

Summer 1991

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Recommended Citation

Wade H. Logan III, Lawyer Advertising and Solicitation: The Birth of the Marlboro Man, 42 S. C. L. Rev. 859 (1991).

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LAWYER ADVERTISING AND SOLICITATION: THE BIRTH OF THE MARLBORO MAN

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I. INTRODUCTION

For many members of the legal profession, the “barbarians are at the gate.”¹ Since the mid-1970s it has become clear that commercial speech is protected by the First Amendment.² Despite the acceptance of this basic premise, the debate over lawyer advertising and solicitation has raged unabated for two decades, frequently generating more heat than light. The spectrum runs from those who wish that the attorney general, like his medical cousin, somehow could require a disclaimer that legal advertising is dangerous to the health of the client and the legal profession, to those who feel that ambulance chasing, both personal and corporate, is a desirable form of consumerism.

This Article will discuss the case law background of the controversy, the history of attempts to regulate lawyer advertising and solicitation, and the limited empirical evidence of the effect of those practices. Further, this Article will suggest that, since effective enforcement of any detailed regulation may be a practical impossibility, legal advertising should be restricted to the dissemination of basic information about an attorney’s practice.

II. UNITED STATES SUPREME COURT CASES

A. *Bates v. State Bar*³

The *Bates* case was the first important case in which the United States Supreme Court discussed lawyer advertising. The petitioners in *Bates* opened a law office and called it a “legal clinic.” They envisioned handling only routine matters for persons of moderate income who did

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1. B. BURROUGH & J. HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* (1990).

2. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

3. 433 U.S. 350 (1977).

not qualify for governmental legal aid. Petitioners intended to charge relatively low fees by using standardized forms, paralegals, automatic typewriting equipment, and by handling a large volume of cases. They placed an advertisement in a local newspaper offering their legal assistance and listing their fees for certain routine services. The state bar filed a grievance. The Supreme Court of Arizona upheld the conclusion of a three-member Special Local Administrative Committee that the advertisement in question violated Arizona's version of DR 2-101(B).⁴ The United States Supreme Court thereafter granted certiorari. Speaking for the majority in a five-to-four decision, Justice Blackmun held that the operation of Arizona's version of DR 2-101(B), which effectively prohibited lawyer advertising, violated the First Amendment.⁵

Justice Blackmun preliminarily remarked that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making."⁶ The Court acknowledged three issues it was not called upon to decide. First, the case was not an advertising claim related to the quality of petitioner's legal services. Second, the case did not involve in-person solicitation by a lawyer or a "runner." Third, neither DR 2-102 nor Arizona's Rule 29(a) prohibited the advertisement of basic factual information such as the attorney's name, address, telephone number, and office hours.⁷ The majority found that such "spartan fare would provide scant nourishment" for the hungry potential legal consumer.⁸

4. *Id.* at 354-56. Arizona has adopted the Model Code of Professional Responsibility DR 2-101(B) and it provided in part:

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

ARIZ. S. CT. R. 29(a). The Model Code of Professional Responsibility, adopted by the American Bar Association on January 1, 1970, with amendments, was adopted by the South Carolina Supreme Court as the standard of professional conduct for attorneys admitted to practice in South Carolina. DR 2-101(B) remained in effect until the supreme court adopted a version of the Model Rules of Professional Conduct, effective September 1, 1990. *See* S.C. APP. CT. R. 407, Rule 7.2.

5. *Bates*, 433 U.S. at 355. The Supreme Court also unanimously held that the petitioner's Sherman Act claim was barred by the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), but this portion of the holding is beyond the scope of this Article.

6. *Bates*, 433 U.S. at 364 (citation omitted).

7. *Id.* at 366; *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(6) (1969).

8. *Bates*, 433 U.S. at 367.

The narrow holding of *Bates* is that a state may not constitutionally prohibit truthful advertising of the availability and cost of certain routine legal services. The Court, in the absence of a factual record from the court below, rejected the following arguments that favor the blanket restriction of attorney advertising: (1) the adverse effect on professionalism, (2) the inherently misleading nature of attorney advertising, (3) the adverse effect on the system of justice, (4) the undesirable economic effect of advertising, (5) the adverse effect of advertising on the quality of service, and (6) the difficulties of enforcement.⁹

The Court held that the particular advertisement at issue was not misleading. The Court also stated in dicta that certain limitations on lawyer advertising could be constitutionally permissible, including prohibitions against misleading or deceptive advertising. These limitations might include advertisement of the quality of legal services, prohibitions against in-person solicitation, and a requirement of a disclaimer or warning.¹⁰ The Court also noted that a state might impose reasonable restrictions on the time, place, and manner of advertising, and it alluded to the "special problems" of advertising in the electronic broadcast media.¹¹

All four of the dissenting justices expressed grave misgivings about the majority's unsupported assumption that the machinery of the bench and bar could regulate lawyer advertising effectively. Justice Powell's dissent includes what has to rank as the understatement of the legal century. He concluded that "within undefined limits today's decision will effect profound changes in the practice of law, viewed for centuries as a learned profession."¹² Justice Rehnquist discerned that differentiations between protected and unprotected speech in the field of advertising have been abandoned in favor of case-by-case adjudication. He made reference to the "slippery slope" upon which the Court embarked, a concern which has proven to be prophetic.¹³

B. *Ohralik v. Ohio State Bar Association*¹⁴

The Supreme Court donned its cleats and checked its slide down the slippery slope in *Ohralik*, decided the year after *Bates*. Speaking for six of the eight justices who participated in the decision, Justice Powell answered one of the questions reserved in *Bates*. The Court

9. *Id.* at 368-79.

