

July 2012

## The Present Constitutional Status of Lawyer Advertising-- Theoretical and Practical Implications of In re R.M.J.

Douglas Whitman

Clyde D. Stoltenberg

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

### Recommended Citation

Whitman, Douglas and Stoltenberg, Clyde D. (1983) "The Present Constitutional Status of Lawyer Advertising--Theoretical and Practical Implications of In re R.M.J.," *St. John's Law Review*: Vol. 57 : No. 3 , Article 1.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss3/1>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# ST. JOHN'S LAW REVIEW

VOLUME 57

SPRING 1983

NUMBER 3

## THE PRESENT CONSTITUTIONAL STATUS OF LAWYER ADVERTISING—THEORETICAL AND PRACTICAL IMPLICATIONS OF *IN RE* *R.M.J.*

DOUGLAS WHITMAN\*  
CLYDE D. STOLTENBERG\*\*

### I. INTRODUCTION

The Supreme Court has looked favorably upon the advertisement of routine professional services by attorneys. Indeed, although the Court has recognized the fears expressed by opponents of such advertising, including the adverse effect on professionalism and the inherently misleading nature of attorney advertising,<sup>1</sup> it has concluded that a rule prohibiting advertising by lawyers is not

---

\* B.A., Knox College, 1970; J.D., University of Missouri, 1973; M.B.A., University of Kansas, 1975; LL.M., University of Missouri at Kansas City, 1982.

\*\* B.A., University of Iowa, 1969; J.D., Harvard University, 1972.

<sup>1</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-77 (1977). One of the greatest fears of attorney advertising is its alleged capacity to commercialize the legal arena. See *id.* at 368. Such commercialization, it has been argued, necessarily decreases the dignity attached to and inherent in the "professional milieu." See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1184 (1972) [hereinafter cited as Note, *Advertising, Solicitation*]. More specifically, advertising enhances a lawyer's commercial need to earn, and thereby undermines the public's impression of an attorney as one who is idealistically committed to societal welfare. See *Bates*, 433 U.S. at 368; Note, *Advertising, Solicitation, supra*, at 1184. A second objection to attorney advertising is the less persuasive argument that such solicitation is inherently misleading. See *Bates*, 433 U.S. at 372; cf. Note, *Ambulance Chasing*, 30 N.Y.U. L. REV. 182, 187-88 (1955) (an attorney who "chases ambulances" is usually prone to formulating or exaggerating claims). It is contended that advertising by attorneys is misleading, since it is self-serving, see B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 140 (1970), and that the advertised facts are usually highly irrelevant and immaterial, see *Bates*, 433 U.S. at 372.

warranted.<sup>2</sup> Notwithstanding this approval, the Supreme Court has given little guidance as to the types of advertising restraints that are constitutionally permissible.<sup>3</sup> Moreover, states have revised their codes of ethics to permit only a minimum of advertising.<sup>4</sup> Thus the type and degree of permissible attorney advertising have remained uncertain. *In re R.M.J.*,<sup>5</sup> the Supreme Court's most recent pronouncement in this area and an outgrowth of earlier cases extending first amendment protection to commercial speech, to a large extent settles this uncertainty by clarifying the degree of constitutional protection to be afforded advertising by attorneys.

This Article seeks to place in their contemporary perspective the constitutional concepts of commercial speech and lawyer advertising. Accordingly, the Article will trace the development of constitutional treatment of commercial speech, and review the commercial speech concept as it has been applied to attorney advertising. Thereafter, an analysis of *In re R.M.J.* will be undertaken, with a view toward both its theoretical and its practical implications.

---

<sup>2</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977); see *infra* notes 56-65 and accompanying text. See generally Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585, 585-87 (1978).

<sup>3</sup> The uncertain boundaries of permissible lawyer advertising have been attributed to the Supreme Court's hesitation to delineate specifically the constitutional prescriptions by which the states must abide when regulating commercial speech. See, e.g., Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 554 (1982). In fact, establishing a specific level of post-*Bates* permissible attorney advertising has been labeled an "insurmountable task." Welch, *supra* note 2, at 612.

<sup>4</sup> See L. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 43 (1980). Andrews observes that many state regulations seem designed to discourage advertising rather than to promote it. *Id.* She notes that in 26 states the rules are so restrictive that even the advertisement in *Bates* would not be permissible. *Id.* The American Bar Association's immediate acceptance of *Bates* has been described as "grudging at best." Shadur, *The Impact of Advertising and Specialization on Professional Responsibility*, 61 CHI. B. REC. 324, 325 (1980). Shadur notes:

When a post-*Bates* ABA Task Force on Lawyer Advertising produced two alternative proposals, the ABA's Board of Governors approved the more restrictive one. Even if that version could withstand constitutional scrutiny, it certainly is not openly responsive to the public's interest in the full, free flow of information, as expressed by the Supreme Court.

*Id.*

<sup>5</sup> 455 U.S. 191 (1982).

## II. THE CONCEPTUAL FOUNDATION AND JURISPRUDENTIAL DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE

### A. *The Conceptual Sources for Protecting Freedom of Expression*

Any discussion of the historical development of the commercial speech concept should commence with a recognition and understanding of the two conceptual bases for protecting freedom of expression—the right to expression and the right to know.<sup>6</sup> Commentators have regarded the right to expression as the more important of these conceptual bases, since expression lies at the heart of human individuality.<sup>7</sup> The right to express oneself, therefore, is construed to protect “all speech that has as its source an individual.”<sup>8</sup>

The source of protection for the “speech” of business enterprises, on the other hand, has been perceived as rooted solely in the individual’s right to know.<sup>9</sup> Although the right to know, in con-

---

<sup>6</sup> See Cox, *The Supreme Court 1979 Term Foreward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 1-2 (1980). Professor Cox maintains that man “can experience no greater affront to . . . [his] humanity than denial of freedom of expression.” *Id.* at 1. Similarly, Cox believes that “[t]he hearer and reader suffer a violation of their spiritual liberty if they are denied access to the ideas of others.” *Id.*; see Emerson, *Toward A General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963) [hereinafter cited as Emerson, *General Theory*]. In the context of individual self-realization, man’s potential can only be achieved through development of the mind. Emerson, *General Theory, supra*, at 879. With the resulting right to form beliefs and opinions came “the right to express these beliefs and opinions.” *Id.* Since no foreseeable limit can or should be placed on this process of thought and development of ideas, any suppression is deemed an intolerable burden on man’s struggle to become a “free and knowing” individual. *Id.* at 880. Consequently, censoring the mind by infringing upon freedom of expression impedes man’s mental exploration and intellectual development. *Id.* See generally L. LEVY, LEGACY OF SUPPRESSION 88-125 (1960).

<sup>7</sup> See Comment, *Commercial Speech and the Limits of Legal Advertising*, 58 OR. L. REV. 193, 206 (1979). One commentator poignantly stated:

The need to express, as distinguished from the need to impart information, is a peculiarly human requirement. Expression is a requisite to human dignity, and therefore it must be pursued along whatever path conscience dictates. People must be true to themselves, and our society strives to allow this. Yet expression which is true to self at times transcends the bounds of social utility. Therefore, by its very terms, the right of expression can only be understood as a right of the individual, for businesses are of value only insofar as they contribute to social utility.

*Id.*

<sup>8</sup> *Id.* (emphasis in original); see Emerson, *General Theory, supra* note 6, at 878.

<sup>9</sup> Comment, *supra* note 7, at 207. It has been argued that the only first amendment protection to which businesses are entitled is “that which is derived from the people’s right to hear their speech.” *Id.*; see *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). In

trast to the right to expression, does not contribute to individual self-realization,<sup>10</sup> it nevertheless is essential to the effective operation of the "marketplace of ideas."<sup>11</sup> Thus, even though the right to know generally will yield less protection than the right to expression,<sup>12</sup> an independent protection for the right to know has been regarded as necessary when a speaker cannot enforce his right to communicate.<sup>13</sup> To be sure, the right to know protects idea-laden speech, regardless of its source.<sup>14</sup> It is interesting that at least one commentator has argued that the right to know should be considered as important as the right to express oneself.<sup>15</sup>

---

*Bellotti*, a Massachusetts statute prohibited corporations from making contributions or expenditures for the purpose of influencing voters on questions contained in State referenda. 435 U.S. at 767-68. Massachusetts justified this prohibition by claiming that a first amendment right is extended to corporations only when a political issue has a material effect on its business or property. *Id.* at 771. Declining to differentiate between the value of corporate and individual speech, *id.* at 777, the Supreme Court rejected this contention, holding that it reflected too narrow an understanding of the purpose behind the first amendment, *id.* at 784. The Court stated that "[t]he speech proposed by [the corporations] is at the heart of the First Amendment's protection," *id.* at 776, but added that "we need not survey the outer boundaries of the Amendment's protection of corporate speech . . .", *id.* at 777. In so holding, the Court relied upon both freedom-of-press and commercial-speech precedent. *Id.* at 782-83; *see, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-90 (1969) ("[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas"). The *Bellotti* Court found the identity of the speaker, a corporation, to be irrelevant: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777.

<sup>10</sup> Comment, *supra* note 7, at 208-09. Purely commercial speech was perceived as serving not the person, but the business entity. *See id.*; Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 12-15 (1976). Hence, it was regarded as merely profit oriented, and thus not worthy of constitutional protection. Baker, *supra*, at 12-15; *see infra* note 17 and accompanying text.

<sup>11</sup> *See* Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 4 [hereinafter cited as Emerson, *Legal Foundations*].

<sup>12</sup> *See* *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 807 (1978) (White, J., dissenting); Comment, *supra* note 7, at 209-10, 209 n.93. Justice White asserted that "[i]deas which are not a product of individual choice are entitled to less first amendment protection." 435 U.S. at 807 (White, J., dissenting). Hence, "[s]ince the right to know protects communications that are not the product of individual belief . . .," such a right will not yield the extensive protection accorded the right to expression. Comment, *supra* note 7, at 209.

<sup>13</sup> Emerson, *Legal Foundations*, *supra* note 11, at 4.

<sup>14</sup> Comment, *supra* note 7, at 206; *see* *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). The value of speech to informed decisionmaking "does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U.S. at 777.

<sup>15</sup> *See* Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CR. REV. 245, 256. Although the United States Supreme Court has not accorded the right to know the same status as the right to expression, it certainly has attributed independent significance to the concept: "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from

### B. *The Supreme Court and Commercial Speech*

Historically, the Supreme Court has recognized the limited power of states and municipalities to regulate communication of information and dissemination of opinion in public places.<sup>16</sup> With respect to "purely commercial" advertising, however, the Court initially found no equivalent constitutional restraint.<sup>17</sup> Indeed, the Supreme Court determined that the permissible scope of business advocacy was wholly subject to the dictates of the governing legislative body.<sup>18</sup> Despite this initial proclamation of an ostensibly unlimited right of the states to regulate commercial advertising, it appears that the Court never provided any authority for legislative curbing of purely commercial speech in the absence of some competing public interest.

The analysis undertaken by the Supreme Court in evaluating legislative restrictions upon commercial speech indicates why the vitality of not according such advertising constitutional protection persisted for some time. With respect to individual speech, the Court seems to have focused primarily upon the individual's free-

---

which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>16</sup> See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-21, at 689 (1978). It has been indicated that the states may not "unduly burden" the communication of information or the dissemination of opinion in public thoroughfares. *Valentine*, 316 U.S. at 54. Generally, the only time a government can regulate or prohibit either speech or speech-related conduct in such places is when the regulation or prohibition is "necessary to serve significant governmental interests." L. TRIBE, *supra*, § 12-21, at 689.

<sup>17</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942). *Valentine* was the first case to render commercial speech subordinate to other types of speech. That case involved an attempt by a submarine owner to distribute handbills advertising the exhibition of his submarine. *Id.* at 52-53. He was advised by the police that such activity would violate the applicable handbill ordinance. *Id.* The Court upheld the ordinance against him by reasoning that the limitations on states and municipalities to regulate the free communication of information and opinion are not applicable when the speech in question is "purely commercial advertising." *Id.* at 54-55.

<sup>18</sup> *Id.* at 54. After distinguishing commercial speech from other types of speech, the *Valentine* Court stated:

Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.

*Id.* at 54-55.

dom of expression<sup>19</sup> in striking the balance between the community's right to regulate time, place and manner of distribution on the one hand, and the individual's right to expression on the other.<sup>20</sup> When examining restrictions imposed upon commercial speech, however, the Court has used a content-based distinction that subordinates commercial speech to other types of speech for purposes of assessing the validity of time, place and manner limitations.<sup>21</sup> The first case to recognize and adopt this distinction was *Breard v. City of Alexandria*.<sup>22</sup> In *Breard*, an ordinance excluding uninvited solicitors of magazine subscriptions from private residences was upheld.<sup>23</sup> In adopting this content-based distinction, the Court apparently considered the form of communication involved as merely an alternative method of conducting business rather than as a form of speech.<sup>24</sup>

The *Breard* content-based analysis was followed in later cases

---

<sup>19</sup> The Court's focus on the individual's freedom of expression is obvious from its many references to "dissemination of ideas," "espousing various causes," "dissemination of opinion," and "freedom to distribute information." See *Martin v. City of Struthers*, 319 U.S. 141, 145-46 (1943).

<sup>20</sup> See, e.g., *id.* at 143. In *Martin*, an ordinance forbidding door-to-door distribution of handbills advertising a religious meeting was held unconstitutional. *Id.* at 149. The Supreme Court of Ohio dismissed an appeal on the ground that a sufficient constitutional question was lacking. *Id.* at 142 n.2. The United States Supreme Court also dismissed the appeal, stating that "no constitutional question had been properly raised in accordance with Ohio procedure." *Id.* Upon reconsideration, however, the Court addressed the substantive elements of the case, stating: "We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message . . . ." *Id.* at 143.

