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John Ratino

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IN RE R.M.J.: REASSESSING THE EXTENSION OF FIRST AMENDMENT PROTECTION TO ATTORNEY ADVERTISING

The extension of first amendment protection to attorney advertising is of recent origin.\(^1\) Prior to 1977, bar association rules in every state prohibited an individual attorney from utilizing any form of media advertisement.\(^2\) These rules made it difficult for many consumers to gain access to information about their legal rights and the availability of legal services.\(^3\) The American Bar Association, however, asserted that total proscription was justified to protect consumers from potentially deceptive legal advertisements.\(^4\) In addition, it was argued that competitive advertising by attorneys would bring about commercialization of the legal profession and thereby undermine public confidence in attorneys and the law.\(^5\) Despite widespread acceptance by the American Bar, these asserted justifications proved inadequate to support state prohibition of attorney advertising.

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1. The first amendment guarantees of freedom of expression and association were first extended to legal solicitation by legal rights organizations in NAACP v. Button, 371 U.S. 415 (1963) (upholding the right of the NAACP to solicit clients to challenge school segregation laws in Virginia). See infra notes 55-57 and accompanying text. However, first amendment protection of individual attorney advertising was not granted until Bates v. State Bar of Arizona, 433 U.S. 350 (1977). See infra notes 82-107 and accompanying text.

2. The Model Code of Professional Responsibility, formulated by the American Bar Association in 1969 and later adopted into law by every state, placed a general prohibition on all forms of media advertisement. Disciplinary Rule 2-101(A) stated "a lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication . . . calculated to attract lay clients . . . ." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1976).


4. Prior to 1977, Ethical Consideration 2-9 of the Model Code read in pertinent part: "The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful self-laudatory brashness in seeking business and thus, could mislead the layman." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9 (1976).

5. Prior to 1977, Ethical Consideration 2-9 of the Model Code contained the following assertion: "[competitive advertising] would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services." See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9 (1976).
against a challenge based on the free speech clause of the first amendment.  

In Bates v. State Bar of Arizona, the United States Supreme Court balanced the interests of the states in regulating the legal profession against the first amendment rights of both attorneys and consumers. Having recently extended first amendment protection to commercial speech, the Court in Bates held that attorney advertising is entitled to limited first amendment protection and, therefore cannot be subjected to blanket suppression. Although the Bates decision clearly curtailed state power in this area, the degree to which states could continue to regulate attorney advertising remained unclear.

In response to the Bates decision, all states and the District of Columbia revised their rules on attorney advertising to allow some media access. Nevertheless, most jurisdictions were unwilling to abandon the firmly entrenched restrictive approach to attorney advertising. Though some adopted rules that significantly facilitated attorney use of effective advertising means, the majority of jurisdictions adopted rules that narrowly limited attorney advertising in terms of content, format, and media. Typifying the more restrictive approach were the rules adopted by the State Supreme Court of Missouri.

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6. In Bates, the Court said, "We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system." Bates, 433 U.S. at 379. Therefore, the Court was not persuaded that the traditional justifications for advertising prohibitions adequately supported the resulting infringement on free speech rights. Id.


8. See infra notes 90-102 and accompanying text.

9. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Prior to this decision, commercial speech was not considered subject to first amendment protection. For a general discussion of this decision, see infra notes 72-81 and accompanying text.


12. See infra notes 27-67 and accompanying text.

13. Eighteen states and the District of Columbia generally allow "dignified" forms of truthful attorney advertising. See Andrews, supra note 11, at 809-10; for further discussion see infra note 117 and accompanying text.

14. Thirty states have adopted a "regulatory" approach that limits permissible attorney advertising to specified categories of information. Many states also limit attorney advertising to only certain forms of media. See Andrews, supra note 11, at 809. For a discussion of the "regulatory" approach, see infra notes 118-20 and accompanying text.

15. The Missouri attorney advertising rules allow an attorney to publish only 10 categories of information. Advertisements may be placed only in local print media. See Mo. Sup. Ct. R. 4. In addition, an addendum specified the terminology that can be used to describe an attorney's "area of practice" and provides that a listing of an area of practice must be accompanied by a disclaimer of expertise. See Mo. Sup. Ct. R. 4, Addendum III (Adv.
Recently, the United States Supreme Court considered the constitutionality of the revised Missouri rules in *In re R.M.J.* While finding these rules unconstitutional, the Court reassessed the scope of state power to regulate attorney advertising. The appellant in *R.M.J.* was a member of the Missouri bar who had recently opened a law office in St. Louis. To announce the opening of his office, he placed several advertisements in local newspapers and in the yellow pages. In addition, he mailed out professional announcement cards to a preselected list of addressees. Upon learning of these activities, the State Advisory Committee on Professional Ethics and Responsibilities filed an information in the Missouri Supreme Court that charged the appellant with violating the Missouri rules on attorney advertising. The Missouri Supreme Court, in a divided opinion, adopted the findings of the Advisory Committee and issued a private reprimand. Defenses based on the first and fourteenth amendments were summarily rejected by the court.

The United States Supreme Court held that the Missouri rules violated the free speech clause of the first amendment. The Court ruled that although a state always has a substantial interest in protecting the public from the potential deception that is inherent in attorney advertising, restrictions must be carefully drawn so as not to burden free speech unnecessarily. Thus, the standard emerging from *R.M.J.*, while limiting the ability of states to proscribe broad categories of attorney advertising, allows some state regulation of all forms of such advertising.


17. *Id.* at 206-07.
18. *Id.*
19. *Id.* at 196.
20. An "information" is an accusation that a person has engaged in some form of criminal conduct, presented to the court without an indictment. BLACKS LAW DICTIONARY (rev. 5th ed. 1979).
21. The appellant was charged with illegally publishing three advertisements that listed the courts in which he was admitted to practice, described his areas of practice, used terminology that was not approved by the state advisory committee, and that failed to include a disclaimer along with his area of practice description. *R.M.J.*, 455 U.S. at 197-98. In addition, he was charged with impermissibly sending professional announcement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives." *Id.* at 198 (quoting Mo. Sup. Ct. R. 4, DR 2-102).
22. The Missouri Supreme Court provided only a cursory rationale for its decision. *In re R.M.J.*, 609 S.W.2d 411, 412 (Mo. 1980).
23. *Id.*
25. *Id.* at 203.
26. *Id.*
This Note will discuss the development of attorney advertising prohibitions, focusing on the traditional justifications for restraints. It will describe how the Court's decision in *R.M.J.*, while correctly limiting state power to proscribe broad categories of attorney advertising, preserves an outdated distinction between attorney advertising and other forms of commercial speech. Finally, this Note will suggest that full application of general commercial speech standards to attorney advertising is a more reasoned alternative to the standard of review applied in *R.M.J.*

I. **TOTAL PROHIBITION OF ATTORNEY ADVERTISING**

A. **The Development of State Prohibition of Attorney Advertising**

Although the legal profession traditionally has been opposed to lawyer advertising, formal restrictions are relatively modern. The profession's abstinence from advertising can be traced to medieval English rules of professional etiquette. The close-knit legal fraternity of that time consisted almost entirely of members of the aristocracy who regarded the law "as primarily a form of public service in which the gaining of a livelihood was but an incident." Rules against advertising, mostly unwritten, were regarded as a way of maintaining professional dignity. In addition, there was a desire to protect the public from such abuses as barratry, champerty, and maintenance.

Having been incorporated into the traditions of the English legal profession, the practice of refraining from advertising was continued by the

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28. One author suggests that one of the original justifications for the legal profession's opposition to attorney advertising was to promote harmony within the profession. Because in medieval England, lawyers often lived and trained together at the Inns of Court, competitive advertising would have created friction among members of the bar. See H. Drinker, *supra* note 27, at 210.

29. *Id.* at 210.

30. As stated by Drinker, "Many of the most desirable clients, imbued with high respect both for their lawyer and his calling, would have no use for a lawyer who did not maintain the dignity and standards of his profession." *Id.* at 212.

31. "Barratry" is the offense of frequently stirring up quarrels and suits. BLACKS LAW DICTIONARY (rev. 5th ed. 1979).

