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REGULATION OF LAWYER ADVERTISING: IN THE PUBLIC INTEREST?

Roger P. Brosnahan and Lori B. Andrews***

In 1908, the American Bar Association adopted a formal ban on lawyer advertising and solicitation.¹ At that time, lawyers' promotional activities were viewed as not only unprofessional, but unnecessary. Most lawyers were general practitioners in small communities, and legal services were rendered in a one-to-one relationship between people who knew each other in the community. It is within that context that a 1908 Canon of Ethics stated: "[t]he most worthy and effective advertisement possible . . . is the establishment of well-merited reputation for professional capacity and fidelity to trust."²

As the century has unfolded, communities have grown in size, lawyers have become more specialized and legal considerations have come to affect more aspects of daily life. As a result, it has become difficult for the average citizen to determine when he has a legal problem, how that problem might be resolved and what part lawyers can play in the process.

In 1973 and 1974, the American Bar Association, in a joint project with the American Bar Foundation, conducted a survey in thirty-three states to analyze the public's level of knowledge about lawyers, the law and the legal process. This comprehensive study found that members of the public had difficulty determining when they need legal services, how to find a lawyer to provide such services and what a lawyer might cost.³ According to the survey, a substantial portion of the public felt that many people failed to seek legal advice because they had no way of

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¹ ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908).

² *Id.*

³ B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

knowing which lawyers are competent to handle their particular problems.⁴

In *Bates v. State Bar of Arizona*,⁵ the Supreme Court declared that the first amendment protects some lawyer advertising from state prohibition. The *Bates* Court was influenced, in part, by the Bar Association survey.⁶ The Court saw legal advertising as a way to close the information gap identified in that study. The Court stated: "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."⁷ The Court noted that the interest of the listener is substantial: "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."⁸

In *Bates*, John R. Bates and Van O'Steen, both of whom were licensed to practice law by the state of Arizona, placed an advertisement in a daily newspaper stating that they were offering "legal services at very reasonable fees."⁹ This advertisement, which listed prices for routine legal services, was in conceded violation of the rules of the Supreme Court of Arizona prohibiting an attorney from publicizing himself or his firm in newspapers or through other means of commercial publicity.¹⁰

The Supreme Court found that people were in need of information about the nature and availability of legal services and that they were generally capable of understanding that information. The Court recognized that an occasional client, unable to appreciate the complexity of his problem, might mistakenly believe that his problem could be handled at the advertised price.

⁴ *Id.* at 228. The survey revealed that 48.7% of the population in the areas studied "strongly agreed" and 30.2% "slightly agreed" with the statement that people do not go to attorneys because they do not know which ones are competent to handle their particular problems. *Id.* See also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370 n.23 (1977).

⁵ 433 U.S. 350 (1977).

⁶ See *id.* at 370 n.23.

⁷ *Id.* at 364.

⁸ *Id.*

⁹ See *id.* at 354. The advertisement, asking "Do You Need a Lawyer?," offered "routine legal services" at "very reasonable prices." The following services were mentioned with prices quoted: uncontested divorces and legal separations, adoption proceedings, individual and joint uncontested bankruptcy proceedings and name changes. See *id.* at 385 app. The advertisement also contained a picture of the scales of justice. *Id.*

¹⁰ ARIZ. SUP. CT. R. 29(a) (amended 1978).

However, that mistaken belief could be cleared up at the initial consultation and a fee negotiated in the normal manner.¹¹ Where this is the case, "[t]he client is thus in largely the same position as he would be if there were no advertising."¹² The Court concluded that "[i]n light of the benefits of advertising to those whose problem can be resolved at the advertised price, suppression is not warranted on account of the occasional client who misperceives his legal difficulties."¹³

In addition to its fear that the public would be misled, the Arizona Bar Association expressed concern that advertising would impair the quality of legal services and would have undesirable economic effects.¹⁴ The *Bates* Court found that these concerns were outweighed by the need of the public for information on the availability and terms of legal services.¹⁵ The Court also pointed out the responsibility of the bar in correcting any inaccurate picture that might be caused by advertising: "If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."¹⁶

Soon after the Supreme Court's decision in *Bates*, a majority of the states revised their stances on lawyer advertising, either legislatively or judicially. These state reactions have ranged

¹¹ 433 U.S. at 373 n.23.

¹² *Id.*

¹³ *Id.*

¹⁴ See *id.* at 377-78. The Court discussed each of these arguments in turn: "*The Adverse Effect on Professionalism*," *id.* at 358; "*The Inherently Misleading Nature of Attorney Advertising*," *id.* at 372; "*The Adverse Effect on the Administration of Justice*," *id.* at 375; "*The Undesirable Economic Effects of Advertising on the Quality of Service*," *id.* at 378; and "*The Difficulties of Enforcement*," *id.* at 379.

¹⁵ *Id.* at 364. See text accompanying notes 7-8 *supra*.

¹⁶ *Id.* at 375.