<sup>21</sup> See *Breard v. City of Alexandria*, 341 U.S. 622, 641-45 (1951).

<sup>22</sup> 341 U.S. 622 (1951).

<sup>23</sup> *Id.* at 645. The appellant, Jack Breard, was employed by Keystone Readers Service, Inc., a Pennsylvania corporation. *Id.* at 624. Breard was arrested for soliciting magazine subscriptions from owners and occupants of private dwellings. *Id.* The trial court convicted Breard of violating the local ordinance and the Supreme Court of Louisiana affirmed. *Id.* at 625. The United States Supreme Court affirmed the Louisiana court. *Id.* at 645.

<sup>24</sup> See *id.* at 644. The treatment of the form of communication as an alternative method of conducting business is implicit in the balancing test employed by the Court: "[T]he constitutionality of Alexandria's ordinance turn[s] upon a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." *Id.* Dissenting, Justice Black professed that the first amendment "bars laws like the present ordinance which punish persons who peacefully go from door to door as agents of the press." *Id.* at 650 (Black, J., dissenting) (footnote omitted). At the same time, however, Justice Black supported a content-based restriction on commercial speech by stating that the "ordinance could constitutionally be applied to a 'merchant' who goes from door to door 'selling pots.'" *Id.* at 650 n.1 (Black, J., dissenting).

in which the challenged advertisements conveyed information relating to vital public issues.<sup>25</sup> For example, in *Bigelow v. Virginia*,<sup>26</sup> a Virginia newspaper editor who had published a New York organization's abortion referral service advertisement was convicted of violating a Virginia statute which prohibited publications encouraging the procuring of abortions.<sup>27</sup> Upon review of that decision, the Supreme Court disregarded the label affixed to the challenged speech—be it commercial or otherwise—and subjectively elected to utilize a balancing test to determine the constitutionality of the statute.<sup>28</sup> The analytical framework employed by the Court involved weighing the alleged first amendment interest at stake against the public interest that the regulation purportedly served.<sup>29</sup>

---

<sup>25</sup> See, e.g., *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). In *Sullivan*, L.B. Sullivan, one of three commissioners of Montgomery, Alabama, with supervisory duties over the Police Department, brought a libel action against four Alabama clergymen and the New York Times. 376 U.S. at 256. The alleged libel was contained in a paid advertisement published in the New York Times on March 29, 1960. *Id.* The advertisement elicited support for the defense of Dr. Martin Luther King, Jr., and for the civil rights movement. *Id.* at 256-57. Although Sullivan was not mentioned by name, the advertisement discussed the violent acts of the Montgomery police. *Id.* at 257-58. A jury awarded Sullivan \$500,000 in damages and the Supreme Court of Alabama affirmed. *Id.* at 256. In reversing the Alabama court, the United States Supreme Court held that Sullivan's evidence failed to support a finding of "actual malice," and thus could not support the judgment. *Id.* at 285-86.

Although the communication was in the form of a paid advertisement soliciting funds on behalf of the civil rights movement, the Court characterized it "as an expression of grievance and protest on one of the major public issues of our time." *Id.* at 271. Accordingly, it was not difficult for the Court to conclude that the advertisement was not a "commercial" advertisement, see *id.* at 266, but rather, it was a manifestation of "freedom of expression upon public questions," *id.* at 269, which retains its constitutional protection notwithstanding that it appears in an advertisement, *id.* at 271; see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973); *infra* note 29.

<sup>26</sup> 421 U.S. 809 (1975).

<sup>27</sup> *Id.* at 811-12. The Virginia statute provides: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." VA. CODE § 18.1-63 (1960) (current version at VA. CODE § 18.2-76.1 (1975)); see 421 U.S. at 812-13. The Virginia Supreme Court affirmed the lower court's conviction of the defendant, reasoning that the first amendment does not prohibit states from regulating commercial advertising. *Bigelow v. Virginia*, 213 Va. 191, 195, 191 S.E.2d 173, 176 (1972), *rev'd*, 421 U.S. 809 (1975). While this statement of law was correct, the Virginia court's determination was nevertheless found to be erroneous since the advertisement in question "contained factual material of clear 'public interest'." 421 U.S. at 822. The advertisement contained the statements: "Abortions are now legal in New York. There are no residency requirements." *Id.* The Supreme Court regarded this advertisement as involving "the exercise of the freedom of communicating information and disseminating opinion." *Id.*

<sup>28</sup> 421 U.S. at 826.

<sup>29</sup> *Id.* The *Bigelow* Court stated:



Due to the serious first amendment overtones resulting from the defendant's position as an editor and publisher of a newspaper<sup>30</sup> and the constitutional interests of the general public in the factual material contained in the advertisement, the Court found the first amendment interests to be substantial.<sup>31</sup> Conversely, the Court considered the asserted legitimate state interest to be of questionable import.<sup>32</sup> Hence, the Court concluded that, as applied to the defendant, the statute infringed upon constitutionally protected speech.<sup>33</sup>

Although the *Bigelow* emphasis on the right-to-know principle has been interpreted as initiating the demise of commercial speech as a constitutionally unprotected activity,<sup>34</sup> the Court's opinion, in actuality, left unanswered the question of the extent to which first amendment protection might be afforded purely commercial solicitation not arguably within the realm of the "marketplace of ideas."<sup>35</sup> In fact, reviewing *Bigelow* and its predecessors reveals that the Court was making ad hoc determinations based princi-

The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or 'solicitations,' . . . or because appellant was paid for printing it, . . . or because appellant's motive or the motive of the advertiser may have involved financial gain . . . .

*Id.* at 818 (citations omitted). The Court concluded that the Virginia courts failed to balance the first amendment interests with those of the State. *Id.* at 825.

<sup>30</sup> *Id.* at 828. By underscoring that the defendant was an editor of a newspaper, the decision raises questions as to what the outcome of identical litigation against the advertiser, referral agency or practitioner might have been. *Id.* The Supreme Court intimated that less first amendment protection would be afforded these groups should such litigation arise. *See id.*

<sup>31</sup> *Id.* at 822.

<sup>32</sup> *See id.* at 827-28. The advertisement (1) did not affect the quality of medical services within Virginia, (2) did not relate to a commodity or service then illegal in either New York or Virginia, (3) was not deceptive or fraudulent, (4) did not further a criminal scheme in Virginia, and (5) would not invade the privacy of citizens or infringe on other rights. *Id.* at 828. The *Bigelow* Court concluded that Virginia's interest in shielding its citizens from information concerning services not within the purview of Virginia's police powers "was entitled to little, if any, weight under the circumstances." *Id.* Justice Rehnquist, however, suggested that a legitimate public interest in the regulation, as asserted by the Supreme Court of Virginia, did indeed exist: "the prevention of commercial exploitation of those women who elect to have an abortion." *Id.* at 832 (Rehnquist, J., dissenting); *see Bigelow*, 213 Va. at 196, 191 S.E.2d at 176.

<sup>33</sup> 421 U.S. at 829.

<sup>34</sup> *See, e.g.,* Comment, *supra* note 7, at 196.

<sup>35</sup> *See* 421 U.S. at 826.

pally upon the respective content of the messages under attack.<sup>36</sup> While the ramifications of *Bigelow* for general commercial advertising have been viewed as favorable, the Court's own observation that the decision was not inconsistent with earlier cases involving the regulation of professional activity made the implications of *Bigelow* for advertising by professionals quite perplexing.<sup>37</sup>

A later case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>38</sup> presented issues of both the protection of purely commercial speech and the regulation of professionals. In *Virginia Pharmacy*, a consumer group challenged a state statute prohibiting pharmacists from advertising prescription drug rates.<sup>39</sup> The Court posed the question whether "speech which does 'no more than propose a commercial transaction'" categorically is excluded from first amendment protection.<sup>40</sup> Answering in the negative, the Court relied heavily upon the right-to-know principle.<sup>41</sup> Justice Blackmun, writing for the Court, reasoned that a particular consumer's interest in maintaining easy access to commercial information may be as great as, if not greater than, his

---

<sup>36</sup> See *id.* Justice Rehnquist criticized the practice of resolving each case based on the content of the advertisements, stating: "If the Court's decision does, indeed, turn upon its conclusion that the advertisement . . . was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference." *Id.* at 831 (Rehnquist, J., dissenting). One commentator has postulated that where commercial advertising is dissimilar to fully protected speech, it should not be given full protection but should be "governed by the principle that a regulatory law is constitutional if it can reasonably be supposed to contribute to the effectuation of some rational view of the public interest." Cox, *supra* note 6, at 27.

<sup>37</sup> 421 U.S. at 825 n.10; see Whitman, *Advertising by Professionals*, 16 AM. BUS. L.J. 39, 53 (1978). After extending first amendment protection to the plaintiff's advertisement—apparently expanding the applicability of the free-speech doctrine to include commercial advertising—the Court stated that its "decision . . . is in no way inconsistent with [its] holdings in the Fourteenth Amendment cases that concern the regulation of professional activity." 421 U.S. at 825 n.10.

<sup>38</sup> 425 U.S. 748 (1976).

<sup>39</sup> *Id.* at 749-50.

<sup>40</sup> *Id.* at 762. The Court questioned whether purely commercial speech "is so removed from any 'exposition of ideas,' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it is to go completely unprotected." *Id.* (citations omitted).

<sup>41</sup> *Id.* at 769-70. The right-to-know aspect of the first amendment was discussed and confirmed in *Virginia Pharmacy*, which involved a group of consumers seeking access to information barred by the governing regulation. *Id.* at 763-65. The statute had previously been scrutinized in *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969), in which the court held that the statutory provision aimed at advertising prices and terms of sale of prescription drugs was valid, but that such a statute could not be used to prohibit the fixing of prescription drug prices. *Id.* at 827.

interest in current political events, and that society in general may also have a keen interest in free access to commercial information.<sup>42</sup> In fact, employing the reasoning historically undertaken to protect the right to an informed electoral or political choice, the Court concluded that in order for consumers to determine what is in their best interests, they need fully to be apprised of all relevant facts.<sup>43</sup> Of particular import to the Court's decision were the needs of the poor, sick, and aged.<sup>44</sup>

Balanced against this personal and societal right-to-know was Virginia's strong interest in upholding a high level of professionalism among pharmacists.<sup>45</sup> Recognizing this interest, the Court stated that the government could prescribe whatever professional standards it desired, but not at the expense of keeping the public unapprised of the competing terms offered by different pharmacists.<sup>46</sup> By observing that the state interests allegedly advanced by

---

<sup>42</sup> 425 U.S. at 763-64. The Court surmised that since the free flow of commercial information is essential to the proper allocation of resources in a free-market system, this stream of information is also essential in formulating an intelligent opinion as to the proper regulation of that system. Thus, the free flow of information serves the goal of "enlighten[ing] public decisionmaking in a democracy." *Id.* at 765 (footnote omitted). The logic of the above analysis in making the free operation of the market an element of first amendment doctrine has not gone without criticism. See Cox, *supra* note 6, at 28. Cox has stated that "[t]he philosophical and political foundations of first amendment doctrine scarcely extend to an offer to enter into a private commercial transaction." *Id.* at 27; see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 4-6 (1979).

<sup>43</sup> 425 U.S. at 770. Justice Blackmun asserted that the choice between alternative approaches was left neither to the Court nor to the legislature, stating that "[i]t 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 . . ." *Id.*

<sup>44</sup> *Id.* at 763. The Court observed that the poor, the sick and the aged were the least capable of bearing the consequences of a proscription on information regarding the price of drugs. *Id.* The aged, in particular, suffer a "diminished capacity . . . for the kind of active comparison shopping that a ban on advertising makes necessary . . ." *Id.* at 763 n.18. Citing various figures derived from a number of publications, the Court noted that the elderly expend more than twice the amount of money that other age groups spend on medical supplies. *Id.* Moreover, the aged are commonly stricken with chronic conditions and suffer diminished resources. *Id.* Thus, "information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities." *Id.* at 764.

<sup>45</sup> *Id.* at 766. The Court noted that maintaining the standards of professionalism among pharmacists can benefit consumers in many ways. *Id.* For example, the Court observed that where a physician has failed to indicate the quantity of drugs to be dispensed, the pharmacist's skill will augment that of the physician. *Id.* at 767.

<sup>46</sup> *Id.* at 770. Justice Blackmun stated that the Court would not follow the "highly paternalistic approach" of shielding consumers from pharmacist advertising of prices. *Id.* Instead, the Court posited that consumers will act in their own best interest if they have the

the challenged regulation already were guaranteed to a substantial degree by the existing state regulations,<sup>47</sup> the Court revealed that its holding was essentially an application of a least restrictive alternative theory.<sup>48</sup> Under such an analysis, the only restrictions sanctioned by the Court for regulating commercial speech were: (1) reasonable time, place and manner restrictions,<sup>49</sup> (2) prohibitions on

---

requisite knowledge about the product in question, and the best method to achieve this objective is to "open the channels of communication." *Id.*

<sup>47</sup> *Id.* at 768.