10. *Id.* at 383-84.

11. *Id.* at 384.

12. *Id.* at 389.

13. *Id.* at 405.

14. 436 U.S. 447 (1978).

held that a state might constitutionally prohibit the in-person solicitation of a client for pecuniary gain under circumstances likely to involve damages that the state had a right to prevent.¹⁵

Ohralik involved a classic set of circumstances—an attorney soliciting an automobile collision victim in-person, while the victim laid in traction still in the hospital. The attorney also solicited a passenger who had been injured in the same accident, by visiting her, without invitation, at her home. Both women verbally agreed to representation, but later repudiated their agreements. *Ohralik* insisted they had binding oral agreements and brought breach of contract actions against the women. Both the victim and the passenger eventually filed grievances.¹⁶ After a hearing before the Board of Commissioners on Grievances and Discipline, the Supreme Court of Ohio held that *Ohralik*'s conduct was not constitutionally protected, and suspended him indefinitely.¹⁷

On appeal the United States Supreme Court particularly seemed concerned that in-person solicitation provides opportunities for overreaching, misrepresentation, and other forms of harm to the solicited client, because in-person solicitation can afford the lawyer an opportunity to exert pressure and demand an immediate response. The Court noted that the “aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking”¹⁸ The Court acknowledged that, according to *Bates*, an informed decision can be aided by legal advertising.¹⁹ In-person solicitation, particularly of an “unsophisticated, injured, or distressed lay person,”²⁰ however, is not conducive to informed, reasoned decision-making. Moreover, this type of solicitation, unlike advertising, is not susceptible to public scrutiny and is not easily regulated. The Court found that these concerns compelled a restraint on speech.²¹

15. *Id.* at 458-62.

16. *Id.* at 449-52. The Court noted that *Ohralik* made secret tape recordings of his conversations with both the victim and passenger.

17. *Id.* at 447.

18. *Id.* at 457.

19. *Id.* at 457-58.

20. *Id.* at 465.

21. *Id.* at 462; see also *In re Primus*, 436 U.S. 412 (1978) (solicitation may be permissible if it is in writing, related to a civil rights matter, and the attorney's primary motive is not pecuniary gain).

C. Central Hudson Gas & Electric Corp. v. Public Service Commission²²

Although this case did not directly involve lawyers, *Central Hudson* had important implications for lawyer advertising. The New York Public Service Commission ordered public utilities to stop advertising to promote the use of electricity during a fuel shortage in the winter of 1973-1974. A few years later, after the fuel crisis had abated, the Commission, as a conservation measure, extended its prohibition on promotional advertising.²³ The Commission distinguished between "promotional" advertising, intended to stimulate sales, and "institutional and informational" advertising, which it defined as any advertising not intended to promote sales.²⁴

The New York Court of Appeals affirmed the decision of the Commission to extend the ban,²⁵ finding that promotional advertising does not contribute to the sort of informed decision-making discussed in *Bates*. The court of appeals also held that the governmental interest in the conservation of electrical power outweighed the value of the type of commercial speech in question.²⁶

In *Central Hudson* Justice Powell observed that the Constitution affords less protection to commercial speech than to other forms of expression secured by the First Amendment, and the constitutional concern for commercial expression is based on the speech's informational function.²⁷ The Court determined that if the commercial speech is not misleading, then the government's power to regulate it is more circumscribed, requiring a state to set forth a substantial governmental interest to be served by its restriction on speech.²⁸ Consequently, the proposed regulation must advance the state interest involved directly; if a more limited restriction would be as effective in advancing the governmental interest, then the broader regulation cannot survive constitutional scrutiny.²⁹

The Court held that a court examining a particular regulation of commercial speech must employ a four-part test: the court must (1) discern whether or not the speech is protected by the First Amendment (at a minimum, it must concern lawful activity and not be mis-

22. 447 U.S. 557 (1980).

23. *Id.* at 558.

24. *Id.* at 560.

25. *Id.* at 561; see also *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

26. *Central Hudson*, 447 U.S. at 561.

27. *Id.* at 563.

28. *Id.*

29. *Id.* at 564.

leading), and (2) resolve whether or not the governmental interest to be advanced is a "substantial" one. If both of the first two questions are answered affirmatively, the court must then (3) determine whether or not the proposed regulation directly advances the substantial governmental interest; and (4) decide whether the regulation is more extensive than necessary to accomplish the advancement of the interest.³⁰ If the regulation fails any one of these four prongs of the analysis, it will not pass constitutional muster.