It should be noted that the *Bates* Court did not strike all restrictions on lawyer advertising. Advertisements that are false, deceptive or misleading still can be prohibited. *Id.* at 383 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 & n.24 (1976)), and the time place and manner of lawyer advertising may be subject to reasonable restrictions. *Id.* at 384 (citing *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). The Court felt that a warning or disclaimer might be required in order to assure that the consumer would not be misled. *Id.* The Court also noted that the "special problems of advertising in the electronic broadcast media will warrant special consideration." *Id.* See notes 39-48 and accompanying text *infra*. It reserved for future consideration the issue of in-person solicitation. *Id.* See notes 46-58 and accompanying text *infra*.

from minor revisions which were intended to do no more than recognize the propriety of advertisements that duplicate the one examined by the Court in *Bates*, to sweeping changes recognizing all but deceptive lawyer advertising. In addition, the American Bar Association Commission on Advertising has suggested a permissive model rule on lawyer advertising, which will be discussed.

I. STATE REGULATION OF ADVERTISING

The Supreme Court in *Bates* called the ban on advertising "highly paternalistic,"¹⁷ and stated that "the preferred remedy [to public ignorance about lawyers and available legal services] is more disclosure rather than less."¹⁸

Since the Supreme Court decision in *Bates*, forty-five states and the District of Columbia have amended their advertising rules.¹⁹ The problem is that many of these rules restrict attorneys from advertising the very information that would be most

¹⁷ 433 U.S. at 365.

¹⁸ *Id.* at 375.

¹⁹ Ala. Sup. Ct. Order, May 11, 1978, and May 2, 1979; Alaska Sup. Ct. Order No. 356 dated Jan. 25, 1979, effective April 1, 1979, and No. 377 dated June 29, 1979, effective July 1, 1979; ARIZ. SUP. CT. R. 29(a) (Supp. 1979-1980); *In re* Amendments to the Code of Professional Responsibility and Canons of Judicial Ethics, 263 Ark. 948 (1978); CAL. BUS. & PROF. CODE § 6076 R. 2-101, 2-102; COLO. SUP. CT. R. DR 2-101; Conn. Sup. Ct. Order dated July 1, 1978; DEL. CODE ANN. tit. 16, DR 2-101, 2-102 (Supp. 1978); D.C. CT. R. DR 2-101; FLA. R. CT. DR 2-101; GA. CODE ANN. tit. 9, DR 2-101; Idaho Sup. Ct. Order effective Feb. 23, 1979; IND. CODE ANN. DR 2-101, 2-102 (Burns Supp. 1979) IOWA R. CT. DR 2-101, 2-102; KAN. STAT. ANN. ch. 7, DR 2-101(B); 18 Ky. REV. STAT. ANN. R. 3.135; La. Sup. Ct. Order dated Feb. 7, 1979, DR 2-101; ME. R. CT. 3.8, 3.9; MD. ANN. CODE R. 1230; Mass. Sup. Jud. Ct. Order dated May 15, 1979, effective July 1, 1979; Mich. Sup. Ct. Orders effective Mar. 15, 1978, and Feb. 2, 1979; MINN. R. CT. DR 2-101, 2-102; Miss. Ethics Committee Opinion No. 44, citing Miss. Disciplinary Rule 1-102(A)(8) as amended by the Sup. Ct. of Miss. on Sept. 19, 1977; Mo. R. CT. DR 2-101, 2-102; Neb. Sup. Ct. Order May 9, 1979; 1 NEV. REV. STAT. R. 164; N.H. Sup. Ct. Order effective Mar. 5, 1980, reprinted in 6 N.H.L.W. 429-30 (1980); N.J. CT. R. DR 2-101; 2 N.M. STAT. ANN. R. 2-101, 2-102; N.Y. JUD. LAW DR 2-101, 2-102; 1978 N.C. ST. B.Q. 20, which contains amendments to Canon 2 approved by the Chief Justice Feb. 24, 1978; OHIO CT. R. DR 2-101, 2-102; OKLA. CT. R. & PROC. DR 2-101, 2-102; Or. Sup. Ct. Order, adopted Jan. 9, 1979; PA. CODE tit. 204, § 81.2; 2B R.I. GEN. LAWS DR 2-101, 2-102; 22 S.C. CODE DR 2-101, 2-102; S.D. CODE OF PROFESSIONAL RESPONSIBILITY as amended by the S.D. Sup. Ct. on Oct. 23, 1979; 5A TENN. CODE ANN. 2-101, 2-102; 1A TEX. CIV. CODE ANN. tit. 14 app., art. 12 § 8, DR 2-101, 2-102; Utah Disciplinary Rules adopted by the Sup. Ct. of Utah, May 25, 1978, effective July 1, 1978, and Sup. Ct. of Utah Order No. 16347 dated May 22, 1979; Vt. Disciplinary Rules adopted by the Vt. Sup. Ct. July 15, 1977; Va. Code of Professional Responsibility amendments as adopted by the Sup. Ct. of Va. on Oct. 3, 1979, effective Jan 1, 1980; Wash. Sup. Ct. Order dated Nov. 9, 1978,

helpful in deciding whether a problem requires legal services and who best could provide those services. Moreover, some rules so restrict effective advertising that attorneys might find it economically unfeasible to advertise.²⁰ Without any empirical rationale, state advertising rules regulating the content or media of lawyer advertising often prevent lawyers from effectively using advertising content that addressed the identification of legal problems and the nature and cost of legal services.