<sup>48</sup> *Id.* at 770. The Court applied a test similar to the least restrictive alternative theory in *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), in determining whether the township of Willingboro could adopt an ordinance which prohibited the posting of real estate "For Sale" and "Sold" signs. *Id.* at 86. The basic rationale for adopting the ordinance had been to curb panic selling by white homeowners. *Id.* at 88. Testimony at trial had indicated that such signs had exacerbated this panic, *id.*, and that racial fervor had subsided following the adoption of the ordinance, *id.* at 90. In response to an action seeking a declaratory judgment and injunctive relief, the district court had declared the ordinance unconstitutional, but the court of appeals reversed. *Id.* at 86-87. The township argued that although the ordinance limited commercial speech, speakers and listeners had a lesser first amendment interest in this form of speech than did the parties in *Bigelow* and *Virginia Pharmacy*. *Id.*

<sup>49</sup> 425 U.S. at 771. Several conditions were placed on the imposition of time, place and manner restrictions. First, they must not be content based. *Id.* Second, they must "serve a significant governmental interest." *Id.* Finally, the restrictions must leave open adequate alternatives for disseminating the information. *Id.* The Court's insistence that the regulation be blind to content is somewhat questionable, given its observation that "[i]f there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content." *Id.* at 761. Although the Court held that commercial speech is not wholly denied protection under the first amendment, it did not grant commercial speech the level of protection afforded other varieties of speech. *Id.* at 771 n.24. Fundamental differences between commercial speech and other types of speech cause uncertainty because the distinction appears to be based on differences in content. The complications posed by such content-based distinctions are amply illustrated in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). See Cox, *supra* note 6, at 26-31; *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 93, 211-21 (1981).

In *Young v. American Mini Theatres*, a divided Court upheld the constitutionality of a Detroit zoning ordinance which prohibited the operation of an adult theater "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." 427 U.S. at 52. The ordinance differentiated between theaters exhibiting sexually explicit films and those which did not. *Id.* at 53. Writing for the majority, Justice Stevens stated that the "city's interest in planning and regulating the use of property for commercial purposes is clearly adequate to support [the zoning restriction]." *Id.* at 62-63. Justice Stevens' prognosis that the level of first amendment protection to be given commercial speech in the future will be determined by its content, *id.* at 68-69, however, was supported by only three other members of the Court, *see id.* at 51.

The problems in this area were unresolved by *Metromedia, Inc. v. City of San Diego*, in which the Court was unable to reach a position satisfactory to a majority. In *Metromedia*, the plurality struck down a San Diego ordinance banning most billboard advertising. 453 U.S. at 493-96, 521. The plurality concluded that the city could not allow some forms of

advertising which might in any way be false or misleading,<sup>50</sup> and (3) restrictions on advertisements promoting illegal transactions.<sup>51</sup> Since the case specifically involved product advertising by pharmacists, however, the extent and limitations of the first amendment protection and the types of speech covered remained somewhat speculative.<sup>52</sup> For example, specifically left unanswered by the Court was the status of advertising for professional services, an area where the possibility of deception is inherently high.<sup>53</sup> *Virginia Pharmacy* thus remained an enigmatic decision and commercial speech as "an instrument to enlighten public decisionmaking in a democracy," continued to evade precise definition.<sup>54</sup>

### III. LAWYER ADVERTISING

Shortly after the *Virginia Pharmacy* decision was rendered,<sup>55</sup>

---

noncommercial advertising while prohibiting others. *Id.* at 514-15. At the same time, the Court left unanswered the question whether a total ban of outdoor advertising would violate the first amendment. *Id.* at 515 n.20.

<sup>50</sup> 425 U.S. at 771.

<sup>51</sup> *Id.* at 772.

<sup>52</sup> *Id.* at 773 n.25. In a concurring opinion, Chief Justice Burger emphasized that *Virginia Pharmacy* addressed the advertisement of standardized products, rather than professional services. *Id.* at 774 (Burger, C.J., concurring). The Chief Justice posited that advertising by certain professionals may be "inherently misleading," because the services required by each individual client or patient will differ. *Id.* at 775 (Burger, C.J., concurring).

<sup>53</sup> *Id.* at 773 n.25. In *Virginia Pharmacy*, the Court noted that professional services, unlike certain products, are not subject to standardization. *Id.* Since these services are of an "almost infinite variety and nature," there is a reduced possibility of formulating an archetypal model and thus an enhanced danger of confusion and deception. *See id.* This risk of deception is further enhanced when the advertisement contains information concerning the quality of legal services or includes standardized price listings for complex legal services. *See Bates*, 433 U.S. at 366, 372. Thus, "because 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." *Id.* at 383 (footnote omitted).

<sup>54</sup> 425 U.S. at 765. By failing to delineate the scope of the nascent protection of commercial speech, the Court relegated the applicability of *Virginia Pharmacy* to future interpretation.

<sup>55</sup> Subsequent to *Virginia Pharmacy*, the Court had two opportunities to expand the commercial speech doctrine. *See Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). For a discussion of *Linmark*, see *supra* note 48. *Carey*, decided during the same term as *Linmark*, involved a challenge to a New York statute prohibiting, *inter alia*, the advertisement or display of contraceptives. 431 U.S. at 681. The statute contained more than merely a time, place or manner restriction; it was a content-based prohibition of information regarding "the availability of products and services that are not only entirely legal . . . but [are] constitutionally protected." *Id.* at 701 (citation omitted). The Court held that the potentially offensive and inciteful nature of these advertisements were insufficient to justify total suppression, *id.* at 701-02, and thereby expanded commercial speech protection to a wider variety of

the Supreme Court, in *Bates v. State Bar of Arizona*,<sup>56</sup> had the opportunity to address unequivocally the propriety of an advertisement solely for professional services. In *Bates*, two attorneys had advertised their "legal clinic" in a local newspaper,<sup>57</sup> identifying several routine legal services that their clinic offered and stating the fees to be charged.<sup>58</sup> Although conceding that they had violated Disciplinary Rule 2-101(B), which prohibited lawyer advertising through any medium,<sup>59</sup> the attorneys contended that the disciplinary rule was violative of the Sherman Antitrust Act<sup>60</sup> and in-

advertisement.

<sup>56</sup> 433 U.S. 350 (1977).

<sup>57</sup> *Id.* at 354. The attorneys in *Bates* sought to provide legal services to people of moderate means by accepting only simple legal matters and by making extensive use of paralegals. *Id.* A substantial volume of cases was therefore imperative to insure low fees. *Id.* In order to sustain their practices, the attorneys were compelled to advertise. *Id.*; see Welch, *supra* note 2, at 585-86.

<sup>58</sup> 433 U.S. at 385. The *Bates* advertisement appeared as follows:

**Divorce or legal separation—uncontested**

[both spouses sign papers]

\$175.00 plus \$20.00 court filing fee

**Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

\$100.00

**Adoption—uncontested severance proceeding**

\$225.00 plus approximately \$10.00 publication cost

**Bankruptcy—non-business, no contested proceedings**

Individual

\$225.00 plus \$55.00 court filing fee

Wife and Husband

\$300.00 plus \$110.00 court filing fee

**Change of Name**

\$95.00 plus \$20.00 court filing fee

*Id.* Additionally, the advertisement stated that information regarding other types of cases would be furnished upon request. *Id.*

Shortly after the advertisement appeared in the local newspaper, the clinic experienced an increase in clientele. *Id.* at 354 n.4. It was unclear, however, whether the increase was attributable to the advertisement or was merely a result of subsequent publicity. *Id.*

<sup>59</sup> *Id.* at 355; see Comment, *Bates v. State Bar of Arizona: A Consumers' Rights Interpretation of the First Amendment Ends Ban on Legal Advertising*, 55 DEN. L. J. 103, 103 (1978). The Arizona disciplinary rule provided that "[a] lawyer shall not publicize himself . . . 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 . . ." ARIZ. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976).

<sup>60</sup> *Bates*, 433 U.S. at 356. The attorneys argued that since the disciplinary rule tended to limit competition, it violated sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976). 433 U.S. at 356. The Court, however, summarily dismissed this claim, relying on *Parker v. Brown*, 317 U.S. 341 (1943), in which certain state actions were exempted from the Sherman Act. 433 U.S. at 359, 363. See generally L. ANDREWS, *supra* note 4, at 3-6.

fringed upon their first amendment rights.<sup>61</sup> The Arizona Bar Association, on the other hand, advanced numerous grounds for sustaining the disciplinary regulation, including the adverse effects of advertising on professionalism and the administration of justice.<sup>62</sup> Addressing itself solely to the issue of whether a state constitutionally may prohibit newspaper advertising of fees charged for "routine legal services,"<sup>63</sup> the Court concluded that the public's need for information concerning the availability and terms of legal services outweighed the alleged detrimental effects of such advertising.<sup>64</sup> The Court observed that the advertising restriction actually contravened, rather than advanced, some of the arguments of the Arizona Bar.<sup>65</sup>

The *Bates* decision constituted a broad expansion of constitutional protection to the highly controversial area of attorney advertising.<sup>66</sup> Prohibitions on advertising by lawyers, once untouchable

---

<sup>61</sup> 433 U.S. at 356.

<sup>62</sup> *Id.* at 368-77. In addition to asserting the adverse effects of advertising as grounds for sustaining the disciplinary regulation on professionalism and the administration of justice, the Arizona Bar argued that attorney advertising was inherently misleading, had undesirable economic effects, *id.* at 372-75, adversely affected the quality of legal services, *id.* at 378-79, and would prove difficult to regulate, *id.* at 379. See Boden, *supra* note 3, at 553; Welch, *supra* note 2, at 596-98.

<sup>63</sup> See 433 U.S. at 367. The Court stated that "the heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain services will be performed." *Id.* at 367-68 (emphasis in original); see Welch, *supra* note 2, at 595-96.

<sup>64</sup> See 433 U.S. at 379. The Court exclaimed that no justification espoused by the Arizona Bar Association ascended to "an acceptable reason for the suppression of all advertising by attorneys." *Id.* In discussing the public's need for information regarding the availability and terms of legal services, the Court articulated three general principles: the public has the right to make an informed, intelligent choice concerning legal counsel, *id.* at 365, 377; the legal profession suffers from an adverse public image, which may be due in part to the belief that attorney's fees are too high, *id.*; and advertising may reduce prices, and thus will promote the use of legal counsel among the middle class, *id.* at 377. L. ANDREWS, *supra* note 4, at 4-5.

<sup>65</sup> 433 U.S. at 372-79. Contrary to the contention that advertising will adversely affect legal professionalism, the Court opined that lawyer advertising actually may have a positive impact on professionalism. *Id.* at 368-71. This stems from the suggestion that the refusal of lawyers to advertise has exacerbated public cynicism toward the profession. *Id.* at 370-71. Additionally, the Court rejected as dubious the argument that advertising will increase fees charged, reasoning that the competition resulting from advertising may instead serve to lower rates. *Id.* at 377-78; see Welch, *supra* note 2, at 595-98.

<sup>66</sup> In *Virginia Pharmacy*, the Court noted that its holding did not extend to the advertising of professional services. See 425 U.S. at 768. Additionally, neither *Carey* nor *Linmark* represented theoretical expansions of commercial speech protection beyond the limits of *Virginia Pharmacy*. See *supra* notes 48 & 55. Thus, until *Bates*, the extent to which the Court would protect the advertising of professionals remained unclear.

*Bates*, by permitting lawyer advertising, rejected the arguments that such advertising

within the sanctuary of attorney professionalism, for the first time were discredited by the Supreme Court. Nevertheless, a number of aspects of the *Bates* holding serve to lessen the decision's impact.<sup>67</sup>

First, by virtue of the conspicuously narrow nature of the *Bates* holding,<sup>68</sup> the constitutional permissibility of advertising other than routine legal services remained speculative. Indeed, problems surrounding advertisements which relate to the quality of legal services as well as questions concerning in-person solicitation were left unanswered.<sup>69</sup> This hesitancy to afford meaningful protection to more profound attorney advertising is somewhat puzzling, since the Court itself noted that the lack of advertising bred "disillusionment with the profession."<sup>70</sup>

In addition, the *Bates* Court enunciated a number of permissible restrictions,<sup>71</sup> including those set forth in *Virginia Pharmacy*: reasonable time, place, and manner restrictions, and restraints on

---

was somehow unethical. See *Bates*, 433 U.S. at 371-72. Legal advertising, previously considered inherently inconsistent with the ethics of the profession, was rendered equivalent to purely economic commercial speech. Although *Bates* did not add doctrinally to commercial speech, it should be viewed as the preamble to the Court's subsequent elaboration of the commercial speech theory.

<sup>67</sup> See *infra* notes 68-71 and accompanying text.

<sup>68</sup> See 433 U.S. at 383-84; *supra* note 63 and accompanying text. By restricting its holding to advertisements of routine legal services, the *Bates* Court appears to have applied the "standardized products" rationale of *Virginia Pharmacy*. Thus, it seems that the *Bates* Court has likened the advertising of routine legal services to the commercialization of "prepackaged drugs." See 433 U.S. at 391 (Powell, J., concurring in part and dissenting in part).

<sup>69</sup> 433 U.S. at 366. The Court expressly reserved ruling on advertisements relating to the quality of legal services and those concerning in-person solicitation, stating: "[A]dvertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation." *Id.* at 383-84. It should be noted that the Court subsequently addressed the solicitation issue, see *infra* notes 75-95, but still has not addressed the "quality" issue.

<sup>70</sup> 433 U.S. at 370 (footnote omitted). The low esteem with which the public held the bar prior to the Court's sanctioning of lawyer advertising would tend to refute the argument that such advertising would have damaging repercussions upon the dignity of the profession. See Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475, 516 & n.221 (1977). Indeed, "dissatisfaction with the bar stems in major part from the aloofness of lawyers and their failure to reach out to the community." *Id.* at 516. There is an implicit contradiction in the legal profession's denunciation of advertising and its condonation of the avid structuring of social and civic engagements to broaden an attorney's potential client base. See 433 U.S. at 370-71.

