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Cover Page Footnote

The authors acknowledge the contribution of Barbara R. Szucsik, University of Cincinnati College of Law, Class of 1993.

OHIO'S ETHICAL PROHIBITION AGAINST THE USE OF DUAL DEGREES IN LETTERHEADS: A TIME FOR CHANGE?

Jorge L. Carro and Lisa A. Martinez***

I. INTRODUCTION

The practice of law in conjunction with another profession has been confronted by conflicting positions regarding the ethical implications of dual careers. For example, if an attorney in Ohio is also a registered nurse or an accountant, the attorney-nurse or attorney-accountant may practice in both professions. According to Ohio Code of Professional Responsibility DR 2-102(E),[1] however, that same individual may not indicate the other profession on law practice letterhead or a business card. Neither, according to Ohio DR 2-102(E), may he identify himself as a lawyer in relation to his other career or identify himself with dual occupations in any publication associated with these professions.[2] The justification for such a general ban is the concern for the "use of the non-legal occupation as a 'feeder' to generate business for a legal practice."[3] On the other hand, if the attorney-nurse or attorney-accountant is actively practicing only law, she may indicate that she has a J.D./R.N. or J.D./C.P.A. on her business card and letterhead.[4] This Article will explore whether such a general ban is still appropriate.

In 1978, after its revision of the Rules under Canon 2, the ABA Committee on Ethics and Professional Responsibility wrote that the re-

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1. DR 2-102(E) states: "A lawyer who is engaged in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(E) (Anderson 1992).

2. Ohio Code of Professional Responsibility adopted by the Supreme Court of Ohio, October 5, 1970; *see also* Cincinnati Bar Ass'n Comm. on Ethics and Professional Responsibility, Op. 89-90-06 (1989); Ohio State Bar Ass'n [hereinafter OSBA] Comm. on Legal Ethics and Professional Conduct, Informal Op. 88-2 (1988); Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Op. 88-23 (1988).

3. OSBA Comm. on Legal Ethics and Professional Conduct, Informal Op. 88-2 (1988).

4. Cincinnati Bar Ass'n Comm. on Ethics and Professional Responsibility, Op. 89-90-06 (1989).

tention of DR 2-102(E) may have been an oversight given the United States Supreme Court decision in *Bates v. State Bar of Arizona*[5] the previous year.[6] ABA Informal Opinion 1422 stated:

> It appears to this Committee that its proscription is plainly inconsistent with the tenor of DR 2-101, as amended. DR 2-101 expressly permits a lawyer to publicize in certain media considerably more information about himself and his practice than that which remains forbidden by DR 2-102(E).[7]

The Committee then took the position that DR 2-102(E) should be deleted from the ABA Code, and recommended such action.[8]

In 1980, the ABA deleted DR 2-102(E) and redesignated DR 2-102(F) as the new DR 2-102(E). The new DR 2-102(E) states: "Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in law."[9] In August 1983, the ABA approved its new Model Rules of Professional Conduct which superseded the Model Code. The omission of any provision regarding letterheads in the new Rules implies a lack of concern for this issue.

When the Ohio Supreme Court promulgated its Code of Professional Responsibility in 1970, it followed the ABA Model Code. Since 1970, the Ohio Code has adopted several of the changes made by the ABA in the Model Code. One change that the Ohio Supreme Court has never adopted, however, is the change in the ABA's DR 2-102(E).[10] The focus of this article is whether Ohio should redraft its version of DR 2-102(E).

II. HISTORICAL APPROACH TO DUAL PRACTICE ISSUES

The issue of the dual practice of law and another profession appeared to come to the forefront as Certified Public Accountants became attorneys. In 1946, The American Institute of Certified Public Accountants disagreed with condemning the dual practice of accounting and law.[11] But, the American Bar Association Ethics Committee took a different view in Opinion 297. Opinion 297 discussed under what circumstances it was ethical for a lawyer who was a public accountant

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5. 433 U.S. 350 (1977).
6. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1422 (1978).
7. *Id.*
8. *Id.*
9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(E) (1980). DR 2-102(E) was deleted and DR 2-102(F) was redesignated as DR 2-102(E) in February 1980. ABA Comm. on Ethics and Professional Responsibility, Report No. 1 (1980).
10. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(E) (Anderson 1992).
11. *See* 83 J. ACCT. 172 (1947).

to work in both the legal and accounting fields.[12] The Committee on Professional Ethics stated: "The person who is qualified as both a lawyer and an accountant must choose between holding himself out as a lawyer and holding himself out as an accountant . . . dual holding out is self-touting and a violation of Canon 27."[13]