In *Bates*, the Supreme Court observed that one reason why people do not go to lawyers is that "they have no way of knowing which lawyers are competent to handle their particular problems."²¹ Nonetheless some state advertising rules prevent lawyers from letting the public know the nature of their practice.

Provisions in six states impede attorneys from fully describing the nature of their practices by prohibiting them from advertising the fixed fees of other than enumerated routine services.²² Although some of these six states allow the advertising of the four services listed in the *Bates* advertisement,²³ they differ substantially with respect to what other services are considered routine. For example, in Georgia²⁴ and Rhode Island,²⁵ debt collec-

effective Jan. 1, 1979; 1 W. VA. CODE app. DR 2-101, 2-102; Wis. Ct. R. & Proc. DR 2-101, 2-102; Wyo. Disciplinary Rules adopted by the Wyo. Sup. Ct. Jan. 1, 1978.

²⁰ The restrictiveness of the state rules is demonstrated by the fact that the advertisement at issue in *Bates* would not be permissible under the rules of 24 states. See Ala. DR 2-102(A)(7)(b); Alaska DR 2-101(B)(25); Ariz. DR 2-101(B)(25); Ark. DR 2-101(B)(25); Conn. DR 2-201(B)(19); 16 DEL. CODE ANN. DR 2-101(B)(25); GA. CODE ANN. tit. 9, DR 2-101(B)(14); IND. CODE ANN. DR 2-201(B)(24); KAN. STAT. ANN. ch. 7, DR 2-101(B)(25); 18 KY. REV. STAT. ANN. R. 3.135; Miss. DR 2-102(A)(8); Mo. R. Ct. DR 2-101(B)(10); Neb. DR 2-101(B)(25); 1 NEV. REV. STAT. R. 164(2); N.M. STAT. ANN. R. 2-101(B)(23); N.C. DR 2-101(B)(14); OKLA. CT. R. & PROC. DR 2-101(B)(d); R.I. Provisional Order No. 11 effective Jan. 12, 1978; 5A TENN. CODE ANN. DR 2-101(B)(23); Utah DR 2-101(B)(24); Wash. DR 2-101(B)(26); 1 W. VA. CODE app. DR 2-101(B)(25); Wyo. DR 2-101(B)(25).

²¹ 433 U.S. at 370-71 n.23 (citing ABA, *Legal Services & the Public*, 3 ALTERNATIVES 15 (1976)).

²² 16 DEL. CODE ANN. DR 2-101(C)(25), (D); GA. CODE ANN. tit. 9, DR 2-101(B)(14); IOWA R. CT. DR 2-101(C); Miss. DR 2-101(A)(8); Mo. R. Ct. DR 2-101(B)(10); N.H. Sup. Ct. Order effective Mar. 5, 1980, reprinted in 6 N.H.L.W. 429-30 (1980); R.I. Sup. Ct. Provisional Order No. 11 effective Jan. 12, 1978. In Iowa attorneys are not even permitted to inform the public that they are available to help clients arrange uncontested adoptions, a service which was mentioned in the *Bates* advertisement itself. IOWA R. CT. DR 2-101(D) (listing "specific legal services" which may be advertised).

²³ See, e.g., GA. CODE ANN. tit. 9, DR 2-101(B)(14); Mo. R. Ct. DR 2-101(B)(10).

²⁴ GA. CODE ANN. tit. 9, DR 2-101(B)(14)(a)-(e).

²⁵ R.I. Sup. Ct. Provisional Order No. 11 effective Jan. 12, 1978.

tion is considered routine, while in Iowa,²⁶ Mississippi,²⁷ Missouri²⁸ and Rhode Island,²⁹ preparation of an individual tax return is classified as routine.³⁰

Other states' rules also hinder attorneys' attempts to let the public know the nature of their practice. In at least eleven states, an attorney is permitted to describe his area of practice only under specific designations.³¹ In these states, the permissible names are not necessarily those understandable to the public and certain areas of law may be left out. For example, the terms "Appellate Practice" and "Product Liability," which appear on the list of permissible descriptions of practice in Utah,³² might not be immediately recognizable to the public. No term appears on the list in Utah that would appear to cover job discrimination.³³

In addition to information on the identification of legal problems and the nature of legal services available, the public may wish to know how much the services of a lawyer might cost. In fact, many people may not seek necessary legal advice because they may think that a lawyer's services will be prohibitively expensive. Although the Supreme Court focused in *Bates* on fixed prices for routine legal services,³⁴ information concerning other methods of payment, such as contingency fee schedules, may also be helpful to the public. Nevertheless, in seven of the forty-six jurisdictions that have amended their advertising

²⁶ IOWA R. CT. DR 2-101(D)(1)-(12).

