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Missouri Supreme Court and Lawyer Advertising: RMJ and Its Aftermath, The

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THE MISSOURI SUPREME COURT AND LAWYER ADVERTISING: *RMJ* AND ITS AFTERMATH

CHARLES B. BLACKMAR*

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The United States Supreme Court declared Missouri's rules governing lawyer advertising unconstitutional in one of the state's most-discussed cases of the year: *In re RMJ*.¹ The author of this Article was counsel for the appellant in that case and argued against the validity of those rules before the Supreme Court. This Article discusses that decision, the events leading up to it, the background of decisions against which it was decided, and its implications for the future of lawyer advertising in Missouri.

I. BACKGROUND

A. *The Bates Decision*

On June 27, 1977, the United States Supreme Court stunned the legal profession with its decision in *Bates v. Arizona*,² holding that an absolute prohibition of advertising by lawyers violates the first amendment. In earlier

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1. 102 S. Ct. 929 (1982).

2. 433 U.S. 350, 383 (1977). See generally Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401 (1980).

decisions the Court had extended first amendment protection to commercial speech,³ but the most recent had expressly excluded lawyer advertising from its scope.⁴ Many lawyers had hoped that rules prohibiting such advertising would be upheld. They were disappointed.

The particular advertisement before the Court involved a "legal clinic" organized by two recent law graduates, advertising routine legal services at fixed prices. The Court decided that the "overbreadth" doctrine did not apply to commercial speech,⁵ and so it examined the entire advertisement to determine whether each item was protected. The Court found that the following items in the *Bates* advertisement were "protected speech":⁶

- (1) the listing of routine services and fees;
- (2) the use of the term "legal clinic" to describe the operation;
- (3) the statement that the office charged "very reasonable prices";
- (4) the prominent slogan, "Need a lawyer," and the logo of the scales of justice.

The Court found no evidence that these items were "untruthful" or "misleading" and concluded that they were therefore protected.⁷

The Court emphasized that all regulation of lawyer advertising was not foreclosed and expressly indicated that advertising having a potential for harm might be regulated.⁸ It referred to "restrained" advertising, without elaboration, and suggested that it would approve:

- (1) prohibition of untruthful or misleading advertising;
- (2) regulation of advertising that touts the quality of legal services, since it can be misleading;
- (3) requirement of a limited disclaimer;
- (4) regulation of solicitation in person;
- (5) reasonable "time, place and manner" restrictions;
- (6) special rules dealing with the electronic media.⁹

Justice Powell, joined by Justice Stewart, made it clear that he would uphold the general proposition that lawyers could advertise but dissented because he felt that price advertising, even of routine legal services, was inherently misleading.¹⁰ Chief Justice Burger also indicated that an absolute

3. See *Linmark Associates v. Willingboro*, 431 U.S. 85, 97 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 829 (1975). See generally *Symposium on Commercial Speech*, 46 BROOKLYN L. REV. 389 (1980).

4. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976).

5. 433 U.S. at 381.

6. *Id.* at 384.

7. *Id.*

8. *Id.* at 383.

9. *Id.* at 383-84.

10. *Id.* at 391 (Powell, J., dissenting).

prohibition on advertising would not long survive, but he wanted to give the bar authorities the opportunity to formulate their own regulations.¹¹ Only Justice Rehnquist took the firm position that commercial speech in general, and lawyer advertising in particular, were not entitled to first amendment protection.¹²

B. *The Bar Reaction*

The Arizona rules invalidated in *Bates* were based on the American Bar Association's Model Code of Professional Responsibility and had their counterparts, with minor variations, in almost all American jurisdictions.¹³ As the Chief Justice's dissent in *Bates* shows,¹⁴ the ABA was engaged in studies looking toward relaxation of the absolute ban on advertising. No proposal for doing so had ever passed the House of Delegates, however, and many lawyers remained firmly opposed to lawyer advertising in any form. When it became apparent that the *Bates* opinion would be handed down before the summer recess, the ABA's Board of Governors authorized formation of a Task Force on Lawyer Advertising. When the Court's decision was announced, quick action was necessary. On July 25, 1977, the Task Force announced two proposals.¹⁵

Proposal A, representing a conservative approach to advertising, listed twenty-five items that could be included in printed advertising.¹⁶ The list

11. *Id.* at 386-88 (Burger, C.J., dissenting).

12. *Id.* at 404-05 (Rehnquist, J., dissenting).

13. See L. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 2-6, 97 n.14 (1980).

14. 433 U.S. at 386 (Burger, C.J., dissenting).

15. Task Force on Lawyer Advertising, American Bar Association, Report to Board of Governors (Aug. 4, 1977) [hereinafter cited as Task Force Report], reprinted in L. ANDREWS, *supra* note 13, at 91.

16. The provisions of Proposal A important to this discussion are as follows:
DR 2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

-
- (2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of practice, to the extent authorized under DR 2-105;
 - (3) Date and place of birth;
 - (4) Date and place of admission to the bar of state and federal courts;
 - (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
 - (6) Public or quasi-public offices;
 - (7) Military service;
 - (8) Legal authorships;
 - (9) Legal teaching positions;
 - (10) Memberships, offices, and committee assignments in bar associations;
 - (11) Membership and offices in legal fraternities and legal societies;
 - (12) Technical and professional licenses;
 - (13) Memberships in scientific, technical and professional associations and societies;
 - (14) Foreign language ability;
 - (15) Names and addresses of bank references;
 - (16) With their written consent, names of clients regularly represented;
 - (17) Prepaid or group legal services programs in which the lawyer participates;
 - (18) Whether credit cards or other credit arrangements are accepted;
 - (19) Office and telephone answering service hours;
 - (20) Fee for an initial consultation;
 - (21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
 - (22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
 - (23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
 - (24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
 - (25) Fixed fees for specific legal services, the description of which

would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

- (C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law]. Any such application shall be served on [the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters] who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.

. . . .

- (H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

- (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.
- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
- (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
- (4) In and on legal documents prepared by him.
- (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

. . . .

DR 2-102 Professional Notices, Letterheads and Offices.

- (A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

. . . .

- (2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It

was taken bodily from existing DR 2-102(A)(6),¹⁷ which set out the items approved for inclusion in "reputable law lists" designed for circulation within the profession.¹⁸ Proposal B¹⁹ confined itself to a general prohibition on

shall not state the nature of the practice except as permitted under DR 2-105.

....

DR 2-103 Recommendation of Professional Employment.

- (A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner or associate to a layperson who has not sought his advice regarding employment of a lawyer.

Task Force Report, *supra* note 15, *reprinted in* L. ANDREWS, *supra* note 13, at 102-09 (footnotes omitted).

17. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(6) (1976) (amended 1977).

18. There was a question as to whether Proposal A embodied the *only* permitted subject matter for lawyer advertisements. If so, inclusion of anything not on the list would lead to discipline. Such a construction was inconsistent with *Bates*, which required examination of each item to see if it was untruthful or misleading. In his opinion in *In re RMJ*, Justice Powell suggested that the items listed in Proposal A (by then partially embodied in DR 2-101(B)) be construed as a "safe harbor," permitting the advertising of certain things without fear of challenge, while other advertising matter could be questioned by the authorities. 102 S. Ct. at 933 n.4. This approach had been implicitly rejected by the Missouri Supreme Court in its decision below. *In re RMJ*, 609 S.W.2d 411, 412 (Mo. 1981), *rev'd*, 102 S. Ct. 929 (1982). See also *Carter v. Lovett & Linder, Ltd.*, ___ R.I. ___, 425 A.2d 1244 (1981); *In re Rule of Court Governing Lawyer Advertising*, 564 S.W.2d 638 (Tenn. 1977); Task Force Report, *supra* note 15, *reprinted in* L. ANDREWS, *supra* note 13, at 92. For cases holding that the "exclusive" construction is constitutionally infirm under *Bates*, see *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982); *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980).

19. The portions of Proposal B germane to this discussion are:
DR 2-101 Publicity and Advertising.

- (A) A lawyer shall not, on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.
- (B) Without limitation, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
- (1) Contains a material misrepresentation of fact;
 - (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
 - (3) Is intended or is likely to create an unjustified expectation;
 - (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;
 - (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

-
- (6) Relates to legal fees other than:
 - (a) A statement of the fee for initial consultation;
 - (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
 - (c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
 - (d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;
 - (e) The availability of credit arrangements; and
 - (f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive; or
 - (7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.
- (C) A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:
- (1) Is intended or is likely to result in a legal action or legal position being asserted merely to harass or maliciously injure another;
 - (2) Contains statistical data or other information based on past performance or prediction of future success;
 - (3) Contains a testimonial about or endorsement of a lawyer;
 - (4) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;
 - (5) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion; or
 - (6) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format; or
 - (7) Utilizes television until [the agency having jurisdiction under state law] shall have determined that the use of such media is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential customers of legal services.

.....

DR 2-102 Professional Notices, Letterheads, Offices and Law Lists.

(A) A lawyer or law firm shall not use or participate in the use of a pro-

misleading advertisements without detailed specifications of items approved for advertising. The House of Delegates approved Proposal A.

Since *Bates* had involved newspaper advertising, neither proposal dealt with direct mail advertising. DR 2-102(A)(2) of the Model Code of Professional Responsibility, adopted by Missouri and most other states, limited mailings to announcements of the opening or relocation of law offices or the association of new lawyers and permitted the mailing of announcements only to "lawyers, clients, former clients, personal friends and relatives."²⁰ In light

professional card, professional announcement card, office sign, letterhead, telephone directory listing, law list, legal directory listing, or a similar professional notice or device if it includes a statement or claim that is false, fraudulent, misleading, or deceptive within the meaning of DR 2-101(B) or that violates the regulations contained in DR 2-101(C).

....

DR 2-103 Recommendation or Solicitation of Professional Employment.

(A) A lawyer shall not seek by direct mail or other form of personal contact and shall not recommend employment as a private practitioner of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer, or assist another person in so doing, except that if success in asserting rights or defenses of his clients in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept employment from those he is permitted under applicable law to contact for the purpose of obtaining their joinder. This Disciplinary Rule does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from requesting referrals from a lawyer referral service operated, sponsored, or approved by a bar association or from cooperating with any other qualified legal assistance organization.

....

DR 2-105 Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

Task Force Report, *supra* note 15, reprinted in L. ANDREWS, *supra* note 13, at 123-33.

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1979).

of *Bates*, it is difficult to see how a rule that purported to set out the only permitted addressees could stand. The *Bates* Court, by referring to special problems of the electronic media,²¹ could be understood as indicating that any regulation of media had to support expressly a substantive state interest. Nothing in *Bates* indicates that the justices sensed any particular problem in mailed advertising, but in 1981 thirty-eight states had rules prohibiting general lawyer advertising by mail.²² Most of these rules, including Missouri's, remained in pre-*Bates* form.²³

Most of the states that considered the problem of advertising after *Bates* expressed a preference for the Proposal A form of regulation.²⁴ Many of these adopted Proposal A with modifications, the effect of which was to further restrict the right to advertise. Several published opinions indicated judicial preference for Proposal A.²⁵ None of these, however, discussed the question of how the rule should be construed nor the issue of direct mail advertising.