Applying the test to the ban on promotional advertising by electric utilities, the Court in *Central Hudson* found that the advertising was constitutionally protected, that New York's interest in conserving energy was a substantial governmental interest, and that the conservation of energy was advanced directly by the ban on promotional advertising.³¹ The Court also found, however, that a blanket suppression of all advertising was broader than required to further the state's interest in energy conservation, so that the regulation violated the First Amendment.³² The Court, as it did in *Bates*, suggested that certain forms of more limited regulation, such as restricting the content and format of the advertising, requiring the inclusion of information about the relative expense of the service in question, and instituting a system whereby attorneys would preview their advertisements to ensure that they would not defeat the policy in question, might be permissible.³³

D. In re R.M.J.³⁴

In 1977, in an attempt to comply with *Bates*, the Supreme Court of Missouri revised its version of DR 2-101(B). The revised rule specified the categories of information that a lawyer might publish. As enforced, the rule prohibited the publication of any material other than specific information, such as fees charged for ten particular "routine" services. In addition, the rules listed twenty-three areas of practice that might properly be included in the advertisement and prohibited lawyers from indicating that they "limited" their practice to these areas. DR 2-101(B) also required that attorneys disclaim any certification or expertise in the practice areas. A separate rule, DR 2-102, limited the categories of persons to whom professional announcements could be mailed.³⁵

30. *Id.* at 566.

31. *Id.* at 566-71.

32. *Id.* at 570-71.

33. *Id.*

34. 455 U.S. 191 (1982).

35. *See id.* at 194 & nn.3-6.

In *In re R.M.J.* the attorney allegedly violated a number of the provisions of Missouri's DR 2-101(B) by publishing information in newspaper and *Yellow Pages* advertisements not allowed expressly by the rule, and by failing to include a disclaimer of certification or expertise, which was required after the attorney listed his areas of practice. He also advertised in capital letters that he was a member of the Bar of the Supreme Court of the United States.³⁸ The Supreme Court of Missouri upheld the constitutionality of DR 2-101(B) and issued a private reprimand.³⁷

Writing for a unanimous Court, Justice Powell reversed. Justice Powell found that Missouri's revised rule failed to withstand the constitutional analysis he had articulated in *Central Hudson*.³⁸ The Court noted that the state identified no substantial interest in restricting a lawyer from advertising the number of areas of his practice or a listing of jurisdictions in which he is licensed to practice. Further, the Court found the state advanced no reason to restrict a lawyer from mailing announcement cards. The Court discovered little in the record to articulate a substantial governmental interest, and it did not find a less restrictive alternative to serve any interests asserted.³⁹

Following the pattern of earlier decisions, the Court again bemoaned the lack of an adequate record in the court below, and indicated that its holding was based, at least in part, upon the lack of such a record.⁴⁰ The Court again felt compelled to catalogue certain forms of constitutionally appropriate restrictions. The Court suggested that a state might require that all general mailings by an attorney be filed with a regulatory body, that a copy of these mailings be maintained by the attorney for some limited time period, or that the attorney could be required to stamp "This is an advertisement" on the envelope in which the materials were mailed.⁴¹

*E. Zauderer v. Office of Disciplinary Counsel*⁴²

The petitioner in *Zauderer* ran an advertisement in a local news-

36. *Id.* at 196. Interestingly, petitioner's failure to include the required disclaimer regarding his lack of expertise apparently did not form the basis for the imposition of discipline, and this issue was not brought out in the appeal. *Id.* at 205 n.18.

37. *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1981), *rev'd*, 455 U.S. 191 (1982). The Missouri Supreme Court did not address the constitutionality of DR 2-102 regarding professional announcement cards.

38. 455 U.S. at 203; *see supra* text accompanying note 30.

39. *Central Hudson*, 455 U.S. at 205-06.

40. *Id.* at 205-07.

41. *Id.* at 206-07.

42. 471 U.S. 626 (1985).

paper stating that he would represent clients in drunk driving cases and that he would refund the full fee if the client were convicted. Later, he ran another newspaper advertisement announcing his willingness to represent women who had been injured by the use of the Dalkon Shield intrauterine device (the advertisement featured a drawing of the device). He declared, among other things, that "no legal fees are owed by our clients,"⁴³ if the client did not recover. After the lawyer's discipline had been affirmed by the Supreme Court of Ohio,⁴⁴ Zauderer appealed to the United States Supreme Court.

Justice White wrote the opinion for a divided Court. Referring frequently to the analytical framework suggested by Justice Powell in *Central Hudson*,⁴⁵ the Court held that Ohio could not constitutionally prohibit the solicitation of legal business through an advertisement which contained advice and information about a specific legal problem, such as the Dalkon Shield litigation, nor could it restrict the use of illustrations in advertisements by lawyers, provided, of course, that such advertisements were neither misleading nor deceptive.⁴⁶ The Court held that Ohio could constitutionally require a lawyer to disclose to a client that the client is liable for costs under a contingent fee agreement.⁴⁷ The lawyer apparently did not appeal Ohio's prohibition against contingent fees in criminal cases. The Court upheld Zauderer's discipline for that violation in spite of his due process challenge.⁴⁸

The Court's holding re-emphasized some old themes. It mentioned the *Ohralik* distinction between printed materials and personal solicitation.⁴⁹ It rejected the notion that truthful, nondeceptive advertising may be a basis for attorney discipline simply because it may have a tendency to encourage the filing of lawsuits.⁵⁰ The opinion questioned whether or not a state's desire that attorneys maintain "dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights."⁵¹ As in prior decisions, the Court addressed the lack of any empirical evidence

43. *Id.* at 630.

44. *Id.* at 635; see also *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984), *aff'd in part, rev'd in part*, 471 U.S. 626 (1985).