²⁷ Miss. DR 2-101(A)(8).

²⁸ Mo. R. Ct. DR 2-101(B)(1)-(11).

²⁹ R.I. Sup. Ct. Provisional Order No. 11 effective Jan. 12, 1978.

³⁰ In one state the preparation of a "simple" will apparently is not so simple since it is not included in its list of routine legal services. See GA. CODE ANN. tit. 9 DR 2-101(B)(14)(a)-(e).

³¹ ALASKA DR 2-105; COLO. SUP. CT. R. DR 2-101(A)(5); 16 DEL. CODE ANN. DR 2-105; IOWA R. CT. DR 2-105; MO. R. CT. DR 2-105; N.C. DR 2-105; OKLA. CT. R. & PROC. DR 2-105; 5A TENN. CODE ANN. DR 2-105; UTAH DR 2-105; W. VA. CODE app. DR 2-105; WYO. DR 2-105.

³² See Utah DR 2-105(B).

³³ *Id.* In at least one jurisdiction in which attorneys may describe the nature of their practice only by using officially sanctioned designations, no list has yet been promulgated. See Alaska DR 2-105(2) (list to be authorized by Board of Governors of the Alaska Bar Association). Attorneys in Alaska, therefore, are effectively prevented from advertising their areas of specialization.

³⁴ See 433 U.S. at 384.

rules since *Bates*, the advertising of contingency fees is prohibited.³⁵

While the Supreme Court's immediate concern in *Bates* was a newspaper advertisement, it took the opportunity to observe that "the special problems of advertising on the electronic broadcast media will warrant special consideration."³⁶ Some states have relied on this statement as support for banning broadcast advertising. Presently, twelve jurisdictions allow print advertisements only,³⁷ two allow print and radio advertisements³⁸ and thirty-two allow advertisements in print, on radio and on television.³⁹

Those jurisdictions that restrict advertising to print media prevent an attorney's message from reaching the blind or the functionally illiterate.⁴⁰ In addition, it has been found that the poor tend to rely on the broadcast media to obtain information far more than they use printed sources.⁴¹ Thus, restricting advertising to the print media can prevent large segments of the

³⁵ Ala. DR 2-102(A)(7)(g); COLO. SUP. CT. R. DR 2-101(B)(14); GA. CODE ANN. tit. 9, DR 2-101(B)(12)-(14); Miss. Ethics Comm. Opinion No. 44; Mo. R. Ct. DR 2-101(B)-(D); OKLA. CT. R. & PROC. DR 2-101; R.I. Sup. Ct. Provisional Order No. 11 effective Jan. 12, 1978.

³⁶ 433 U.S. at 384.

³⁷ Ala. DR 2-102(A)(7)(d); Conn. DR 2-101(B); 16 DEL. CODE ANN. DR 2-101(B); IOWA R. CT. DR 2-101(B); Miss. DR 2-102(A)(8); Mo. R. Ct. DR 2-101(B); N.H. Rule 1; N.J. CT. R. DR 2-101(D); 2 N.M. STAT. ANN. R. 2-101(B); OKLA. CT. R. & PROC. DR 2-101(B); Vt. DR 2-101(D); 1 W. VA. CODE app. DR 2-101(B).

³⁸ IND. CODE ANN. DR 2-101(B); Wyo. DR 2-101(B).

³⁹ Ala. DR 2-101(B); Ariz. DR 2-101(B); Ark. DR 2-101(B); CAL. BUS. & PROF. CODE § 6076 R. 2-101(A); COLO. SUP. CT. R. DR 2-101(B); D.C. CT. R. DR 2-101(D); FLA. R. CT. DR 2-101(D); GA. CODE ANN. tit. 9, DR 2-101(B), DR 2-101(C); Idaho DR 2-101(A); KAN. STAT. ANN. ch. 7, DR 2-101(B); 18 Ky. REV. STAT. ANN. R. 3.135; La. Sup. Ct. Order dated Feb. 7, 1979, DR 2-101; ME. R. Ct. 3.9(a); MD. ANN. CODE R. 1230 app. F., DR 2-101(A); Mass. DR 2-101; Mich. Administrative Order 1978-4; MINN. R. CT. DR 2-101(A); Neb. DR 2-101(B); 1 Nev. REV. STAT. R. 164.1; N.H. Sup. Ct. Order effective Mar. 5, 1980, reprinted in 6 N.H.L.W. 429-30 (1980); 22 N.Y.C.R.R. 603.22(a); N.C. DR 2-101(B); OHIO CT. R. DR 2-101(B); Or. DR 2-101(A); PA. CODE ANN. tit. 204, § 81.2; R.I. Provisional Order No. 11.1; S.D. DR 2-101(A); 5A TENN. CODE ANN. DR 2-101(B); Utah DR 2-101(B) and Utah Sup. Ct. Order No. 16347 dated May 22, 1979; Va. DR 2-101(B); Wash. DR 2-101(B); Wis. Sup. Ct. Order dated April 30, 1979. In addition, the Texas provision provides no guidelines regarding broadcast advertising, but merely suspends the operation of its pre-*Bates* advertising rule "to the extent that it conflicts with . . . *Bates*." Tex. Sup. Ct. Order, effective Dec. 13, 1978.