C. *The Missouri Reaction*

Since 1974, the Missouri Supreme Court has had a Standing Committee on Ethics and Professional Responsibility, composed of well-known lawyers and judges.²⁶ Immediately after *Bates*, the court asked the Committee to consider rule revisions. The Committee worked diligently and, on September 9, 1977, submitted a report to the court. This report was considered and approved by the Board of Governors of the Missouri Bar. No public hearings were held and there is no indication that constitutional opinions or other outside input were sought. The report was not circulated to the bar generally or released to the public, either before or after the court acted on it.

In the meantime, several lawyers had taken it upon themselves to advertise, assuming that *Bates* entitled them to do so. Some of the advertisements followed the *Bates* model closely, while others were individually composed. Those whose advertisements came to the attention of the General Chairman of the Advisory Committee²⁷ received letters from him, advising that

21. 433 U.S. at 384.

22. L. ANDREWS, *supra* note 13, at 136-45.

23. The text of DR 2-102(A)(2) was not changed in Proposal A. *See* Task Force Report, *supra* note 15, reprinted in L. ANDREWS, *supra* note 13, at 106.

24. *See* Hellman, *The Oklahoma Supreme Court's New Rules on Lawyer Advertising: Some Practical, Legal, and Policy Questions*, 31 OKLA. L. REV. 509 (1978). *See also* L. ANDREWS, *supra* note 13, at 136-46.

25. *See In re Arkansas Bar Ass'n*, 263 Ark. 948, 963 (1978); *In re Rule of Court Governing Lawyer Advertising*, 564 S.W.2d 638, 643 (Tenn. 1978).

26. Its members at this time were practicing lawyers Robert L. Hawkins, Jr., Chairman, David Blanton, Meredith B. Turner, Forest M. Hemker, R. Leroy Miller, Bertram W. Tremayne, Jr., Martin J. Purcell, and J. Andy Zenge, Jr., and Judges James Ruddy and Donald L. Mason. *See In re RMJ*, 609 S.W.2d at 411.

27. The Advisory Committee is established under Missouri Supreme Court

they violated the existing Missouri rules, which were substantially the same as the Arizona rules held invalid in *Bates*.²⁸ He suggested that they wait until the Missouri Supreme Court amended its rules, which, he advised them, it was in the process of doing. He was unwilling to recognize *Bates* as having the immediate effect of permitting advertising that complied with its specifications. Some of the lawyers who received letters replied by saying that they had the right to advertise under *Bates* and would continue to do so.²⁹

In promulgating its new rules, the Committee on Ethics proceeded on the assumption that, even after *Bates*, legal advertising remained a matter that required the permission of the regulatory authorities. The Committee studied the *Bates* Court's reservation about advertising in the electronic media and concluded that no such advertising should be permitted "at this time."³⁰ It noted that the Missouri Supreme Court was undertaking a study of legal specialization and decided that it should make no further recommendations regarding advertising of specialties.³¹ No attention was given to mailed advertising because *Bates* did not deal specifically with it.

The Committee's report shows a disposition to keep a tight lid on lawyer advertising. It described *Bates* as the decision of a "narrow majority,"³² a characterization which, considering the variety of views expressed by the dissenters, is not accurate. The Committee expressed a definite preference for Proposal A but recommended that the list of twenty-five sanctioned items be cut to nine.³³ It felt that the shortened list contained all of the essential information a prospective client might need and was adequate to inform the public about the availability and cost of routine legal services.³⁴ The report suggested that the Missouri Supreme Court delegate to the Advisory Committee the authority to designate "fields and areas of law" that might be used by a lawyer in advertising and to list the "routine legal services" for which prices could be advertised.³⁵

The Missouri Supreme Court substantially adopted the Committee's report in an order dated October 24, 1977.³⁶ The new rules were to be effective January 1, 1978. A tenth category of permitted advertising was added, allowing lawyers to say that "credit arrangements for the collection of fees

Rule 5.03. It has a full-time, compensated General Chairman and supervises matters of professional ethics, unauthorized practice of law, and disciplinary proceedings.

28. See *In re RMJ*, 102 S. Ct. at 932 n.1. Several lawyers advised the author that they had received similar letters.

29. At least two lawyers, who requested anonymity, so advised the author.

30. Committee on Professional Ethics and Responsibility, Missouri Bar Ass'n, Interim Report (Sept. 9, 1977).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. See 33 J. MO. B. 497 (1977).

will be given consideration.”³⁷ The court did not invite participation by other interested parties and issued no opinion or advisory memorandum. The new rule was published in December 1977.³⁸

The Advisory Committee immediately began work on the task assigned it by the court, and in November 1977, it issued an Addendum to the new DR 2-101(B), effective January 1, 1978.³⁹ The Addendum allowed a lawyer to adopt certain general designations: “General Civil Practice,” “General Criminal Practice,” or “General Civil and Criminal Practice.”⁴⁰ Choosing one of those designations precluded the listing of additional areas of practice. As an alternative, the Addendum allowed a lawyer to list any one or more fields of law from an approved list of twenty-three fields.⁴¹ A lawyer who listed the fields had to state, “Listing of the above areas of practice does not indicate any certification of expertise therein.”⁴² The Addendum commanded sternly, “No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.”⁴³ It was published in the *Journal of the Missouri Bar* early in 1978,⁴⁴ and, as Judge Seiler noted in his later dissent from the Missouri Supreme Court decision, was available in no other source of general reference.⁴⁵ The Advisory Committee issued no report or memorandum explaining why it approved certain fields for listing while excluding others.

The list of permissible fields had several remarkable features. There was no limit on the number of fields a lawyer could list, so long as he confined himself to the approved list and used the specified language. There was no requirement that a lawyer have any experience in the fields he chose to list. The Advisory Committee’s choice of fields follows no consistent pattern. It cannot be said that the fields listed are simply the normal or routine areas of practice, since such items as “Anti-Trust Law,” “Environmental Law,” “Financial Institutions Law,” and “International Law” are listed⁴⁶ while fields such as “Securities Law” and “Social Security Law” are not listed in any form.

The Addendum was subsequently amended to substitute “Negligence Law” for “Tort Law,” and “Domestic Relations Law” for “Family Law.”⁴⁷ The amendment, like the Addendum, was apparently published

37. See MO. SUP. CT. R. 4, DR 2-101(B)(9).

38. 33 J. MO. B. 497 (1977).

39. See 34 J. MO. B. 51 (1978).

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.*

44. 34 J. MO. B. 51 (1978).

45. 609 S.W.2d at 415 (Seiler, J., dissenting).

46. See 34 J. MO. B. 51 (1978) (adopted at MO. SUP. CT. R. 4, DR 2-101(B)(5)).

47. See 35 J. MO. B. 72 (1979) (adopted at MO. SUP. CT. R. 4, DR 2-101(B)(6)).

only in the Journal of the Missouri Bar.⁴⁸

There were wholesale violations of the new rules, as they were later construed by the Missouri Supreme Court, from their inception. Nonconforming advertisements appeared in the St. Louis and Kansas City telephone directories⁴⁹ and in newspapers and other periodicals. These violations continued through subsequent directories, even after the bar's disciplinary machinery began to operate.⁵⁰

One lawyer filed an action in the Circuit Court of Jackson County, seeking a declaration that he had a constitutional right to advertise the fact that he practiced "Social Security Disability Law."⁵¹ The petition was resisted by the Advisory Committee on the ground that there was no actual controversy until the advertisement had been published; the court sustained a motion to dismiss.⁵² The court's holding meant that a lawyer could not obtain a test of the rule except by putting his license on the line.

Another lawsuit was filed protesting the total prohibition on radio and television advertising, but it was dismissed by the plaintiff before any decision was rendered.⁵³ The rules would not be tested until someone decided to violate them and submit to disciplinary action.

II. THE CASE OF RMJ

RMJ⁵⁴ was admitted to the bars of Missouri and Illinois in 1973. After working in Washington, D.C., part of the time as an attorney for the Securities and Exchange Commission, he opened his own office in Clayton, Missouri, in 1977.

A. *RMJ's Advertising*

To announce the opening of his new office, RMJ mailed the usual "tombstone" announcements, which his wife helped him address. His wife was active in a civic organization and used its roster to obtain the addresses

48. *Id.*

49. *See In re RMJ*, 609 S.W.2d at 415 n.1 (Seiler, J., dissenting).

50. There is no public record of disciplinary proceedings before those taken in the case of *RMJ*. In no other case was a public information filed by the Advisory Committee or by any Circuit Bar Committee. Since informal contacts by the Advisory Committee or other bar committees are secret, and formal hearings are also secret until an information is filed in court, MO. SUP. CT. R. 5.22, details of other enforcement efforts are unavailable.

51. *Gann v. Missouri Bar Ass'n Advisory Comm.*, No. CV 78-3779 (Jackson County Cir. Ct. Feb. 22, 1979).

52. *Id.*

53. This suit was disclosed in the remarks of Harold W. Barrick, General Chairman of the Missouri Bar Advisory Committee, at the formal hearing in the *RMJ* case, April 19, 1979.

54. The Missouri Supreme Court, in its opinion in the case, decreed that the

of those in the organization whom she knew. Two announcements were mailed to a St. Louis County couple that RMJ apparently did not know. RMJ stated that the announcements were sent to the couple because his wife thought she was acquainted with the wife. He regarded the addressees of his announcements as "acquaintances," which he considered synonymous with the word "friends" in DR 2-102(A)(2).⁵⁵

RMJ also advertised in newspapers. He did not follow the *Bates* model but designed his own format. No charges for specific services were listed. One advertisement in a periodical brought the General Chairman's customary letter, asserting noncompliance with the rules and suggesting that RMJ wait until the new Missouri rules became effective.⁵⁶ RMJ responded that his advertising was proper under *Bates* and asked that the format be approved.⁵⁷ The General Chairman replied, after some delay, that the proposed advertisement was a violation of the new rules.⁵⁸

At the time he first heard from the General Chairman, RMJ had contracted for advertising in the Yellow Pages of the St. Louis Suburban Telephone Directory and in a suburban newspaper. These advertisements contained no disclaimer of expertise since the contracts had been signed in November 1977, and the Addendum requiring the disclaimer was not published until January 1978.⁵⁹ RMJ stated that he tried to stop publication after he learned of the disclaimer requirement but was unable to do so.⁶⁰

The Advisory Committee summoned him to an informal hearing, which was held on May 22, 1978.⁶¹ He was questioned about the two announcements received by the St. Louis County couple and about advertisements that had appeared in newspapers and the Yellow Pages.⁶² About ten months

published opinion should carry only the initials of the respondent. *In re RMJ*, 609 S.W.2d 411 (Mo. 1981), *rev'd*, 102 S. Ct. 929 (1982).

55. Stipulation 16, Appellant's Jurisdictional Statement at A-25, *In re RMJ*, 102 S. Ct. 929 (1982).

56. Letter from Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee, to RMJ (Nov. 8, 1977).

57. Letter from RMJ to Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee (Nov. 15, 1977).

58. Letter from Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee, to RMJ (Dec. 19, 1977).

59. See 34 J. MO. B. 51 (1978).

60. See 609 S.W.2d at 415-16 (Seiler, J., dissenting).

61. A transcript of the informal hearing is on file with the Clerk of the Missouri Supreme Court. The discussion that follows is taken from that transcript.