32. "Champerty" describes the situation in which a stranger agrees to carry on a suit for one of the parties involved in return for a share of the eventual reward. *Id.*

33. "Maintenance" is any attempt by a stranger to maintain, promote, or support the litigations of another. *Id.*
founding members of the American bar who had trained in England.\textsuperscript{34} Under the guidance of these men, the practice of law was considered an elite profession in the late eighteenth and early nineteenth century America.\textsuperscript{35} During this same period, however, a political climate that was very hostile to professionalism began to emerge.\textsuperscript{36}

By the middle of the nineteenth century, there existed a widespread belief "that professions were undemocratic and un-American."\textsuperscript{37} This attitude greatly weakened the control that the organized bar had over the legal profession.\textsuperscript{38} As the bar's control decreased, so did educational and ethical standards for admission to the practice of law.\textsuperscript{39} Consequently, corruption in the courts and among members of the legal profession increased significantly.\textsuperscript{40} By the post-Civil War period, the once exclusive practice of law had been reduced in status to that of an ordinary trade.\textsuperscript{41}

It became apparent that a reorganization of the legal profession was necessary. Bar associations were developed to regain the lost honor and dignity of the profession.\textsuperscript{42} These early bar associations raised the educational standards for admission to the practice of law\textsuperscript{43} and formulated ethical standards of attorney conduct.\textsuperscript{44} Modeled after English traditions, these early ethical rules contained provisions for the regulation, but

\textsuperscript{34} Early members of the American bar often trained at the English Inns of Court, then returned to practice law in America. See H. DRINKER, supra note 27, at 210.
\textsuperscript{35} See Francis & Johnson, supra note 3, at 224.
\textsuperscript{36} Id.
\textsuperscript{37} See Comment, supra note 27, at 645 (quoting 5 R. POUND, JURISPRUDENCE 679 (1959)).
\textsuperscript{38} For a discussion of the weakening of the organized bar during this period, see Wickser, Bar Associations, 15 CORNELL L.Q. 390, 391-95 (1930).
\textsuperscript{39} In 1879, the first president of the Wisconsin Bar Association, Mr. Moses Strong, commented:
The older of you can remember when nothing less than seven years study was requisite to entitle an applicant to earn an examination for admission to the bar.
Now how changed! There are practically no prerequisites, of either knowledge of laws, or knowledge of anything else, as conditions of admission to the bar.
\textit{Id.} at 395.
\textsuperscript{40} See Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. C.R.-C.L. L. REV. 301, 304 (1970).
\textsuperscript{41} See Wickser, supra note 38, at 393-95.
\textsuperscript{42} The earliest bar associations were formed in the large urban centers where corruption was most acute. See Comment, supra note 40, at 304. The first bar association formed was the Association of Bar of the City of New York. See Wickser, supra note 38, at 396. The stated objective of this association was "to maintain the honor and dignity of the profession." \textit{Id.} From 1870 to 1878, 15 bar associations were formed for essentially this same purpose. \textit{Id.}
\textsuperscript{43} See Comment, supra note 40, at 305.
\textsuperscript{44} Id.
not the prohibition, of attorney advertising.45

Prohibition of virtually every form of advertising, however, was incorporated into the Canons of Professional Ethics, adopted by the American Bar Association (ABA) in 1908.46 To protect the public from deceptive practices and to promote professional dignity, canon 27 prohibited all forms of attorney advertising, direct and indirect, except the customary use of simple professional cards.47 This restrictive approach prohibited many forms of advertising that had been permitted under the earlier rules and considered proper by commentators of that time.48

Canon 27 was redrafted in 1937 to allow publication of professional cards in approved law lists.49 Later amendments enlarged the categories of information that could be published in the approved lists.50 In addition, some exceptions were made to allow recognized legal aid organizations freedom to promote their services,51 but the names of the lawyers participating in such organizations could not be published.52 Thus, individual

45. See, e.g., Alabama State Bar Association Code of Ethics (1887), reprinted in H. Drinker, supra note 27, at 356.
46. The primary control over attorney advertising was contained in canon 27, which stated: “The most worthy and effective advertisement possible, even for a young lawyer, and especially for his brother lawyer, is the establishment of a well merited reputation for professional capacity and fidelity. This cannot be forced, but must be the outcome of character conduct...” ABA CANONS OF PROFESSIONAL RESPONSIBILITY No. 27 (1908) as cited in H. Drinker, supra note 27, at 215. Canon 27 continued by prohibiting every form of attorney advertising except “ordinary simple business cards.” Id.
47. Id.
49. An approved law list was defined as follows: “[e]very list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment shall be deemed an approved law list.” RULES AND STANDARDS OF LAW LISTS R. 1 (1937) (amended 1941, 1942, 1944), reprinted in Sprecher, Ethical Advertising and Solicitation Law Lists, 72 COM. L.J. 209 (1967).
50. Canon 27 was amended in 1937, 1940, 1942, 1943, and 1951. By 1951, canon 27 allowed publication of the following information: name, associate’s names, telephone numbers, areas of practice, age, school attended, honors, legal publications, membership in various organizations, and references. H. Drinker, supra note 27, at 216.
51. The ABA Standing Committee on Professional Ethics and Grievances ruled on the propriety of advertisements by bar associations. The committee, in one opinion, made it clear that some advertising “which is calculated to teach laymen the benefits and advantages of preventative legal services” would be permissible. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 179 (1938). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 148 (1935) (allowing the American Civil Liberties League to Solicit clients to challenge new deal legislation); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 227 (1941) (allowing a local bar association to operate a lawyer reference service) (modified by ABA Comm. on Ethics and Professional Responsibility, Formal Op. 291 (1956)).
52. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 179, supra
attorneys and groups not recognized as traditional legal aid societies remained sharply constrained in their use of advertising means.

As a result of these advertising restrictions, the public received very limited information from the legal profession. Many people were unaware of their legal rights and did not know how to go about securing competent legal advice.\(^5\) When private groups were formed to help the public gain access to needed legal information, the organized bar's ethical proscriptions against advertising and solicitation often prevented such organizations from operating effectively.\(^4\)

Recognizing these problems, the United States Supreme Court, in a series of decisions beginning with *NAACP v. Button*,\(^5\) upheld the rights of legal assistance groups to solicit clients. In *Button*, the appellants, members of the NAACP, were arrested and convicted for soliciting plaintiffs to participate in school desegregation suits in violation of a Virginia antisolicitation statute based on canon 27.\(^5\) In reversing their convictions, the Court held that "the activities of the NAACP . . . [are] protected by note 51; see also [ABA Comm. on Ethics and Professional Responsibility, Formal Op. 205 (1940) (permitting a local bar association to form a panel of lawyers willing to serve indigent clients at a reduced fee provided that no lawyer's name was advertised)]."

5. Lewis F. Powell, Jr., President of the ABA from 1963 to 1964, recognized that: "far too many persons are not able to obtain equal justice under the law. This usually results because their poverty or their ignorance has prevented them from obtaining legal counsel." Francis & Johnson, *supra* note 3, at 229 n.43. Powell, who dissented in *Bates*, authored the R.M.J. opinion. See infra notes 89, 177-94 and accompanying text.

4. See, e.g., *In re Brotherhood of Trainmen*, 13 Ill. 2d 391, 150 N.E.2d 163 (1958) (interest of railroad union in helping members prosecute personal injury claims held insufficient to allow the union to engage in solicitation for individual lawyers); Hildebrand v. State Bar of Cal., 225 P.2d 508 (Cal. 1950) (participation by lawyers in labor union programs designed to help members procure legal assistance held to be a violation of professional ethics); *In re Maclub of America*, 3 N.E.2d 272 (Mass. 1936) (corporation which sold motorists memberships entitling the motorists, among other benefits, to legal assistance for actions arising out of ownership and operation of automobiles held to have illegally engaged in the practice of law).