⁴⁰ Because of widespread "functional illiteracy," radio and television are the only methods of informing many members of the public. ABA Report to the House of Delegates Committee on Advertising (Aug. 1978).

⁴¹ R.H. BRUSKIN ASSOCS., TVB REPORT No. 75-36 (1975).

population from obtaining information that might help them determine when they need legal services, how they can find a lawyer to provide those services and what a lawyer may cost.⁴²

In an attempt to assure that information about legal services is widely available, the ABA Model Code of Professional Responsibility was amended to permit advertising on television as well as in print and on radio.⁴³ Some states followed the ABA's lead by amending their print-only rules to allow broadcast advertisements.⁴⁴ In other states such change resulted from successful litigation brought by attorneys or broadcast associations.⁴⁵

The status of advertisements sent through the mail is less clear than that of printed, radio and television advertisements.⁴⁶ Although most state courts have not yet tackled the issue of direct mail,⁴⁷ amendments to the advertising rules have created confusion as to the status of direct mail communications. For example, since *Bates*, Michigan⁴⁸ and Minnesota⁴⁹ have

⁴² Bar associations have been known to use radio and television advertising to improve the image of lawyers and to announce the availability of lawyer referral services. See NATIONAL ASS'N OF BROADCASTERS, ADVERTISING BY LAWYERS: A BROADCASTER'S APPROACH 18-19 (1978). "The use of such advertisements indicates a belief that radio and television are effective in reaching consumers who need the services of a lawyer and that such information can be provided in a dignified manner which does not detract from professionalism." *Id.* at 18.

⁴³ See ABA BOARD OF GOVERNORS REPORT 177B, at 11-12 (1977) [hereinafter cited as ABA REPORT 177B].

⁴⁴ See, e.g., ARIZ. SUP. CT. R. DR 2-101(B); COLO. SUP. CT. R. DR 2-101(B); 5A TENN. CODE ANN. DR 2-101(B); Wash. DR 2-101(B).

⁴⁵ See, e.g., *In re Rhode Island Broadcasters Ass'n*, 404 A.2d 846 (1979).

⁴⁶ In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Supreme Court held that face-to-face in-person solicitation could constitutionally be prohibited. Although the Court did not address the issue of direct mail solicitation, it did note that states could regulate advertising that is inherently conducive to overreaching. *Id.* at 464.

In *In re Primus*, 436 U.S. 412 (1978), the Supreme Court found that at least some forms of mail and in-person solicitation are protected from state regulation. Under *Primus* direct mail solicitation may not be prohibited where the solicitation is not for pecuniary gain and is a form of political expression and political association. *Id.* at 437-38.

⁴⁷ Two state courts that have examined this issue have reached opposite results. In *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489 (La. 1978), the Supreme Court of Louisiana held that a letter sent by an attorney describing available legal services constituted an "in-person solicitation," and as such may be prohibited under *Ohralik*. In *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978), however, a letter discussing real estate transactions was held not to constitute an "in-person solicitation," but rather was a legitimate advertisement within the scope of the *Bates* rule.

⁴⁸ Mich Admin. Order 1979-3 ADM 267 entered Mar. 15, 1978.

⁴⁹ MINN. R. CT. DR 2-101(A).

amended their lawyer advertising rules to allow commercial "public communications,"⁵⁰ yet ethical rules still prohibit lawyers from personally soliciting members of the public. The Oregon rules, which allow "commercial communications to the general public,"⁵¹ apparently allow general mailings but prohibit targeted direct mail communication such as letters about legal representation for the purchase of a house to people who are about to buy a home. In New York,⁵² Pennsylvania⁵³ and Wis-

⁵⁰ The question remains whether a direct mail communication is a permissible "public communication" or a prohibited solicitation. If the question turns on how "public" the communication is, that may be a function of the number of recipients or the wording of the message. A problem might arise, for example, with regard to a letter sent to people who are about to purchase a house addressed to "Dear Potential Homebuyer." See note 52 *infra*.

⁵¹ Or. DR 2-101(A).

⁵² 22 N.Y.C.R.R. 603.22 No. 47.

The propriety of the use of direct mail communications has been considered by two different bodies in New York, with two different results. In March, 1979, the New York State Bar Association's Committee on Professional Ethics ruled that lawyers could advertise by direct mail. New York State Bar Association Committee on Professional Ethics, Opinion No. 508 (Mar. 29, 1979) (80-78). Noting that "direct mail has long been recognized as an appropriate and relatively inexpensive advertising medium," the New York State Bar Association Ethics Committee stated that a communication that satisfied 22 N.Y.C.R.R. 603.22 No. 47 "does not become an improper solicitation merely because it is placed in the recipient's mailbox by a postman rather than by a newsboy."