62. RMJ appeared at the hearing without counsel and was questioned aggressively and critically. The committee members went into detail about the fields of law he listed and his experience in those fields. To the suggestion that he was claiming the right to substitute his judgment for that of the state's highest court, RMJ replied that he considered that *Bates* gave him the right to advertise. Transcript of Informal Hearing before Missouri Bar Advisory Committee (May 22, 1978).

later, RMJ was summoned to a formal hearing before the Advisory Committee. The notice set out four charges, which were substantially identical with the four counts of the information that was eventually filed.⁶³ The author of this Article appeared as counsel for RMJ at the formal hearing,⁶⁴ which was held on April 19, 1979.⁶⁵

The atmosphere at the formal hearing was not unfriendly.⁶⁶ Presentation of the Committee's evidence was facilitated by stipulations. RMJ testified and was questioned by members of the Committee. The General Chairman took the firm position that the Committee had no authority to consider the validity of the rules or the Committee's own Addendum; he asserted that the deliberations were confined to deciding whether there was probable cause to believe that the violations charged in the notice had occurred.

RMJ requested and was granted permission to file a post-hearing brief discussing the constitutional questions involved. Additional arguments raised in the brief were that DR 2-101(B) should be considered a "safe harbor," indicating items that would not be challenged by disciplinary authorities but not an exclusive list of permitted advertising statements, and that the incident involving the two mailed announcements was de minimis and should not be considered in further proceedings. Counsel for the Advisory Committee filed no response.

RMJ and his counsel decided to litigate the case in the Missouri courts.⁶⁷

63. The items which had been considered at the informal hearing were the subjects of Counts I, II, and III. Count IV was based on an advertisement in the St. Louis Yellow Pages, August 1978, which appeared after the informal hearing.

64. The representation was arranged by the American Civil Liberties Union, which also sustained the substantial expenses of the continuing litigation.

65. Although not provided for by the Missouri Supreme Court Rules, *see* MO. SUP. CT. R. 5.13(e), a return was filed to the Notice of Formal Hearing in order to show that the constitutional question had been raised at the earliest opportunity.

66. A transcript of the formal hearing is on file with the Clerk of the Missouri Supreme Court.

67. Serious consideration was given to the filing of a declaratory and injunctive action in the United States District Court under 42 U.S.C. § 1983 (1976). If such an action were filed, the prevailing party would have the opportunity to recover costs and attorneys' fees. *See id.* § 1988. An obstacle might have been presented by *Younger v. Harris*, 401 U.S. 37, 43-44 (1971), which held that federal courts should usually decline to proceed with cases raising constitutional challenges to criminal statutes if state proceedings are pending, especially since formal proceedings had already been commenced. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S. Ct. 2515 (1982), indicates a strong preference for allowing lawyer disciplinary matters to proceed in state court even though federal constitutional questions are presented, "[s]o long as the constitutional claim . . . can be determined in the state proceedings and so long as there is no showing of bad faith, harrassment or some other extraordinary circumstance that would make abstinence inappropriate." *Id.* at 2523. In *Middlesex County*, the state supreme court had made it

One reason for this decision was the recent holding of the Missouri Supreme Court that publication and dissemination of a "divorce kit" could not be enjoined,⁶⁸ which led counsel to consider that the court was sensitive to first amendment rights in the area of legal advertising.

On September 17, 1979, the General Chairman advised RMJ that the Advisory Committee had found probable cause to believe that there had been violations of all four counts of the notice. The advice was coupled with the rather chilling suggestion that further proceedings could be avoided if the respondent would surrender his license.⁶⁹ RMJ, responding to that heavy-handed approach, replied that the constitutional arguments were advanced in good faith and in the belief that they were meritorious, that the case was designed to test the validity of the rules, and that it would be highly inappropriate to seek disbarment as a remedy.⁷⁰ The response contained an offer to waive formal service and to submit to the jurisdiction of the Missouri Supreme Court. The General Chairman replied that discipline was a matter for the court's discretion and that the information would be in the usual form.⁷¹

Counts I, II, and IV of the information dealt with advertising in the print media.⁷² Count I involved an advertisement in the January-February 1978 issue of *West End Word*, a free newspaper distributed in the St. Louis area. The information alleged that the advertisement violated DR 2-101(B) by listing the courts before which RMJ was admitted to practice and areas of law not approved for advertising purposes and in failing to include the required statement disclaiming certification of expertise in those areas. Count II made identical charges with regard to an advertisement in the Yellow Pages of the St. Louis Suburban West Telephone Directory in February 1978. Count IV involved the Yellow Pages for August 1978 but dropped the disclaimer violation.

The advertisements that were the subject of Counts I, II, and IV contained the statements, "Admitted to Practice Before THE UNITED STATES SUPREME COURT," and "Licensed in: MISSOURI &

clear, after federal proceedings were instituted, that it would accept an interlocutory appeal raising federal constitutional questions. *Id.* at 2524 n.15. The case provides some guidance for lower federal courts in an uncertain area. Because of the Advisory Committee's position that it would not consider constitutional questions, however, it is possible that a federal court would have accepted jurisdiction in *RMJ*.

68. *In re Thompson*, 574 S.W.2d 365, 369 (Mo. 1978).

69. Letter from Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee, to the Author (Sept. 17, 1979).

70. Letter from the Author to Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee (Sept. 18, 1979).

71. Letter from Harold W. Barrick, General Chairman, Missouri Bar Advisory Committee, to the Author (Sept. 20, 1979).

72. The advertisements in question were attached as an appendix to the Supreme Court's opinion in the case. 102 S. Ct. at 940.

ILLINOIS.”⁷³ These were charged as violations because they were not expressly authorized by the rules. The remaining portion of the charge, relating to the fields of law specified, can best be illustrated by the August 1978 advertisement that was the subject of Count IV. The advertisement listed twenty-three areas of law, the same number authorized by the Addendum. Four of these were listed in the language of the Addendum,⁷⁴ while nine were Addendum-authorized fields but in somewhat different language.⁷⁵ Eight fields had no counterpart in the Addendum.⁷⁶

Count III involved the mailing of the two announcements to the St. Louis County couple with whom RMJ was unacquainted. No claims were made that any of the advertisements violated the “misleading” advertising standard of DR 2-101(A).

B. *Proceedings in the Missouri Supreme Court*

Even before the information was filed, RMJ filed a motion in the Missouri Supreme Court asking that proceedings be held in camera and without disclosing his name. The Advisory Committee opposed the motion and it was summarily denied without opinion.⁷⁷ The information then became a public document, but there was no substantial publicity attending the start of proceedings.

RMJ filed a return, setting forth the same constitutional questions that had been presented to the Advisory Committee along with an offer to submit the matter directly to the court on the record made before the Committee. The court indicated that, for it to accept the case directly, a stipulation of all facts would be required.⁷⁸ A stipulation was agreed to, with numerous exhibits, and this became the record for further proceedings in the case. The case then stood for briefing and oral argument in the manner of an appeal, with the Advisory Committee having responsibility for filing the initial brief.⁷⁹

The Committee’s opening brief simply set forth facts condensed from the stipulation and quoted *Bates* to the effect that some regulation of lawyer

73. The courts to which RMJ was admitted were set in all capital letters and were, next to his name, the most prominent feature of the advertisements. *Id.*

74. The four areas were “Bankruptcy,” “Anti-Trust,” “Labor,” and “Criminal.” *Id.*

75. *E.g.*, “Tax” instead of “Taxation Law,” “Corporate” instead of “Corporate Law and Business Organizations,” “Real Estate” instead of “Property Law,” “Personal Injury” instead of “Tort Law.” *See id.* at 934 n.8.

76. These areas included “Contracts,” “Aviation,” “Securities-Bonds,” “Pension-Profit-Sharing,” “Zoning and Land Use,” “Entertainment/Sports,” “Communications,” and “Food, Drug and Cosmetics.” *Id.* at 940.

77. *In re RMJ*, No. 62,821 (Mo. Jan. 15, 1980).

78. Letter from Clerk of the Missouri Supreme Court to the Author (Feb. 19, 1980).

79. MO. SUP. CT. R. 84.24.

advertising is permitted so long as it is reasonable. The brief did not offer a reasoned constitutional justification for the Missouri rules.⁸⁰

The respondent's initial brief asserted that all of the advertisements were constitutionally protected speech, and that an absolute prohibition on direct mail advertising also violated the first amendment.⁸¹ It was argued that the

80. Informant's Opening Brief, *In re RMJ*, 609 S.W.2d 411 (1981).

81. The respondent's "Points Relied On," which are an essential part of the brief in Missouri, *see* MO. SUP. CT. R. 84.04(c), were as follows:

I. The respondent has the constitutional right to publish newspaper and "Yellow Pages" advertisements listing the courts in which he is admitted to practice, and DR 2-101(B) is unconstitutional to the extent that it purports to forbid this publication.

a. The right to publish statements which are truthful, not misleading, and not self-laudatory is guaranteed by Article I of the Constitution of the United States.

b. DR 2-101(B) should not be construed so as to forbid the publication of all advertising matter which is not specifically listed in its ten subsections.

II. The respondent has the constitutional right to list the areas of the law in which he holds himself out as available for rendering of legal services, and DR 2-101(B) is invalid to the extent that it purports to forbid this publication.

a. DR 2-101(B) constitutes an invalid delegation of legislative power to the Advisory Committee.

b. The Advisory Committee Addendum deprives persons in the position of the respondent of freedom of expression as guaranteed by the First Amendment, in forbidding the listing of fields of law not set out specifically in the Addendum, and in requiring adherence to the exact language of the Addendum.

c. DR 2-101(B)(2) should be construed so as to sustain its constitutionality.

d. DR 2-101(B) has been applied by the Advisory Committee in an arbitrary and capricious manner, in that the Addendum does not permit the listing of proper fields of law.

III. The respondent should not be disciplined on account of the omission of a disclaimer of expertise in the advertisements which are the subject of Counts I and II of the Information.

a. The advertisements were contracted for in good faith, prior to the promulgation of the Advisory Committee Addendum.

b. The disclaimer provisions of the Advisory Committee Addendum cannot validly be applied to the respondent (i) because six months' notice of the amendment to DR 2-101(B) was not given; (ii) because DR 2-101(B) contains an invalid delegation of legislative power; and (iii) because the delegation of power is limited to the authorization and approval of fields of law, and does not authorize the requirement of a disclaimer.

IV. The respondent should not be subject to discipline on account of his wife's having mailed an announcement, on two occasions, to a couple which did not recall any acquaintance, (a) because the sending of a factual

Addendum was based on an invalid delegation of the supreme court's rulemaking power to the Advisory Committee, since no standards were set for the Committee's rulemaking and no findings were required as conditions precedent to its determinations.⁸² The brief also presented the "safe harbor" argument, asserting that the amended rules should be construed so as to make them constitutionally valid.

The Committee filed a reply brief, accompanied by copies of the lawyer advertising rules of most states. The brief took the firm position that any advertisement that included matter not specifically authorized by the rules constituted a violation.⁸³ It took issue with RMJ's claim that the first amendment protected all legal advertising that was truthful and not misleading, except to the extent that it was regulated by a narrowly drawn rule passed to further a substantial government purpose. The brief argued instead that the rule should be upheld if it represented a reasonable regulation of lawyer advertising. As proof of reasonableness, the Committee pointed to the rules of numerous other states, based on ABA Proposal A.⁸⁴

Two important events occurred between the scheduled date of the initial hearing and the date later set.⁸⁵ The first was the United States Supreme

announcement in the mail is protected speech under *Bates* and (b) because the evidence shows no intent to violate any rule.

a. Under *Bates*, a lawyer has the constitutional right to use the mails for announcing the opening of his office, and his right to do this is not confined to persons he knows.

b. The incident described in Count III, as shown by the stipulated facts, is trivial and not likely to recur, and for that reason should not be the basis of discipline.