<sup>71</sup> 433 U.S. at 383. By mentioning only "some of the clearly permissible limitations on advertising" by attorneys, the Court implied the existence of other possible regulations. *Id.* (emphasis supplied). No clue was provided, however, with respect to what these other possible restrictions might be. See *id.*



false, deceptive or misleading advertising.<sup>72</sup> The Court thus made the permissible restrictions on general commercial speech applicable to lawyer advertising.<sup>73</sup> The *Bates* decision, therefore, while exemplifying the ever-increasing nature of commercial speech protection, rests uncomfortably on the same ad hoc foundation as previous commercial speech cases.<sup>74</sup>

Subsequent to *Bates*, the Supreme Court considered the regulation of direct solicitation by attorneys.<sup>75</sup> *In re Primus*<sup>76</sup> concerned an attorney, Edna Smith Primus, who was associated with both a private law firm and the American Civil Liberties Union (ACLU).<sup>77</sup> In 1973, the ACLU initiated a program to commence actions on behalf of any person sterilized as a condition of a state medical program.<sup>78</sup> Upon learning that a victim, Mary Williams, was willing to commence such a suit, Primus wrote the woman informing her of the ACLU's offer of free legal representation.<sup>79</sup> Shortly thereafter, Williams responded by informing the attorney of her intention not to sue.<sup>80</sup> As a result of the written communication to the victim, however, Primus was charged with violating the State's disciplinary rule prohibiting solicitation of clients.<sup>81</sup> Despite

<sup>72</sup> *Virginia Pharmacy*, 425 U.S. at 771; see *supra* notes 49-50 and accompanying text.

<sup>73</sup> 433 U.S. at 383-84.

<sup>74</sup> See *supra* notes 66-73 and accompanying text.

<sup>75</sup> See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Assoc.*, 436 U.S. 447 (1978).

<sup>76</sup> 436 U.S. 412 (1978).

<sup>77</sup> *Id.* at 414. Primus did not receive remuneration from the ACLU, but was paid a retainer fee by the South Carolina Council on Human Relations. *Id.* at 414-15.

<sup>78</sup> *Id.* at 415-16. Mothers receiving Medicaid were informed that sterilization was a precondition for remaining on the program. *Id.* at 415. Consequently, several sterilizations were performed. See *id.* As a representative of the South Carolina Council on Human Relations, Primus addressed a group of women who allegedly had been sterilized under the program. *Id.* at 415-16. During the meeting, Primus informed the women of their legal rights and "suggested the possibility of a lawsuit." *Id.* at 416. Shortly thereafter, Primus was willing to represent these women on behalf of the ACLU. *Id.*

<sup>79</sup> *Id.* The letter stated in part: "The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed the operation. . . . [I]f you are interested, let me know . . . ." *Id.* at 416 n.6.

<sup>80</sup> *Id.* at 417. The victim telephoned Primus to reject the offer of free legal counsel. *Id.* Prior to telephoning the attorney, the victim visited the doctor who performed the sterilization and signed a document releasing him from liability. *Id.* There was no further communication between the victim and Primus. *Id.*

<sup>81</sup> *Id.* at 418; see S.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(5)(C), DR 2-104(A)(5) (1973). A complaint against the attorney was filed with the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board). 436 U.S. at 417. A board-appointed panel determined that the lawyer had solicited a client on behalf of the ACLU in violation of the disciplinary rules. *Id.* at 418. At the hearing, the attorney

Primus' contentions that her activity was constitutionally protected,<sup>82</sup> she was publicly reprimanded by the state's highest court.<sup>83</sup>

On appeal, the Supreme Court, rather than relying upon any of the previously discussed cases, held the rule in *NAACP v. Button*<sup>84</sup> to be dispositive.<sup>85</sup> In *Button*, the Court had ruled that the litigation assistance offered by the NAACP was a form of political expression and association, fully protected by the first and fourteenth amendments.<sup>86</sup> Since the *Primus* Court determined that the ACLU engaged in activities similar to those of the NAACP in *Button*, it concluded that Primus' conduct was likewise protected.<sup>87</sup> Notably, the Court indicated that states may regulate in-person solicitation, distinguishing *Ohralik v. Ohio State Bar Association*,<sup>88</sup>

---

offered to produce expert testimony that some degree of solicitation is necessary to protect the "liberties of inarticulate, economically disadvantaged" persons who may be unaware of their rights and the availability of counsel. *Id.* at 418 n.9. This offer was "rejected as not germane to the disciplinary hearing." *Id.*

<sup>82</sup> 436 U.S. at 417. The attorney argued that her activity was protected under the first and fourteenth amendments, as well as under Canon 2 of the Code of Professional Responsibility. *Id.*

<sup>83</sup> *Id.* at 421.

<sup>84</sup> 371 U.S. 415 (1963).

<sup>85</sup> See 436 U.S. at 426-31.

<sup>86</sup> 371 U.S. at 428-29. At issue in *Button* was the constitutionality of a Virginia statute which provided that solicitation of legal services by attorneys constituted attorney malpractice. *Id.* at 423-26 & 423 n.7. The Court held the statute unconstitutional as applied to the NAACP—a corporation whose major purpose is to eradicate all barriers to racial equality. *Id.* at 419, 428-29. The Court stated that the NAACP's activities are protected "modes of expression and association." *Id.* at 428. Subsequent decisions interpreting *Button* have established the principle that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transp. Union v. State Bar*, 401 U.S. 576, 585 (1971); see *Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977).

<sup>87</sup> 436 U.S. at 427. The Court stated: "[T]he ACLU . . . much like the NAACP . . . 'engage[s]' in extensive educational and lobbying activities and 'also [devotes] much of [its] funds . . . to an extensive training program of litigation on behalf of [their] declared purposes.'" *Id.* (quoting *NAACP v. Button*, 371 U.S. at 419-20). Notably, the *Primus* Court rejected the argument that, because the ACLU has a policy of requesting an award of counsel fees, their activities did not fall under the protective umbrella of *Button*. 436 U.S. at 429. The Court concluded that the legal activities of the ACLU were "a form of political expression" and "political association," *id.* at 428 (quoting *NAACP v. Button*, 371 U.S. at 429, 431), and therefore, the attorney's letter to the victim clearly was protected by the first amendment freedom of expression, 436 U.S. at 431. Furthermore, the Court observed that the ACLU's litigation was not only a form of political activity, but was also a method of conveying important information to the public—a form of commercial speech. See *id.* at 431. Thus, the Court reasoned, the ACLU's activity was protected by traditional first amendment considerations as well as the commercial-speech doctrine. See *id.*

<sup>88</sup> 436 U.S. 447 (1978); see *infra* notes 91-96 and accompanying text.

the companion case to *Primus*.<sup>89</sup> The distinguishing factor, observed the Court, was that the speech in *Primus* was a form of associational expression intended to advance "beliefs and ideas."<sup>90</sup> Therefore, *Primus* can be understood independently of the commercial speech doctrine, in that *Primus*' political activity was subject to absolute first amendment protection.

In *Ohralik*, an experienced attorney who personally solicited the business of two young auto accident victims<sup>91</sup> was found guilty of in-person solicitation.<sup>92</sup> Suspending the attorney indefinitely for his conduct, the *Ohralik* Court initially noted that the *Bates* decision was not dispositive, since in-person solicitation vastly differs from the type of advertising sanctioned in *Bates*.<sup>93</sup> In so distinguishing *Bates*, the Court focused upon the direct pressure and one-sidedness endemic to in-person solicitation and its attendant encouragement of hasty, uninformed decisionmaking.<sup>94</sup> After recognizing that the states have the primary responsibility for maintaining professional standards for lawyers,<sup>95</sup> the Court observed that the advertising in *Bates* did not erode this state interest, whereas the type of blatant solicitation involved in *Ohralik* seriously implicated the states' power to preserve professionalism

---

<sup>89</sup> 436 U.S. at 435-36, 438-39. The Court distinguished the solicitation by letter in *Primus* from the in-person solicitation in *Ohralik*, noting that "written communication lessens substantially the difficulty of policing solicitation practices . . ." *Id.* at 435-36.

<sup>90</sup> *See id.* at 422. Noting that the attorney's offer of legal services was premised upon civil liberty objectives, rather than on pecuniary gain motives, as was the case in *Ohralik*, the Court determined that such business constitutes associational activity which had already been afforded full first amendment protection. *Id.*; *see Button*, 371 U.S. at 430. *See generally* Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 6-15 (1964).

<sup>91</sup> 436 U.S. at 449-50. *Ohralik* visited the victim of an automobile accident in the hospital, offering to represent her in any ensuing litigation. The victim initially declined the offer, but 2 days later she signed a contingency fee agreement with the attorney. *Id.* Additionally, *Ohralik* secured an oral agreement to represent another party who was injured in the accident. *Id.* at 450-52.

<sup>92</sup> *Id.* at 453. The attorney's conduct was determined to be violative of Ohio's Code of Professional Responsibility. *See id.*; OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), DR 2-104(A) (1970). Despite a recommendation from the grievance committee that the attorney be publicly reprimanded, the Ohio Supreme Court suspended the attorney indefinitely. 436 U.S. at 453-54.

<sup>93</sup> 436 U.S. at 455, 458; *see infra* note 94 and accompanying text.

<sup>94</sup> 436 U.S. at 457. The Court stated that in-person solicitation actually may "disserve the individual and societal interest . . . in facilitating 'informed and reliable decisionmaking.'" *Id.* (quoting *Bates*, 433 U.S. at 364).

<sup>95</sup> *Id.* at 464; *cf.* 37 Fed. Reg. 22,934, 22,937 (1972) (Federal Trade Commission report seeking to regulate harmful aspects of direct-selling industry).

among lawyers.<sup>96</sup>

It can be seen that even after *Primus* and *Ohralik*, a clear standard for lawyer advertising, or for commercial speech generally, had not been articulated. Rather, *Primus*' political overtones removed the case from the confines of pure commercial speech, and the defendant's outrageous conduct in *Ohralik* gave rise to so compelling a state interest that the establishment of a standard for less offensive lawyer conduct would have been misplaced.<sup>97</sup> It was not until *Central Hudson Gas & Electric Corp. v. Public Service Commission*<sup>98</sup> that the Court enunciated a test for evaluating commercial speech proscriptions and, as will be seen, this standard has gravely impacted upon the law of attorney advertising.

The *Central Hudson* inquiry, applicable to commercial speech cases generally, required judicial consideration of: (1) whether the speech concerns lawful activity and is not misleading, (2) whether the state has advanced a substantial interest in the regulation, (3) whether the regulation directly promotes that interest, and (4) whether the regulation exceeds the bounds of necessity to serve

---

<sup>96</sup> 436 U.S. at 466. The majority believed that the *Ohralik* facts vividly illustrated the harm inherent in in-person solicitation by attorneys. *Id.* at 468. An examination of the Court's description of the facts makes this apparent:

[The attorney] approached two young accident victims at a time when they were especially incapable of making informed judgments or of assessing and protecting their own interests. He solicited Carol McClintock in a hospital room where she lay in traction and sought out Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior inquiries that she had just been released. . . . He employed a concealed tape recorder . . . . He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer. He refused to withdraw

. . . .

*Id.* at 467.

<sup>97</sup> See *supra* notes 90 & 96 and accompanying text.

<sup>98</sup> 447 U.S. 557 (1980). In *Central Hudson*, the New York Public Service Commission ordered the cessation of all promotional advertising by electric utilities regarding the use of electricity. *Id.* at 558. The only advertising that did not fall within the ambit of the order was advertising deemed "informational" in nature—designed to lower consumption during high demand periods. *Id.* at 560. Reversing the New York Court of Appeals, the Supreme Court invalidated the regulation. *Id.* at 571. Although the commercial regulation was determined to be violative of the first amendment, Justice Powell, writing for the majority, recognized a crucial distinction between commercial speech "and other varieties of speech," thereby necessitating different levels of protection. *Id.* at 562-63. Whereas noncommercial speech is accorded full protection absent clear and present danger, *Schenck v. United States*, 249 U.S. 47, 52 (1919), "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation," 447 U.S. at 563. Thus, the Court reasoned that inaccurate or deceptive commercial speech is always subject to state regulation. 447 U.S. at 563.

such interest.<sup>99</sup> Although in devising the test the Court culled the rationales of earlier commercial speech decisions,<sup>100</sup> the *Central Hudson* holding was not of the limited, ad hoc variety.<sup>101</sup> Rather, in requiring a state to show that a regulation is "no more extensive than is necessary to serve the [substantial] state interest" at stake,<sup>102</sup> the *Central Hudson* standard appears to provide the long-awaited beacon by which the constitutionality of proscriptions on commercial speech clearly can be ascertained.<sup>103</sup>

#### IV. *In re R.M.J.*—A THEORETICAL PERSPECTIVE

After the *Bates* decision, a number of states amended their rules concerning lawyer advertising. The Missouri Supreme Court, for example, promulgated a revised disciplinary rule<sup>104</sup> whereby attorneys were permitted to publish ten categories of information in newspapers, periodicals, and the telephone yellow pages.<sup>105</sup> An addendum to the amended rule required any lawyer who mentioned areas of practice, to do so by either listing one of three descriptive terms—General Civil Practice, General Criminal Practice, or General Civil and Criminal Practice, or by indicating one of twenty-

---

<sup>99</sup> 447 U.S. at 566. Applying the four-prong test, Justice Powell noted that the advertising of information regarding services by public utilities was clearly a lawful activity, *id.* at 566-68; that the state had a legitimate interest in energy conservation and ensuring a "fair and efficient" rate structure, *id.* at 568-69; and that the state's interests were directly advanced by the regulation, *id.* at 569. With respect to the fourth inquiry, the extensiveness of the regulation, however, the Court concluded that the state's interest in energy conservation did not justify suppressing "all promotional advertising, regardless of the impact of the touted service on overall energy use." *Id.* at 570. It is suggested that the import of *Central Hudson* is not the protection afforded public utilities but its enunciation of a clearly defined, yet flexible standard by which to evaluate commercial advertising. The flexibility of the *Central Hudson* test lay in the relative weight to be accorded any one part of the test. Justice Powell indicated that the crucial inquiry in *Central Hudson* was the extensiveness of the state regulation, *id.* at 569-70, implying that more weight may be attributed another part of the test in a different factual situation.