5. 371 U.S. 415 (1963). Later decisions included: United Transp. Workers v. State Bar of Mich., 401 U.S. 576 (1971) (where the Court allowed a union not only to recommend and retain attorneys, but also to transport the union members to the attorney's office and guarantee that the fee charged would not be above 25% of the recovery); United Mine Workers v. Illinois State Bar, 389 U.S. 217 (1967) (extending to unions the right to retain lawyers to handle members' claims); and Brotherhood of Trainmen v. Virginia *ex rel.* Virginia State Bar Ass’n, 377 U.S. 1 (1964) (upholding the Trainmen Union's right to recommend lawyers in work injury claims).

56. The antisolicitation statute in *Button* extended canon 27's prohibition against solicitation to any attorney who accepted employment in connection with an action from any person who is not a party and who does not have a pecuniary interest in the proceeding. Canon 27 also made it illegal for any person or group to solicit business for an attorney. *Button*, 371 U.S. at 423-25.
First and Fourteenth Amendments. Thus, the *Button* decision questioned the constitutionality of the canon's broad ethical proscriptions as applied to advertising by nontraditional legal service groups.

Anticipating the effect that *Button* would have on enforcement of its antiavertising policies, the ABA established a special committee to review the Canons of Professional Ethics and to recommend appropriate changes. As a result of the committee's efforts, the Canons were re-drafted in 1969 and became part of the Model Code of Professional Responsibility (Code).

The Code specifically recognized the need to make legal information more available to the public. Lawyers were encouraged to participate in group activities designed to educate laymen and to support programs designed to make legal assistance more accessible. Nevertheless, individual attorney advertising designed to solicit clients was still considered unethical. Disciplinary Rule 2-101 prohibited an attorney from advertising in any form of “public communications” media. Even the mailing of professional announcement cards to prospective clients, a practice that had not been formally prohibited by the Canons, was banned by the Code. These restrictions on attorney advertising were based upon the belief that attorney advertising was inherently misleading and beneath the dignity of the profession, a view embodied in canon 27 and supported by the courts. But these values were soon challenged by consumer groups and

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57. Id. at 428-29.
58. *Board of Governors' Recommendation Re Creation of a Special Committee on Ethical Standards*, 89 ABA REP. 381, 383 (1964).
60. The new Code consisted of three interrelated components: general statements of professional conduct, referred to as “Canons”; aspirational objectives termed “Ethical Considerations”; and mandatory guidelines of minimum conduct, called “Disciplinary Rules.”
61. Canon 2 of the Code states “A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.”
63. *See supra* note 4.
65. DR 2-102(A)(2) of the Code allowed only for the mailing of professional announcement cards to “lawyers, clients, former clients, personal friends, and relatives.”
67. These values were expressed by the New Jersey Supreme Court in *In re Braun*, 293 A.2d 186 (1972). The defendant was a member of the New Jersey bar who, upon opening a branch office to his existing firm, mailed announcement cards to approximately 1,000 area
others interested in the beneficial informational aspects of attorney advertising.

B. Total Bans on Attorney Advertising are Challenged

Traditionally, the bar has cited the need to protect the public as the primary justification for bans on attorney advertising. 68 The ever-increasing concern for the development of more fully informed consumers during the 1970's, 69 however, eroded the legitimacy of this justification. One national survey found that 83% of the public believed that people refrained from contacting attorneys because they could not determine which members of the profession were competent to handle their particular legal problem. 70 As it became increasingly clear that the advertising ban was not necessarily in the public interest, the constitutional validity of the ban came under attack in the courts. 71

The constitutional argument against the advertising ban was based on the United States Supreme Court's then recent extension of first amendment protection to commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. 72 The appellees in Virginia Phar-
macy, members of a consumers' union, challenged a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs. The appellees asserted that first amendment free speech protections extend to the consumer's right to receive a free flow of commercial information. Therefore, they contended that the ban on prescription advertising was unconstitutional.

Writing for the majority, Justice Blackmun acknowledged that consumers have a first amendment interest in receiving accurate commercial information. Justice Blackmun noted, however, that the state has a substantial interest in regulating advertising by pharmacists, based on the need to maintain a high level of professionalism. The Court reconciled these competing interests by employing a balancing test to weigh the first amendment interests of the consumers against the state interest in regulating professional pharmacists. The Court concluded that although a fundamental difference exists between commercial speech and ideological speech, the first amendment precludes a state from completely suppressing the dissemination of concededly truthful advertisements. Virginia Phar-

lishing a proabortion advertisement. Id. at 811. In overturning his conviction, the Court suggested that purely commercial speech might be entitled to some first amendment protection. Id. at 818-21. Because the decision was based on the advertisement's ideological content rather than its commercial content Christensen was not overruled. Id. at 820-29. Nevertheless, the Bigelow Court's suggestion that it might have been willing to extend to advertisements limited first amendment protection independent of their ideological content was a significant departure from precedent and a sign of a changing attitude toward commercial speech.

73. Virginia Pharmacy, 425 U.S. at 753-54.
74. Id. at 754.
75. The Court stated that "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information . . . ." Since the dissemination of commercial information is important to "private economic decisions," the Court reasoned that advertising is entitled to some limited measure of first amendment protection. Id. at 765.
76. Id. at 766.
77. Because the state interest in protecting the public was determined to rest "on the advantages of their being kept in ignorance," the Court found them inadequate to support the prohibition. Id. at 769. In evaluating the weight of the interests involved, the Court noted: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." Id. at 770.
78. The distinction between commercial speech and ideological speech was noted in a footnote to the decision. Note 24 reads in pertinent part:

There are common sense differences between speech that does 'no more than propose a commercial transaction' . . . and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless . . . a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired.

Id. at 771 n.24 (citation omitted).
macy was the first instance in which the Supreme Court recognized commercial speech as a form of constitutionally protected communication.\textsuperscript{79} As such, \textit{Virginia Pharmacy} represented a significant step in the development of constitutional protection for attorney advertising.

Although the extension of first amendment protection to commercial speech signalled that state power to regulate attorney advertising was abating, the \textit{Virginia Pharmacy} decision did not address this specific issue. In a footnote to the opinion, the Court indicated that the historical and functional differences between attorneys and pharmacists might require consideration of “quite different factors” if an attorney were to advertise.\textsuperscript{80} Since attorneys do not sell a standardized product, the Court reasoned, there would be an “enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.”\textsuperscript{81} It was unclear, therefore, whether attorney advertising would be entitled to first amendment protection under this newly formulated commercial speech doctrine.

\textbf{C. The Extension of Limited First Amendment Protection to Attorney Advertising}

A challenge to attorney advertising based in part on first amendment considerations, however, was soon before the Court. In \textit{Bates v. State Bar of Arizona},\textsuperscript{82} the petitioners were members of the Arizona bar who had advertised their fees for routine legal services in a Phoenix newspaper. Such advertising violated the Arizona statutory attorney advertising ban.\textsuperscript{83} The petitioners challenged the Arizona rules on the grounds that they violated both the Sherman Antitrust Act\textsuperscript{84} and the first amendment right of free speech. The Supreme Court of Arizona rejected these challenges and imposed disciplinary sanctions.\textsuperscript{85}

\textsuperscript{79} See infra note 72.
\textsuperscript{80} 425 U.S. at 773 n.25.
\textsuperscript{81} Id.
\textsuperscript{82} 433 U.S. 350 (1977).
\textsuperscript{83} Arizona had incorporated DR 2-101(B) of the Model Code in Rule 29(a) of the Supreme Court of Arizona as follows:

\begin{quote}
(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 or commercial publicity, nor shall he authorize or permit others to do so in his behalf.
\end{quote}


The United States Supreme Court affirmed in part and reversed in part. The Court unanimously upheld the Arizona Supreme Court’s rejection of the antitrust challenge, reasoning that the Arizona disciplinary rules were exempt from federal antitrust regulation under the “state action” exemption established in Parker v. Brown. In a divided opinion, however, the Court sustained the first amendment challenge, basing its decision on the rights of consumers to receive a free flow of commercial information as established in Virginia Pharmacy.