45. *Zauderer*, 471 U.S. at 637-38. Justice Powell did not participate in the *Zauderer* decision. For a discussion of *Central Hudson*, see *supra* notes 22-33 and accompanying text.

46. *Zauderer*, 471 U.S. at 637-38.

47. The Court rejected the lawyer's contention that a disclosure requirement, as opposed to a blanket prohibition of advertising, should be subject to a "least restrictive means" analysis. *Id.* at 651 n.14.

48. *Id.* at 654-55.

49. *Id.* at 642.

50. *Id.* at 643.

51. *Id.* at 648.

on the state's part to support its contentions regarding the effect of lawyer advertising.⁵² The petitioner apparently presented evidence in the proceeding below, including expert testimony regarding the beneficial economic effects of advertising, as well as testimony from two of his clients that they would have been unaware of their Dalkon Shield claims in the absence of his advertisements.⁵³

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, expressed the view that a state properly could prohibit attorneys from using unsolicited legal advice to obtain clients.⁵⁴ The dissent is significant in that it established the continuation of Justice Rehnquist's pattern of dissenting in lawyer advertising cases. It also marked Justice O'Connor's first dissent in such a case.

F. *Shapero v. Kentucky Bar Association*⁵⁵

In 1988 Justice Brennan, writing for a Court increasingly divided on the issue of lawyer advertising and solicitation, held in *Shapero* that the Kentucky Supreme Court could not, by rule, completely prohibit Kentucky lawyers from soliciting legal business for pecuniary gain if the lawyers sent truthful and nondeceptive correspondence to potential clients known to face particular legal problems. Six members of the Court agreed with that proposition. A majority of the Court could not agree, however, on whether the particular letter in question was overreaching and therefore unworthy of First Amendment protection. Justice O'Connor wrote a lengthy dissent, joined by Justices Rehnquist and Scalia, that criticized the whole line of attorney advertising and solicitation cases, and suggested that *Bates* should be re-examined.⁵⁶

The petitioner in *Shapero* had sought an advisory opinion concerning the ethical propriety of a letter that he proposed to send to potential clients whose homes were threatened with foreclosure. The Kentucky Supreme Court concluded that its existing rule prohibiting targeted, direct-mail solicitation was invalidated by *Zauderer*.⁵⁷ The court substituted Model Rules of Professional Conduct Rule 7.3⁵⁸ for

52. *Id.* Justice Brennan pointed out that the Court consistently has struck down regulations when a state has failed to produce evidence in support of its contentions. *Id.* at 659 (Brennan, J., concurring in part and dissenting in part).

53. *Id.* at 634.

54. *Id.* at 673.

55. 486 U.S. 466 (1988).

56. *Id.* at 480-91.

57. See *supra* notes 42-54 and accompanying text.

58. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3(b) (1983) provides, in part, that lawyers may not solicit professional employment from prospective clients by written

its existing rule, and held that the proposed letter violated Rule 7.3. The Kentucky Bar Association did not argue that the letter was false or misleading.⁵⁹ Instead, the lawyer was disciplined because direct-target mailings presented the potential for overreaching, undue influence, and intimidation when the targeted audience is vulnerable and already may be overwhelmed by legal problems.⁶⁰ On appeal, the United States Supreme Court decided that the proper focus should not be on the susceptibility of potential clients, but on whether “the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.”⁶¹

Justice Brennan again emphasized the *Ohralik* distinction between written, mailed materials and in-person solicitation, and suggested ways that a state could constitutionally regulate mailings, such as requiring attorneys to file these letters with a state agency for review.⁶² He also referenced the lack of evidence in the record to support the state’s contentions. The opinion tacitly approves the practice of a lawyer searching the public records for automobile accident reports or mortgage foreclosure complaints, and then writing the victims of those accidents or the mortgagors to “volunteer” his services.⁶³

G. *Peel v. Attorney Registration and Disciplinary Commission*⁶⁴

In an extremely confusing decision, the United States Supreme Court in *Peel* recently held that Illinois’ DR 2-105(A)(3)⁶⁵ violated the First Amendment by completely prohibiting an attorney from advertising that he has been certified by private professional organizations. The Supreme Court of Illinois disciplined the petitioner under DR 2-105(A)(3) for mentioning his certification by the National Board of Trial Advocacy (NBTA) on his letterhead.⁶⁶ The Illinois Supreme

communication if the prospective client lets the lawyer know the client has no interest in solicitation, or the solicitation involves coercion, duress, or harassment.

59. *Shapero*, 486 U.S. at 479-80.

60. *Id.* at 474 (citing *Shapero v. Kentucky Bar Ass’n*, 726 S.W.2d 299, 301 (1987), *rev’d*, 486 U.S. 466 (1988)).

61. *Id.*

62. *Id.* at 476.

63. *Id.* at 477.

64. 110 S. Ct. 2281 (1990).

65. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (3) provides: A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as “certified” or a “specialist.”

66. *In re Peel*, 126 Ill. 2d 397, 534 N.E.2d 980 (1989), *rev’d sub nom. Peel v. Attorney Registration and Disciplinary Comm’n*, 110 S. Ct. 2281 (1990).