If he elects to hold himself out as an accountant, he must not practice law or he will violate Canon 27 in that he will be using his activity as an accountant to feed his law practice.[14] In determining whether he is practicing law when he holds himself out only as an accountant, the controlling factor is whether the activity in question is one which would constitute the practice of law when engaged in by one holding himself out as a lawyer.[15] "If he elects to hold himself out as a lawyer, he will not violate any Canon of Ethics merely because in rendition of legal services he utilizes and applies accounting principles."[16]

The Ohio State Bar, however, did not directly follow Opinion 297 of the American Bar Association. The Ohio State Bar stated that a lawyer could practice in another profession, such as accounting, but that a dual practice could create conflicts which the practitioner must attempt to avoid.[17] Idaho followed an even more liberal view allowing a lawyer-C.P.A. to place "Certified Public Accountant" on his office door, his business card, and his letterhead.[18] The attorney could also practice both professions from the same office, as long as he followed the professional standards for attorneys regarding advertising and solicitation.[19] Thus, while the American Bar Association was condemning the proposal that an attorney in dual practice could hold himself out as

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12. ABA Comm. on Professional Ethics, Formal Op. 297 (1967), *reprinted in*, OPINIONS ON PROFESSIONAL ETHICS 652-55 (1967).

13. OPINIONS ON PROFESSIONAL ETHICS 652-55 (1967).

14. Canon 27 reads in part:

> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communication or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper. . . .

ABA CANONS OF PROFESSIONAL ETHICS Canon 27, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND OTHER SELECTED STANDARDS INCLUDING CALIFORNIA RULES ON PROFESSIONAL RESPONSIBILITY 423 (1990).

15. OPINIONS ON PROFESSIONAL ETHICS 654 (1967).

16. *Id.*

17. OSBA Comm. on Legal Ethics and Professional Conduct, Formal Op. 22 (1966).

18. Idaho State Bar Foundation Comm. on Professional Ethics, Formal Op. 10 (1959).

19. *Id.*

both a C.P.A. and an attorney or practice in both fields simultaneously, the Ohio Bar did not take such a strict stance concerning dual practice issues.

As early as 1932, the American Bar Association expressed concerns regarding a lawyer practicing in two professions at the same time. In Formal Opinion 57 of the ABA Committee on Ethics and Professional Responsibility,[20] it was held, according to then-existing Canons 27[21] and 35,[22] that a lawyer could not ethically practice law and also manage an investigating and adjustment bureau that obtained and solicited business from insurance companies.[23] Also, the lawyer could not allow his name to be printed on the letterhead of his non-legal practice.[24] The American Bar Association continued to express its doubts concerning dual practices up until the late 1960's.[25] Various reasons were articulated as to why a lawyer should not practice in a second profession or business while actively practicing law. One reason

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20. ABA Comm. on Professional Ethics and Grievances, Formal Op. 57 (1932).

21. *See supra* note 14.

22. Canon 35 reads:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.
>
> A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any manner in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

ABA CANONS OF PROFESSIONAL ETHICS Canon 35, *reprinted in* THOMAS D. MORGAN & RONALD D. ROTUNDA, *supra* note 14, at 426.

23. ABA Comm. on Professional Ethics and Grievances, Formal Op. 57 (1932).

24. *Id.*

25. The ABA expressed concerns about dual practices in several opinions in the 1960's:

(1) It is improper for a practicing attorney to sell life insurance. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 424 (1961). Concerns surround the fact that a life insurance agent must involve himself with legal issues, and such a dual profession could act as a "feeder." *Id.*

(2) A lawyer may be an officer and director of a bank, as long as his position is not utilized as a way to obtain professional legal employment. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 431 (1961). If the lawyer is actively practicing law, he may be an executive officer of a bank as long as he is not requested to interact with bank customers regarding legal issues. *Id.*

(3) It is doubtful whether a lawyer can be a securities broker and actively practice law without violating the Canons of Professional Ethics. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 442 (1962). The Committee's concern centered around the fact that securities work involves legal issues, and such a service could operate as a "feeder" to the legal practice. *Id.*

(4) A lawyer-accountant cannot practice both professions in one city, even though each practice is established in two different locations within the city. ABA Comm. on Professional Ethics, Informal Op. 506 (1962).

cited was the difficulty in remaining current with the changes and developments in both professions.[26] In addition, one commentator stated that to practice in a law related area, accounting for example, would be equal to holding oneself out as a specialist.[27] Another commentator stated that a lawyer should be committed to the practice of law full-time,[28] and suggested that the public could be misled when an attorney presented dual titles.[29] The reason stated most often for condemning dual practice, however, was that the second profession would operate as a "feeder" to the law practice and that the second occupation would be a form of indirect solicitation.[30]

Whatever doubts and concerns the American Bar Association had regarding dual practice began to erode in the early 1970's. According to ABA Formal Opinion 328, a lawyer could simultaneously engage in another business or profession and operate both professions out of one office, even if the secondary profession was closely related to law.[31] The lawyer, however, had to comply with all of the provisions of the Code

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(5) The dual practice of law and making mortgage loans is unethical because the mortgage loan business would act as a feeder. ABA Comm. on Professional Ethics, Informal Op. 520 (1962).