V. Even if the court upholds all or any part of the existing rules, no discipline should be assessed against the respondent.

Respondent's Brief at 5-6, *In re RMJ*, 609 S.W.2d 411 (1981).

82. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 429-32 (1936).

83. The points in the Committee's reply brief were as follows:

I. Rule DR 2-101(B) restricting advertising by lawyers is not unconstitutional. Insofar as it does not permit listing the courts in which a lawyer, in this case Respondent, is permitted to practice, and restricts the areas of law to which the lawyer may restrict his practice, it is not violative of the lawyer's First Amendment rights of free speech. The Disclaimer Provision is proper.

II. The part of Rule DR 2-101 (B) restricting the persons to whom direct mailing can be made is valid and not violative of respondent's First Amendment right of free speech.

Informant's Reply Brief at 3-4, *In re RMJ*, 609 S.W.2d 411 (1981).

84. See note 16 and accompanying text *supra*.

85. The case was initially set for argument in June 1980. Several days before the date set, counsel for the Committee spoke to the Chief Justice of the Missouri Supreme Court about problems encountered in filing a reply brief, and the court continued the case until fall.

Court's decision in *Central Hudson Gas & Electric Company v. New York Public Service Commission*,⁸⁶ which sought to establish guidelines for the regulation of commercial speech. The Court established a four-part test for such regulations, including the requirement that the regulation be "not more extensive than necessary to serve" a substantial government interest.⁸⁷ The Court also declared that regulations of commercial speech must be "narrowly drawn."⁸⁸ If the invalidity of the Missouri rules had not been clearly demonstrated by *Bates*, *Central Hudson* should have cleared up any doubts. The decision was available at the time the Committee's reply brief was filed but was not discussed in that brief.

The second development involved a St. Louis lawyer, Arnold T. Phillips, Jr., against whom investigations were commenced both by the local Bar Committee and by the Advisory Committee. Phillips had circulated an advertisement by mail to commercial firms, informing them of his availability for collection matters and setting forth his rates. He was challenged for that mailing and an informal hearing was noticed. The Advisory Committee also raised questions about a newspaper advertisement in which he described provisions of the bankruptcy laws and suggested that they might provide a source of relief for persons in financial distress. The advertisement was Phillips's own composition and was, of course, not covered by the express listings of DR 2-101(B).

The bankruptcy advertisement presented a new dimension in lawyer advertising. RMJ's printed advertisements were simple displays, saying in effect, "Here I am. This is what I do." The Phillips advertisement sought to inform the public about a legal remedy, the availability of which might not have been generally known. If the Advisory Committee's position were correct, informative advertising would be absolutely prohibited, and the public would receive only "spartan fare."⁸⁹ If Phillips-type advertisements could be prohibited, then first amendment protection for lawyer advertising would be slight indeed.

Phillips filed two federal actions, one in the United States District Court for the Eastern District of Missouri⁹⁰ based on the mailed advertising, and

86. 447 U.S. 557 (1980).

87. *Id.* at 566. The test articulated by the Court is as follows:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

88. *Id.* at 565.

89. *See Bates*, 433 U.S. at 367.

90. *Phillips v. Schmidt*, No. 80-0684-C(1) (E.D. Mo. filed May 28, 1980).

one in the United States District Court for the Western District of Missouri⁹¹ based on the bankruptcy advertisement. Neither proceeded to final adjudication. The judge in the Eastern District denied a temporary restraining order,⁹² while the Western District judge first suggested proceedings before the Advisory Committee, then advised Phillips to attempt to intervene in the *RMJ* proceedings. The suggestion was accepted and leave to appear *amicus curiae* was obtained. Phillips filed a brief containing a detailed analysis of *Central Hudson* and a compilation of state statutes on court rules with official citations. *Central Hudson* was also discussed in detail in *RMJ*'s reply brief.⁹³

On the day set for oral argument, *RMJ* was the last case on the calendar. The judges questioned the parties aggressively.⁹⁴ To a statement of the Committee's counsel that it was not particularly seeking disbarment, Judge Donnelly asked whether disbarment should not follow for willful violation of the court's rules; before the proceedings were concluded, however, he stated that he would not vote for disbarment on the record before him. Judge Morgan asked whether freedom to advertise the areas of the law practiced would not interfere with pending proposals to license and certify specialists. Judge Rendlen asked about the effect of advertising on the "professionalism" of lawyers. Counsel for Phillips argued that "times have changed," and the old norms no longer applied. Because of the very detailed questioning, the court allotted the respondent's counsel extra time.

The court's opinion, handed down December 15, 1979, came as an anticlimax after the detailed briefing and thorough oral argument. Delivered by Judge Donnelly, with the concurrence of Judges Rendlen, Morgan, Welliver, and Higgins, the opinion took notice of the *Central Hudson* decision and went on to state:

We are urged now by the respondent to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the subjective *ad hoc* judgments of a majority of the justices of the United States Supreme Court. . . .

We recognize respondent's right to press on in the courts authorized by Article III of the United States Constitution. If he exercises that right and obtains a favorable result there, we can then decide whether we will honor our duty to exercise "superintending control over all courts" in Missouri . . . or will order DR 2-101 excised from Rule 4 of this Court.⁹⁵

The court noted that the case was a test case and that the violations were

91. Phillips v. Barrick, No. 80-4114-CV-C(5) (W.D. Mo. filed May 20, 1980).

92. Phillips v. Schmidt, No. 80-0684-C(1) (E.D. Mo. June 2, 1980).

93. Respondent's Reply Brief at 15-16, *In re RMJ*, 609 S.W.2d 411 (1981).

94. The Missouri Supreme Court records oral arguments for the court's use, but the transcripts are not public information. The details of the court's questioning are supplied from the recollections of the author.

95. *In re RMJ*, 609 S.W.2d 411, 412 (Mo. 1980).

minimal. The respondent was privately reprimanded and ordered to pay the costs of the proceeding.⁹⁶

Judge Donnelly's opinion is similar to some of the concurring, partially concurring, and dissenting opinions he wrote in other constitutional cases.⁹⁷ Other members of the court, however, had not previously joined in those opinions. The court's opinion in *RMJ* did not respond to some matters raised in the briefs: (1) whether the respondent was found in violation of all, or only some, of the counts; (2) the question of advertising through the mails; (3) the point about invalid delegation of rulemaking power; (4) whether the items listed in the rule were the only items that could be used or were merely examples; and (5) whether *RMJ* could be punished for failing to include the disclaimer before the Addendum was adopted.

Chief Justice Bardgett and Judge Seiler filed separate dissenting opinions which, as Justice Powell subsequently wrote, "reflect a thoughtful examination of the charges made against appellant."⁹⁸ Bardgett expressed doubt that all the ramifications of *Central Hudson* applied to lawyer advertising, but he felt that DR 2-101(B) should be construed as setting forth examples of proper advertising rather than as establishing exclusive subject matter.⁹⁹ Seiler felt that *Central Hudson* was applicable.¹⁰⁰ He was critical of *RMJ*'s advertising his membership in the bar of the United States Supreme Court which, he suggested, was of minimal benefit to the public in selecting a lawyer and was used purely for promotional purposes,¹⁰¹ but he felt that *RMJ* was using protected speech in listing fields of law other than those approved by the Advisory Committee, using words that varied from those approved by the Committee, and advertising the states in which he was admitted to practice.¹⁰² Seiler demonstrated at some length that *RMJ* had contracted for the advertisements that were the subjects of Counts I and II before he could have known of the Addendum, and that he tried to stop publication.¹⁰³ The dissenting opinions played an important part in the later United States Supreme Court review of the case by indicating, as the majority opinion failed to do, just what had been considered and decided by the Missouri court.

96. *Id.* at 412.

97. *See, e.g.*, *State v. McCrary*, 621 S.W.2d 266, 274 (Mo. 1981) (Donnelly, J., concurring in result); *Wengler v. Druggist Mutual Ins. Co.*, 601 S.W.2d 8, 9 (Mo. 1980) (Donnelly, J., concurring); *Sours v. State*, 593 S.W.2d 208, 223 (Mo. 1980) (Donnelly, J., dissenting); *State v. Handley*, 585 S.W.2d 458, 465 (Mo. 1979) (Donnelly, J., concurring).

98. 102 S. Ct. at 935 n.9.

99. 609 S.W.2d at 414 (Bardgett, C.J., dissenting).

100. *Id.* at 416 (Seiler, J., dissenting).

101. *Id.* (Seiler, J., dissenting). Bardgett disagreed with Seiler's criticism of the listing of Supreme Court admission. *Id.* at 414 (Bardgett, C.J., dissenting).

102. *Id.* at 416 (Seiler, J., dissenting).

103. *Id.* at 415 n.1 (Seiler, J., dissenting).

The majority opinion, at first blush, appeared to be in flagrant conflict with both *Bates* and *Central Hudson*. The situation was compounded by the Missouri court's action in virtually throwing down the gauntlet to the United States Supreme Court. But there were problems in seeking review. If any portion of the advertisement could be found to contravene a proper regulation, it might support the mild disciplinary sanction imposed. Since the *Bates* opinion had examined each part of the advertisement to see if protected speech was involved,¹⁰⁴ it was possible that the sanction would have been proper had *any* item in the advertisement been found not to be protected expression. There were two other points of vulnerability: the failure to include the disclaimer in the first of the two advertisements, and the mention of admission to practice before the United States Supreme Court.

RMJ moved for clarification. The Committee did not respond. The court denied the motion summarily but stayed the effect of the decision pending further review.¹⁰⁵

III. IN THE UNITED STATES SUPREME COURT

A. *The Appeal*

Since the case involved a constitutional challenge to state legislation¹⁰⁶ and the decision of the highest state court was in favor of the validity of the legislation, the United States Supreme Court had jurisdiction by appeal.¹⁰⁷ Notice of appeal was filed in the Missouri Supreme Court on January 9, 1981, and a jurisdictional statement was filed in the United States Supreme Court in March 1981, raising the following "Questions Presented":¹⁰⁸

1. Whether, consistent with the First and Fourteenth Amendments, a state may adopt and enforce a court rule listing the exclusive categories of information which are permissible in lawyers' advertisements in the printed media.

2. Whether, consistent with the First and Fourteenth Amendments, a state may discipline a lawyer for including in advertisements the concededly accurate and non-misleading information, not ex-

104. 433 U.S. at 363-65.

105. It was necessary to at least attempt to get clarification because of the matters not discussed in the majority opinion. The United States Supreme Court is reluctant to accept cases that are not "clean" or that have subsidiary issues that might be sufficient to support the judgment. *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 230-34 (5th ed. 1978). Even though the *RMJ* case was an appeal, not a request for certiorari, the great majority of appeal cases are dismissed at the jurisdictional stage without argument. *Id.* at 318.

106. *See* *Ohralik v. Ohio*, 436 U.S. 477, 479 (1978); *In re Primus*, 436 U.S. 412, 415 (1978); *Bates*, 433 U.S. at 352.