<sup>100</sup> *See id.* at 561-66.

<sup>101</sup> In delineating the specific elements of the four-part inquiry, the Court did not confine the applicability of the test to advertisements by commercial utilities. *See id.* at 566.

<sup>102</sup> *Id.* at 564. Clearly, in the absence of a showing that the state has a substantial interest in the regulation at issue, the remaining tiers of analysis will be rendered unnecessary. *See id.* at 566.

<sup>103</sup> Compare *Virginia Pharmacy*, 425 U.S. at 773 n.25 and *Bigelow*, 421 U.S. at 826 with *Central Hudson*, 447 U.S. at 566.

<sup>104</sup> MO. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1983).

<sup>105</sup> *Id.* DR 2-101(B)(1)-(10). Permissible categories of information in an advertisement included, *inter alia*, firm name, the names of professional associates, particular areas or fields of law, and the fees for initial consultations and certain routine services. *Id.* DR 2-101(B)(1), (2), (7), (10).

three specific areas of practice.<sup>106</sup> With respect to the inclusion of specific fields of practice in the advertisement, attorneys were precluded from stating that their practice was limited to the designated areas and were required to disclaim certification of expertise.<sup>107</sup> Additionally, the Missouri rule permitted lawyers to send announcement cards to indicate changes in associates, firm name or related matters.<sup>108</sup> The persons to whom such announcements could be delivered, however, were restricted to other attorneys, present and former clients, relatives and personal friends.<sup>109</sup>

Subsequent to the rule revision, R.M.J., a Missouri attorney, was charged with violating the regulations by placing an advertisement in two telephone directories and a neighborhood newspaper. Specifically, R.M.J. listed the courts to which he was admitted to practice, indicated areas of the law which were not approved by the disciplinary rule, and failed to disclaim certification of expertise in the areas of practice listed.<sup>110</sup> In addition, announcement cards were sent to persons other than those specifically permitted under the rule.<sup>111</sup>

Arguing that the advertising restrictions contravened the first amendment, R.M.J. urged the Missouri Supreme Court to modify its standards in accordance with the four-part test enunciated in *Central Hudson*.<sup>112</sup> Despite the apparent applicability of *Central Hudson*, the Missouri court refused to apply that case's four-part test, stating that it "respectfully decline[d] 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."<sup>113</sup> Indeed, although acknowledging that it was presented with a "test" case, the Missouri court held that the revised rules were the exclusive permissible criteria for lawyer advertising and

---

<sup>106</sup> *In re R.M.J.*, 455 U.S. 191, 195 n.6 (1982). The addendum to DR 2-101 prohibited any deviation from the particular phraseology set forth in the regulation. *See id.* at 196 n.6.

<sup>107</sup> Mo. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1983).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* The disciplinary rule did not permit a description of the nature of the attorney's practice, except in certain limited circumstances permitted under DR 2-105. *Id.*

<sup>110</sup> 455 U.S. at 197-98. R.M.J. listed the terms "personal injury" and "workmen's compensation" rather than the prescribed "tort law" and "workers compensation law." *Id.* at 197 n.8. In addition, the advertisement included the term "contracts," which had no counterpart in the addendum. *In re R.M.J.*, 609 S.W.2d 411, 414 (Mo. 1981) (en banc).

<sup>111</sup> 455 U.S. at 198.

<sup>112</sup> *In re R.M.J.*, 609 S.W.2d at 412.

<sup>113</sup> *Id.* (emphasis in original).

therefore privately reprimanded R.M.J.<sup>114</sup>

On appeal, the Supreme Court initially noted that under *Bates*, lawyers could advertise prices for routine legal services and that such advertising was not inherently misleading.<sup>115</sup> Reviewing commercial speech precedent, a unanimous Court, in an opinion authored by Justice Powell, then emphasized that it is entirely proper for states to regulate commercial speech if the purpose is to curb false, deceptive or misleading advertising.<sup>116</sup> Thereafter, Justice Powell summarized the present status of the commercial speech doctrine as applied to advertising by professionals:

<sup>114</sup> *Id.* The Missouri court recognized R.M.J.'s right to appeal, stating that it would reserve judgment on the validity of the disciplinary rule, pending a decision by the Supreme Court. *Id.* Dissenting, Chief Justice Bardgett objected to the requirement in the Advisory Committee's addendum that only certain boilerplate language be used to describe the attorney's field of practice. *Id.* at 414 (Bardgett, C.J., dissenting). The Chief Justice asserted that "[t]he addendum [should] be considered as a *guide* and that no unethical conduct is committed if the terminology used to describe a field of practice is reasonable and fairly describes to a nonlawyer the field of law" indicated in the advertisement. *Id.* (Bardgett, C.J., dissenting) (emphasis added). Furthermore, Chief Justice Bardgett contended that R.M.J. did not engage in unethical conduct by stating that he was admitted to practice in Missouri, Illinois and the United States Supreme Court. *Id.* (Bardgett, C.J., dissenting).

Judge Seiler, filing a separate dissenting opinion, contended that the charge regarding the disclaimer should have been dismissed, since R.M.J., upon being notified of the rule, immediately attempted to modify the advertisement. *Id.* at 415-16 (Seiler, J., dissenting). Unlike Chief Justice Bardgett, who condoned a listing indicating practice before the Supreme Court, *id.* at 414 (Bardgett, C.J., dissenting), Judge Seiler doubted that the "[i]nformational value gained by the consumer by advertising [this] isolated fact . . . justify[ed] the risk of the false impression that such advertising may convey," *id.* at 416 (Seiler, J., dissenting). Although questioning the propriety of a listing, Judge Seiler nevertheless asserted that R.M.J.'s advertisement did not warrant discipline. *Id.* (Seiler, J., dissenting). Judge Seiler found particularly disturbing the limited variety of phrases offered in the addendum to describe areas of legal practice. *Id.* (Seiler, J., dissenting). Indeed, Judge Seiler contended that many of the phrases used by R.M.J. in his advertisement actually might have been more helpful to consumers than the limited terms provided in the addendum. *Id.* (Seiler, J., dissenting).

<sup>115</sup> 455 U.S. at 199.

<sup>116</sup> *Id.* at 200. Justice Powell elaborated on the limits of the *Bates* holding:

[T]he decision in *Bates* . . . was a narrow one. The [*Bates*] Court emphasized that advertising by lawyers still could be regulated. False, deceptive, or misleading advertising remains subject to restraint, and the Court recognized that advertising by the professions poses special risks of deception . . . [C]laims as to quality or in-person solicitation might be so likely to mislead as to warrant restriction. . . . [and] a warning or disclaimer might be appropriately required.

. . . .

Thus, the Court has made clear in *Bates* and subsequent cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.

*Id.* at 200-02 (footnotes and citations omitted).

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of 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 . . . . [R]estrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served. Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.<sup>117</sup>

Applying the above language, which is essentially that of *Central Hudson*,<sup>118</sup> Justice Powell declined to sanction the restrictions placed upon lawyer advertising since the state was unable to demonstrate that the attorney's statements were misleading or that a substantial state interest was fostered by the regulations.<sup>119</sup> Although the Court deemed problematic the potentially misleading nature of a listing which stated that an attorney is a member of the bar of the Supreme Court,<sup>120</sup> it found no justification for a rule prohibiting the publication of the jurisdictions in which a lawyer is licensed to practice. Thus, Justice Powell determined that the publication of the information in R.M.J.'s advertisement was permissible in the absence of evidence that such material is misleading.<sup>121</sup>

---

<sup>117</sup> *Id.* at 203 (footnotes and citations omitted).

<sup>118</sup> *See id.*; *see supra* note 99 and accompanying text. The Court conceded that the *Central Hudson* guidelines failed to provide a comprehensive framework, but asserted that more adequate guidelines would emerge as the case law developed. 455 U.S. at 204 n.16.

<sup>119</sup> 455 U.S. at 205-07. The Court noted that the particular listing in question was neither misleading nor deceptive. Citing the lower court dissent, Justice Powell observed that the listing may in fact be more informative than the material prescribed by the addendum. *Id.* at 205. Justice Powell then indicated that the state could not assert a substantial interest in prohibiting attorney's from listing the jurisdictions in which they are licensed to practice. The Justice considered this information "factual and highly relevant." *Id.*

<sup>120</sup> *Id.* Justice Powell considered R.M.J.'s listing of admission to practice before the Supreme Court to be in "bad taste" and potentially misleading, particularly when the public is "unfamiliar with the requirements of admission to the Bar of [the Supreme Court]." *Id.* Nevertheless, the Justice stated that no showing had been made of the listing's misleading nature. *Id.* at 205-06.

<sup>121</sup> *Id.* at 206-07.



Furthermore, the Court rejected the mailing of the announcements as a basis for disciplinary action, noting that a means of supervising mailings and handbill distribution less restrictive than an absolute prohibition was possible.<sup>122</sup> Justice Powell concluded that state regulation of commercial speech in general, and lawyer advertising in particular, must be accomplished in a limited and reasonable manner.<sup>123</sup> It is axiomatic that an absolute prohibition does not meet this requirement.<sup>124</sup>

#### A. *R.M.J. as a Predictable Culmination*

It is suggested that *R.M.J.* is a logical outgrowth of the Supreme Court's previous treatment of commercial speech cases. Traditionally, the Court has construed commercial speech quite narrowly.<sup>125</sup> Similarly, the decisions rendered in the aftermath of *Bates* failed to expatiate lawyer advertising beyond the prohibition of an absolute proscription.<sup>126</sup> It was not until *Central Hudson* that the Court extended first amendment protection to all purely commercial speech that is neither deceptive nor misleading.<sup>127</sup> Notably, that decision did not specifically address the issue of lawyer advertising. As a result, significant restrictions remained upon that form of speech, as the states attempted "to construe [*Bates*] narrowly . . . and rewrite the rules preserving as much of the old tradition as could be rationalized constitutionally."<sup>128</sup> Faced with the natural progression from *Virginia Pharmacy* to *Central Hudson*, the *R.M.J.* Court was presented with an opportunity to continue this judicial expansionism, and extricate lawyer advertising from the confines of *Bates*. Thus, *R.M.J.*, in extending *Central Hudson* to lawyer advertising specifically, appears to be a predictable culmination of the commercial speech cases. Indeed, it safely can be

---

<sup>122</sup> *Id.* at 206; see *infra* notes 145-60 and accompanying text.

<sup>123</sup> 455 U.S. at 207. The regulation of advertising that is inherently misleading or shown to be misleading would continue to be within the domain of state authority. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See *supra* notes 16-54 and accompanying text.

<sup>126</sup> See *supra* notes 55-97 and accompanying text.

<sup>127</sup> See *supra* notes 98-103 and accompanying text.

<sup>128</sup> Boden, *supra* note 3, at 555. Despite the *Bates* mandate that lawyer advertising was within the ambit of first amendment protection, "most state disciplinary authorities did indeed try to salvage as much of the pre-*Bates* regulatory scheme as could be accomplished, while giving lip service to the constitutional right identified in *Bates*." *Id.* Such state reactions may be understandable in light of *Bates*' failure to articulate clearly a standard by which the states were to abide. *Id.*; see *supra* note 3.

stated that *R.M.J.* is to *Bates* in the context of lawyer advertising what *Central Hudson* was to *Virginia Pharmacy* in the area of commercial speech generally—an enunciation of a workable standard and an expansion of first amendment protection.

### B. *The Substantial State Interest Standard*

The commercial speech doctrine, premised in large part upon the public's right of access to a free flow of information,<sup>129</sup> requires a state to demonstrate a substantial interest to support any proscription on commercial speech.<sup>130</sup> As implemented, the quantification of substantiality has been achieved through a balancing of various factors,<sup>131</sup> with the Court evincing a proclivity toward the interests of the public. Significantly, the identical test has been applied to *all* forms of commercial speech.<sup>132</sup> The Court has indicated, however, that the advertisement of professional services is inherently dissimilar to other commercial speech forms.<sup>133</sup> Thus, the question arises whether lawyer advertising commands a different level of judicial scrutiny.

The commercial speech doctrine presupposes that the public has a right to know—a right to be exposed to a free flow of information.<sup>134</sup> In *Virginia Pharmacy*, Justice Blackmun, writing for the Court, observed that “[i]f there is a right to advertise, there is

---

<sup>129</sup> See *supra* notes 6-15 and accompanying text.

<sup>130</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). It is the substantial interest test component of the *Central Hudson* inquiry which represents the crucial distinction between the protection afforded commercial speech and that afforded traditionally protected free speech. Whereas a state must demonstrate a substantial interest in commercial-speech cases, *id.* at 564, it must establish the presence of a clear and present danger in pure-speech cases, *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>131</sup> The line of cases from *Virginia Pharmacy* to *R.M.J.* balanced the interests of the state or locality against those of the speaker and the public. See, e.g., *Virginia Pharmacy*, 425 U.S. at 761-70. In devising its four-part inquiry, the *Central Hudson* Court drew from these cases and established what is essentially a four-tiered balancing test. See *Central Hudson*, 447 U.S. at 566-71.