In sustaining the first amendment challenge, the Court rejected many of the traditional justifications forwarded by the bar in opposition to advertising. The Court dismissed, for example, the claim that advertising would have an adverse effect on professionalism on the grounds that such a claim was inapplicable to modern society. Recognizing the original basis for the bar’s opposition to advertising, the Court concluded that “[s]ince the

immune from federal antitrust regulations. In re Bates, 555 P.2d at 643. See infra note 88 for a discussion of the “state action” exemption. In rejecting the constitutional attack, the court noted that in Virginia Pharmacy the Supreme Court had expressly reserved judgment on the question of whether attorney advertising was entitled to first amendment protection. Id. at 649. See supra notes 80-81 and accompanying text.


87. The Court held that the Arizona attorney advertising regulations were “shielded from the Sherman Act by the state action exemption . . . .” Id. at 357. See infra note 88 for a discussion of the state action exemption.

88. 317 U.S. 341 (1943). Parker involved a California raisin producer who brought suit to enjoin the California Director of Agriculture from establishing a marketing program that would restrict the sale of his raisins. In reversing the lower court’s decision to issue the injunction, the Supreme Court distinguished acts which are performed by state officials acting under color of state law from acts of private individuals. The former were held immune from federal antitrust regulations because the commerce clause, on which the antitrust regulations are based, does not prohibit state regulation of local concerns. Id. at 359, 368.

89. Bates, 433 U.S. at 363-85 (Burger, C.J., Stewart, Powell, & Rehnquist, J.J. dissenting). Chief Justice Burger argued that Virginia Pharmacy was distinguishable because legal services, unlike drugs, are not standardized products. Id. at 386. He claimed that advertising of legal services therefore “can never give the public an accurate picture on which to base its selection of an attorney.” Id. at 386.

Justices Powell and Stewart joined in a separate dissent, also arguing that the standardized product distinction should control. Id. at 390-91. They contended that because legal services are not standardized, attorney advertising will inevitably “mislead many who respond to it.” Id. at 394 (Powell, J., dissenting).

In a lone dissent, Justice Rehnquist argued that all commercial speech falls outside the scope of first amendment protection. Id. at 404-05 (Rehnquist, J., dissenting).

90. In all, the Court rejected six separate justifications advanced by the state to support its advertising restrictions: (1) The adverse effect on professionalism, id. at 368-72; (2) the inherently misleading nature of attorney advertising, id. at 372-75; (3) the adverse effect on the administration of justice, id. at 375-77; (4) the undesirable economic effects of advertising, id. at 377-78; (5) the adverse effect of advertising on the quality of service, id. at 378-79; and (6) the difficulties of enforcing less than a total ban, id. at 379.

91. Id. at 368-72. The Court noted that today many professionals, including bankers
belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for advertising restraint has crumbled.\textsuperscript{92}

A second justification for advertising restraint that was rejected by the Bates Court was the contention that advertising of legal services would be inevitably misleading to the public.\textsuperscript{93} The Court reasoned that this argument was based on the presumption that the public "is not sophisticated enough to realize the limitations of advertising."\textsuperscript{94} This presumption was seen as an underestimation of the public.\textsuperscript{95} But, even assuming this presumption to be valid, the Court concluded that the preferred remedy would be more exposure, rather than less.\textsuperscript{96}

The Court also rejected claims that advertising would have adverse effects on the quality and price of legal services, and ultimately on the administration of justice.\textsuperscript{97} Such claims, the Court reasoned, are unproven and of questionable validity.\textsuperscript{98} A final claim that the state would be unduly burdened by having to regulate closely attorney advertising if its total ban was overturned was summarily rejected.\textsuperscript{99} Finally, the court bal-

\begin{itemize}
  \item and engineers, advertise and that these professions are not considered undignified. \textit{Id.} at 369-70.
  \item \textsuperscript{92} \textit{Id.} at 371-72. \textit{See supra} notes 27-48 and accompanying text for a discussion of the historical basis for attorney advertising restraints.
  \item \textsuperscript{93} The state argued that the advertising of legal services would be inevitably misleading:
    \begin{itemize}
      \item (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement,
      \item (b) because the consumer of legal services is unable to determine in advance just what services he needs, and
      \item (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.
    \end{itemize}
    \textit{Id.} at 372.
  \item \textsuperscript{94} \textit{Id.} at 375.
  \item \textsuperscript{95} The Court stated: "We suspect the argument rests on an underestimation of the public." \textit{Id.}
  \item \textsuperscript{96} \textit{Id.}
  \item \textsuperscript{97} Advertising restrictions were seen as a particularly ineffective way of deterring shoddy legal services. \textit{Id.} at 378.
  \item \textsuperscript{98} The claim that advertising would have an undesirable economic impact on consumers was dismissed because the advertising ban was found too anticompetitive. Thus, it was reasoned that the advertising ban prevented consumers from effectively locating low cost legal services and allowing market mechanisms to operate. \textit{Id.} at 377-78.
  \item \textsuperscript{99} The claim, specifically, was that advertising would tend to promote increased litigation and thus have a detrimental effect on the judicial process. The Court counterbalanced this assertion by relying on studies showing that information about legal services was sorely needed by the public. \textit{Id.} at 376.
  \item \textsuperscript{100} \textit{See supra} notes 94-99 and accompanying text.
  \item \textsuperscript{101} The Court reasoned that it was "at least somewhat incongruous for opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." 433 U.S. at 379.
\end{itemize}
anced the beneficial impact that attorney advertising would have on public access to legal information against all of the asserted adverse consequences and concluded that the asserted consequences could not support total proscription.102

Although the Bates Court clearly limited state power over attorney advertising, the final holding was extremely narrow.103 To emphasize the limited scope of its decision, the Court specifically stated that states would remain free to regulate certain types of attorney advertising. Advertising that was false, misleading, or deceptive would continue to be subject to state proscription.104 As with other types of commercial speech, reasonable time, manner, and place restrictions would also be allowed.105

To emphasize the narrowness of its holding further, the Bates Court expressly recognized some of the important questions left unanswered by its decision. These included the permissibility of state prohibition of in-person solicitation,106 and the permissible scope of state regulation, short of proscription, of attorney advertising.107 Therefore, although Bates was the first case to limit expressly state power over individual attorney advertising, the degree of first amendment protection actually extended to attorney advertising remained vague.

II. Modern Regulations and Challenges

A. Revised Regulations

Following the Bates decision, the ABA established a task force to revise its attorney advertising ban.108 Within two months of the Bates decision, the task force had formulated two proposed amendments to Disciplinary Rule 2-101 of the Code,109 the provision that regulated attorney advertising. The two proposals differed significantly in terms of the degree of control that states would exercise over attorney advertising. The first,

102. Id.
103. The Court stated: "The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants truthful advertisement concerning the availability and terms of routine legal services." Id. at 384.
104. Id. at 383-86.
105. Id. at 383-84.
106. Id.
107. The Court specifically indicated that it had not addressed "advertising claims as to the quality of services." Id. at 383. In addition, the Court indicated that its present decision did not foreclose states' imposition of warning and disclaimer requirements. Id. at 384.
108. See Welsh, Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation, 30 BAYLOR L. REV. 585 (1978). A brief treatment of the history behind the adoption of the revised rules is provided. Id. at 600-03.
109. See Welsh, supra note 108, at 603.
Proposal A, was termed "regulatory" because it limited advertising to certain prespecified content. Proposal A contained a list of information that an attorney would be permitted to include in an advertisement of legal services. If an attorney published information that was not included on the approved list, he or she would be subject to disciplinary action.

Proposal B, in contrast, was described as "directive," because it only prohibited advertisements that were "false, fraudulent, misleading, or deceptive." Some guidelines for determining when an advertisement was deceptive were included, but these were general in form. Therefore, under proposal B, an attorney would be much freer to choose the types of information to be included in his or her advertisement. Discipline would be imposed only if the advertisement was actually found to be false or deceptive. Ultimately, the ABA adopted proposal A. Both proposals, however, were circulated to individual states to be considered for adoption into state law.