Court held that the certification was similar to a claim of quality and superiority and therefore it inherently was likely to mislead clients.⁶⁷

Justice Stevens, joined in the *Peel* opinion by Justices Brennan, Blackmun, and Kennedy, perceived the issue to be whether a lawyer has a constitutional right to advertise an NBTA certification as a trial specialist. First, the Court concentrated on whether the petitioner's statement was misleading and thus unprotected by the First Amendment under commercial speech standards. Second, the Court acknowledged that commercial speech which potentially is misleading may create a state interest substantial enough to justify regulation of the speech.⁶⁸

The Court rejected the notion that petitioner's advertising was misleading or deceptive. The Court concluded that the speech was truthful and verifiable by consumers, and that "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."⁶⁹ The Court also determined that truthful statements about an attorney who is a specialist or is certified in a field are no more misleading than the advertising permitted in *R.M.J.*, *Shapero*, and *Zauderer*. The Court also held that the state failed to show that a more narrow regulation could not satisfy its interest in limiting the petitioner's speech.⁷⁰

The Court noted that certification by "objective and consistently applied standards relevant to practice in a particular area of law"⁷¹ both enhanced consumers' ability to make informed decisions and encouraged attorneys to use meritorious certification programs.⁷² Based on this reasoning, the Court remanded the case.

Justices Marshall and Brennan found the letterhead to be potentially misleading and thus subject to state regulation. They noted that facts can be misleading if they are presented without adequate explanation, a particular problem in this case because the NBTA is not a commonly recognized organization.⁷³ They concurred in the judgment, however, because they determined that Illinois' blanket prohibition of potentially misleading commercial speech under DR 2-105(A) was

67. *Id.* at 406, 534 N.E.2d at 984. The state supreme court also held that a juxtaposition on the petitioner's letterhead of the NBTA certification and his being "licensed" in three states implied official licensure. It also held the use of the word "specialist" implied formal authorization by the state.

68. *Peel*, 110 S. Ct. at 2287.

69. *Id.* at 2292.

70. *Id.*

71. *Id.*

72. *Id.* at 2293.

73. *Id.* at 2295.

unconstitutional.⁷⁴

Justice White also found the letterhead to be potentially misleading, but dissented in the opinion. Justice White found it inappropriate that the petitioner was free to circulate a potentially misleading letterhead until the state was able to fashion a more narrow regulation. According to Justice White, the petitioner had the responsibility to eliminate the letterhead's potential to mislead.⁷⁵

Justices O'Connor, Rehnquist, and Scalia all found the petitioner's letterhead to be inherently misleading. Their dissent argued that ordinary consumers of legal services could not verify easily the petitioner's statements. They also asserted that because the certification could not be presented in a nondeceptive manner, an absolute prohibition by the state was acceptable.⁷⁶

Once again, the Court pointed out the lack of empirical evidence to support the state's claim of deception.⁷⁷ Notably, the "traditional" dissenters, Justices O'Connor, Rehnquist and Scalia, were joined for the first time by Justice White.

H. Trends in the Case Law

These cases demonstrate that a growing number of Justices on the Supreme Court may believe that the Court's rulings in the area of lawyer advertising, beginning with *Bates*, should be re-examined. The Court has emphasized that the basis for First Amendment protection of commercial expression such as lawyer advertising is the speech's informational character, which supposedly contributes to enlightened decision making by the public.⁷⁸ The Court has taken pains, in dicta, to suggest constitutionally permissible forms to regulate advertising and solicitation.⁷⁹

III. ATTEMPTS AT REGULATION

The fast pace of the Supreme Court's opinions in the area of lawyer advertising and solicitation frequently has outrun the ability of state regulatory authorities to conform to them.⁸⁰ At least three states

74. *Id.* at 2293.

75. *Id.* at 2297.

76. *Id.* at 2300.

77. *Id.* at 2290.

78. *See* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

79. *See* *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988); *In re R.M.J.*, 455 U.S. 191, 200-04 (1982); *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977).

80. *Bates* was decided in 1977; *Ohralik* in 1978; *Central Hudson* in 1980; *In re*

have tried to enact rules that effectively regulate attorney advertising practices, while at the same time, comply with the Court's constitutional requirements.

A. Iowa

Iowa's experiences illustrate a state's attempt to comply with the Supreme Court decisions. Following the 1977 *Bates* opinion, the Iowa Supreme Court asked the Committee on Professional Ethics and Conduct of the Iowa State Bar Association to investigate lawyer advertising and to recommend an advertising rule. The Iowa Supreme Court adopted a version of DR 2-101(B) which prohibited television advertisements that contained background sound, visual displays other than those allowed in print, more than one "non-dramatic" voice, and self-laudatory statements. A lawyer who views the rule as unduly restrictive may petition the court to have the rule modified through an expedited appeal procedure.⁸¹

In 1982 three Iowa lawyers aired television commercials that purportedly violated DR 2-101(B)(5).⁸² The Committee requested the Iowa Supreme Court to enjoin the continued use of the advertisements. The court found the rule to be constitutional and issued an injunction.⁸³

In its decision, the Iowa Supreme Court discussed the applicable United States Supreme Court opinions, including *Bates*, *Ohralik*, *R.M.J.*, and *Central Hudson*. Applying constitutional analysis, it found that the television commercials were misleading because the advertisements failed to inform prospective clients that they might be liable for costs even in contingent fee arrangements. The commercials also contained self-laudatory comments about the expertise of the advertising lawyers.⁸⁴

The Iowa Supreme Court made the excellent point that a line should be drawn between advertising that informs the public, and therefore promotes the kind of enlightened decision making applauded in *Bates*, and advertising that merely promotes the lawyer.⁸⁵ The court found that the commercials at issue primarily promoted the lawyers rather than provided relevant information to the public.

