_\_\_

Recirculated: MAY 20 1985

20

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-2166

PHILIP Q. ZAUDERER, APPELLANT *v.* OFFICE  
OF DISCIPLINARY COUNSEL OF THE  
SUPREME COURT OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

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### I

Appellant is an attorney practicing in Columbus, Ohio. Late in 1981, he sought to augment his practice by advertising in local newspapers. His first effort was a modest one: he ran a small advertisement in *The Columbus Citizen Journal* advising its readers that his law firm would represent

HAB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 3, 1985

MEMORANDUM TO THE CONFERENCE

Cases held for 83-2166 -

Zauderer v. Office of Disciplinary Counsel

Two cases were held for Zauderer:

(1) Committee on Professional Standards v. Wiegen, No. 84-1120. In this case, petr challenges the New York Court of Appeals' ruling that a rule prohibiting direct-mail solicitation by attorneys violates the First Amendment. The court reached its conclusion by applying the analysis developed in Central Hudson and reaffirmed in Zauderer. The court first noted that communications are not inherently misleading because sent by direct mail and thus are not disqualified from asserting First Amendment protection. The court then considered the justifications offered for the rule by the State and found most of them not insufficient to meet the Central Hudson test. The state's concern about "commercialization" of the profession, the court noted, was insubstantial in light of the value of attorney advertising as a means of informing consumers about the availability of legal services. The State's interest in protecting consumers against invasion of privacy and undue influence was also insufficient to justify a restraint on direct-mail solicitation, as such solicitation--in contrast to the in-person solicitation that this Court has held may be forbidden--actually poses little risk of such abuses. The State's concern that direct-mail solicitation would "stir up" litigation, the court held, was also insubstantial as applied to communications that were not misleading and did not foment groundless litigation, for the value of informing consumers of their legal rights outweighed any concerns about increased litigation. Finally, the court considered the argument that direct-mail solicitation could be proscribed because such solicitation, unlike advertising in the mass media, was not subject to public scrutiny and therefore was harder to police for deceptive

(m)

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 28, 1985

Re: No. 83-2166-Zauderer v. Office of Disciplinary  
Counsel of the Supreme Court of Ohio

Dear Byron:

I await further writing.

Sincerely,



T.M.

Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 9, 1985

Re: No. 83-2166-Zauderer v. Office of Disciplinary  
Counsel of the Supreme Court of Ohio

Dear Bill:

Please join me in your opinion.

Sincerely,

*T.M.*  
T.M.

Justice Brennan

cc: The Conference

1

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 4, 1985

Re: No. 83-2166, Zauderer v. Office of Disciplinary Council

Dear Byron:

Please join me.

Sincerely,



Justice White

cc: The Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 1, 1985

83-2166 Zauderer v. Office of Disciplinary Counsel

Dear Byron:

Please add at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

*Lewis*

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

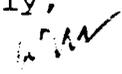
CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

February 25, 1985

Re: No. 83-2166 Zauderer v. Office of Disciplinary  
Counsel of the Supreme Court of Ohio

Dear Byron,

I am "with you" on most of the points you make in your opinion, but have some of the reservations Sandra expressed about the "dignity" arguments, and also disagree with your treatment of the argument about "stirring up litigation," pages 14 through 15. I realize that this Court in the case of In re Primus, 436 U.S. \_\_\_\_\_, went a long way towards ruling out this argument in the context of federal claims under §1983. But what we are talking about here are state law claims to recover for personal injuries, which so far as I can see do not depend in any way on federal law. It seems to me that Ohio may adopt the position that it does not wish attorneys practicing in its courts in cases involving Ohio law to "stir up litigation," and therefore I think this argument advanced by the state is entitled to more weight than you give it.

Sincerely,  


Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 3, 1985

Re: 83-2166 - Zauderer v. Office of Disciplinary  
Counsel of the Supreme Court of Ohio

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

February 21, 1985

Re: 83-2166 - Zauderer v. Office of  
Disciplinary Counsel of the  
Supreme Court of Ohio

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

February 22, 1985

Re: 83-2166 Zauderer v. Office of Disciplinary  
Counsel

Dear Byron,

Your opinion sweeps more broadly than I am presently able to join, particularly in Part III discussing Ohio's rule prohibiting the giving of unsolicited legal advice. I tend to think the dignity of the profession justifies a little more leeway in state regulation. The use of unsolicited professional advice to obtain business should be subject to greater regulation than other forms of commercial speech, in my view.

For the present, I will wait to see if other writing emerges.

Sincerely,



Justice White

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

March 13, 1985

Re: 83-2166, Zauderer v. Office of Disciplinary Council

Dear Byron,

No one else has indicated a plan to write separately in this case, and I am still persuaded that more deference is due State Bar regulations of attorney advertising than is acknowledged in your opinion. In due course I will circulate something concurring in part and dissenting in part.

Sincerely,



Justice White

Copies to the Conference

pp. 5, 7

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: **Justice O'Connor**

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*Mg 2, '85*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

**PHILIP Q. ZAUDERER, APPELLANT v. OFFICE OF  
DISCIPLINARY COUNSEL OF THE SUPREME  
COURT OF OHIO**

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

JUSTICE O'CONNOR, concurring in part and dissenting in part.

I join parts I, II, V, and VI of the Court's opinion. I agree that appellant Zauderer was properly reprimanded for his drunk driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban.<sup>1</sup> I dissent from part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

Merchants in this country commonly offer free samples of their wares. Customers who are pleased by the sample are likely to return to purchase more. This effective marketing technique may be of little concern when applied to many products, but it is troubling when the product being dispensed is professional advice. Almost every State restricts an attorney's ability to accept employment resulting from un-

<sup>1</sup> Like the majority, I express no view as to whether this is also the case for broadcast media. As the Court observed in *Bates v. State Bar of Arizona*, 433 U. S. 350, 384 (1977), "the special problems of advertising on the electronic broadcast media will warrant special consideration."

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Justice Brennan  
Justice White  
Justice Marshall  
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Justice Powell  
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Justice Stevens

From: Justice O'Connor

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My 16, 1985

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

**PHILIP Q. ZAUDERER, APPELLANT v. OFFICE OF  
DISCIPLINARY COUNSEL OF THE SUPREME  
COURT OF OHIO**

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

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Stylistic Changes Throughout

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

My 20, 1985

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

PHILIP Q. ZAUDERER, APPELLANT *v.* OFFICE OF  
DISCIPLINARY COUNSEL OF THE SUPREME  
COURT OF OHIO

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens

From: Justice O'Connor

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21  
May 21, 85

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-2166

**PHILIP Q. ZAUDERER, APPELLANT *v.* OFFICE OF  
DISCIPLINARY COUNSEL OF THE SUPREME  
COURT OF OHIO**

ON APPEAL FROM THE SUPREME COURT OF OHIO

[May —, 1985]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

d c | I join Parts I, II, V, and VI of the Court's opinion, and its judgment except insofar as it reverses the reprimand based on appellant Zauderer's use of unsolicited legal advice in violation of FR 2-103(A) and 2-104(A). I agree that appellant was properly reprimanded for his drunken driving advertisement and for his omission of contingent fee information from his Dalkon Shield advertisement. I also concur in the Court's judgment in Part IV. At least in the context of print media, the task of monitoring illustrations in attorney advertisements is not so unmanageable as to justify Ohio's blanket ban.<sup>1</sup> I dissent from Part III of the Court's opinion. In my view, the use of unsolicited legal advice to entice clients poses enough of a risk of overreaching and undue influence to warrant Ohio's rule.

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