<sup>132</sup> The *Central Hudson* Court enunciated its test for general application to commercial speech. See 447 U.S. at 566. Until *R.M.J.*, however, it was unclear whether that test would apply to lawyer advertising. By adopting the *Central Hudson* inquiry, the *R.M.J.* Court indicated that all commercial-speech cases will be governed by the same standard. See *In re R.M.J.*, 455 U.S. at 203-04.

<sup>133</sup> See *Virginia Pharmacy*, 425 U.S. at 773 n.25. The *R.M.J.* Court observed that “the *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.” 455 U.S. at 204 n.15 (emphasis supplied).

<sup>134</sup> See *supra* notes 6-15 and accompanying text.

a reciprocal right to receive the advertising . . . ."<sup>135</sup> Whereas the interests of the speaker are merely economic,<sup>136</sup> "the particular consumer's interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."<sup>137</sup> The *Bates* Court recognized that a potential client has an interest in lawyer advertising similar to that of the consumer,<sup>138</sup> and the lawyer, as speaker, has interests similar to those of other commercial advertisers.<sup>139</sup> Certainly, those who most need access to legal information, the middle seventy percent of the population, are the persons least able to bear the consequences of limitations on their access to such data.<sup>140</sup> Therefore, just as consumer access to commercial information in general is essential to the free enterprise system, information concerning lawyers specifically is a necessary ingredient for private economic decisionmaking. Additionally, lawyer advertising is "helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered."<sup>141</sup>

The foregoing analysis indicates that the policy considerations implicit in the Supreme Court's evaluation of traditional commercial speech are equally applicable to lawyer advertising.<sup>142</sup> In examining the public's interests with respect to purely economic commercial speech, the Court appropriately determined that a

---

<sup>135</sup> 425 U.S. at 757. The right to receive advertising is not a transient right that disappears when such information is otherwise available. Justice Blackmun stated that there is "no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . ." *Id.* at 757 n.15.

<sup>136</sup> *Id.* at 762. The fact that the commercial speaker's interests are purely economic is not dispositive on the issue of the degree of protection afforded that speech. Indeed, Justice Blackmun indicated in *Virginia Pharmacy* that the interests of labor disputants are "primarily economic" but nevertheless protected by the first amendment when transposed into expression. *Id.* at 762-63.

<sup>137</sup> *Id.* at 763.

<sup>138</sup> See 433 U.S. at 364-65. The *Bates* Court noted that its decision to hold Arizona's disciplinary rule unconstitutional flowed *a fortiori* from the *Virginia Pharmacy* analysis of consumer interest in advertising. *Id.* at 365.

<sup>139</sup> See *id.* at 368-69 & 368 n.19.

<sup>140</sup> *Id.* at 376-77. Justice Blackmun observed that a number of studies have revealed a hesitation to seek the services of an attorney because of the paucity of available information regarding those services. *Id.* at 370-71. The average citizen is uninformed with respect to the fees for specific services, *id.* at 370 & n.22, and as to which lawyers are competent to handle certain problems, *id.* at 371 n.23.

<sup>141</sup> *Id.* at 358 (quoting *In re Bates*, 113 Ariz. 394, 402, 555 P.2d 640, 648 (1976) (Holohan, J., dissenting)).

<sup>142</sup> See *supra* notes 38-54, 98-103 and accompanying text.

substantial interest inquiry was the proper standard of review.<sup>143</sup> The myriad of issues surfacing in lawyer advertising cases parallel those presented in the general commercial speech cases.<sup>144</sup> It thus would appear that the *R.M.J.* Court correctly applied the substantial interest test to the commercialization of legal services.

### C. *The Direct Mailing Controversy*

Another important aspect of *R.M.J.* concerns state prohibitions on the solicitation of clients by direct mailing.<sup>145</sup> Prior to *R.M.J.*, state courts employed two diametrically opposed approaches to resolve this problem.<sup>146</sup> The first approach upheld prohibitions on direct mailing and relied primarily on *Ohralik*.<sup>147</sup> These courts reasoned that since direct mailing was solicitation for pecuniary gain,<sup>148</sup> it was subject to inherent abuses similar to those

---

<sup>143</sup> Since *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding commercial speech wholly without the ambit of first amendment protection), the Court has incrementally recognized the value of commercial speech. The *Virginia Pharmacy* Court emphasized: "[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, [it could not be said] that the free flow of [commercial] information does not serve that goal." *Virginia Pharmacy*, 425 U.S. at 765 (1976). Through an evolutionary progression, the Court has afforded protection to a vital form of speech which is potentially of greater value than political speech. *Id.* at 763. To be sure, the Supreme Court has recognized certain peculiarities inherent in commercial speech lending credence to the sanction of such speech's limited state regulation.

Despite the important role commercial speech plays in society, the state clearly retains a legitimate interest in protecting the citizen as consumer. Certain doctrines of the law of contracts—unconscionability, duress, overreaching, and misrepresentation—are distinctively related to the state's regulatory powers so that the state "can legitimately claim an interest quite distinct from the suppression of free expression." Farber, *Commercial Speech and First Amendment Theory*, 74 *Nw. U.L. Rev.* 372, 408 (1979). It is suggested that the substantial interest test—not an absolute bar to state regulation because of the legitimacy of the state's role in protecting the consumer, yet a demanding standard necessitated by the import of the information at hand—is a uniquely capable standard by which both the state's and the public's interests will be adequately protected.

<sup>144</sup> See *supra* notes 38-54, 98-103 and accompanying text.

<sup>145</sup> 455 U.S. at 206.

<sup>146</sup> Compare *Florida Bar Ass'n v. Schreiber*, 407 So. 2d 595, 600 (Fla. 1981) (direct mail solicitation may be prohibited) and *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489, 496 (La. 1978) (ban on mail solicitation upheld) with *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 151, 412 N.E.2d 927, 934, 432 N.Y.S.2d 872, 878-79 (1980) (ban on mail advertising may not constitutionally be upheld), *cert. denied*, 450 U.S. 1026 (1981) and *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978) (mail advertising may not be prohibited).

<sup>147</sup> See, e.g., *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 428, 393 A.2d 1175, 1181 (1978); see also *supra* notes 91-96 and accompanying text.

<sup>148</sup> See, e.g., *Florida Bar v. Schreiber*, 407 So. 2d 595, 599 (Fla. 1981) (harm was "the blinding of an attorney's legal judgment by pecuniary light").

of in-person solicitation,<sup>149</sup> and therefore, could be prohibited by state regulation. In contrast, the second approach invalidated prescriptions on direct mailing, concluding that mailings are akin to the type of advertising sanctioned in *Bates*,<sup>150</sup> and, accordingly, are constitutionally protected under the commercial speech doctrine.<sup>151</sup>

The *R.M.J.* Court, in a cursory discussion, apparently adopted the second approach,<sup>152</sup> holding that the direct mailing in issue could not be constitutionally prohibited.<sup>153</sup> The Court, however,

---

<sup>149</sup> See, e.g., *id.* at 599-600; *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489, 496 (La. 1978); see also *supra* note 94 and accompanying text. Conceding that the potential dangers associated with direct mailings are not as grave as those present in in-person solicitations, e.g., *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d at 496, courts have expressed three major concerns with solicitation by mail. First, it has been maintained that the ability of direct mailings to reach a specifically targeted audience enhances the possibility that attorneys may exert undue influence over a vulnerable populace. See *Florida Bar v. Schreiber*, 407 So. 2d 595, 599 (Fla. 1981). Direct-mailing lists provide perhaps the greatest potential for overreaching. For instance, it is not difficult to imagine a probate attorney seeking to obtain lists from funeral homes of the next-of-kin of recently deceased persons, or a personal-injury lawyer attempting to secure from hospitals the names and addresses of recently admitted accident victims. Such solicitation is clearly no more desirable than the "ambulance chasing" involved in *Ohralik*. Second, courts indicate that mail solicitation may invade the privacy of the recipient and force the information contained therein upon a "captive audience." See *id.* at 598. It has been suggested that a person would feel compelled to open a letter from an attorney, see *id.*, and would not be inclined to discard it without reading it carefully, as he might if it were sent by a traditional commercial establishment, see *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541-42 (1980). Finally, courts have voiced a concern with the ability of the states to regulate direct mailing since mailings, unlike newspaper advertising, are not in the "public domain." See *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d at 496.

<sup>150</sup> See *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 146-47, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875-76 (1980), *cert. denied*, 450 U.S. 1026 (1981); see also *supra* notes 57-58 and accompanying text. It should be noted that "direct mail is considered by marketing experts to be an advertising medium." Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. BAR FOUND. RESEARCH J. 967, 1018 [hereinafter cited as *Lawyer Advertising*].

<sup>151</sup> See *Bishop v. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n*, 521 F. Supp. 1219, 1232 (S.D. Iowa 1981); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 147-50, 412 N.E.2d 927, 932-34, 432 N.Y.S.2d 872, 876-78 (1980), *cert. denied*, 450 U.S. 1026 (1981). The New York Court of Appeals applied the four-prong *Central Hudson* test to direct mailings, concluding that the State interests were capable of protection by less restrictive regulation. See *Koffler*, 51 N.Y.2d at 147-50, 412 N.E.2d at 932-34, 432 N.Y.S.2d at 876-78; accord *Bishop*, 521 F. Supp. at 1231-32.

<sup>152</sup> See 455 U.S. at 206-07.

<sup>153</sup> *Id.* at 206. The Court observed that the State had neither articulated a substantial interest nor illustrated that it had attempted to protect such an interest by using less restrictive regulations. See *id.* Moreover, the Court held that all of the restrictions imposed upon *R.M.J.* were subject to the commercial-speech doctrine. See *id.* at 206-07. Thus, while the Court did not expressly apply the *Central Hudson* test to direct mailings, its inquiry

declined to address whether states have a more exigent interest in direct mailings, thereby justifying more stringent regulation than that imposed upon traditional advertising.<sup>154</sup> It is suggested that the state's interest in direct mailings is indeed more compelling than general commercial advertising because of the greater potential for overreaching and invasion of privacy.<sup>155</sup> Moreover, the greater difficulties in supervising mail solicitation lend credence to more intrusive state regulation.<sup>156</sup>

In light of the foregoing it is submitted that states should promulgate comprehensive regulations that protect the public from the potential abuse of direct mail advertising by attorneys. As an aid to the state legislatures, the following regulation is proposed:

A lawyer or law firm may use direct mail advertising provided it does not violate any statute or court rule, and is in accordance with other disciplinary rules. For the purposes of this section direct mailings shall consist of all material intended as an advertisement, delivered to a person or persons in whatever form,

---

into possible government interests, and its employment of a less restrictive means analysis indicates that the *Central Hudson* test was indeed applied. *See id.* at 206; *supra* notes 98-103 and accompanying text. Clearly, an absolute prohibition on direct mailings could not withstand constitutional scrutiny under the *Central Hudson* test, since any significant state interest may be protected, pursuant to the less restrictive means analysis, by carefully articulated regulations. *See Howard, Going About Suppressing Speech: A Comment on In the Matter of R.M.J.*, 26 St. Louis U.L.J. 361, 362 (1982).

<sup>154</sup> *See* 455 U.S. at 206. Though the Court indicated that the record was silent regarding the ability of the states to supervise direct mailings, it stated that "[m]ailings and handbills may be more difficult to supervise than newspapers." *Id.* In fact, the Court suggested two regulations to curb direct-mailing abuses. *See id.* at 206 & n.20; *infra* notes 158-59 and accompanying text.

<sup>155</sup> *See supra* note 149. Even those courts which have invalidated direct-mailing prohibitions have suggested that some regulation may be necessary to protect the public from potential invasion of privacy. *See* 455 U.S. at 206 n.20; *Bishop v. Commission on Professional Ethics & Conduct of the Iowa State Bar Ass'n*, 521 F. Supp. 1219, 1231-32 (S.D. Iowa 1981). These courts have indicated that the public possibly could be frightened by receiving a letter from an attorney's office. *See In re R.M.J.*, 455 U.S. at 206 n.20; *Bishop*, 521 F. Supp. at 1231. Moreover, one post-*R.M.J.* court, addressing the overreaching issue, held that mail advertising directed toward a vulnerable segment of the population could be regulated by the states. *State v. Moses*, 231 Kan. 243, 246, 642 P.2d 1004, 1007 (1982).

<sup>156</sup> *See supra* note 149. Pre-*R.M.J.* courts that invalidated prohibitions on direct mailings conceded that mailings were more difficult to supervise than newspaper advertising, and consequently, require additional regulation. *See Bishop v. Commission on Professional Ethics and Conduct of the Iowa State Bar Ass'n*, 521 F. Supp. 1219, 1232 (S.D. Iowa 1981); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 149-50, 412 N.E.2d 927, 933, 432 N.Y.S.2d 872, 878 (1980), *cert. denied*, 450 U.S. 1026 (1981).

including but not limited to, letters and announcement cards.<sup>157</sup>

1. All direct mailing conspicuously shall bear the words "Advertising Content," "This is an Advertisement," or other words of similar meaning, in the same area as the return address.<sup>158</sup>

2. A copy of any direct mailing and a list of the intended recipients shall be mailed to the local bar association advisory committee simultaneously with the delivery of any direct mailing.<sup>159</sup>

3. No direct mailing shall be sent to any person or persons whom the lawyer knows or should know to be in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer.<sup>160</sup>

#### V. PRACTICAL IMPLICATIONS OF *R.M.J.* FOR COMMERCIAL SPEECH BY ATTORNEYS

Like the *Bates* decision, *R.M.J.* apparently will provide the foundation for increased advertising on the part of attorneys.<sup>161</sup> Indeed, it is probable that *R.M.J.* will lead to increased lawyer advertising for at least two reasons. First, the Supreme Court's rejection

<sup>157</sup> The word "delivered" includes any material delivered to the public by the United States Postal Service, as well as any other method used to deliver material to the public.