R.M.J. in 1982; *Zauderer* in 1985; *Shapero* in 1988; and *Peel* in 1990.

81. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B).

82. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey, 355 N.W.2d 565, 568-69 (Iowa 1984), *vacated and remanded*, 472 U.S. 1004 (1985), *reh'g denied*, 476 U.S. 1165 (1986).

83. *Id.* at 571.

84. *Id.* at 570.

85. *Id.* at 571.

Taking a cue from the United States Supreme Court, the Iowa Supreme Court appointed a judge as a commissioner and developed a detailed factual record.⁸⁶ The evidence apparently included the results of a public survey in which a group of people were shown television commercials for lawyers and questioned about their attitudes about lawyers, both before and after watching the advertisements.⁸⁷ Following the viewing, the opinions held by the group regarding lawyers changed for the worse. Those who perceived that lawyers were trustworthy, for example, dropped from seventy-one percent to fourteen percent; those who considered lawyers to be honest dropped from sixty-five percent to fourteen percent.⁸⁸

The lawyers appealed to the United States Supreme Court. While the case was on appeal, *Zauderer* was decided. The United States Supreme Court vacated the judgment of the Iowa Supreme Court and remanded the case for further consideration in light of the *Zauderer* decision.⁸⁹

On reconsideration, the Iowa Supreme Court again ordered that the injunction issue.⁹⁰ It concluded that the *Zauderer* opinion did not affect electronic media advertisements.⁹¹ The Iowa court noted that the United States Supreme Court had acknowledged the unique problems involved in electronic broadcasts requiring special consideration.⁹² The court expressed concern that electronic media advertising presented “a very strong potential for abuse”⁹³ and explained that it had tried to draw a line between “the dissemination of protected information and crass personal promotion.”⁹⁴

Not surprisingly, the lawyers appealed again, but the Supreme Court dismissed the appeal for want of a substantial federal question.⁹⁵ Under the doctrine of *Hicks v. Miranda*,⁹⁶ such a dismissal is considered a decision on the merits of a case.

After the United States Supreme Court’s decision in *Shapero v.*

86. *Id.* at 567.

87. Reynoldson, *The Case Against Lawyer Advertising*, 75 A.B.A. J. 60 (1989).

88. *Id.*

89. *Humphrey v. Committee on Professional Ethics & Conduct of Iowa State Bar Ass’n*, 472 U.S. 1004 (1985).

90. *Committee on Professional Ethics & Conduct of Iowa State Bar Ass’n v. Humphrey*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 114 (1986).

91. *Id.* at 645.

92. *Id.* (citing *Bates v. State Bar*, 433 U.S. 350, 384 (1977)).

93. *Id.* at 647.

94. *Id.*

95. *Humphrey v. Committee on Professional Ethics & Conduct of Iowa State Bar Ass’n*, 475 U.S. 1114 (1986).

96. 422 U.S. 332 (1975).

Kentucky Bar Association,⁹⁷ the Supreme Court of Iowa again amended Iowa's version of the Code of Professional Responsibility. The changes particularly impacted advertising in telephone directories, city directories, and by direct mail.⁹⁸ This amendment followed another public opinion survey prepared for the Iowa Bar Association.⁹⁹

Effective June 1, 1989, the Supreme Court of Iowa amended DR 2-101, 2-102, and 2-105 of the Iowa Code of Professional Responsibility. DR 2-101, "Publicity," was modified to include strict requirements on the language of advertising, the method of dissemination, the informational content, and the fee information content.¹⁰⁰ DR 2-101 also provides that the advertisement must contain a disclaimer.¹⁰¹ Moreover, print media advertising must be disseminated in the geographic area where the lawyer maintains offices or where a significant part of the lawyer's clientele resides. Prior to mailing a written solicitation, the lawyer must file a copy of the proposed solicitation with a committee of the Iowa State Bar Association. As suggested in *Zauderer*, the envelope in which a written advertisement or solicitation is mailed must have printed on it the words "ADVERTISEMENT ONLY."¹⁰² If the particular written communication suggests the institution of litigation, it must disclose that filing a suit solely to harass or to coerce a settlement may be illegal and could render the plaintiff liable for malicious prosecution or abuse of process in a civil suit.¹⁰³ To date, no appellate court has ruled on the constitutionality of these new provisions.

B. Florida

The Florida Bar followed the general procedure adopted in Iowa. Following an extensive study of attorney advertising and solicitation

97. 486 U.S. 466 (1988).

98. Order, "In the Matter of Rules DR 2-101, DR 2-102, and DR 2-105 of the Iowa Code of Professional Responsibility for Lawyers," April 28, 1989 (forwarded to members of Iowa Bar under cover of letter from Committee on Professional Ethics and Conduct of Iowa State Bar Association dated May 1, 1989).