Because the Bates Court had left the scope of permissible state regulation of attorney advertising unclear, the rules eventually adopted by the states varied widely from jurisdiction to jurisdiction. A minority of jurisdictions adopted proposal B type regulations that allow attorneys to utilize more fully available advertising means. The majority of states, however, adopted versions of proposal A. In general, these regulations specify what forms of attorney advertising will be allowed and prohibit any

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110. **Model Code of Professional Responsibility** DR 2-101 (Proposal A Discussion Draft 1977), reprinted in Welsh, supra note 108, at 600-01. Among the items included were: name, field of practice, birthdate, date of admission to the bar, schools attended, public or quasi public offices held, legal authorships, fees for initial consultations, range of fees, and hourly rate. Id.

111. Id.


113. For example, under Proposal B, an advertisement is considered misleading if it: contains a misinterpretation of fact; fails to state any material fact necessary to make the statement, in light of all circumstances, not misleading; is intended or likely to create an unjustified expectation; or appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotions. Id.

114. Id.

115. See Welsh, supra note 108, at 603.

116. Id.


118. E.g., Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Tennes-
variation therefrom. But the regulations of this group differ from state to state in terms of the content, format, and form of media that are permissible.

The Supreme Court of Missouri adopted one of the most restrictive of the proposal A type regulations. The Missouri rules list ten specific categories of information that may be included in a legal advertisement and prohibit the inclusion of any additional information. Attorney advertisements may be placed only in "newspapers, periodicals, and the yellow pages of telephone directories." In an addendum, the terminology that


122. The Missouri rules allowed a lawyer to publish the following information:
(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;
(2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by The Advisory Committee;
(3) Date and place of birth;
(4) Schools attended, with dates of graduation and degrees;
(5) Foreign language ability;
(6) Office hours;
(7) Fee for an initial 30-minute consultation;
(8) Availability upon request of a schedule of fees;
(9) Credit arrangements for payment of fees will be given consideration;
(10) The fixed fee to be charged for the following specific routine legal services:
   1. An uncontested dissolution of marriage;
   2. An uncontested adoption;
   3. An uncontested personal bankruptcy;
   4. An uncomplicated change of name;
   5. A simple warranty or quietclaim deed;
   6. A simple deed of trust;
   7. A simple promissory note;
   8. An individual Missouri or federal income tax return;
   9. A simple power of attorney;
   10. A simple will;
   11. Such other services as may be approved by The Advisory Committee; the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Id.

123. Id.
an attorney may use in advertising his area of practice is specified. In addition, the addendum requires that any listing of an area of practice be accompanied by a disclaimer of certified expertise. Because the Missouri rules prohibit advertisements that are entirely truthful and nondeceptive, their constitutional validity has been questioned almost from their inception.

B. Post-Bates Challenges

Until recently, the constitutionality of state "regulatory" rules, including those of Missouri, has escaped review by the United States Supreme Court.

124. The addendum reads in pertinent part:
1. 'General Practice'
2. 'General Criminal Practice'
3. 'General Civil and Criminal Practice'
   If a lawyer or law firm uses one of the above, no other area can be used . . . . If one of the above is not used, then a lawyer or law firm can use one or more of the following:
   1. 'Administrative Law'
   2. 'Anti-Trust Law'
   3. 'Appellate Practice'
   4. 'Bankruptcy'
   5. 'Commercial Law'
   6. 'Corporation Law and Business Organizations'
   7. 'Criminal Law'
   8. 'Eminent Domain Law'
   9. 'Environment Law'
   10. 'Family Law'
   11. 'Financial Institution Law'
   12. 'Insurace Law'
   13. 'International Law'
   14. 'Labor Law'
   15. 'Local Government Law'
   16. 'Military Law'
   17. 'Probate and Trust Law'
   18. 'Property Law'
   19. 'Public Utility Law'
   20. 'Taxation Law'
   21. 'Tort Law'
   22. 'Trial Practice'
   23. 'Workers Compensation.'
   No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.
   If one or more of these specific areas of practice are used in any advertisement, the following statement must be included . . . .: 'Listing of the above areas of practice does not indicate any certification of expertise therein.'


125. Id.

126. See Welsh, supra note 108, at 612.
The Court provided some guidance as to the scope of permissible state regulation of attorney advertising by its decisions in related areas of the law. The permissibility of state proscription of in-person solicitation by lawyers, a question specifically left open in *Bates*, was upheld.\(^2\) The Court also allowed state prohibition of professional advertisements when there is a demonstrated history of abuse.\(^2\) Finally, a new analysis was formulated for commercial speech that appears to require a more precise balance of the competing interests involved.\(^2\) These decisions, while not specifically overruling the state "regulatory" rules, when read together, cast doubt on their constitutional validity.\(^3\)

1. Attorney Solicitation

In *Ohralik v. Ohio State Bar Association*,\(^3\) the Supreme Court addressed state prohibition of in-person solicitation. In *Ohralik*, an Ohio attorney had solicited the business of two automobile accident victims while they were hospitalized. Both agreed to his representation but later discharged him and filed a complaint with the local bar grievance committee.\(^4\) A state disciplinary board charged the lawyer with violation of the Ohio statutory rules forbidding in-person solicitation.\(^5\) The Ohio Supreme Court adopted the board's findings and issued an indefinite suspension.\(^6\)

The United States Supreme Court upheld the sanction,\(^7\) reasoning that the in-person solicitation of clients poses significant potential public harm

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129. *See Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557 (1980). The new commercial speech analysis requires that for any nonmisleading commercial speech to be subject to state regulation, the state must first assert a substantial interest justifying the regulation. Then, the state must show that the regulation is narrowly drawn to promote the asserted interest without burdening the flow of commercial information any more than is reasonably necessary. *Id.* at 561-66. For a further discussion of this decision, see infra notes 151-65 and accompanying text.
130. *See Welsh, supra* note 108, at 611.
132. *Id.* at 453.
133. DR 2-103(A) of the Ohio Code of Professional Responsibility provided in relevant part: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." *OHIO CODE OF PROFESSIONAL RESPONSIBILITY*, as amended by Ohio Sup. Ct. Order effective Nov. 28, 1977.
134. Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976).
that does not exist in other professional advertising.\textsuperscript{136} Distinguishing \textit{Bates}, the Court noted the private nature of in-person solicitation and consequent difficulties in post-hoc proof of wrongdoing.\textsuperscript{137} However, it was the "potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment,"\textsuperscript{138} demonstrated by the facts in \textit{Ohralik}, the Court concluded, that justified state imposition of proscriptive regulations.\textsuperscript{139} Thus, the difference in treatment between attorney advertising and in-person solicitation, implied by the \textit{Bates} Court, was made express in \textit{Ohralik}.

2. \textit{Professional Use of Trade Names}

Although professional advertising is considered less dangerous than in-person solicitation, the Court has allowed a state to prohibit the use of trade names in professional advertising when there is a demonstrated history of their deceptive use. In \textit{Friedman v. Rogers},\textsuperscript{140} the petitioner, an optometrist, challenged a Texas law that forbade the use of "trade names" by optometrists.\textsuperscript{141} The rule was designed to prevent optometrists from purchasing the practices of other optometrists and continuing the practice under a trade name.\textsuperscript{142} In Texas, large commercial chains of optometrist shops had developed, with all of the shops in an individual chain practicing under the same trade name in an attempt to convey the impression of uniform care.\textsuperscript{143} Rogers, who owned eighty-two shops, brought an action in federal district court, claiming that the law violated his first and fourteenth amendment rights.\textsuperscript{144} The district court employed a balancing test to sustain Roger's challenge, concluding that the first amendment rights of the optometrist precluded state prohibition of his use of trade names.\textsuperscript{145}

\begin{itemize}
  \item \textsuperscript{136} Id. at 464-66.
  \item \textsuperscript{137} Id. at 466. The Court reasoned that because in-person solicitation is usually a private transaction between the lawyer and the prospective client, it is often difficult to obtain reliable proof of what actually took place. \textit{Id}.
  \item \textsuperscript{138} Id. at 468. The Court argued that the dangers of overreaching, recognized in the face-to-face selling of ordinary consumer goods, "is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." \textit{Id}. at 464-65.
  \item \textsuperscript{139} Id. at 468.
  \item \textsuperscript{140} 440 U.S. 1 (1979).
  \item \textsuperscript{141} Id. at 6.
  \item \textsuperscript{142} Id. at 14-15.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Rogers v. Friedman, 438 F. Supp. 428 (E.D. Tex. 1977).
  \item \textsuperscript{145} The district court found that the state interests in preserving the doctor-patient relationship, maintaining the standards of quality eye care, and protecting against the inherent potential for deception that is involved in practicing under an assumed name did not outweigh Roger's right to commercial free speech. \textit{Id}. }
\end{itemize}
The United States Supreme Court reversed.\textsuperscript{146} The first amendment protection that it had recently extended to commercial speech in \textit{Bates}\textsuperscript{147} and \textit{Virginia Pharmacy}\textsuperscript{148} was held to be inapplicable because trade names, unlike price information, have no intrinsic meaning and thus present a greater potential for abuse.\textsuperscript{149} In addition, the Court noted that there was a demonstrable history of deceptive trade name use in Texas.\textsuperscript{150} Thus, the Court in \textit{Ohralik} and \textit{Rogers} suggested that when the inherent or proven potential for public harm was greater than in \textit{Bates}, states would be permitted to prohibit advertising and solicitation practices. Nevertheless, it remained unclear what measures states could take, short of prohibition, in an attorney advertising case in which there was no special increased potential for public harm.