(6) It is unethical to list one's bar association membership in the telephone book under the title "Marriage Counselor," even if the attorney is not actively practicing law. ABA Comm. on Professional Ethics, Informal Op. 537 (1962). The rationale behind this rule is that such a listing could give the impression that an attorney is prepared to give legal advice while acting as a marriage counselor. *Id.*

(7) It is unethical for an attorney/C.P.A. to hold himself out as both an attorney and C.P.A., using separate letterheads, but the attorney/C.P.A. may utilize dual listings in a phone book and legal directory. ABA Comm. on Professional Ethics, Informal Op. 565 (1962).

To summarize, if the practice of law and the other profession are so closely related, the lawyer may not practice both professions simultaneously. This can be a difficult determination, however. For example, the ABA Committee on Ethics and Professional Responsibility was not prepared to decide whether medicine and law were so closely related that a lawyer could not participate in both. ABA Comm. on Professional Ethics, Informal Op. 896 (1965). *But see* ABA Comm. on Professional Ethics, Informal Op. 931 (1966)(lawyer may practice law and engage in a real estate business at the same time even though the real estate business is closely related to the practice of law, but lawyer must decline to act as an attorney on any transaction initiated by him as a broker). All of the Informal Opinions discussed in this note were rendered prior to the adoption of the ABA Code of Professional Responsibility in 1969.

26. *See* Levy and Sprague, *Accounting and Law: Is Dual Practice In The Public Interest?*, 52 A.B.A. J. 1110, 1111 (1966).

27. *Id.* at 1114.

28. *See Lawyers & Certified Public Accountants: A Study of Interprofessional Relations*, 56 A.B.A. J. 776, 778 (1970).

29. *Id.* at 779.

30. *See, e.g.*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 501 (1962); Henry G. Burke, *Dueling Over the Dual Practice*, 27 MD. L. REV. 142, 147 (1967); Copal Mintz, *Accounting & Law: Should Dual Practice Be Proscribed?*, 53 A.B.A. J. 225, 228-29 (1967); John R. Wilson, *The Attorney-C.P.A. and the Dual Practice Problem*, 36 U. DET. L.J. 457, 458 (1959).

31. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 328 (1972).

of Professional Responsibility while practicing his non-legal occupation.[32] At this time, former ABA DR 2-102(E), which was the same as the current Ohio DR 2-102(E), was still in effect. Thus, the lawyer had to use separate letterheads and business cards in the dual practice of law.

Although former ABA DR 2-102(E) was still in effect, two interesting comments were made in ABA Formal Opinion 328. The first comment stated: "[T]his committee cannot condemn any activity today on the basis of 'indirect solicitation' or 'feeding' of a law practice. Any proscription must be based upon the provisions of the Code."[33] The opinion found the terms "indirect solicitation" and "feeding the law practice" too vague and overbroad. Those who drafted the Code implied that such terms should not be utilized to evaluate the outside activities and occupations of lawyers.[34] Instead, the drafters of the Code developed specific Disciplinary Rules to deal with such vexing problems.[35] The second comment implied that the mere existence of an increased risk that a lawyer may violate a disciplinary rule should not prevent a lawyer from conducting business in a certain manner, particularly when the business involves a secondary profession unrelated to the lawyer's active legal practice or the practice of law.[36]

Presently, Ohio DR 2-102(E) does not use the terms "indirect solicitation" or "feeding" within the rule. The rationale behind prohibiting the use of dual degrees on letterheads and business cards when an attorney is practicing in both professions is that the attorney could use her other profession as a feeder for her law practice.[37] According to Ohio's Disciplinary Rules, it is not unethical for the attorney to go on television and advertise only his or her legal practice.[38] One could reasonably argue that this advertising is essentially feeding the law practice. One commentator has stated that: "the honest practitioner, . . .