99. FRANK N. MAGID ASSOC., INC., CONSUMER ATTITUDES TOWARD *Yellow Pages* LEGAL ADVERTISING (1988).

100. For example, lawyers must use "restrained subjective characterizations" of rates or fees, such as the term "reasonable." IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A).

101. The disclaimer must read: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa." *Id.*

102. *Id.* DR 2-101(B)(4)(d).

103. *Id.* DR 2-101(F).

practices in Florida,¹⁰⁴ the Florida Bar Board of Governors, on July 20, 1989, voted in favor of proposals to circumscribe severely advertising by lawyers, much in the fashion of the Iowa rule. For example, all advertising, whether print or electronic, would be required to include a disclaimer similar to the disclaimer required in Iowa. Restrictions on television advertising were even more severe than under the Iowa rule. Direct mail solicitation by personal injury lawyers would be banned entirely, although other attorneys, such as bankruptcy practitioners, could have engaged in direct mail solicitation. In November 1989 the bar filed a petition with the Florida Supreme Court asking that the rules be adopted.

By a divided decision, the Florida Supreme Court in a lengthy order adopted the new rules in a modified form.¹⁰⁵ The court's order, which became effective January 1, 1991, eliminated the proposed requirement that only a member of the Florida Bar could be a spokesperson for the firm advertising in a television commercial. It also eliminated the requirement of a disclaimer or disclosure in electronic advertising, and modified the total ban on direct-mail solicitation in personal injury cases.¹⁰⁶ A number of parties, including advertising organizations, filed opposition to the new rules. Thus far, no appellate court has ruled on the constitutionality of the new Florida rules.

C. South Carolina

The Model Code of Professional Responsibility, as adopted and amended by the House of Delegates of the American Bar Association, previously governed the professional conduct of lawyers admitted to practice before the Supreme Court of South Carolina.¹⁰⁷ One South Carolina attorney has been disbarred and another publicly reprimanded for advertising services in a manner that violated DR 2-102.¹⁰⁸

In *In re Burgess*¹⁰⁹ an attorney placed advertisements in *The State* newspaper regarding his bankruptcy practice. Citing *Bates v.*

104. See, e.g., THE COMMUNICATIONS RESEARCH CENTER, FLA. STATE UNIV., THE RESULTS OF THE FLORIDA BAR PUBLIC OPINION SURVEY (1987).

105. The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990).

106. *Id.* Direct mail solicitation in personal injury cases is prohibited for the first thirty days after the accident.

107. S.C. Sup. Ct. R. 32, DR 2-101.

108. Another attorney was reprimanded publicly after he received a separate public censure in New York for advertising in a Syracuse, New York telephone directory "in a manner which constituted a holding out to the public of specialization in areas of law in which he had no experience." *In re Zimmerman*, 277 S.C. 342, 342, 287 S.E.2d 474, 474 (1982).

109. 279 S.C. 44, 302 S.E.2d 325 (1983).

State Bar,¹¹⁰ the court acknowledged that lawyer advertising was protected speech, but reaffirmed that states have a legitimate interest in regulating this type of speech.¹¹¹ The court held that the attorney's advertising violated DR 2-101 because it did not "further the legitimate aim of attorney advertising, which is to educate the public and facilitate intelligent selection of counsel, and not merely to attract clients."¹¹² The court also found the attorney's advertising campaign increased the attorney's practice to such an extent that he was unable to respond properly to his clients' needs.¹¹³ A divided court publicly reprimanded the attorney for advertising in *The State* newspaper regarding his bankruptcy practice.

The majority in *In re Hodges*¹¹⁴ found an attorney's advertisements to be "remarkably similar" to those disapproved of in *Burgess*.¹¹⁵ Justices Gregory and Harwell dissented, however, and asserted that Hodges's advertisement was neither false nor misleading. The dissent also noted that the advertisement was directed at a particular lay audience and written in terms laypersons could understand, and thus was valuable to the consuming public.¹¹⁶

The Commission on Evaluation of Professional Standards of the American Bar Association proposed that the ABA adopt the Model Rules of Professional Conduct to replace the Model Code, and in 1983 the Model Rules were adopted by the House of Delegates of the ABA. The South Carolina Bar petitioned the South Carolina Supreme Court to adopt the Model Rules. While that petition was pending, *Shapero* was decided. The South Carolina Bar suggested that Rule 7 of the Model Rules be modified to conform to the holding in *Shapero*.¹¹⁷ Prior to its decision on the petition, the South Carolina Supreme Court, recognizing the problem of enforcing the existing rule in light of *Shapero*, amended Rule 32 to delete EC 2-9 through EC 2-16 and DR 2-101 through DR 2-105, and added Rules on Lawyer Advertising.¹¹⁸

110. 433 U.S. 350 (1977); see *supra* notes 3-13 and accompanying text.

111. *Burgess*, 279 S.C. at 45, 302 S.E.2d at 325-26.

112. *Id.* at 46, 302 S.E.2d at 326.

113. *Id.* The attorney previously had been publicly reprimanded, *In re Burgess*, 275 S.C. 315, 270 S.E.2d 436 (1980), and thus possibly received a harsher sanction than may have been imposed had this been his first appearance in a disciplinary proceeding. *Burgess*, 279 S.C. at 47, 302 S.E.2d at 326.

114. 279 S.C. 128, 303 S.E.2d 89, *cert. denied*, 464 U.S. 960 (1983).