107. 28 U.S.C. § 1257(2) (1976).

108. "Questions Presented" are an essential part of the Supreme Court appellate process and must be set out before anything else in the brief. *See* FED. R. CIV. P. 34.1(a).

pressly prohibited by rule, that he is licensed to practice in two states, that he is admitted to practice before the Supreme Court of the United States, and that he practices in areas of law such as "personal injury," "contracts," and "securities and bonds," which designations are not among those explicitly approved by the state authorities.

3. Whether a state, consistent with the Commerce Clause, may discipline a lawyer for publishing in a telephone directory which circulates in adjoining states, the truthful information that he is licensed to practice in both states.

4. Whether a state, consistent with the First and Fourteenth Amendments, may discipline a lawyer for mailing a simple announcement of the opening of his office to persons with whom he is not acquainted, on the basis of a court rule limiting the mailing of announcements to "lawyers, clients, former clients, personal friends and relatives."¹⁰⁹

RMJ made a suggestion of summary reversal. The appellees did not file a response within the allotted time. RMJ's counsel served a copy of the jurisdictional statement on the Attorney General of Missouri,¹¹⁰ who declined to participate. Phillips's counsel obtained the consent of both parties and filed a brief *amicus curiae* prior to a ruling on jurisdiction.

The Court took the rather unusual step of requesting appellees to file a response to the jurisdictional statement. There was some feeling that this presaged summary reversal, with the Court perhaps reluctant to reverse without having any argument from the appellees. On the other hand, the Court may have wanted to give the appellees every opportunity to call its attention to jurisdictional problems. The appellees responded with a brief motion to dismiss on the ground that the constitutional question had not been passed on by the court below. The issue was never ruled on expressly, but in May 1981 the Court noted probable jurisdiction.¹¹¹

The appellant's brief made essentially the same constitutional arguments that had been presented to the Missouri Supreme Court¹¹² and pointed out that the constitutional questions had necessarily been resolved adversely to him, as the decision below indicated.¹¹³ Appellees argued that (1) the Missouri rules were "reasonable and . . . not more extensive than necessary"; (2) there was no constitutional right to list courts of admission and, particularly, admission to the bar of the United States Supreme Court; (3) diversity rather than unity should be the rule in reviewing state provisions regarding lawyer advertising; (4) regulatory rules should be subjected

109. Appellant's Jurisdictional Statement at i, *In re RMJ*, 102 S. Ct. 929 (1982).

110. The Attorney General was served because of the Court's equation of court rules with statutes. *See* 28 U.S.C. § 2403(b) (1976); FED. R. CIV. P. 28.4(c).

111. 453 U.S. 910 (1981).

112. *See* note 81 *supra*.

113. Appellant's Jurisdictional Statement at 12, *In re RMJ*, 102 S. Ct. 929 (1982).

to a "low level of judicial scrutiny"; and (5) the Missouri rules had the virtue of certainty.¹¹⁴ Heavy emphasis was placed on the rules of other states which supported similar programs of regulation. Appellees also argued that direct mail advertising could be prohibited because of its potential for intrusiveness.¹¹⁵

Two amicus briefs were filed in addition to the Phillips brief. The American Trial Lawyers' Association filed a brief urging reversal and arguing for wide latitude for truthful advertising, leaving it to the public to determine whether the factors set out in the advertisements were important.¹¹⁶ The State Bar of Texas, on the other hand, set forth "horrible examples" of lawyer advertising in that state.¹¹⁷ It suggested that, since advertising by lawyers in Texas was out of control, the Court might find it appropriate to reconsider *Bates* at an early opportunity. The brief requested that, in the meantime, the opinion in *RMJ* be framed in the narrowest possible terms so as to avoid pronouncements on issues not explicitly before the Court.¹¹⁸

114. Appellees' Brief at 3. The headings for the points raised in the appellees' brief are as follows:

I. DR 2-101 of Rule 4 of the Missouri Supreme Court does not violate the First Amendment right of free speech by restricting lawyer advertising only to those routine legal services and areas of practice listed therein. . . .

. . . .

II. Appellant has no constitutional right to list in advertisements the courts in which he is admitted to practice

. . . .

III. The part of DR 2-102(A) of Rule 4 of the Supreme Court of Missouri restricting the persons to whom direct mailing can be made is valid and not violative of Respondent's First Amendment right of free speech. . . .

. . . .

IV. Although this Court is the final arbiter of First Amendment rights, in areas of doubt concerning state regulation of lawyer advertising it should defer to the states and leave the states in the traditional role of regulating the conduct of lawyers within their boundaries. . . .

Id. at 4.

115. *Id.* at 12.

116. Amicus Curiae Brief, American Trial Lawyers' Ass'n, at 10, *In re RMJ*.

117. Amicus Curiae Brief, State Bar of Texas, at 4-10, *In re RMJ*. Texas had suspended enforcement of its rules governing legal advertising "to the extent they conflict with *Bates*." L. ANDREWS, *supra* note 13, at 144, 146. There are no reported cases involving any disciplinary action for advertising in Texas. Several of the advertisements pictured in the amicus brief had to do with provisions of the bankruptcy laws, just as Phillips's advertisements did. Amicus Curiae Brief, *supra*, at 12. There have been quite a few complaints about this kind of advertising, but it may be that those who complain are not sympathetic with the substantive provisions of the bankruptcy laws and are reluctant to see anyone take advantage of them.

118. Amicus Curiae Brief, *supra* note 117, at 16.

The case came up for oral argument on November 9, 1981. Appellant's counsel was quickly besieged by questions.¹¹⁹ Several justices asked persistently whether there was any benefit to the public in indicating membership in the bar of the United States Supreme Court.¹²⁰ There were questions about the advertising of a lawyer's past successes¹²¹ and about the use of the mails in solicitation.¹²² The justices also asked a great many questions of appellees' counsel, some of which were very pointed. Much was made of the requirement in the Addendum that "tort law" be stated instead of "personal injury law,"¹²³ as RMJ had used. There were complaints that

119. The official transcript does not designate the particular justice who asks a question, and the justices' names are supplied from the memory of the author and his associates. The first question came after appellant's counsel had spoken only 43 words:

QUESTION [by Justice Rehnquist]: Well, Mr. Blackmar, as to the particular facts of this case, supposing we were to conclude that under *Bates* the rules adopted by the Supreme Court of Missouri were unconstitutional. Would we be free to roam at large beyond this particular rule and say that A, B, C, D are permitted, but E, F, G are not?

Official Transcript of Oral Argument before United States Supreme Court at 3, *In re RMJ*.

120. *Id.* at 12-14, 18-20, 32.

121. Justice Powell, for example, put it this way: "Would it be appropriate in your view for a lawyer who practiced personal injury law to say that my average verdicts over the past 12 months have been \$129,000, assuming that is a fact?" *Id.* at 8.

122. Justice Powell was concerned about possible abuses:

QUESTION: Mr. Blackmar, thinking about mail advertising, let's assume that a lawyer had access to the names of people who were admitted to the emergency room of a great hospital in a large city. Could he use that list of names to send invitations to come and see him when they got well enough?

Id. at 11. Justice O'Connor also pressed the point:

QUESTION: Do you think that it would be proper and not subject to state bar regulation for an attorney to send out letters to people who are listed in the newspaper as being widows of recently deceased spouses, listing an area of expertise or practice as representation of widows? Is that something the State could not properly reach?

Id. at 20.

123. Justice Stevens interrogated appellees' counsel thoroughly on this point:

QUESTION: I think I may be troubled by something that Justice O'Connor asked you. You are suggesting it could have been a better rule. Tort isn't the most informative rule to describe a personal injury specialist, or a medical malpractice specialist. But do you defend this rule as being constitutional? Do you defend the judgment of the court below?

MR. ENGLISH: Your Honor, yes, I do defend the rule.

QUESTION: You think it is adequate to say "tort" and forbid any other word?

MR. ENGLISH: As I answered Justice O'Connor, that word was changed to negligence.

the opinion of the Missouri Supreme Court was of little help,¹²⁴ and appellees' counsel conceded that it was also of little help to him.¹²⁵ The proceedings were surprisingly informal at times, the reporter on several occasions noting "general laughter."

The Court recessed promptly at noon. Each side had about five minutes left. When the proceedings resumed, neither side used the full time remaining.¹²⁶

B. *The Opinion*

On January 25, 1982, the Missouri Supreme Court's judgment was reversed outright in a unanimous opinion written by Justice Powell, who, though among the dissenters in *Bates*,¹²⁷ has been the Court's primary spokesman in recent commercial speech cases.¹²⁸ The Court discussed the *Bates* rules in general terms:

Truthful advertising related to lawful activities is entitled to the

QUESTION: Yes, but he was disciplined because he did not use the word "tort." Is that not correct?

MR. ENGLISH: Well, yes, that is correct.

QUESTION: Now, do you defend that discipline?

MR. ENGLISH: Yes, sir, I do, Your Honor.

QUESTION: So you really cannot rely on the fact that now they say you can use the word "negligence."

MR. ENGLISH: Well, no. That is true. It has been changed. But that was only part of—

QUESTION: And do you not also agree that tort is by no means the most informative word to describe that kind of practice?

MR. ENGLISH: I would agree with that.

QUESTION: And yet you defend—

MR. ENGLISH: But that is only one of the items, Your Honor.

QUESTION: No, but it is perhaps an important item to a large number of people who would be using this kind of method of finding clients.

Id. at 30.

124. *Id.* at 32, 36-37, 42. The opinion noted that "the court did not explain the reason for its decision." 102 S. Ct. at 936.

125. Appellees' counsel was being prodded by Justice Stevens:

MR. ENGLISH: Unfortunately, Justice Stevens, the court below did not tell us which of these items it was considering as violative of the rules—

QUESTION: It really didn't tell us very much, did it?

MR. ENGLISH: They certainly did not. No, sir, Your Honor.

Official Transcript of Oral Argument before United States Supreme Court at 32, *In re RMJ*.

126. The author had the distinct impression that the Court, at this point, had heard all the argument it cared to hear.

127. See 433 U.S. at 391 (Powell, J., dissenting).

128. See, e.g., *Central Hudson Gas & Elec. Co. v. New York Public Serv. Comm'n*, 447 U.S. 557 (1980); *Ohralik v. Ohio*, 436 U.S. 477 (1978); *In re Primus*, 436 U.S. 412 (1978).

protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proven 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, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.¹²⁹

The Court held emphatically that the *Central Hudson* rule is applicable to legal advertising, observing: "Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent that regulation furthers the state's substantial interest."¹³⁰

The opinion then examined each of the charged violations. The Court noted that the constitutionality of the disclaimer was not challenged. It determined, with the aid of the dissenting opinions below, that the Missouri Supreme Court had found violations of all four of the counts in the information, including the one involving the Yellow Pages advertisement in which the disclaimer had been included.¹³¹

The restrictions on areas of practice that could be listed and the requirements of specific descriptive language were held invalid because RMJ's listing presented "no apparent danger of deception" and was not "shown to be misleading"; the state suggested "no substantial interest promoted by the restriction."¹³² The Court agreed with Chief Justice Bardgett's observation that RMJ's listings were, in some respects, more informative than the Advisory Committee's.¹³³

The Court also noted that the listing of states in which a lawyer is admitted to practice may be helpful and informative, especially in border areas. It held that the Advisory Committee had shown no substantial public interest in prohibiting such a listing.¹³⁴

The inclusion, in prominent letters, of RMJ's admission to practice before the United States Supreme Court was, however, "somewhat more troubling," as it "could be misleading to the general public unfamiliar with the requirements of admission to the bar of this Court."¹³⁵ Nevertheless, the Court rejected that statement as a basis for discipline:

There is nothing in the record to indicate that the inclusion of this information was misleading. Nor does the Rule specifically iden-

129. 102 S. Ct. at 937.