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32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See* OSBA Comm. on Legal Ethics and Professional Conduct, Informal Op. 75-7 (1975). Under DR 2-102(E), an attorney may practice in another profession; even if it is law related, he may practice his secondary occupation from his law office. *Id.* He may not, however, indicate his dual occupation on his letterhead, office sign or business card, nor may he identify himself as a lawyer in a publication that is connected with his secondary occupation. *Id.*; *see also* OSBA Comm. on Legal Ethics and Professional Conduct, Informal Op. 76-7 (1976)(lawyer may not use his secondary occupation as a feeder or to advertise his legal occupation).
38. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (Anderson 1992). According to Ohio DR 2-101(B), in order for a potential client to be informed in the selection of a lawyer, the lawyer may advertise his services in print media, radio or television, subject to DR 2-102 to 2-105. *Id.*

will after a moment's reflection on his own career, agree that every activity he engages in in his daily life, in effect, feeds his practice. It is his associations and the impressions he gives to the public that brings his clients to his door."[39]

In Ohio, however, ethical problems occur if the attorney uses J.D./C.P.A., R.N., M.D., or Ph.D., etc., on his or her letterheads and business cards while involved in a dual practice. One might argue that when the dual practicing attorney advertises solely as an attorney, the individual is not utilizing the additional professional credentials. This argument is flawed, however. It is very possible that individuals the attorney comes in contact with in his other profession may see the television ad and, at this point, become aware that the C.P.A., R.N., or M.D. they know is also an attorney. Thus, without ever using dual degrees on business stationery or violating Ohio DR 2-102(E), the attorney's other profession automatically becomes a feeder. Whatever evil Ohio DR 2-102(E) is attempting to prevent is circumvented by the attorney's permissible television advertising.

III. First Amendment Considerations

In Informal Opinion 1422, the American Bar Association's Committee on Ethics and Professional Responsibility stated that DR 2-102(E) in the ABA Code was inconsistent with the tenor of amended DR 2-101.[40] Amended DR 2-101 permitted the lawyer, in various media, to distribute more information about that lawyer and his practice than was permitted in DR 2-102(E).[41] The Committee then recommended that DR 2-102(E) be deleted.[42] Informal Opinion 1422 appeared to imply that retention of DR 2-102(E) would contradict the opinion of the United States Supreme Court in *Bates v. State Bar of*

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39. Wilson, *supra* note 30, at 459; *see also* Burke, *supra* note 30, at 147.

40. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1422 (1978).

41. DR 2-101, as amended, provides:

(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 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 customers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed 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 . . . .

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1992). DR 2-101(B) then lists twenty-five types of information that a lawyer may publish or broadcast.

42. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1422 (1978).

Arizona.[43] Hence, in 1980, the ABA deleted DR 2-102(E) and redesignated DR 2-102(F) as the new DR 2-102(E).[44]

Currently, the Ohio Code of Professional Responsibility and the American Bar Association's DR 2-101 are similar because Ohio redrafted its version of DR 2-101 accordingly. Ohio, however, has not redrafted its version of DR 2-102(E), even though the ABA eliminated this version of the rule.[45] The following analysis will explore whether Ohio should redraft DR 2-102(E) due to First Amendment considerations.

One could reasonably argue that business cards and letterheads are a form of advertising or commercial speech. One commentator suggests that advertising entails some type of publication that draws the target audience's attention to the publication.[46] It is informational in form.[47] Such advertising can include the lawyer's address and phone number, office hours, or the fact that the lawyer is in practice.[48] Advertising boils down to solicitation of business.[49] Thus, the attorney is attempting to acquire or to maintain a client base.[50]

A. Valentine, Bigelow and Virginia State Board of Pharmacy

Historically, the United States Supreme Court did not give advertising First Amendment protection. Instead, it developed the "commercial speech doctrine" which permitted the government to control advertising as a form of speech. In *Valentine v. Chrestensen*,[51] the Court upheld a ban on the distribution of advertising pamphlets, stating that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising."[52] Thus, if advertising was purely for an economic or commercial purpose and not a political one, the government could regulate or even prohibit it.[53]

The "commercial speech doctrine," however, began to erode in the 1970's. In *Bigelow v. Virginia*,[54] the Court first observed that certain

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43. 433 U.S. 350 (1977); *see infra* notes 74-78 and accompanying text for discussion of *Bates*.

44. *See supra* note 9.

45. *Id.*

46. Ralph G. Elliot, *Trolling For Clients Under the First Amendment: It's Hard to Keep a Good Solicitor Down*, 60 CONN. B.J., 219, 220-21 (1986).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. 316 U.S. 52 (1942).

52. *Id.* at 54.

53. *See, e.g.*, Ginzburg v. United States, 383 U.S. 463 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Thomas v. Collins, 323 U.S. 516 (1945).