<sup>158</sup> See *In re R.M.J.*, 455 U.S. at 206 n.20 (proposing " 'This is an Advertisement' "); *Bishop v. Commission on Professional Ethics & Conduct of the Iowa State Bar Ass'n*, 521 F. Supp. 1219, 1231-32 (S.D. Iowa 1981) (suggesting " 'Advertising Content' "). The requirement that the direct mailing be marked as an advertisement is designed to safeguard the public's right to privacy. See *Bishop*, 521 F. Supp. at 1231-32. By stamping such a disclaimer on the mailing, the recipient is immediately advised that the material is commercial, and may feel free to discard it. See *id.* at 1231.

<sup>159</sup> Ky. Sup. Ct. R. 3.135; see *In re R.M.J.*, 455 U.S. at 206. A filing requirement will facilitate supervision of direct-mail advertising. See *In re R.M.J.*, 455 U.S. at 206. One commentator suggests a requirement for "pre-clearance" of direct mailings by the state bar association. See Comment, *The First Amendment, In Re R.M.J., and State Regulation of Direct Mail Lawyer Advertising*, 34 BAYLOR L. REV. 411, 429 (1982). Such a proposal has been rejected by the ABA because of its dubious constitutionality. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7.2(b) comment (1982). A simultaneous filing requirement for direct mail, however, does not conflict with the constitutional doctrine of prior restraint, see *Near v. Minnesota*, 283 U.S. 697, 715-16 (1931), yet adequately provides for supervision.

<sup>160</sup> Cf. D.C. DR 2-103(a)(3) (1982) (referring to in-person solicitation). Minors, the mentally impaired, and other vulnerable segments of the population would be protected from possible overreaching by a regulation prohibiting attorneys from knowingly issuing direct mailings to persons incapable of exercising the judgment necessary to select an attorney. Clearly, an attorney who knowingly dispatches direct mailings to such impaired persons should receive more severe disciplinary sanctions than those who do so unwittingly.

<sup>161</sup> See *supra* note 66 and accompanying text.

of the advertising limitations devised by the Missouri Supreme Court should induce other states that regulate the content or form of such speech to amend their unduly restrictive attorney advertising rules.<sup>162</sup> More importantly, by applying the *Central Hudson* criteria to this field, the *R.M.J.* Court has provided the states with clearer guidelines for formulating advertising regulations.<sup>163</sup> This, in turn, should encourage the states to eliminate ambiguities—a major deterrent to the use of advertising by lawyers—that pervade currently existing regulations, such as the difference, if any, between advertising and solicitation.<sup>164</sup>

Despite the beneficial impact on lawyer advertising that is likely to result from *R.M.J.*, a caveat must be sounded. Studies have shown that the majority of lawyers are reluctant to advertise.<sup>165</sup> This reluctance stems, in part, from the negative perception

---

<sup>162</sup> After the *Bates* decision, 49 jurisdictions revised their lawyer-advertising regulations. L. ANDREWS, *supra* note 4, at 43. Such changes in state law, however, have been met with reluctance. See Andrews, *The Selling of a Precedent*, STUDENT LAW., (Mar. 1982), at 12, 14 [hereinafter cited as Andrews, *The Selling*]; Comment, *supra* note 159, at 412-13; *supra* note 3.

<sup>163</sup> See Comment, *supra* note 159, at 435-36. Some commentators contend that the *Central Hudson* criteria impose too great a restriction upon state regulation of commercial speech. See, e.g., Cox, *supra* note 6, at 26-27. Cox argues that the *Central Hudson* test increases not only "the weight of the burden put upon the state," but also "the degree to which judicial opinion is substituted for the state regulatory authority." *Id.* at 35. Such close scrutiny, according to Cox, deprives a state of the opportunity to experiment with various solutions to serious social problems. *Id.*

<sup>164</sup> See Comment, *supra* note 159, at 435-36. *But cf.* Andrews, *The Selling*, *supra* note 162, at 14 (states have altered their regulations in ways intended to inhibit lawyer advertising since the *Bates* decision). The most recent controversy regarding attorney advertising has focused upon the distinction between advertising and solicitation. See Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L. L. REV. 77, 78 (1973). The terms themselves are relatively simple to define: "Advertising informs or calls attention to the lawyer and his willingness to provide legal services. Solicitation is a more intense form of advertisement and is a pleading, an earnest request, and a more personal petition than advertising." Comment, *supra* note 159, at 411. In addition, the Court apparently has taken the position that advertising merits first amendment protection while solicitation does not. See *In re R.M.J.*, 455 U.S. at 199, 202. A problem arises, however, in determining what forms of lawyers' commercial speech constitute advertising and what forms are actually solicitation. Andrews, *The Selling*, *supra* note 162, at 47; see Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest?*, 46 BROOKLYN L. REV. 423, 430 (1980).

<sup>165</sup> See, e.g., Hudec & Trebilcock, *Lawyer Advertising and the Supply of Information in the Market for Legal Services*, 20 U.W. ONT. L. REV. 53, 68-69 (1982); *Advertising Attracting Neither Participants Nor Supporters*, 67 A.B.A. J., 1618, 1618 (1981) [hereinafter cited as *Advertising*]. A nationwide survey conducted in 1981 for the American Bar Association Journal revealed that 67% of the lawyers polled indicated that they intended to refrain from advertising, while 23% were "unlikely" to advertise or unsure if they would do so. *Advertising*, *supra*, at 1618. A mere 10% of those polled stated that they had advertised in



that lawyers have regarding the impact of advertising on the profession.<sup>166</sup> Many believe, for example, that advertising of legal services is inherently misleading.<sup>167</sup> It is also commonly believed that only incompetent or unscrupulous attorneys need to advertise.<sup>168</sup> Opinions such as these, as well as arguments with a firmer foundation, will most likely preclude *R.M.J.* from resulting in a dramatic increase in attorney advertising.<sup>169</sup> These disadvantages, however, are more apparent than actual, as a brief examination of them will demonstrate.

The most commonly exploited argument against lawyer advertising is that it creates innumerable opportunities to mislead and deceive the public.<sup>170</sup> Supposedly, the rationale underlying this contention is that the uniqueness of legal services renders misleading any attempt to quote a standard fee.<sup>171</sup> Assuming the truth of this premise, an absolute ban on the information consumers need to make intelligent decisions regarding legal action, nevertheless

---

the past. *Id.* at 1618.

<sup>166</sup> See Andrews, *The Selling*, *supra* note 162, at 48. The senior, established attorneys, who control the promulgation of state advertising standards, tend to have a negative view of lawyer advertising. Slavin, *Lawyers and Madison Avenue*, 6 BARRISTER 46, 48 (1979); Braverman, *A Perspective on Solicitation Emerging—Maybel*, 70 ILL. B.J. 310, 310 (1982).

<sup>167</sup> See *Advertising*, *supra* note 165, at 1618. The American Bar Association's 1981 survey revealed that 51% of the attorneys polled believed that advertising by lawyers had "misled" the public. *Id.*

<sup>168</sup> Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503, 510-11 (1982). Professor Devine contends that the notion that attorneys "who advertise are *per se* bad" stems from the belief that there is a longstanding tradition against lawyer advertising. *Id.* In actuality, there was no substantial advertising regulation in the United States until 1888 and no outright prohibition until 1908. Note, *Advertising, Solicitation*, *supra* note 1, at 1182; *infra* notes 184-86 and accompanying text.

<sup>169</sup> See Hudec & Trebilcock, *supra* note 165, at 95; Note, *Advertising, Solicitation*, *supra* note 1, at 1184-91.

<sup>170</sup> See Note, *Advertising, Solicitation*, *supra* note 1, at 1182-84; Commentary, *The Solicitation Rule: Ethical Restrictions and Legal Fictions*, 22 CATH. U.L. REV. 218, 224-25 (1972) [hereinafter cited as Commentary, *The Solicitation Rule*].

<sup>171</sup> See *Bates*, 433 U.S. at 372. In addition to the argument that the uniqueness of legal services renders any attempt to set a standard fee misleading, the *Bates* Court cited two other reasons why legal services advertising might be misleading: consumer ignorance as to what services are needed, and the temptation for attorneys to emphasize factors irrelevant to work quality. *Id.* at 372-75. A sizable number of lawyers apparently find these contentions persuasive. The 1981 American Bar Association Journal survey found that 37% of the members questioned believed that advertising gave the public false ideas concerning the cost of routine legal services. *Advertising*, *supra* note 165, at 1619. The Court, however, was unimpressed with these arguments, indicating that the nonfungibility of legal services does not make a fixed fee quotation misleading if the required work is performed at the advertised price. *Bates*, 433 U.S. at 372-73.

remains unjustified.<sup>172</sup> Truthful, clearly presented information concerning an attorney's educational background, areas of specialization, consultation fees, and prices for routine transactions, such as uncontested divorces, presents minimal opportunity for deception.<sup>173</sup> Furthermore, any presentation of information in a form likely to deceive can be curtailed by state regulation, as the *R.M.J.* Court emphasized.<sup>174</sup> Additionally, the intelligence of the consumer of legal services should not be underestimated.<sup>175</sup> Though notably ignorant of legal services, most consumers are reasonably experienced in detecting exaggerated advertising claims.<sup>176</sup> Thus, there seems to be no justification for surmising that consumers would be unable to assimilate advertising for legal services, particularly if the use of jargon is avoided.<sup>177</sup>

A closely related argument advanced for prohibiting lawyer advertising is that such commercialization will impair the dignity of the legal profession.<sup>178</sup> This postulate is based upon two false premises: that only dishonest or inept lawyers will choose to advertise, and that allowing lawyers to advertise violates an American legal tradition.<sup>179</sup> Though there is a dearth of empirical data regarding the use of lawyer advertising, the available evidence indi-

<sup>172</sup> See *Bates*, 433 U.S. at 374-75; Devine, *supra* note 168, at 513.

<sup>173</sup> See Hudec & Trebilcock, *supra* note 165, at 71. It has been suggested that routine services are likely to be the only legal services advertised, even under liberal advertising rules, because of the inability of advertising media to portray complex information effectively. *Id.* at 68. Assuming this to be true, the chance that deceptive advertisements will be circulated is decreased, since it is the complexity of legal services that allegedly creates opportunities for deceit. See *Bates*, 433 U.S. at 372.

<sup>174</sup> See *In re R.M.J.*, 455 U.S. at 207. The *R.M.J.* Court stated:

[W]e emphasize . . . that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions.

*Id.*

<sup>175</sup> See Hudec & Trebilcock, *supra* note 165, at 71.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> See, e.g., Note, *Advertising, Solicitation*, *supra* note 1, at 1184; Commentary, *The Solicitation Rule*, *supra* note 170, at 224-25.

<sup>179</sup> Christensen, *Advertising by Lawyers*, 1978 UTAH L. REV. 619, 619-20; Devine, *supra* note 168, at 509-11. Distaste for lawyer advertising is actually a British legal tradition. Comment, *Legal Ethics: The Solicitation Prohibition*, 18 WASHBURN L.J. 383, 383 (1979) [hereinafter cited as Comment, *Legal Ethics*]. This sentiment flourished in England because the practice of law was originally the prerogative of the well-to-do, who frowned on merchant-like behavior among their own. Comment, *The Solicitation Rule*, *supra* note 170, at 218-19 & 218 n.1.

cates that lack of clients, not lack of ethics, impels lawyers to experiment with advertising.<sup>180</sup> Legal neophytes, or those seeking to establish a practice in a locale where they are not well known, have great difficulty acquiring clients under existing advertising rules.<sup>181</sup> This does not intimate, however, that these attorneys will resort to garish commercialization of their services if advertising regulations are liberalized.<sup>182</sup> Since clients prefer to consult with lawyers they perceive as competent, honest, and responsible, a lawyer's advertising must reflect that image for it to be successful.<sup>183</sup> Meretricious advertising techniques would thus defeat the purpose of advertising.

The argument that lawyer advertising violates an American tradition similarly is misconceived. Prior to the early 1900's, there was no traditional ban on lawyer advertising.<sup>184</sup> The prohibition

---

<sup>180</sup> *E.g.*, Andrews, *The Selling*, *supra* note 162, at 48-49; Slavin, *supra* note 166, at 46-47. For accounts of recently admitted attorneys who sought to establish a practice by using advertising, see Andrews, *The Selling*, *supra* note 162, at 12-14, 47-48; Vilkin, *Lawyer Uses Direct Mail to Drum Up Rights Cases*, Nat'l L.J., Aug. 30, 1982, at 11, col. 1.

<sup>181</sup> See Andrews, *The Selling*, *supra* note 162, at 12; Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 AM. B. FOUND. RESEARCH J. 459, 462; Slavin, *supra* note 166, at 47; Whitman, *supra* note 37, at 40-41; Comment, *supra* note 159, at 413. The present attitude of the American bar toward advertising has the effect of dividing the profession into two classes: those who serve the rich, and those who serve the poor. See Andrews, *The Selling*, *supra* note 162, at 49; Comment, *supra* note 164, at 83. Attorneys for "rich men" supposedly advertise by "ethical" means, such as lawyer referral networks, public relations campaigns, and law lists—lawyer directories of limited circulation. Commentary, *The Solicitation Rule*, *supra* note 170, at 219; Comment, *supra* note 164, at 82-84. In the absence of media access, however, "poor men's" attorneys have no effective means of advertising available to them. Commentary, *The Solicitation Rule*, *supra* note 170, at 224; Comment, *supra* note 164, at 77.