130. *Id.* at 939.

131. *Id.* at 938 n.18. The Court did not respond to appellant's assertion that, if the disclaimer is proper, a lawyer should at least be allowed to explain that the Missouri Bar does not certify specialists. It seems clear from the opinion, however, that a truthful explanation could not be prohibited.

132. *Id.* at 938.

133. *Id.*

134. *Id.* at 938-39.

135. *Id.* at 939.

tify this information as potentially misleading or, for example, place a limitation on type or require a statement explaining the nature of the Supreme Court bar.¹³⁶

The Court then dealt with the subject of direct mail advertising.¹³⁷ The issue, a subordinate one, was raised only because the Advisory Committee sought to discipline RMJ for the mailing of the two announcements. The Missouri Supreme Court's opinion did not deal with the issue at all, but the two dissenters had argued that the same advertisement that could be published in a private medium could be sent through the mail.¹³⁸ The Court agreed that mailings or handbills might be more difficult to police than published advertisements but noted that the state had not demonstrated its inability to supervise mailings or that an absolute prohibition was the only feasible method of regulation.¹³⁹

The opinion concluded with the observation that the states retain substantial authority over lawyer advertising. It spoke favorably of narrowly drawn rules designed to meet specific evils.¹⁴⁰ It found the Advisory Committee's case deficient in its failure to demonstrate that the desired regulatory goals could not be achieved by means short of total prohibition and that less drastic means had been attempted without success.¹⁴¹

The opinion is not expansive. It does not hold that all lawyer advertising is protected by the first amendment, even if it is truthful and not misleading. It did not adopt the proposition, asserted by the appellant, that the state could not prescribe the contents of protected speech.¹⁴² It did not

136. *Id.* The Court's concern, expressed both in oral argument and in the opinion, is surprising. RMJ's statement was perfectly true. Over 100 St. Louis lawyers listed admission to the bar of the United States Supreme Court in the 1981 edition of the Martindale-Hubbell Legal Directory, which is available in public libraries. The Advisory Committee gave no indication that it was more concerned about this statement than any other portion of RMJ's advertisement. The Committee, in its reply brief in the Missouri Supreme Court, characterized the statement as "puffing," but did not emphasize the point. The state court's majority opinion made no comment about it. The first substantial criticism of the statement is found in Judge Seiler's dissent. 609 S.W.2d at 416 (Seiler, J., dissenting). The United States Supreme Court's comments indicate that the statement might be misleading and within the scope of the state's regulatory power. 102 S. Ct. at 938-39.

137. 102 S. Ct. at 939.

138. 609 S.W.2d at 414 (Bardgett, C.J., dissenting); *id.* at 416 (Seiler, J., dissenting).

139. 102 S. Ct. at 939.

140. *Id.* The suggestion of "narrowly drawn rules" was first made in *In re Primus*, 436 U.S. 412, 417 (1978) (mail solicitation of legal business in noncommercial setting). The proposition was cited with approval in *Central Hudson Gas & Elec. Co. v. New York Public Serv. Comm'n*, 447 U.S. 557, 565 (1980).

141. 102 S. Ct. at 940.

142. See Howard, *Going About Suppressing Speech: A Comment on In the Matter of RMJ*, 26 ST. LOUIS U.L. REV. 328, 337 (1982).

even hold explicitly that a lawyer must be expressly charged with publishing misleading advertising if the regulatory authorities can show that it is, in fact, misleading. The regulators have the burden of showing either that the information in question is misleading or that there is substantial public interest in restrictive requirements.¹⁴³

IV. IMPLICATIONS

The *RMJ* opinion deliberately emphasizes the state's power to regulate lawyer advertising in the interest of protecting the public. The Court noted that "the potential for deception and confusion is particularly strong in the context of advertising professional services."¹⁴⁴ The opinion did not indulge in extensive dicta about fact situations not present in the case, but it did indicate that *Bates* is not to be read narrowly or grudgingly. Although the advertising in question had no ambiguities or seriously controversial items, the subject matter of the case is varied enough to give reliable guidance about remaining problems in lawyer advertising, some of which have already been drawn into litigation.

A. *Misleading Information*

Both *Bates* and *RMJ* emphasize the propriety of prohibiting misleading advertising. The Court's substantial attention to and discussion of *RMJ*'s statement that he was admitted to practice before it is instructive. The statement is pure fact, yet the opinion suggests that it could be misleading to members of the public who do not realize how easy it is to gain admission.¹⁴⁵ The opinion recognizes, then, that even a true statement can be misleading.¹⁴⁶ The problem of misleading advertising might be approached in three possible ways.

First, a state could adopt a general prohibition of misleading advertising such as Missouri's DR 2-101(A).¹⁴⁷ This would be sufficient to support an information, but the regulatory authorities would have the burden of demonstrating that a particular statement was misleading. A recent Wiscon-

143. The Wisconsin Supreme Court has so interpreted *RMJ*. *In re Marcus*, ___ Wis. 2d ___, ___, 320 N.W.2d 806, 815 (1982).

144. 102 S. Ct. at 937. See Carson, *Legal Advertising in Kansas: Expanding Marketing of Legal Services*, 21 WASHBURN L.J. 626 (1982); Young, *Supreme Court Report*, 68 A.B.A. J. 342 (1982).

145. 102 S. Ct. at 939.

146. The point is illustrated by Justice Marshall's tongue-in-cheek question as to whether a young lawyer could advertise, "I have never lost a case!" Official Transcript of Oral Argument before United States Supreme Court at 14, *In re RMJ*.

147. See generally Devine, *Lawyer Advertising and the Kutak Commission: A Refreshing Return to the Past*, 18 WAKE FOREST L. REV. 503, 513-14 (1982). *RMJ* was not charged with a violation of DR 2-101(A) and no issue of misleading advertising was tried before the Advisory Committee or the Supreme Court.

sin case, *In re Marcus*,¹⁴⁸ holds that, under *RMJ*, the disciplinary authorities have the burden of proving that an advertisement is misleading, and that they cannot put that burden on the advertiser.¹⁴⁹ In that case a law firm had published advertisements containing subjective judgments about the experience of the lawyers and the reasonableness of the fees. A referee had found the advertisements were not misleading. The court confirmed this finding on the basis of its own evaluation of the evidence, holding that the informants had not sustained the burden of proof.¹⁵⁰ The court reached this conclusion on the basis of statements in the *RMJ* opinion that a mere potential to mislead does not justify a prophylactic rule if less restrictive measures could correct the anticipated mischief,¹⁵¹ and that the regulatory authorities had not established that the statements were misleading.¹⁵²

Second, a state could adopt rules forbidding the use in advertising of certain statements that the authorities have determined to be misleading. The Supreme Court has sustained a Texas statute requiring that a practitioner of optometry not use a trade name or the name of an optometrist who is not present in the office.¹⁵³ New Jersey has just sustained a rule that forbids the use in law firm names of lawyers who are not present or past members of the New Jersey bar.¹⁵⁴ Iowa has defined the term "legal clinic" and has forbidden the use of this designation except by organizations meeting certain specifications.¹⁵⁵ The burden is on the state to show that truthful information could be misleading, but if it meets this burden the objective truth of the matter does not necessarily guarantee a right of publication.

Third, a state might adopt regulations, analogous to those of the Securities and Exchange Commission, requiring the filing of all advertising matter with the regulatory authorities.¹⁵⁶ Those in authority could then voice their objections or suggest additional material by way of explanation or disclaimer. It might even be possible to require a short delay in order to

148. ____ Wis. 2d ____, 320 N.W.2d 806 (1982).

149. *Id.* at ____, 320 N.W.2d at 815.

150. *Id.* at ____, 320 N.W.2d at 815-16.

151. 102 S. Ct. at 937.

152. *Id.* at 938-39.

153. *Friedman v. Rogers*, 440 U.S. 1, 13-16 (1979).

154. *In re Review of Opinion 475*, 89 N.J. 74, ____, 444 A.2d 1092, 1094 (1982), *appeal dismissed for want of substantial federal question*, 51 U.S.L.W. 3338 (U.S. Nov. 1, 1982) (No. 82-139).

155. *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1227-28 (S.D. Iowa 1971), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

156. For a discussion of such regulation, see 2A WEST'S FEDERAL PRACTICE MANUAL §§ 2245, 2247, 2268 (M. Volz rev. 2d ed. 1977). When a registration statement is filed it is examined by the SEC staff, which prepares a "deficiency letter" with suggestions for additions or modifications. The registration statement in theory becomes effective 20 days after filing, but in practice the registrant complies with the staff's request for delays. The SEC has no power to delay effectiveness for more than 20 days and may then seek a "stop order" if it believes that the statement does not comply with the law.

allow the regulators to discuss their objections with the advertiser or seek injunctive relief. The imposition of such a delay, however, may bring the problem of prior restraint into the case and create other problems.¹⁵⁷ A more reasonable approach to the problem would be for the regulatory agency to *invite* prepublication submission.

The Court's comments about the advertising of admission to its bar indicate that the term "misleading" will not necessarily be read narrowly or technically and that prohibition could be imposed, or explanation required, of statements that *might* be viewed in a false light. The Court would certainly prefer required explanation to out-and-out prohibition.

B. *Non-Misleading Information*

The Supreme Court flatly rejected the Missouri approach, in which the regulatory authorities decide what information might be helpful to the consuming public and forbid everything else. Lawyers have the first amendment right to choose the method and content of their expression, so long as it concerns lawful activity and is not misleading. Restrictions must be specific rather than general and must be supported by a substantial public interest. The least restrictive means must be used, or at least tried.

Bates spoke in terms of "restrained" advertising.¹⁵⁸ This thought was echoed in *RMJ* in the Court's remark that the mention of Supreme Court admission was, at least, in "poor taste."¹⁵⁹ It might be possible for a state to insist on certain standards of dignity. In an earlier case the Supreme Court had refused to disturb a decision that allowed a rule against billboard advertising to stand.¹⁶⁰ In a case originating in Arkansas, the Court let disciplinary action stand against lawyers who had purchased advertising in a book of discount coupons.¹⁶¹ It might be a mistake to read too much into these denials in view of the highly discretionary nature of the Court's certiorari power,¹⁶²

157. *Freedman v. Maryland*, 380 U.S. 51, 57-59 (1965), requires that a speedy judicial determination be available if exhibition of motion pictures is to be delayed pending determination of obscenity. Rules of prior restraint are less strictly applied in commercial speech cases, see *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389-90 (1973), but an *indefinite* delay would surely not be tolerated.

158. 433 U.S. at 372.

159. 102 S. Ct. at 939. The Utah Supreme Court dealt with the issue of dignity in lawyer advertising in *In re Utah State Bar Petition*, 647 P.2d 991 (Utah 1982). Two justices questioned the "dignity" standard, but the majority upheld a prohibition on "billboards, circulars, matchbooks and inscribed pencils and pens." *Id.* at 995.