54. 421 U.S. 809 (1975).

commercial speech had value in a free market and, thus, deserved First Amendment protection.[55] According to the Court's rationale: "The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas."[56] The Court distinguished *Bigelow* from *Valentine* by stating that the *Valentine* decision was concerned only with "a reasonable regulation of the manner in which commercial advertising could be distributed."[57]

The following year, the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[58] The Court held that the public's right to commercial information was greater than the State of Virginia's interest in maintaining a high degree of professionalism in their pharmacists.[59] The Court noted that the public had a high level of interest in obtaining commercial information so that consumers could make informed economic choices.[60] The Court also stated that the right to advertise played a major role in the free market because it advanced competition.[61] The Court, however, appeared to be concerned with advertising by physicians and lawyers. The Court noted that physicians and lawyers did not dispense standardized products, but instead participated in a variety of professional services.[62] The Court believed that, within these two professions, there could be an increased risk of confusion and possibly even deception if professionals participated in certain types of advertising.[63]

B. Central Hudson

A few years later, the Court created a test for evaluating commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[64] The Court developed the following four-prong test to which all restrictions of commercial speech were subject:

> 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

55. *Id.* at 826.
56. *Id.*
57. *Id.* at 819.
58. 425 U.S. 748 (1976).
59. *Id.* at 770, 773.
60. *Id.* at 757, 763-64.
61. *Id.* at 764-65.
62. *Id.* at 773 n.25.
63. *Id.*
64. 447 U.S. 557 (1980).

> regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[65]

The Court stressed that the state could not "completely suppress information when narrower restrictions on expression would serve its interest as well."[66]

C. *In re R.M.J.*

In 1982, the Supreme Court applied the *Central Hudson* test for the first time to print advertising by a lawyer in *In re R.M.J.*[67] In *R.M.J.*, the attorney was charged with violating Missouri's DR 2-101 when he published three advertisements listing areas of law not covered by the rule.[68] A second violation occurred when he listed various courts

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65. *Id.* at 566.
66. *Id.* at 565.
67. 455 U.S. 191 (1982).
68. *Id.* at 197-98. When *In re R.M.J.* was decided, Missouri's version of DR 2-101 allowed only limited advertising:

> As with many of the States, until the recent decision in *Bates*, Missouri placed an absolute prohibition on advertising by lawyers. After the Court's invalidation of just such a prohibition in *Bates*, the Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri revised that court's Rule 4 [DR 2-101] regulating lawyer advertising. The Committee sought to 'strike a midpoint between prohibition and unlimited advertising,' and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.
>
> Thus, part B of DR 2-101 of the Rule states that a lawyer may 'publish . . . in newspapers, periodicals and the yellow pages of telephone directories' 10 categories of information: name, address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain 'routine' legal services. Although the Rule does not state explicitly these 10 categories of information or 3 indicated forms of printed advertisement are the only information and the only means of advertising that will be permitted, that is the interpretation given the Rule by the State Supreme Court and the Advisory Committee charged with its enforcement.
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> In addition to these guidelines, and under authority of the Rule, the Advisory Committee has issued an addendum to the Rule providing that if a lawyer chooses to list areas of practice in his advertisement, he must do so in one of two prescribed ways. He may list one of three general descriptive terms specified in the Rule -- 'General Civil Practice,' 'General Criminal Practice,' and 'General Civil and Criminal Practice.' Alternatively, he may use one or more of a list of 23 areas of practice, including, for example, 'Tort Law,' 'Family Law,' and 'Probate and Trust Law.' He may not list both a general term and specific subheadings, nor may he deviate from the precise wording stated in the Rule. He may not indicate that his practice is 'limited' to the listed areas and he must include a particular disclaimer of certification of expertise following any listing of specific areas of practice.

Id. at 193-95 (citations omitted). R.M.J.'s advertisements violated these rules by listing "personal injury" and "real estate" rather than "tort law" and "property law," and included several terms not listed by the Advisory Committee's addendum to Rule 4. *Id.* at 197.

where he was admitted to practice.[69] This information was not among the ten categories permitted by the rules.[70] Finally, he sent cards announcing the opening of his office to persons other than lawyers, clients, former clients, personal friends and relatives, again violating the Missouri ethics rules.[71] The Court overturned the disciplinary action, stating:

> In sum, none of the three restrictions in the Rule upon appellant's First Amendment rights can be sustained in the circumstances of this case. There is no finding that appellant's speech was misleading. Nor can we say that it was inherently misleading, or that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception. We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading, or that has proved to be misleading in practice. There may be other substantial state interests as well that will support carefully drawn restrictions. But although the States may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests. The absolute prohibition on appellant's speech, in the absence of a finding that his speech was misleading, does not meet these requirements.[72]

Hence, the Court did not have to go further than the first prong of the *Central Hudson* test[73] in deciding in favor of the attorney.