3. \textit{A New Commercial Speech Standard}

Although the scope of state authority to regulate attorney advertising remained vague, the permissible limit of state regulation of general commercial speech was determined by the Supreme Court in \textit{Central Hudson Gas v. Public Service Commission}.\textsuperscript{151} In \textit{Central Hudson}, the Supreme Court developed an analytical framework that significantly clarified the degree of protection to be afforded commercial speech.\textsuperscript{152} The regulation challenged in \textit{Central Hudson} was a New York Public Service Commission prohibition of all advertisements "intended to stimulate the purchase of utility services."\textsuperscript{153} The state justified the ban both as part of the national effort to conserve energy and as a method of preventing increases in the state's utility rates. \textit{Central Hudson}, a New York public utility company, challenged the prohibition in state courts but was unsuccessful at all levels of review.\textsuperscript{154}

\textsuperscript{146} \textit{Rogers}, 440 U.S. at 19.
\textsuperscript{147} \textit{See supra} notes 82-107 and accompanying text.
\textsuperscript{148} \textit{See supra} notes 72-81 and accompanying text.
\textsuperscript{149} The Court, in distinguishing the prior commercial speech cases, stated "Here, we are concerned with a form of commercial speech that has no intrinsic meaning." Because any meaning that a trade name may have acquired through association with price and quality of a particular service, and because this association can be manipulated by the merchant, "there is a significant possibility that trade names will be used to mislead the public." \textit{Rogers}, 440 U.S. at 13-15.
\textsuperscript{150} \textit{Id.} at 17-18.
\textsuperscript{151} 447 U.S. 557 (1980).
\textsuperscript{152} \textit{See infra} notes 159-64 and accompanying text.
\textsuperscript{153} \textit{Central Hudson}, 447 U.S. at 559.
\textsuperscript{154} Consolidated Edison Co. v. Public Serv. Comm'n, 63 A.D.2d 364, 407 N.Y.S.2d 735, \textit{aff'd}, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979). The New York Supreme Court found that the compelling state interest in energy conservation outweighed the asserted first amendment interests. 407 N.Y.S.2d at 738. The court of appeals held that com-
On appeal, the United States Supreme Court reversed in a divided opinion. Consistent with Virginia Pharmacy, the Court stated that commercial speech was not entitled to the same level of constitutional protection as ideological speech. Nevertheless, "the informational function of advertising" requires that commercial speech be given some protection. To test the permissibility of the New York regulation against this protection, the Court set forth a four part analysis.

Because the protection afforded commercial speech is based on the right of the consumer to have free access to information, the first step in the Central Hudson test is to determine whether the commercial message is more likely to deceive than inform. If so, it is not entitled to any first amendment protection. If the message is informative, however, the second step requires the state to show a substantial interest to support any restriction. Assuming a substantial state interest, the third step requires that the restriction must directly, as opposed to "remotely," advance that interest. Finally, that restriction must be narrowly drawn so as not to hinder the flow of information any more than is reasonably necessary to

155. Central Hudson, 447 U.S. 557. Justice Powell wrote the majority opinion. He was joined by Chief Justice Burger and Justices Marshall, Stewart and White. Justice Blackmun concurred in the judgment but expressed dissatisfaction with the limited protection that the majority's analysis afforded commercial speech. Id. at 573 (Blackmun, J., concurring in the judgment). Accurate commercial speech, he reasoned, should be protected from state suppression, absent only a "clear and present danger." Id. at 575. Justice Stevens concurred on the narrower ground that the public utility's advertising ban infringed on more than purely commercial speech. Id. at 579 (Stevens, J., concurring in the judgment). He therefore found the ban over-inclusive. Id. at 580. In a sole dissent, Justice Rehnquist found the majority analysis overly protective of commercial speech. Id. at 584-85 (Rehnquist, J., dissenting). He argued that the new analysis was "virtually undistinguishable" from the protection afforded noncommercial expression. Id. at 591. He reasoned that the "concededly substantial state interest" of energy conservation outweighed the concern for a "free flow of information." Id. at 588-606. Accordingly, he concluded that the Court's holding therefore intruded upon the state's legitimate power of economic regulation. Id. at 605-06.

156. This distinction, according to the Court is based on "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." Central Hudson, 447 U.S. at 562 (quoting Ohralik, 436 U.S. at 455-56).

157. Id. at 563.

158. See infra notes 159-64 and accompanying text.

159. Central Hudson, 447 U.S. at 563.

160. Id.

161. Id. at 564.

162. Id.

163. Id.
promote the asserted state interest.\textsuperscript{164}

Using this analytical framework, the Court struck down the New York ban.\textsuperscript{165} Because the subject matter addressed in \textit{Central Hudson} did not concern attorney advertising, however, the application of the newly formulated test to this area remained uncertain. As the decisions in \textit{Bates} and \textit{Virginia Pharmacy} had indicated, there clearly was a difference between the treatment given to attorney advertising and that given commercial advertising in general.\textsuperscript{166} The Court based this difference on what it perceived to be a greater potential for deception in attorney advertising.\textsuperscript{167} Although the \textit{Central Hudson} Court did not indicate whether this justification would be taken into account by its new standard, the issue was soon before the Court in \textit{In re R.M.J.}.\textsuperscript{168}

\textbf{III. \textit{In re R.M.J.}}

\textbf{A. The Supreme Court's New Attorney Advertising Standard}

The appellant in \textit{R.M.J.} was a St. Louis attorney who had inadvertently violated the Missouri attorney advertising rules. In his efforts to publicize the opening of his law office, he had mailed professional announcement cards to a preselected list of people and law firms. In addition, he had placed several advertisements in the local newspapers and yellow pages. These advertisements, although entirely truthful, contained information and descriptive terminology that were not permitted under the Missouri rules.\textsuperscript{169} The publicity, which described his areas of practice, also failed to provide a disclaimer of expertise, as required by a recent statutory addendum.\textsuperscript{170} On the basis of these promotional activities, the state Advisory Committee on Professional Ethics and Responsibilities filed an informa-

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} at 566. The Court indicated that it would not allow any state restriction on commercial speech to stand if the state could achieve the same result by a less intrusive restriction. \textit{Id.} at 571-72.
\item \textsuperscript{165} \textit{Id.} at 566-71.
\item \textsuperscript{166} In \textit{Bates}, the Court stated that the public's lack of knowledge about legal services and the lack of a standardized "product" made control of deceptive attorney advertising more necessary than control of inaccuracy in a general commercial message. \textit{Bates}, 433 U.S. at 383-84.
\item In \textit{Virginia Pharmacy} the Court indicated that the historical difference between the professions and the lack of standardized legal "product" might make the general commercial speech protection inapplicable to "certain types of advertising" by attorneys. \textit{Virginia Pharmacy}, 425 U.S. at 773 n.25.
\item \textsuperscript{167} \textit{Id.}, 425 U.S. at 773.
\item \textsuperscript{168} 455 U.S. 191 (1982).
\item \textsuperscript{169} See \textit{supra} notes 121-25 and accompanying text for a discussion of the relevant Missouri rules.
\item \textsuperscript{170} See \textit{supra} note 124 and accompanying text.
\end{itemize}
tion in the Supreme Court of Missouri, charging unprofessional conduct and seeking disbarment. In response, the attorney argued that the Missouri rules unconstitutionally violated his freedom of speech under the new commercial speech standard established in Central Hudson.