160. *Calig & Waterman v. Supreme Court of Ohio*, No. 79394 (Ohio June 8, 1979), *cert. denied*, 444 U.S. 941 (1979). For a description of the issues raised by the case, see 48 U.S.L.W. 3243 (1979).

161. *Eaton v. Supreme Court*, 270 Ark. 573, 579-80, 607 S.W.2d 55, 59-60 (1980), *cert. denied*, 450 U.S. 966 (1981).

162. See R. STERN & E. GRESSMAN, *supra* note 105, at 353.

but it can be said that the justices were not seriously disturbed by regulations imposed on advertising that some might regard as undignified.

The state of Iowa adopted a series of specific regulations, some of which prohibited the advertising of truthful matter. A federal district judge drew a distinction between factual matter, which he said could not be misleading, and promotional matter, which could.¹⁶³ The case held that a lawyer could advertise the fact that he is black but could be prohibited from advertising his personal opinions.¹⁶⁴ It is difficult to see how either of those could be misleading.

The distinction between factual and promotional material is of doubtful validity. As has been shown in the preceding section, even factual material can be misleading. It is hard to see the substantial public interest in forbidding the advertising of non-misleading items that, while they may have little objective value in the selection of a lawyer, might possibly affect some clients. Why should not a lawyer advertise, "I am a political conservative and would be pleased to handle the legal problems of conservative people, especially when they have problems with governmental regulation," if he is so disposed and willing to suffer the loss of liberal clientele?

Both ABA Proposal A and Missouri's DR 2-101(A) prohibit self-laudatory statements in advertising. The restriction's validity is open to question, except to the extent that the information is misleading. *Bates* observed that statements about the quality of legal services offered could be misleading,¹⁶⁵ but statements that a lawyer is an Eagle Scout or an All-American halfback, while perhaps self-laudatory, are hardly misleading. A client who learned of these circumstances without the benefit of advertising might be attracted to a lawyer because of them. It is hard to say that these particular statements are in bad taste. Regulators would be well advised to proceed cautiously unless the statements are potentially misleading.

A New Jersey case sustained the continued validity of DR 2-102(D), a pre-*Bates* rule in effect in that state and elsewhere, which prohibits the listing on a lawyer's letterhead of his qualifications in another profession.¹⁶⁶ The petitioner was both a lawyer and a certified public accountant. He wanted to list his accounting credentials on his professional stationery. The statement was absolutely true, and it was not unrelated to his ability to practice law. The court observed, uneasily, that "non-legal training is not directly transferable to legal ability or prowess," and "the inclusion of extra-legal qualifications on a letterhead creates a possibility of confusion that is sufficient to sustain the constitutionality of restrictions on the place and manner of the communication."¹⁶⁷ The rule, said the court, "does not purport

163. *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1227 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

164. *Id.*

165. 433 U.S. at 383-84.

166. *In re Advisory Committee on Professional Ethics Opinion No. 447*, 86 N.J. 473, 432 A.2d 59 (1981).

167. *Id.* at 479, 432 A.2d at 62.

to close other avenues for the advertisement of such accomplishments."¹⁶⁸ The decision is strained and difficult to justify. It is difficult to see the public interest in regulating the information that may be contained on a lawyer's stationery if the forbidden information may be conveyed by other means. If there is a difference of opinion as to the importance of an accounting certificate in the selection of a lawyer, the public should be the judge.

The *RMJ* opinion did not discuss Phillips-type advertising, which purports to offer the public information about legal procedures and processes that might be available to them. One who believed in advertising would argue that such informative advertisements are beneficial to the public. Any fear that this kind of advertising connotes a claim of particular expertise could easily be corrected by a disclaimer. There is no public interest in prohibiting advertising of this general character.

C. Listing of Areas of Practice

The Supreme Court has indicated that a listing of areas of practice is "potentially misleading."¹⁶⁹ Quite a few state authorities have shown similar concern. But a valid regulation would have to be something different from Missouri's provisions for listing only particular areas and using only particular words approved by the Advisory Committee.

State authorities have been concerned about unfounded claims of expertise or specialized knowledge. Tennessee took the position that any listing of an area of practice or statement of limitation of practice, other than a listing of charges for routine legal services, amounted to a claim of special skill. The state prohibited such listings except for the long recognized specialties.¹⁷⁰ A federal district court, in an opinion that showed remarkable anticipation of the *Central Hudson* holding, held the rule invalid.¹⁷¹ The judge observed that a statement of limitation of practice, far from being a claim of special skill, might simply indicate that the lawyer did not claim to be current or competent in areas not listed.¹⁷² But Rhode Island cases, state and federal, have upheld similar rules.¹⁷³

Another aspect of the problem is presented by listings in classified telephone directories of lawyers, arranged by area of practice. A federal court rejected New Jersey's efforts to regulate such listings,¹⁷⁴ but the Montana

168. *Id.* at 480, 432 A.2d at 62.

169. 102 S. Ct. at 937.

170. *In re Rule of Court Governing Lawyer Advertising*, 564 S.W.2d 638, 644-45, 653 (Tenn. 1977). *Cf. In re Amendment of Code of Professional Responsibility*, 267 Ark. 1181, 1182-83, 590 S.W.2d 2, 3-4 (1979).

171. *Durham v. Brock*, 498 F. Supp. 213, 225 (M.D. Tenn. 1980).

172. *Id.* at 223 n.16. The judge used the analogy of a veterinarian who wanted to treat only dogs and cats because he had no practical experience in treating farm animals.

173. *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903, 911-12 (D.R.I. 1981); *Carter v. Lovett & Linder, Ltd.*, ___ R.I. ___, ___, 425 A.2d 1244, 1246 (1981).

174. *Princeton Community Phone Book v. Bate*, 582 F.2d 706, 710-11 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).

Supreme Court, in a case in which the telephone company was a party, held the listings improper because of the implication of special ability.¹⁷⁵ The presence of a general disclaimer at the top of each page was held insufficient as a means of protection.¹⁷⁶ A New York case upheld the discipline of a lawyer who listed himself under more than twenty separate headings when he admitted that he lacked experience in some of those areas.¹⁷⁷ The Mississippi Supreme Court, in a post-*RMJ* case, struck down a rule forbidding all classified advertising other than the attorney's name, firm name, address, and telephone number.¹⁷⁸

The prohibition of listing of areas of practice appears to be invalid under *RMJ*. One may sympathize with a lawyer who feels he must buy multiple directory listings in order to keep up with the competition, but *Bates* arguably shows little sympathy for the goal of protecting lawyers from expense.¹⁷⁹ There is an anomaly in granting a lawyer a general license to practice law just as soon as he passes the bar examination, and then telling him that he cannot tell the public about the areas in which he holds himself out to practice. A disclaimer requirement should be sufficient to protect the public against unjustified claims of expertise.

If the state chooses to certify specialists, it may of course take steps to keep uncertified lawyers from claiming certification. It might even be permissible to require that the words "not certified" be included by uncertified lawyers who hold themselves out as willing to handle matters in fields in which certification is available.

D. Mailed Advertising

The Supreme Court's treatment of mailed advertising in *RMJ* came as a surprise to many. The ABA Task Force had not even seen the need for revising DR 2-102 after *Bates*. Yet the decision was not surprising. Two state courts of last resort, when presented with the issue, held emphatically that the same advertisement that could be published in a newspaper could be sent through the mail,¹⁸⁰ and the Supreme Court agreed. The Court found that the public interests in privacy¹⁸¹ and the policing of advertising¹⁸² could

175. *In re Mountain Bell Directory Advertising*, ___ Mont. ___, ___, 604 P.2d 760, 763 (1979).

176. *Id.* at ___, 604 P.2d at 764.

177. *Zimmerman v. Office of Grievance Committee*, 79 A.D.2d 263, ___, 438 N.Y.S.2d 400, 403 (1981), *appeal dismissed*, 440 N.Y.S.2d 1029 (1981).

178. *McLellan v. Mississippi State Bar Ass'n*, 413 So. 2d 705, 708 (Miss. 1982).

179. *See* 433 U.S. at 377-78.

180. *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, 412 N.E.2d 927, 929, 432 N.Y.S.2d 872, 877 (1980), *cert. denied*, 450 U.S. 1026 (1981).

181. *In re RMJ*, 102 S. Ct. at 939 n.20. The note suggests that fears about receiving a letter from a lawyer could be allayed by a requirement that the words "this is an advertisement" appear on the envelope. *See Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 541-42 (letter is not serious invasion of privacy).

182. *In re RMJ*, 102 S. Ct. at 939. *See Foley v. Alabama State Bar*, 481 F. Supp.

be satisfied by regulation far short of total prohibition of direct mail advertising.

RMJ presented the issue of mailed advertising in its simplest form. The mailing, an announcement of the office opening, was not a direct solicitation, since the lawyer had no reason to believe that the addressees had any current legal business. As a result, the opinion left some unanswered questions about the promotion of legal services by mail.

In a pre-*RMJ* New York decision, the Appellate Division considered the case of a lawyer who mailed 7500 circulars to people who were assumed to be selling their homes, advising them of his charges for legal services in connection with the sale; the court found that the lawyer had engaged in improper solicitation rather than protected advertising.¹⁸³ The New York Court of Appeals reversed, finding that the circular was protected speech and that the distinction between advertising and solicitation, in the context of the case, was "artificial."¹⁸⁴

The Florida Supreme Court took a different view in an opinion handed down shortly before *RMJ* was argued. A lawyer wrote to an international trading company, suggesting that the company "might" have need of a lawyer familiar with immigration law and offering his services.¹⁸⁵ The court held that this was solicitation, which could be regulated.¹⁸⁶

In another pre-*RMJ* decision, the New York Court of Appeals departed from its earlier position, holding that a lawyer violated valid state statutes by sending circulars to a large number of real estate brokers, advising them of his charges for representing buyers and suggesting that they refer customers to him for legal services.¹⁸⁷ The Appellate Division had found the lawyer subject to discipline,¹⁸⁸ and the Court of Appeals affirmed.¹⁸⁹ It found that the rule was a proper "time, place and manner" regulation and that there was a substantial public interest in regulation because of a potential conflict of interest. The court surmised that a lawyer who depended on real estate brokers for his business might be disposed to pass on unmeritorious titles so that the sale would go through and the broker would get his com-

1308, 1311-12 (N.D. Ala. 1979), *rev'd on other grounds*, 648 F.2d 355 (5th Cir. 1981).

183. *Koffler v. Joint Bar Ass'n*, 70 A.D.2d 252, 271-72, 420 N.Y.S.2d 560, 573 (1979).

184. *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 143, 412 N.E.2d 927, 929, 432 N.Y.S.2d 872, 873 (1980).

185. *Florida Bar v. Schreiber*, 407 So. 2d 595, 596 (Fla. 1981). The case was remanded for further disciplinary proceedings and so probably is not final for purposes of United States Supreme Court review.

186. *Id.* at 597.

187. *Greene v. Grievance Committee*, 54 N.Y.2d 118, 120-21, 429 N.E.2d 390, 391, 444 N.Y.S.2d 883, 884 (1981), *cert. denied*, 102 S. Ct. 1738 (1982).

188. *In re Greene*, 78 A.D.2d 131, 133, 433 N.Y.S.2d 853, 854 (1981).