Since one could argue that letterheads and business cards are a form of print advertising, the next question to be asked is whether Ohio's DR 2-102(E) could pass the *Central Hudson* four-prong test. It would not be misleading for an attorney-nurse to put J.D./R.N. on her business card or letterhead if she is, in fact, both an attorney and a registered nurse. The State's interest is that her non-legal profession should not feed her legal profession. Does the State's regulation directly advance this interest? Possibly not, because in Ohio, an attorney-nurse can practice in both areas and still ultimately feed her legal practice without using J.D./R.N. on her letterhead or business card.

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69. *Id.* at 197. In his advertisements, R.M.J. included information that he was licensed in Illinois and Missouri. *Id.*

70. *Id.* at 193-95.

71. *Id.* at 196.

> [DR 2-102(A)(2)] of Rule 4 permits a lawyer or firm to mail a dignified 'brief professional announcement card stating new or changed associates or addresses, change of firm name, or similar matters.' The Rule, however, does not permit a general mailing; the announcement cards may be sent only to 'lawyers, clients, former clients, personal friends, and relatives.'

Id. (citing MO. REV. STAT. Sup. Ct. Rule 4, DR 2-102(A)(2) (1978)(Index Vol.)).

72. *Id.* at 206-07.

73. *See supra* note 65 and accompanying text.

This can be accomplished by direct mail or television advertisements and by participating as a speaker in seminar courses involving law-related health care issues. It is highly likely that individuals with whom she comes in contact in her nursing profession could also register for the seminar course, receive direct mail advertisements, or view the television ad. Thus, the end result could be that her non-legal profession becomes a "feeder" for her legal profession without ever violating Ohio's DR 2-102(E). So, in this example, it is doubtful that the State's regulation directly promotes its interest because the rationale behind DR 2-102(E) can be thwarted by DR 2-101, which permits a lawyer to publicize information about herself.

D. Bates

One year after deciding *Virginia Board of Pharmacy*, the Supreme Court addressed the issue of lawyer advertising as commercial speech for the first time in *Bates v. State Bar of Arizona*.[74] The Court held that attorney advertising was commercial speech and should be afforded First Amendment protection.[75] Therefore, the states could no longer place a blanket prohibition on legal advertising.[76] The Court in *Bates* did not hold that advertising by attorneys could not be regulated. Instead, the Court discussed various instances in which a state could do so.[77] For example, the state could regulate false, deceptive, or misleading advertising, and could restrict certain in-person solicitation or illegal advertising. The Court asserted additionally that certain time, place, and manner restrictions could be imposed by the state.[78]

Two additional cases pertaining to lawyer advertising immediately followed the *Bates* case and were heard by the Supreme Court.[79] Although both cases involved lawyer advertising, they dealt specifically with two forms of "advertising": in-person and written solicitation.

E. Ohralik

In *Ohralik v. Ohio State Bar Association*,[80] a lawyer had solicited clients while they were still in the hospital.[81] The Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio and the Supreme Court of Ohio found that Ohralik violated Ohio Discipli-

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74. 433 U.S. 350 (1977).
75. *Id.* at 363-64.
76. *Id.* at 383-84.
77. *Id.* at 365.
78. *Id.*
79. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); In Re Primus, 436 U.S. 412 (1978); *see infra* notes 80-99 and accompanying text for discussion of both *Ohralick* and *Primus*.
80. 436 U.S. 447 (1978).
81. *Id.* at 447.

nary Rules DR 2-103(A)[82] and 2-104(A).[83] The Supreme Court affirmed the Ohio ruling.[84] The Court, however, did not ban all in-person solicitation. Instead, the Court granted limited First Amendment protection to this activity when it stated: "[T]he entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State's countervailing interest in prohibition."[85]

Furthermore, the Court wrote that: "in-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component. While this does not remove the speech from the protection of the First Amendment, . . . it lowers the level of appropriate judicial scrutiny."[86] The *Ohralik* Court was concerned that, unlike public advertisement, where the individual has time to reflect and think whether or not to act on the message presented in the ad, in-person solicitation may be too coercive and put too much pressure on the individual receiving the message. Hence, the individual may not have time to reflect on the message presented.[87] The Court recognized that audience reaction was an important consideration when they stated: "The immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others."[88]

The Court concluded that the State's interest in the potential harm presented in this case was well-founded.[89] The Court noted that:

> [Ohio's disciplinary rules are] prophylactic measures whose objective is the prevention of harm before it occurs. The Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation, which is inherently conducive to

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82. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (Anderson 1992). "[A] lawyer shall not recommend employment as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." *Id.*

83. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (Anderson 1992). DR 2-104(A) provides:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id.