115. *Id.* at 129, 303 S.E.2d at 89.

116. *Id.* at 130, 303 S.E.2d at 89-90.

117. Brief In Support of Petition to Adopt the Proposed South Carolina Model Rules of Professional Conduct to Replace the Code of Professional Responsibility as Rule 32 of the Rules of the Supreme Court, Nathan M. Crystal, Esquire, Attorney for Petitioner, February 1, 1989.

118. Order re: Rules on Lawyer Advertising, Supreme Court of South Carolina, June

The Model Rules, as modified, were adopted by the South Carolina Supreme Court on January 9, 1990, to become effective September 1, 1990.¹¹⁹ They are now codified as Rule 407 of the South Carolina Appellate Court Rules. The Rules on Lawyer Advertising are contained in Rule 7.1. Although no empirical evidence was gathered as in Iowa and Florida prior to South Carolina's adoption of the new rules, the current standards for attorney advertising embrace restrictions on advertising and solicitation in a number of specific areas. Except for Rule 7.4, the limitations appear constitutionally permissible in light of the applicable United States Supreme Court decisions discussed above.¹²⁰

Rule 7.3, which deals with solicitation of prospective clients, contains detailed requirements concerning disclaimers and the types of information that must be included in written or recorded communications from a lawyer to a prospective client.¹²¹ Rule 7.1, which addresses communications concerning a lawyer's services, and Rule 7.2, which treats advertising, are much less detailed. In light of the complete lack of empirical evidence about how South Carolinians choose a lawyer, this lack of detail is understandable.

IV. CONCLUSION

A review of a local newspaper or the *Yellow Pages* of a local telephone directory demonstrates the increasingly pervasive nature and effect of lawyer advertising. The overwhelming majority of lawyer advertising is promotional in nature, rather than the kind of informational advertising which the *Bates* Court suggested would aid decision making on the part of the legal consumer. For example, few newspaper advertisements list the fees for routine legal services, and even fewer advertisements in the *Yellow Pages* do so. If the purpose of lawyer advertising is to inform the public about legal services, then the majority of these advertisements fall far short of that goal.

The First Amendment does not prohibit a rule making mandatory the inclusion of information that would assist a potential client. It is, after all, its informational aspect that affords commercial speech limited First Amendment protection. The kind of information that would

12, 1989.

119. Order, Supreme Court of South Carolina, Jan. 9, 1990.

120. Rule 7.1, Communication Concerning a Lawyer's Services; Rule 7.2, Advertising; Rule 7.3, Direct Contact with Prospective Clients; Rule 7.4, Certified Specialization and Limitation of Practice; and Rule 7.5, Firm Names and Letterheads. S.C. APP. CT. R. 407, Rules 7.1-7.5. Rule 7.4 probably is not constitutional, in light of the decision in *Peel v. Attorney Registration and Disciplinary Comm'n*, 110 S. Ct. 2281 (1990). See *supra* notes 64-77 and accompanying text.

121. S.C. APP. CT. R. 407, Rule 7.3(c).

assist a potential client in choosing a lawyer could be constitutionally required in advertisements by lawyers.¹²² Such a rule would at least have the virtue of encouraging the sort of "informational" advertising discussed in *Central Hudson Gas*.¹²³

The existing rule permits the public dissemination of certain kinds of information, such as the types of services the lawyer will undertake, the basis upon which the fees for those services are determined, and so forth.¹²⁴ A rule requiring the furnishing of such information would be both beneficial and constitutional. Other mandated information might include, for example, whether or not a client is responsible for costs in a contingency fee case¹²⁵ or the lawyer's years of experience. Either all or part of the information now required to be included only in written or recorded solicitations of employment from prospective clients¹²⁶ also could be required in lawyer advertisements. A rule requiring this type of information in both print and electronic lawyer advertising would be more enforceable, as a practical matter, than a more detailed requirement about what should be excluded.

In South Carolina, enforcement of the Rules of Professional Responsibility is left in the first instance to the Board of Commissioners on Grievances and Discipline and then to the Attorney General.¹²⁷ While the devotion of the volunteer members of the Commission to their duties is beyond question, as is the competence of its staff, the sheer volume of lawyer advertising means that effective enforcement of more detailed prohibitions of certain kinds of conduct would be problematic, at best. The demands upon the Attorney General's resources in this time of restrictive budgets are ever increasing. The more effective regulation arguably would require the inclusion of certain types of information specifically designed to assist the potential client.

The author is unaware of any sort of empirical evidence regarding how South Carolinians select an attorney, or what the effect of lawyer advertising and solicitation has upon the South Carolina public's perception of lawyers and the legal system. The experiences of Iowa and Florida teach us that some advertising practices may affect the perception of the public in general, and of jurors, in particular in ways that may have an adverse impact upon our system of justice. Such research would be an invaluable aid to our understanding of the most effective means of regulating undesirable lawyer advertising.

122. Cf. *Committee on Professional Ethics & Conduct v. Humphrey*, 377 N.W.2d 643 (Iowa 1985).

123. 447 U.S. 557 (1980).

124. S.C. APP. CT. R. 407, Rule 7.2 comment.

125. *Id.* Rules 1.5(c) & 1.8(e)(1).

126. *Id.* Rule 7.3.

127. S.C. APP. CT. R. 413.