The Supreme Court of Missouri, in a divided opinion, upheld the constitutionality of the Missouri rules. However, the majority provided only a cursory opinion to support its decision. The majority simply stated that when the Missouri rules were carefully revised after the Bates decision, there was every reason to believe that they would be constitutional, and refused to discuss the application of the Central Hudson test. Thus framed, the Supreme Court was presented with a clear opportunity to determine how its new commercial speech standard would apply to attorney advertising restrictions.

The United States Supreme Court in R.M.J., applying a refined version of the Central Hudson test, held the Missouri rules to be unconstitutional. Justice Powell, writing for a unanimous Court, began by describing how the narrow holding in Bates had extended only limited commercial speech protection to attorney advertising. The Bates Court, it was emphasized, had expressly allowed attorneys only “to advertise the fees they charge for ‘routine’ legal services.” The Court then explained why attorney advertising should be entitled to less first amendment protection than other forms of commercial speech.

First, as it had done in the Bates decision, the Court assumed the pub-

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171. See supra note 20.

172. The information charged that R.M.J. had listed areas of practice not specified in the addendum, listed information that was not included on the approved list, and had not included the required disclaimer of expertise. In addition, it was charged that the mailing of professional cards to prospective clients was in violation of rules that specified the permissible use of professional announcement cards. R.M.J., 455 U.S. at 198.

173. Id. at 198. See supra notes 151-67 and accompanying text.

174. In re R.M.J., 609 S.W.2d 411 (Mo. 1980). Chief Justice Bardgett dissented, reasoning that the defendant’s conduct was not unethical, and that the Missouri rules should be interpreted as suggested guidelines rather than mandatory restrictions. In addition, he believed that Central Hudson would not fully apply to attorney advertising. Judge Sciler, in a separate dissent, argued that Central Hudson was applicable, and that its application made the Missouri restrictions unconstitutional.

175. Id. at 412.

176. The majority stated “[w]e respectfully decline to enter the thicket of attempting to anticipate and to satisfy the subjective ad hoc judgments of a majority of the justices of the United States Supreme Court.” Id.


178. Justice Powell, who dissented in Bates noted that the extension of first amendment protection to attorney advertising was limited by the narrowness of the Bates decision. Id. at 200. See supra notes 105-09 and accompanying text.

179. R.M.J., 455 U.S. at 199.
lic's lack of legal knowledge.\textsuperscript{180} This lack of knowledge, the Court reasoned, increases the potential for deception in legal advertising.\textsuperscript{181} The Court stated that together with the public's lack of knowledge, "the limited ability of the professions to police themselves and the absence of any standardization in the 'product'" cause attorney advertising to be potentially more deceptive than other forms of commercial speech.\textsuperscript{182} Therefore, the Court concluded that attorney advertising is potentially more harmful to the public.\textsuperscript{183}

Next, the Court distinguished the methods that are available to a state to control potential harm from those that are available to prevent actual harm: advertising that is deceptive and therefore actually harmful to the public may be prohibited entirely by a state.\textsuperscript{184} But, noting the Bates decision, the Court said that "the state may not place an absolute prohibition on certain types of potentially misleading information."\textsuperscript{185} According to the R.M.J. Court, however, even though attorney advertising is not actually misleading, the state retains some authority to regulate. Perceiving a strong potential for deception and confusion, the Court implied that some restrictions will be allowed over all forms of attorney advertising,\textsuperscript{186} so long as the restrictions are "no broader than reasonably necessary to prevent the deception."\textsuperscript{187}

\textsuperscript{180} The Court stated that "[b]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising, may be found quite inappropriate in legal advertising." \textit{id.} at 200 (quoting Bates, 433 U.S. at 383).

\textsuperscript{181} \textit{id.} at 200-02.

\textsuperscript{182} \textit{id.} at 202.

\textsuperscript{183} \textit{id.}

\textsuperscript{184} \textit{id.} at 203.

\textsuperscript{185} \textit{id.}

\textsuperscript{186} The Court summarized the commercial speech doctrine, in the context of attorney advertising, as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, \textit{e.g.}, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in Bates suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. \ldots Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.\

\textit{id.} (emphasis added) (citation omitted).

\textsuperscript{187} \textit{id.}
Before applying these generalizations to Missouri's attorney advertising rules, the Court determined that the constitutionality of the disclaimer requirement was not before the Court.\textsuperscript{188} Then, applying its new attorney advertising standard, the Court struck down Missouri's attorney advertising restrictions that specified permissible advertising content and terminology\textsuperscript{189} and controlled the distribution of professional announcement cards.\textsuperscript{190} The Court noted that there was no claim that any of R.M.J.'s communications were actually misleading.\textsuperscript{191} Nor could it find that any were inherently misleading.\textsuperscript{192} Although it had determined that states retain some authority to regulate all forms of attorney advertising,\textsuperscript{193} the Court held that the Missouri regulations were overly broad and therefore unconstitutional.\textsuperscript{194}

\textbf{B. The Implications of the R.M.J. Decision}

The final holding in \textit{R.M.J.} is well supported. The Missouri attorney advertising restrictions prohibited the dissemination of essentially the same type of truthful information concerning the availability of legal services that had been protected in \textit{Bates}.\textsuperscript{195} In addition to the Supreme Court, other courts\textsuperscript{196} and many commentators\textsuperscript{197} have recognized a legitimate

\begin{itemize}
\item \textsuperscript{188} R.M.J.'s counsel had stated that "[t]he disciplinary action was not based on a failure to include the disclaimer." \textit{Id.} at 204 n.18. In fact, the Court indicated that a requirement of disclaimer or explanation may be allowed on all forms of attorney advertising. \textit{Id.} at 203.
\item \textsuperscript{189} \textit{Id.} at 205.
\item \textsuperscript{190} \textit{Id.} at 206.
\item \textsuperscript{191} \textit{Id.} at 205.
\item \textsuperscript{192} \textit{Id.} at 205-06.
\item \textsuperscript{193} \textit{See supra} notes 186-87 and accompanying text.
\item \textsuperscript{194} The Court concluded:
\begin{quote}
[\textbf{A}lthough the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.]
\end{quote}
\textit{R.M.J.}, \textit{455 U.S.} at 207.
\item \textsuperscript{195} In both \textit{Bates} and \textit{R.M.J.}, the advertisements contained truthful information about the availability of legal services. \textit{See supra} notes 82-83, 169 and accompanying text.
\item \textsuperscript{196} \textit{See, e.g.,} Bishop v. Committee on Professional Ethics, \textit{521 F. Supp.} 1219,1227 (S.D. Iowa 1981), \textit{vacated}, \textit{686 F.2d} 1278 (8th Cir. 1982); (In deciding whether an attorney could include information as to his race in an advertisement, the court stated "[S]uch information can serve a useful purpose"); Durham v. Brock, \textit{498 F. Supp.} 213, 225 (M.D. Tenn. 1980). ("Listing the area of one's practice or the availability of routine legal services is information which is valuable to the consumer."); Matter of Discipline of Appert, \textit{315 N.W.2d} 204, 212 (Minn. 1981) ("The attorney's right to speak and associate freely and the public's right to receive commercial information ... are substantial ... ").
\item \textsuperscript{197} \textit{See} authorities cited, \textit{supra} notes 27, 69, 70, 108; Andrews, \textit{Lawyer Advertising and the First Amendment}, \textit{191 A.B.F. RESEARCH J.} 967; Linenberger & Murdock, \textit{Legal Service
public interest in this type of information. Finally, the brief Missouri Supreme Court opinion had provided little basis to support the Missouri regulations against these substantial interests.198

The attorney advertising standard enunciated by the Court in R.M.J., however, rests on the premise that attorney advertising is potentially more harmful to the public than other forms of commercial speech199 because it has a greater potential for deception.200 In accepting this argument, the Supreme Court has apparently created a different and less exacting standard of review for attorney advertising than it had provided for all other forms of commercial speech in Central Hudson.201 Yet, the assumptions202 on which the Court's rationale ultimately rest provide little support for an analytical distinction in first amendment protection between attorney advertising and other types of commercial speech.