84. *Ohralik*, 436 U.S. at 454.

85. *Id.* at 455.

86. *Id.* at 457.

87. *Id.* at 457-58.

88. *Id.* at 457 n.13.

89. *Id.*

> overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.[90]

The Court seemed to be articulating that, although this commercial speech comes within the realm of First Amendment protection, a state may discipline a lawyer for soliciting clients in-person for pecuniary gain when the facts are such that they pose dangers that the state has a right to prevent. Hence, a state could ban all in-person solicitation because certain dangers were present.

F. In Re Primus

The second case, decided on the same day as *Ohralik*, was *In Re Primus*.[91] In *Primus*, a lawyer with the American Civil Liberties Union (ACLU) wrote a letter to a woman questioning whether she would like to have free legal representation from the ACLU.[92] The Disciplinary Board of the South Carolina Supreme Court considered the letter to be a form of solicitation that violated the State's Disciplinary Rules.[93] The

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90. *Id.* at 464.

91. 436 U.S. 412 (1978).

92. *Id.* at 416. The attorney, Primus, solicited an Aiken County, South Carolina woman, who was among a class of women sterilized as a condition of continued receipt of medical assistance under the Medicaid program. *Id.* at 415.

93. *Id.* at 417-21. Specifically, the Board ruled that Primus violated Disciplinary Rules DR 2-103(D)(5)(a) and 2-104(A)(5) of the Supreme Court of South Carolina. South Carolina's DR 2-103(D)(5)(a) provides:

> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised on behalf of his client without interference or control by any organization or other person. . . .
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services; . . .

Id. at 418-19 n.10, (citing SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D)(5)(a) (1977)). In addition, South Carolina's DR 2-104(A)(5) provides:

> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . .
>
> (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Id. at 420 n.11 (citing SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(5) (1977)).

Supreme Court reversed and distinguished *Primus* from *Ohralik*.[94]

According to the Court, the letter in *Primus* disclosed "information material to making an informed decision" and "was not facially misleading."[95] The Court found that the letter did not invade the privacy of the receiver to an appreciable extent nor did it provide a "significant opportunity for overreaching or coercion," unlike in-person solicitation.[96] The Court also noted that: "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct."[97] Although the Court found that the letter was a form of solicitation, the Court held that the letter deserved First Amendment protection as a form of associational and political speech.[98] According to the Court, "In the context of political expression and association, . . . a State must regulate with significantly greater precision."[99]

G. *Zauderer*

The Supreme Court subsequently examined a lawyer's freedom of commercial speech in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[100] which involved another Ohio attorney who ran two newspaper ads.[101] One advertisement offered to defend drunk drivers, and the other offered to represent women who were injured using a Dalkon Shield Intrauterine Device.[102] The former advertisement stated that the client's " '[f]ull legal fee [would be] refunded if [they were] convicted of DRUNK DRIVING.' "[103] The latter advertisement featured a line drawing of a Dalkon Shield Intrauterine Device.[104] The Court held that truthful newspaper advertising of available legal services to a specific targeted group was protected commercial speech.[105] The Court applied the *Central Hudson* test,[106] and cited to *In re R.M.J.*,[107] for its finding that a state cannot "prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that

94. 436 U.S. at 422.
95. *Id.* at 435.
96. *Id.*
97. *Id.* at 435-36.
98. *Id.* at 437-39.
99. *Id.* at 437-38.
100. 471 U.S. 626 (1985).
101. *Id.* at 429-31.
102. *Id.*
103. *Id.* at 629-30.
104. *Id.* at 630.
105. *Id.* at 646-47.
106. *See supra* note 65 and accompanying text.
107. *See supra* notes 67-73 and accompanying text for discussion of *In re R.M.J.*.

he has some expertise in those areas."[108] The Court stated that "rules prohibiting in-person solicitation of clients by attorneys are, at least under some circumstances, permissible."[109]

The Court then distinguished *Ohralik* from *Zauderer* as follows:

> It is apparent that the concerns that moved the Court in *Ohralik* are not present here. Although some sensitive souls may have found appellant's advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it. More significantly, appellant's advertisement—and print advertising generally—poses much less risk of overreaching or undue influence. Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation. Thus, a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney. Accordingly, the substantial interests that justified the ban on in-person solicitation upheld in *Ohralik* cannot justify the discipline imposed on appellant for the content of his advertisement.[110]