Seven months later, the New York Supreme Court, Appellate Division, Second Department, unanimously reached a contrary conclusion, in *In re Koffler*, 70 App. Div. 2d 252, 420 N.Y.S.2d 560 (2d Dep't 1979). The attorneys involved in that case had run an advertisement in the Long Island newspaper *Newsday*, quoting a \$235 fee for a real estate closing. The attorneys then sent copies of the advertisement to 7500 homeowners, offering to perform closings for \$195 and indicating that this price was well below the fee usually charged by lawyers in the area. Similar letters were sent to several hundred real estate brokers. See *id.* at 255, 420 N.Y.S.2d at 563.

In deciding the case, the court emphasized that the mailings were sent to a captive audience which might be in need of particular services rather than to the general public. Thus, reasoned the court, *Ohralik*, rather than *Bates*, was the applicable precedent. *Id.* at 272, 420 N.Y.S.2d at 573. The court stated that "advertising entails a public notice of the availability of legal services at a specified rate for purposes of informing the public and thereby assisting the public in making an informed choice of legal counsel. . . . Soliciting, by contrast, connotes an act of entreaty to obtain a particular business transaction." *Id.* at 271, 420 N.Y.S.2d at 573.

The court in *Koffler* held only that the communication at issue in that case was impermissible. It did not reach the question whether all mailing was proscribed. Nevertheless, even in dealing with the letter at issue in the case, the court overlooked the fact that a letter does not create any of the dangers traditionally associated with solicitation. Cf. note 46 *supra*.

⁵³ PA. CODE ANN. tit. 204, § 81.2.

consin,⁵⁴ the disciplinary rules have been amended to allow "advertising" without limitation with respect to the medium employed.

California⁵⁵ and the District of Columbia⁵⁶ have shed more light on the subject by amending their solicitation rules to apply only to in-person actions. The reference to "in-person" actions in these solicitation rules suggests that direct mail is permissible under the advertising rules as a "communication" in California⁵⁷ or "public communication" in the District of Columbia.⁵⁸ In Maine, permissible "public communications" under the advertising rule explicitly include direct mail.⁵⁹ In many states, however, the ambiguity has been resolved in another direction. Thirty-four of the forty-six jurisdictions that have amended their disciplinary rules to comply with *Bates* continue to prohibit direct mail communications.⁶⁰

In addition to regulating content and media, many states regulate the format of lawyer advertising, to ensure that only dignified advertisements are published.⁶¹ Similarly, five states

⁵⁴ Wis. Sup. Ct. Order dated April 30, 1979.

⁵⁵ CAL. BUS. & PROF. CODE § 6076, R. 2-101(B), amending CAL. BUS. & PROF. CODE § 6076, R. 2.

⁵⁶ D.C. Ct. R. DR 2-103(A).

⁵⁷ CAL. BUS. & PROF. CODE § 6076, R. 2-101(B).

⁵⁸ D.C. Ct. R. 2-103(A).

⁵⁹ ME. R. Ct. 3.9(a).

⁶⁰ Ala. DR 2-102; ARIZ. SUP. CT. R. 29(a), DR 2-101; Ark. DR 2-101; COLO. SUP. CT. R. DR 2-101; Conn. DR 2-201; 16 DEL. CODE ANN. DR 2-101; FLA. R. CT. DR 2-101; GA. CODE ANN. tit. 9, DR 2-101; Idaho Sup. Ct. Order effective Feb. 23, 1979; IND. CODE ANN. DR 2-201; IOWA R. CT. DR 2-101; KAN. STAT. ANN. ch. 7, DR 2-101; KY. SUP. CT. R. 164; LA. REV. STAT. ANN. tit. 37, ch. 4 app., art. 16, 2-101; Mass. DR 2-103; Miss. DR 1-102; Mo. R. Ct. DR 2-101; Neb. DR 2-101; 1 NEV. REV. STAT. R. 164; N.H. Sup. Ct. Order effective Mar. 5, 1980, reprinted in 6 N.H.L.W. 429-30 (1980); N.J. Ct. R. DR 2-101; 2 N.M. STAT. ANN. R. 2-101; N.Y. Sup. Ct., App. Div., 1st Dep't Order dated June 12, 1978; N.C. DR 2-101; OHIO Ct. R. DR 2-101; OKLA. Ct. R. & PROC. DR 2-101; S.D. Sup. Ct. Order dated Oct. 23, 1979; TEX. REV. CIV. STAT. ANN. tit. 14 app. art. 12, § 8, DR 2-102(A); Utah DR 2-101; Vt. DR 2-101; Wash. DR 2-101; 1 W. VA. CODE app., DR 2-101; Wyo. DR 2-101.