The first of these assumptions is that the public lacks sophistication about legal services and is therefore especially susceptible to deceptive attorney advertising.203 Although the public's lack of legal knowledge had been recognized by the Court in Bates,204 the Court expressly rejected the conclusion that attorney advertising would inevitably mislead the public.205 Significantly the Bates Court had stated that the argument "assumes that the public is not sophisticated enough to realize the limitations of advertising" and therefore likely rests on an "underestimation of the public."206

The Bates Court's tentative confidence in the American consumer is

198. See supra notes 174-76 and accompanying text.
199. The Court stated that attorney advertising is "especially susceptible to abuses." R.M.J., 455 U.S. at 202.
200. The Court stated: "[T]he Central Hudson formulation must be applied to advertising for professional services with the understanding that the special characteristics of such services afford opportunities to mislead and confuse that are not present when standardized products or services are offered to the public." Id. at 203-04 n.15.
201. In Central Hudson, the state was required to assert a substantial interest before any restriction of commercial speech would be tolerated. Central Hudson, 447 U.S. at 564. However, in R.M.J. the state was assumed to have a substantial interest in controlling the potential deception that was found to be inherent in attorney advertising. See supra notes 186-87 and accompanying text.
202. These assumptions are the public's lack of legal knowledge, the limited ability of the profession to police itself, and the lack of any standardization in the legal "product." R.M.J., 455 U.S. at 202.
203. Id. at 202.
204. See supra note 180.
205. See supra notes 94-96 and accompanying text.
supported by research on the consumer decisionmaking process.\textsuperscript{207} Although advertising is often effective in creating public awareness and interest, consumers seldom make important decisions based on advertising alone.\textsuperscript{208} Generally, consumers rely on word-of-mouth sources to "supplement, verify, and reinforce (or refute) information gathered through the mass media."\textsuperscript{209} Even when the exigencies of a legal situation force a consumer to select a lawyer on the basis of advertising, it is unusual for the consumer not to verify the selection through alternative sources.\textsuperscript{210} Thus, the potential for deception that the \textit{R.M.J.} Court feared would result from a legally unsophisticated consumer's exposure to a truthful legal advertisement is greatly minimized by the consumer's decisionmaking process.

The public is in greater danger when the particular form or method of advertisement is actually deceptive. It is well recognized that a state has a legitimate interest in protecting consumers from the harm that is likely to result from such deception.\textsuperscript{211} Regardless of public familiarity with the product advertised, however, deceptive advertisements may be totally banned under the general commercial speech standard enunciated in \textit{Central Hudson}.\textsuperscript{212} Therefore, under the \textit{Central Hudson} standard, the public may be effectively protected from legal advertisements that are actually deceptive.

The second justification utilized by the \textit{R.M.J.} Court to support its analytical distinctions is the legal profession's alleged limited ability to police itself.\textsuperscript{213} The adequacy of the \textit{Central Hudson} standard cannot be discounted on this basis, however. The organized bar has demonstrated a
consistent concern for policing its members with respect to attorney advertising. Both the Canons of Professional Ethics and the Code of Professional Responsibility contain proscriptions against attorney advertising based on the bar's concern for protecting the public from deception. Since other forms of commercial speech generally are not subject to any "policing" scrutiny, it is difficult to discern why the Court expressed a concern for the organized bar's alleged limited ability to police attorney advertising. The expression of this concern, one that has not arisen with regard to other forms of commercial speech, is a clear indication of the Court's belief in the dangers inherent in attorney advertising, but it is not a justification for that belief.

The Court's third justification was that the lack of standardization in legal services increases the potential for deception in attorney advertising. Yet a decreased level of scrutiny is not necessarily supported by this argument. The inherent assumption in this assertion is that the public is unable to comprehend the limitations of advertising. This argument, like the lack of public knowledge argument, ignores the decisionmaking process of consumers when selecting legal counsel. This justification is further undercut by studies demonstrating that it is not financially beneficial for the seller of a nonstandardized product to engage in deceptive advertising. Because the start-up costs of developing an advertising program are high, these costs can only be recouped by repeat business. The financial benefit gained from initial public exposure through deception is quickly lost by a decrease in follow-up business, as individual consumers become aware of deceptive practices. Thus, none of the three assumptions that the R.M.J. Court used to justify increased state authority over attorney advertising can adequately support such a result.

214. See supra notes 47-54, 58-67 and accompanying text.
215. See supra note 46.
216. See supra notes 2, 4.
218. See supra notes 207-10 and accompanying text.
219. In a theoretical analysis of the economic value of advertising, it has been suggested that all goods and services can be classified into either "search" or "experience" goods. Standardized products like clothes, furniture, and groceries are "search" goods. Consumers tend to rely on advertising claims to determine the quality of these types of goods. However, legal services would fall into the category of experience goods. The quality of "experience" goods is judged only after the consumer has had a chance to actually use the product or service. Therefore, advertising claims as to the value and quality of legal services would actually have less effect on consumers than advertising claims as to the quality of standardized products. See Khactu, Advertising, Market Power and the Public Interest: The Lawyer's Case, 55 N.D.L. REV. 525, 529 (1979).
220. Id. at 529.
221. Id.
In addition, an increased level of state restraint over attorney advertising defies the public policy behind the elimination of advertising restraints. In *Virginia Pharmacy*, the basis for the elimination of advertising restraints was to allow people to gain access to commercial information so that they could make more informed consumer choices.\(^{222}\) The strongest attacks on governmental restraints of attorney advertising have come from attorneys interested in achieving the same result.\(^{223}\) Studies conducted after the *Bates* decision have shown that the public's need for adequate information on the availability of legal services has not been fully met.\(^{224}\) Despite the continuing need, the *R.M.J.* analysis provides attorney advertising with less than full commercial speech protection.

Full commercial speech scrutiny would not interfere with a state's ability to prohibit attorney advertising practices that are actually deceptive.\(^{225}\) State imposed restraints on truthful attorney advertising, however, would have to be supported by a substantial state interest.\(^{226}\) A state could meet this burden if it could show that a particular attorney's advertisement has a significant potential for deception.\(^{227}\) Absent such a showing, restrictions on that advertisement would be difficult to support. Thus, full commercial speech scrutiny would provide attorneys with freer access to the media and would give states firmer constitutional guidelines upon which to base their regulations.

### IV. Conclusion

The *R.M.J.* decision defines the degree of first amendment protection to be afforded attorney advertising. The new attorney advertising analysis, unlike the general commercial speech standard enunciated in *Central Hudson*, implies that states have a per se substantial interest in regulating all forms of commercial speech by attorneys, requiring only that the regulation be narrowly drawn. Although categorical prohibitions of truthful

\(^{222}\) *Virginia Pharmacy*, 425 U.S. at 753, 754.


\(^{224}\) See Smith & Meyer, *Attorney Advertising: A Consumer Perspective*, 44 J. MARKETING 56 (1980). This study indicates that "personal information sources, which dominate the actual attorney choice process, do not possess much relevance by the very people who have employed them." *Id.* at 62. The study found that 48% of the consumers who had employed legal counsel said that they would have preferred additional information before actually making their choice. The authors suggest that this indicates "the need for other than personal communication to guide the selection of legal counsel. It is here, that the removal of professional advertising ban might most benefit the public." *Id.*

\(^{225}\) See *supra* notes 160-61 and accompanying text.

\(^{226}\) See *supra* note 162 and accompanying text.

\(^{227}\) See *supra* notes 191-92 and accompanying text.
forms of attorney advertising would be difficult to support under either standard, states retain more freedom to regulate under the R.M.J. standard. By allowing states greater freedom to regulate in this area, the Supreme Court has increased the likelihood that states will continue to constrain the flow of needed legal information to the American public.

John Ratino