189. 54 N.Y.2d at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884. After the Appellate Division opinion but before the case went to the Court of Appeals, the lawyer was suspended for incapacity, but the court nevertheless heard the case on the merits.

mission. The court held that a "third party mailing" could be prohibited, even though the advertisement would be proper and protected if published in a newspaper or mailed directly to the purchaser.¹⁹⁰

A petition for certiorari was filed,¹⁹¹ but it was denied with four justices dissenting.¹⁹² This in itself is surprising, since four votes are usually sufficient for a grant of certiorari,¹⁹³ but it is possible that the intervening suspension of the lawyer for incapacity might have rendered the case moot or unripe.¹⁹⁴ Denial of certiorari, of course, does not connote approval of the state court's decision.

The New York court's decision is absurd, as the dissent demonstrates.¹⁹⁵ The lawyer simply made his availability known. It is not unusual for a real estate buyer to ask the seller's broker to recommend a lawyer, because often buyers are not local people and know no local lawyers. The bare recommendation has never been thought to raise an impermissible conflict of interest. The lawyer is responsible for acting professionally. The potential for conflict of interest is certainly not increased if he sends a simple announcement to a real estate broker who is a stranger to him, advising of his availability and charges. A contrary holding of the Kentucky Supreme Court is sounder.¹⁹⁶

None of the cases just discussed deals with the solicitation of employment in a particular pending matter. A protected advertisement is not converted into an improper solicitation simply because it is addressed to people who might have need for legal services.¹⁹⁷ There is no reason to force lawyers to fire expensive broadsides in order to avoid the charge of solicitation. If advertising in general is beneficial, it is only sensible to allow the information to be targeted to those who have use for it.

There is a more substantial problem if a lawyer makes use of a written communication to try to procure a particular and known piece of legal business. Two pre-*RMJ* cases hold that such attempts are not protected speech.¹⁹⁸ The Supreme Court's opinion in *Ohralik v. Ohio*¹⁹⁹ held that out-and-out "ambulance chasing" was not protected. The Court held that while

190. *Id.* at 125-27, 429 N.E.2d at 394, 444 N.Y.S.2d at 887.

191. Certiorari was requested even though the fact that a state statute was challenged and was upheld by the highest state court might have provided the basis for direct appeal.

192. 102 S. Ct. 1738 (1982).

193. See R. STERN & E. GRESSMAN, *supra* note 105, at 346-50.

194. The Supreme Court is not bound by the state court's decision on the issue of mootness. *Id.* at 886. See *Poe v. Ullman*, 367 U.S. 497, 506 (1961).

195. 54 N.Y.2d at 129-36, 429 N.E.2d at 396-400, 444 N.Y.S.2d at 889-93 (Fuchsberg, J., dissenting).

196. *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978).

197. *Koffler*, 51 N.Y.2d at 145-47, 412 N.E.2d at 930-31, 432 N.Y.S.2d at 875-76.

198. In *Allison v. Louisiana Bar Ass'n*, 362 So. 2d 489, 496 (La. 1978), involving a proposal for group legal services, the court found a violation of the solici-

face-to-face conversations are within the general protection of the first amendment, the elements of intrusiveness and the potential for overreaching justified prophylactic rules.²⁰⁰

The Supreme Court has commented on the difference between a mailing and a face-to-face confrontation, but in a case that did not involve commercial speech.²⁰¹ The *Ohralik* case gave a graphic description of the dangers of person-to-person solicitation.²⁰² It is hard to see how any letter could have such serious potential. Perhaps, however, the Court overwrote in *Ohralik*, so that the states *may* have some power to regulate abject mail solicitations.

E. *Media Regulation*

RMJ emphatically rejected the Advisory Committee's argument that prohibition or severe restriction on the use of the mails in lawyer advertising was permissible as a "time, place and manner" restriction.²⁰³ The holding makes it clear that there must be a substantial public policy reason behind any restriction of the particular advertising medium. It is not sufficient to argue that alternate channels of communication are available. Following *RMJ*, for example, the Utah Supreme Court amended its rules to allow advertising in all "public commercial media."²⁰⁴

We have already considered the validity of advertising in media such as billboards,²⁰⁵ which some might consider lacking in dignity. The same argument might be made about the use of handbills,²⁰⁶ but it is difficult to see why a lawyer should not be able to deliver announcements of the opening of his office to people in his neighborhood, office building, or shopping center without incurring substantial postage expense.

tion rules. There was a concurrence which expressed grave reservations. *Id.* at 496-98 (Tate, J., concurring). Compare Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 482 Pa. 416, 427-28, 393 A.2d 1175, 1181 (1978), *appeal dismissed*, 442 U.S. 907 (1979), a case decided on narrow principles, where lawyers terminating their employment with a firm solicited clients of the firm for future business.

199. 436 U.S. 447, 459 (1978).

200. *Id.* at 457, 467-68.

201. *In re Primus*, 436 U.S. 412, 435-36 (1978).

202. 436 U.S. at 467.

203. 102 S. Ct. at 939. For a discussion of such restrictions, see *Police Department v. Mosley*, 408 U.S. 92 (1972). Time, place, and manner restrictions must be "content neutral" and must be based on a substantial public interest. *Id.* at 99.

204. See *In re Utah State Bar Petition*, 647 P.2d 991, 995 (1982).

205. See L. ANDREWS, *supra* note 13, at 51 (19 jurisdictions clearly prohibit lawyers' billboards).

206. See *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1230 (S.D. Iowa 1981) (prohibition on handbills is a valid "manner" regulation in the interest of minimizing commercialization), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982). It is difficult to see why a lawyer who opens an office in a suburban mall could not distribute his card to the other shops instead of using expensive postal facilities.

The remaining problem is the validity of restrictions or prohibitions of radio and television advertising. The issue of television advertising was presented obliquely in a case from New Jersey,²⁰⁷ one of the relatively few states that forbid television advertising. In the case before it, the state supreme court dealt with a requirement that firm names contain only the names of lawyers licensed in New Jersey. The nationally advertised firm of Jacoby & Myers, neither of whom was licensed in New Jersey, wanted to open an office in the state. The firm, in full compliance with the local rules, advertised on New York television stations whose signals reached into New Jersey.²⁰⁸ The court was unwilling to say that local lawyers could not advertise their affiliation with Jacoby & Myers but saw that this would give those lawyers an unfair advantage since other New Jersey lawyers could not advertise on television. The court solved the problem by holding that local lawyers could not advertise their affiliation so long as Jacoby & Myers continued their New York television advertising.²⁰⁹ The court then referred the entire matter of television advertising to a committee for further study. It seems clear that the court was worried that the television ban would not survive further scrutiny.

In *Bishop v. Board of Professional Ethics*,²¹⁰ a United States District Court upheld the Iowa restrictions on television advertising, including the requirement that advertisements be presented by a single non-dramatic voice, not that of the lawyer, and without background sound. The plaintiff wanted to show a conversation between a lawyer and a layman and to have his partner, who was black, appear on television. The court held that the regulations were reasonable.²¹¹ The holding at this point can be contrasted with the holding in another part of the case that the lawyer had the constitutional right to advertise in the print media that his partner was black.²¹²

It can confidently be predicted that the total prohibition of radio or television advertising cannot stand. The notation in the *Bates* opinion of the "special problems" of the electronic media remains,²¹³ and this suggests that restrictions on those media may be valid while similar restrictions on other media might not. The *Bishop* court so held.

V. THE MISSOURI RESPONSE

After the *RMJ* opinion was handed down, the Missouri Supreme Court entered an order suspending the enforcement of some of its advertising

207. *In re Review of Opinion 475*, 89 N.J. 74, 444 A.2d 1092 (1982), *appeal dismissed for want of substantial federal question*, 51 U.S.L.W. 3338 (U.S. Nov. 1, 1982) (No. 82-139).

208. *Id.* at _____, 444 A.2d at 1099.

209. *Id.* at _____, 444 A.2d at 1099-1100.

210. 521 F. Supp. 1219, 1232 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

211. *Id.* at 1228-29.

212. *Id.* at 1226-27.

213. 433 U.S. at 384.

rules.²¹⁴ There remained the important protection of DR 2-101(A), which forbids advertising that is “false, fraudulent, deceptive, self-laudatory or unfair.”²¹⁵ That rule was never challenged.

In the court’s order conforming to the mandate, however, the suspension was extended to cover all portions of the advertising rules, including the ban on solicitation.²¹⁶ The reason for the blanket suspension is hard to fathom. The *RMJ* opinion took pains to emphasize that the states retain substantial authority to regulate lawyer advertising.²¹⁷ The total suspension gave carte blanche to lawyer advertising except to the extent that it violates general rules forbidding “conduct involving dishonesty, fraud, deceit or misrepresentation,”²¹⁸ and “conduct that is prejudicial to the administration of justice.”²¹⁹

On July 2, 1982, the Missouri Supreme Court appointed another committee on lawyer advertising. As part of the same order, it lifted the total suspension of advertising rules and adopted rules as follows:

DR 2-101. Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm use or participate in the use of any form of public communication containing a misleading statement or claim.

(B) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.²²⁰

The new rule appears to meet all of the standards of validity under *Bates* and *RMJ*. If additional regulation of advertising is recommended, it should be based on a careful analysis of the constitutional requirements and should have a substantial purpose apart from merely imposing a damper. Models are available and should be used.²²¹

The Missouri Supreme Court should also provide a procedure for raising constitutional challenges to advertising rules in some manner that does not involve discipline. New Jersey has a procedure for judicial review of its

214. Order of February 5, 1982 (suspending enforcement of DR 2-101(B), DR 2-101(D), DR 2-103).

215. MO. SUP. CT. R. 4, DR 2-101(A).

216. Chief Justice Donnelly was quoted as saying, “We won’t enforce the rules until we come up with other rules.” *Lawscope*, 68 A.B.A. J. 407 (1982).

217. 102 S. Ct. at 932.

218. MO. SUP. CT. R. 4, DR 1-102(4).

219. *Id.*, DR 1-102(5). See Calkins, *Legal Advertising and Solicitation*, 38 J. MO. B. 199, 208 (1982) (suggesting possible application of EC 9-2, enjoining lawyers to act “in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession”); Devine, *supra* note 147, at 513-21 (advocating reliance on Model Rule 7.1 of the MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981)).

220. Order of July 2, 1982 (adopted at MO. SUP. CT. R. 4, DR 2-101).

221. See ABA MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981); note 19 *supra*. See also *In re Utah State Bar Petition*, 647 P.2d 991, 999-1000 (1982) (containing draft rules revised to conform to *RMJ*).
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advertising rules, which should be studied.²²² If a similar procedure had been available to RMJ it might not have been necessary to litigate his case all the way to the United States Supreme Court. Moreover, if disciplinary proceedings furnish the only means of testing the rules, there is a chilling effect. Most lawyers will comply with the rules, valid or not, because they are unwilling to spend the time and money, and bear the stigma of disciplinary involvement, simply to test the rules. It is not becoming to disciplinary authorities or courts to seek to enforce rules that may violate the first amendment through the threat of disciplinary action.

222. See generally *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 102 S. Ct. 2515 (1982); *In re Review of Opinion 475*, 89 N.J. 74, 444 A.2d 1092 (1982), *appeal dismissed for want of substantial federal question*, 51 U.S.L.W. 3338 (U.S. Nov. 1, 1982) (No. 82-139).