⁶¹ Alaska DR 2-101(B); ARIZ. SUP. CT. R. DR 2-101(B); COLO. SUP. CT. R. DR 2-101(B); Conn. DR 2-101(B); 16 DEL. CODE ANN. DR 2-101(B); GA. CODE ANN. tit. 9, DR 2-101(B); IND. CODE ANN. DR 2-101(B); IOWA R. CT. DR 2-101(B); KAN. STAT. ANN. ch. 7, DR 2-101(B); Mo. R. Ct. DR 2-101(B); Neb. DR 2-101(B); 1 NEV. REV. STAT. R. 164.2; 2 N.M. STAT. ANN. R. 2-101(B); N.C. DR 2-101(B); OHIO Ct. R. DR 2-101(B); OKLA. Ct. R. & PROC. DR 2-101(B); 5A TENN. CODE ANN. DR 2-101(B); Utah DR 2-101(B); Wash. DR 2-101(B); 1 W. VA. CODE app. DR 2-101(B); Wyo. DR 2-101(B).

prohibit the use of slogans, jingles or garish or sensational language and format.⁶²

However, regulation of format may undermine the use of proven advertising techniques that can maintain audience attention and unify a campaign. A unified campaign theme that attracts the attention of the public can also enable the audience to retain the information conveyed. Thus, while the encouragement of only those advertisements that are "dignified" maybe a laudable goal, the Supreme Court in *Bates* recognized the need for advertising to help the public overcome misconceptions and ignorance about the law, lawyers and legal services.

The advertisement approved in the *Bates* case contained a picture of the scales of justice.⁶³ Many states, however, still prohibit the use of a logo or of various graphic displays such as photographs, pictorials, drawings, illustrations or design work.⁶⁴ In addition, some states regulate the size of newspaper advertisements⁶⁵ or the size of the print type.⁶⁶

Similarly, broadcast advertising in many states is subject to format rules that can hamper its effectiveness. Some states prohibit the use of animations⁶⁷ or dramatizations⁶⁸ and thus preclude the discussion of hypothetical situations which may illustrate the need for legal advice even when actors are not

⁶² See FLA. R. CT. DR 2-101(C)(6); Idaho DR 2-101(C)(6); N.H. Sup. Ct. Order effective Mar. 5, 1980, reprinted in 6 N.H.L.W. 429-30 (1980); 2 N.M. STAT. ANN. R. DR 2-101(D)(2); Or. DR 2-101(A)(3)(d).

⁶³ See 433 U.S. at 385 app.

⁶⁴ The use of a logo is specifically prohibited by rules in Iowa, IOWA R. CT. DR 2-101(A), and Rhode Island, Provisional Rules 11(7), and by an ethics opinion issued by the State Bar of Mississippi, Ethics Opinion No. 44 (Sept. 16, 1977). In addition, it would appear to be prohibited under rules that forbid various graphics such as photographs, pictorials, drawings, illustrations or design work. See GA. CODE ANN. tit. 9, DR 2-101(B); IND. CODE ANN. DR 2-101(B); KAN. STAT. ANN. ch. 7, DR 2-101(B); OKLA. CT. R. & PROC. DR 2-101(A). Ohio prohibits the use of all drawings except the scales of justice. OHIO R. CT. DR 2-101.

⁶⁵ In Oklahoma, an advertisement may be no larger than 10 square inches. OKLA. CT. R. & PROC. DR 2-101(G).

⁶⁶ In Georgia, the type size in a lawyer's advertisement may be no greater than one-half centimeter. GA. CODE ANN. tit. 9, DR 2-101(B). See also Miss. Ethics Committee Opinion No. 44 (Sept. 16, 1977) (12 point type).

⁶⁷ KAN. STAT. ANN. ch. 7, DR 2-101(B); N.C. DR 2-101(B); OHIO R. CT. DR 2-101(B).

⁶⁸ KAN. STAT. ANN. ch. 7, DR 2-101(B); OHIO R. CT. DR 2-101(B); Or. DR 2-101(A)(3)(D).

involved. Further, the use of music⁶⁹ or color⁷⁰ in lawyer advertising is prohibited in several states. Many states do not allow the use of an attorney's picture or voice in an advertisement for legal services.⁷¹ Finally, a Mississippi ethics opinion, ironically, provides that advertising should *not* be designed to attract attention.⁷²

II. THE ABA RESPONSE TO *Bates*

In June 1977, while awaiting the *Bates* decision, the ABA Board of Governors appointed a task force on lawyer advertising. The task force drafted two alternative rules for lawyer advertising, both of which permitted broader dissemination of information than that effected by the advertisement at issue in *Bates*.⁷³ The proposal ultimately adopted by the American Bar Association, which lists the type of information that may be provided in lawyer advertisements, permits advertising in the print, radio and television media.⁷⁴ The alternative model, approved for circulation to the states,⁷⁵ prohibits false, fraudulent, misleading and deceptive advertising.⁷⁶

In addition, the ABA Board of Governors established the Commission on Advertising to monitor developments and make recommendations concerning lawyer advertising.⁷⁷ The Commission has found that advertising helps consumers become better

⁶⁹ See IND. CODE ANN. DR 2-101(B); KAN. STAT. ANN. ch. 7, DR 2-101(B); N.C. DR 2-101(B); OHIO R. CT. DR 2-101(B); Or. DR 2-101(A)(3)(d); 5A TENN. CODE ANN. 2-101(E).