<sup>182</sup> See, *e.g.*, Hudec & Trebilcock, *supra* note 165, at 72; Note, *Advertising, Solicitation*, *supra* note 1, at 1190; Commentary, *The Solicitation Rule*, *supra* note 170, at 224-25. At least two different arguments have been advanced to support the proposition that lawyers would not resort to undignified advertising if all advertising restrictions were removed. First, other professionals who routinely advertise, such as engineers and bankers, have suffered no loss of public esteem since they began doing so. L. ANDREWS, *supra* note 4, at 20; Hudec & Trebilcock, *supra* note 165, at 72; Note, *Advertising, Solicitation*, *supra* note 1, at 1190. Additionally, several surveys have shown that the public is more interested in factors such as a lawyer's professional competence than the price charged for his services. See Hudec & Trebilcock, *supra* note 165, at 72.

<sup>183</sup> See Andrews, *The Selling*, *supra* note 162, at 48; Hudec & Trebilcock, *supra* note 165, at 72.

<sup>184</sup> See Devine, *supra* note 168, at 506-07. The first lawyer advertising regulations adopted in the United States were adopted by the Alabama State Bar Association in 1888, and subsequently were adopted by other jurisdictions. *Id.* at 506; Note, *Advertising, Solicitation*, *supra* note 1, at 1182. It was not until 1908 that the American Bar Association sought to persuade American attorneys not to advertise, stating that "[t]he most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for

evolved as a result of the attempt to prevent the growing class of urban lawyers from adopting the tasteless forms of newspaper advertising prevalent at the time.<sup>185</sup> In fact, it was not until the adoption of the present Code of Professional Responsibility that the ban on lawyer advertising uniformly was adopted by all jurisdictions.<sup>186</sup> Obviously, therefore, the American "tradition" of precluding attorney advertising is not historically rooted.

Another popular argument espoused for prohibiting advertising by attorneys is that commercialization of legal services will result in additional frivolous litigation.<sup>187</sup> There is no decisive evidence, however, indicating that lawyer solicitation encourages laymen unjustifiably to resort to legal services.<sup>188</sup> This contention, moreover, assumes the dubious proposition that lawyers will agree to render legal services where such services are unwarranted.

Other critics of lawyer advertising believe that commercialization would prove more harmful than beneficial to consumers of legal services. These critics contend that the use of advertising by lawyers either results in increasing the cost of legal services<sup>189</sup> or reducing their quality.<sup>190</sup> The increasing cost argument presumes that advertising will decrease economic competition among provid-

professional capacity and fidelity to trust." CODE OF PROFESSIONAL ETHICS Canon 27 (1908); see Devine, *supra* note 168, at 507. The ABA's recommended proscription, however, was not absolute, since it permitted the publication of business cards as well as their private circulation. See Devine, *supra* note 168, at 507.

<sup>185</sup> Devine, *supra* note 168, at 507. The 1908 advertising ban, contained in Canon 27 of the Code of Professional Ethics, was promulgated in order to bring both rural and urban lawyers under the same advertising rule. *Id.* Urban lawyers were forbidden to advertise in the sensationalist city press of the era, while rural practitioners were permitted to continue placing the same type of dignified advertisements current in "Abraham Lincoln's day." *Id.* at 506-07.

<sup>186</sup> Christensen, *supra* note 179, at 621.

<sup>187</sup> See Commentary, *The Solicitation Rule*, *supra* note 170, at 222; Comment, *supra* note 164, at 90. One of the long-standing arguments against attorney advertising is that it leads to abuses of the legal system. See Comment, *Legal Ethics*, *supra* note 179, at 383-84. Three types of such abuse were common-law crimes: barratry, champerty, and maintenance. Commentary, *The Solicitation Rule*, *supra* note 170, at 222. Barratry was "[t]he offense of frequently exciting and stirring up quarrels and suits . . ." BLACK'S LAW DICTIONARY 137 (5th ed. 1979). Champerty, on the other hand, involved "a bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation . . . in consideration of receiving, if successful, a part of the proceeds . . ." *Id.* at 209. Finally, maintenance involved "an officious intermeddling in a suit which in no way belongs to one . . ." *Id.* at 860.

<sup>188</sup> See Hudec & Trebilcock, *supra* note 165, at 80-81.

<sup>189</sup> See, e.g., *id.* at 54.

<sup>190</sup> See, e.g., Devine, *supra* note 168, at 510-11; Hudec & Trebilcock, *supra* note 165, at 84.

ers of legal services and thus raise prices.<sup>191</sup> Basic economic principles, however, refute this argument. Effective advertising generally results in increased competition with decreased prices, and no plausible reasons have been voiced indicating that the legal services market will act contrary to this economic hypothesis.<sup>192</sup> The decreasing quality argument implies the opposite assumption—that quality of services must diminish in order to defray advertising costs.<sup>193</sup> This argument, of course, overlooks the possibility that successful advertising, by increasing caseloads, would pay for itself.<sup>194</sup>

The last major argument advanced against lawyer advertising is that its existence would require a regulatory scheme that would be too complex and troublesome to enforce.<sup>195</sup> To the extent that lawyer advertising is beneficial to the public, however, this argument has little merit, for the mere difficulty of a task is not sufficient justification to refuse to undertake it.<sup>196</sup> The benefits of lawyer advertising thus merit brief examination.

First, lawyer advertising undoubtedly would help make members of the public more aware of their legal needs.<sup>197</sup> Although ba-

---

<sup>191</sup> See, e.g., *Bates*, 433 U.S. at 377. The argument that lawyer advertising decreases competition rests on the belief that only large lucrative firms would be able to afford advertising, and would use it to acquire monopoly power in the legal services market. *Id.* Ironically, these are the very firms that neither need nor desire conventional advertising techniques. Commentary, *The Solicitation Rule*, *supra* note 170, at 219-20; *supra* note 181 and accompanying text.

<sup>192</sup> See Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337, 350-52 (1972); Nagle, *Do Advertising-Profitability Studies Really Show That Advertising Creates a Barrier to Entry?*, 24 J.L. & ECON. 333, 349 (1981); Schuck, *Consumer Ignorance in the Area of Legal Services*, 43 INS. COUNS. J. 568, 568 (1976); Whitman, *supra* note 37, at 42-45.

<sup>193</sup> See Devine, *supra* note 168, at 511; McChesney & Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503, 1504 (1979); Staton, *Access to Legal Services Through Advertising and Specialization*, 53 IND. L.J. 247, 258 (1978). One study indicated that the services of a legal clinic that advertised extensively were perceived by consumers as being of higher quality than those of traditional firms, even though the cost of services was less. McChesney & Muris, *supra*, at 1504.

<sup>194</sup> See Devine, *supra* note 168, at 511; Hudec & Trebilcock, *supra* note 165, at 75.

<sup>195</sup> See *Bates*, 433 U.S. at 379; Comment, *supra* note 159, at 431-32.

<sup>196</sup> See *Bates*, 433 U.S. at 379; L. ANDREWS, *supra* note 4, at 5.

<sup>197</sup> See *Bates*, 433 U.S. at 376-77; L. ANDREWS, *supra* note 4, at 27; Hudec & Trebilcock, *supra* note 165, at 61; Comment, *supra* note 159, at 430. Andrews cites a Nebraska State Bar Association Study which illustrates that lawyers and nonlawyers have differing perceptions of legal needs. Members of both groups were asked how they would react if their lawnmower unexpectedly exploded. L. ANDREWS, *supra* note 4, at 27. Over 75% of the lawyers indicated they would consult an attorney promptly, as opposed to less than 15% of the nonlawyers. *Id.* at 27. It is arguable, of course, that it may be better for American society if

sic knowledge is essential to making an informed choice concerning legal action, few members of the public are adequately informed to make such a decision.<sup>198</sup> Advertising also can aid people in identifying the characteristics they desire in an attorney, thus enabling a more educated choice of advocates.<sup>199</sup> More importantly, without sufficient information about the availability of legal services, meaningful access to such services cannot exist.<sup>200</sup> Such access is crucial, not only because it constitutes a fundamental right, but because it can function as an important tool of political and social change by fostering group action.<sup>201</sup> Until such access is achieved, Ethical Consideration 1-1 remains little more than an empty promise.<sup>202</sup>

Advertising also may benefit the profession, not merely by increasing clientele, but by working to equalize the status among the various subgroups of the bar.<sup>203</sup> According to a recent study, one of

---

people were not encouraged to take every minor grievance to court. But, as Justice Powell observed in *Bates*, "[w]e cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Bates*, 433 U.S. at 376 (footnote omitted).

<sup>198</sup> See Andrews, *Lawyer Advertising*, *supra* note 150, at 1009; Hudec & Trebilcock, *supra* note 165, at 62; Schuck, *supra* note 192, at 568; Staton, *supra* note 193, at 255. Possibly due to a dearth of available information regarding law and lawyers, most laymen rely on recommendations from others in selecting attorneys. Hudec & Trebilcock, *supra* note 165, at 63-64. Barbara Curran's in-depth study of the public's legal needs revealed that a majority of those surveyed relied on someone's recommendation in choosing their first lawyer and even a greater percentage did so in selecting lawyers for subsequent problems. B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 201 (1977).

<sup>199</sup> See, e.g., Smith & Meyer, *Attorney Advertising: A Consumer Perspective*, 44 J. MARKETING 56, 62 (1980); Schuck, *supra* note 192, at 569-70.

<sup>200</sup> See Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247, 253-54 (1976); Comment, *supra* note 164, at 78-80. The reason the lack of information about legal services denies the uninformed access to counsel is not difficult to ascertain: "[H]ow will the public know if the employment of a lawyer is advantageous if they never discover that an attorney's services are available?" Comment, *supra* note 159, at 430.

<sup>201</sup> See Nader, *supra* note 200, at 253-54. Nader's viewpoint on the legal access issue is that of the consumer advocate. His suggested program of legal action is geared toward both removing existing abuses of political and economic power and reshaping the framework of governmental power so that the will of the people can be made known by more direct means than the ballot box. See *id.* at 250-51.

<sup>202</sup> See *id.* at 254; Shadur, *supra* note 4, at 325. Ethical Consideration 1-1 states, in pertinent part: "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1979). Ethical Consideration 2-1 expresses a similar concern. See *id.* EC 2-1 (1979).

<sup>203</sup> It has been recognized that current advertising rules help perpetuate class distinctions between wealthy lawyers and poorer ones. See Comment, *supra* note 164, at 83-84. Advertising has enabled some of the "poorer" attorneys to acquire clients. See L. ANDREWS, *supra* note 4, at 82-83. Thus, judging from the negative reaction to lawyer advertising from

the major factors creating fragmentation within the American bar is that small-firm practitioners are often compelled to subordinate their professional judgment to the wishes of their clients in order to ensure the economic survival of their practices.<sup>204</sup> Advertising might help to reduce this obstacle to the exercise of professional judgment by enabling small-firm practitioners to increase their clientele, thus lessening their financial dependence on a relatively limited number of clients.<sup>205</sup> Additionally, it might enable attorneys to expend more time and effort on professional education and other activities that would redound to the benefit of both their clientele and the bar.<sup>206</sup> Only when lawyers realize the full extent of the advantages of appropriate advertising will the *R.M.J.* decision have fulfilled its potential.

## VI. CONCLUSION

The *R.M.J.* decision is the most recent expression of the Supreme Court's readiness to extend the protection of the first amendment to commercial speech by attorneys. By clarifying the constitutional standards to be applied to the regulation of such speech, the decision encourages states to remove ambiguities from their laws and to permit such advertising to flourish. Widespread use of non-deceptive legal services advertising would be beneficial both to the profession and to the public, and it is hoped that the profession will soon realize its value. Today's legal world is far too complex for lawyers to make themselves adequately known to the public by word of mouth alone, or by rigidly controlled use of limited forms of print media. *In re R.M.J.*, by explicitly recognizing that fact, will help provide a foundation for a balanced and mean-

---

the established sources of power in the legal community, such advertising has the potential to alter the status quo. See, e.g., Andrews, *The Selling*, *supra* note 162, at 14, 48-49. But see *supra* note 191 (some argue that advertising will decrease competition and lead to monopolistic legal practice in the hands of the firms that are already large).

<sup>204</sup> E.g., Landon, *supra* note 181, at 461, 469.

<sup>205</sup> See *id.* at 461-62, 467-68; Hudec & Trebilcock, *supra* note 165, at 83.

<sup>206</sup> See Hudec & Trebilcock, *supra* note 165, at 89-91; Landon, *supra* note 181, at 482-84. Landon conducted a survey to determine the extent to which the size of the community in which a lawyer practices affects his attitude about his professional responsibilities. Landon, *supra* note 181, at 459-60. This survey revealed that about three-quarters of rural lawyers also engage in additional nonlegal occupations in order to earn a living, such as real estate, banking, or farming. *Id.* at 472. Of the rural lawyers surveyed, 60% indicated that if it were feasible financially, they would prefer to specialize in the practice of law. *Id.* at 475. Advertising might help such lawyers to expand their practices to match their capabilities and augment their professional endeavors. See Hudec & Trebilcock, *supra* note 165, at 91.

ingful presentation of information about legal services to the general public.