⁷⁰ See GA. CODE ANN. tit. 9, DR 2-101(B).

⁷¹ See, e.g., GA. CODE ANN. tit. 9, DR 2-101(B); N.C. DR 2-101(B); 5A TENN. CODE ANN. 2-101(I).

⁷² Miss. State Bar Ethics Opinion No. 44 (Sept. 16, 1977) (interpreting DR 2-102(A)(8)).

⁷³ See generally ABA REPORT 177B, *supra* note 43.

⁷⁴ ABA, Lawyer's Code of Professional Responsibility DR 2-101, DR 2-102. An earlier draft of these provisions, which permitted only print and radio advertising, see 46 U.S.L.W. 1 (Aug. 23, 1977), was amended to include television advertising.

The proposal adopted by the ABA, "Proposal 'A,'" was described by the Task Force on Lawyer Advertising as "regulatory," relying upon " 'after the fact' enforcement to discipline persons violating the regulation." ABA REPORT 177B, *supra* note 46, at 6.

⁷⁵ ABA REPORT 177B, *supra* note 43, at 11-30.

⁷⁶ "Proposal 'B,'" described as "directive," also "provides guidelines for the determination of improper advertisements which would be subject to 'after the fact' discipline by state authorities." *Id.* at 7.

⁷⁷ See *id.* at 8.

informed and can foster new delivery mechanisms which can provide legal services at reasonable prices to segments of the population with previously unmet legal needs. The obstructionist approach taken by many states tends to undercut these potential benefits.

In fashioning an advertising rule to be recommended for use by the states, the ABA Commission on Advertising considered an approach taken by several states permitting the use of an advertisement resembling the one protected by the Supreme Court in *Bates*.⁷⁸ However, rather than recommend such a restrictive rule which might be modified by future court decision, the Commission chose to develop a more liberal approach based on the notion that any abuses permitted under the rule may be corrected by subsequent amendments.

The advertising rule recommended by the Commission would allow attorney advertising that is not false, fraudulent or misleading.⁷⁹ The recommended ethical considerations would proscribe not only material misrepresentations of fact, but omissions of material facts as well.⁸⁰ The proposed rule would permit advertising in all broadcast and print media, thereby including such means as handbills, billboards, T-shirts and brochures in addition to newspapers, magazines, radio and television. Significantly, the use of direct mail advertising would be permitted, in keeping with the policy of the Commission to encourage *effective* truthful advertising in the interests of both the public and the profession. In addition, the Commission's proposed rule does not restrict the format of lawyer advertising and would permit the use of trade names.

Although it is still in the drafting stages, the provision of the proposed model Code of Professional Responsibility promulgated by the ABA Commission on the Evaluation of Professional Standards⁸¹ concerning lawyer advertising was influenced by and resembles the proposed rule of the Commission on Advertising.

⁷⁸ See Ala. DR 2-102, and N.C. DR 2-101, which allow the advertisement of only those four services listed in the *Bates* advertisement. See note 9 *supra*.

⁷⁹ ABA COMMISSION ON ADVERTISING, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 4 (1979).

⁸⁰ *Id.*

⁸¹ The Code proposed by the Commission on the Evaluation of Professional Standards would allow advertising (including general direct mail) unless it were false, fraudulent or misleading. It would allow the use of a trade name if it does not imply a connec-

CONCLUSION

The United States Supreme Court in *Bates v. State Bar of Arizona*⁸² acknowledged that advertising by lawyers may help to increase the public's knowledge about the nature and availability of legal services. In addition, increased advertising by lawyers may encourage competition among attorneys, thus enhancing quality and lowering prices. Efforts to educate the public about the nature and availability of legal services will be hampered, however, by rules restricting the use of traditional advertising tactics that assure that the public notices and retains the information conveyed. Moreover, attorneys may be reluctant to advertise at all if their opportunity to do so effectively is limited. With the legality of attorney advertising firmly established, however, it is now the responsibility of the profession to define the contours within which such activities take place.⁸³ The American Bar Association, through its Commission on Advertising and Commission on Evaluation of Professional Standards, is drafting model rules with the goal of assuring the maximum amount of useful information to the public while incurring a minimum amount of harm.

tion with a government agency or a charitable legal services organization. It would allow a lawyer to advertise the nature of his practice, although any indication of certification or designation as a specialist must comply with the provisions of such a program. ABA, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft), 48 U.S.L.W. Supp. (Feb. 19, 1980).

⁸² 433 U.S. 350 (1977).

⁸³ See *id.* at 384 (“[W]e expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.”).