In sum, the Court held that: "[A]n attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."[111]

H. Posadas

The Supreme Court's decision in *Posadas de Puerto Rico Association v. Tourism Co. of Puerto Rico*[112] was the beginning of a more relaxed scrutiny over state restrictions on commercial speech. In *Posadas*, the Posadas de Puerto Rico Associates sued the Tourism Company of Puerto Rico claiming the Tourism Company, a public corporation formed to enforce Puerto Rico's restrictions on gambling advertising, violated Posadas' First Amendment freedom of speech rights.[113] Although the Court utilized the *Central Hudson* test,[114] it

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108. *Zauderer*, 471 U.S. at 640 n.9.
109. *Id.* at 638.
110. *Id.* at 642.
111. *Id.* at 647.
112. 478 U.S. 328 (1986).
113. In 1948, the Puerto Rico Legislature legalized certain forms of gambling; however, it restricted gambling advertising by providing that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." *Id.* at 332 (Rehnquist, J., plurality)(citing P.R. LAWS ANN. tit. 15, § 77 (1972)). In addition, the Legislature "authorized

granted more deference to the Puerto Rico Legislature in determining that restrictions on gambling advertisements addressed to Puerto Ricans were appropriate when the goal was to reduce gambling among Puerto Ricans.[115] The Court found that the "fit" between the legislative ends and the means used to achieve those ends was reasonable.[116] The Court's deference to the state legislature in *Posadas* affects the validity of future commercial speech restrictions, including lawyer advertising. Yet, the Court's opinion in *Shapero v. Kentucky Bar Associ-*

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the Economic Development Administration of Puerto Rico (EDA) to issue and enforce regulations implementing various provisions of the [Games of Chance] Act." *Id.* (citing P.R. LAWS ANN. tit. 15, § 76a (1972)). The Tourism Company assumed this regulatory power in 1970 and had the authority to assess fines on those gambling casinos and rooms that conducted illegal advertising. *Id.*

The two regulations at issue in the case were released in 1957 by the EDA. The first regulation reiterated the language of the Games of Chance Act. *Id.* The second regulation, as amended by the Tourism Company in 1971, provided:

> No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public of Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

Id. at 332-33 (citing 15 R. & R. P.R. § 76a-1(7) (1972)). Posadas was organized in 1975, and three years later, was fined twice by the Tourism Company for advertising violations. *Id.* at 333.

Following Posadas' protest of the fines, the Tourism Company released a memorandum to all casino owners. *Id.* The memorandum stated:

> This prohibition includes matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public of Puerto Rico.

Id. Thereafter, Posadas was fined three more times, and paid the fines under the threat of losing its gambling license. *Id.* at 333-34. Posadas then filed a declaratory judgment action seeking a declaration that the law and regulations "facially and as applied by the Tourism Company, violated [Posadas'] commercial speech rights under the United States Constitution. *Id.* at 334. The Superior Court of Puerto Rico, San Juan Section, held that Posadas' constitutional rights were violated, but the advertising restrictions were constitutional. *Id.* at 335-37. The Supreme Court of Puerto Rico dismissed Posadas' appeal of this decision on the ground that no "substantial constitutional question" existed. *Id.* at 337. The United States Supreme Court upheld these decisions. *Id.* at 348.

114. *Id.* at 340-44; *see supra* note 65 and accompanying text.

115. *Posadas*, 478 U.S. at 341-42 (Rehnquist, J., plurality).

116. *Id.* at 341-42. Justice Rehnquist wrote:

> The last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech 'directly advance' the government's asserted interest. In the instant case, the answer to this question is clearly 'yes.' The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that [Posadas] has chosen to litigate this case all the way to this Court indicates that [Posadas] shares the legislature's view.

Id.

ation.[117] indicates that the Court is willing to strike down unconstitutional restrictions on lawyer advertising regardless of legislative deference.

I. Shapero

Three years after the *Posadas* ruling, the Court decided *Shapero.* Shapero proposed to send to potential clients, who were involved in the initial stages of a foreclosure action, a letter advising them of their rights regarding the foreclosure suit.[118] The Kentucky Bar Association, however, opposed targeted, direct-mail solicitation.[119] The Court rejected this stance and upheld its long-standing interpretation that lawyer advertising is constitutionally protected commercial speech.[120] Although the Court recognized that targeted, direct-mail solicitation

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117. 486 U.S. 466 (1988).

118. *Id.* at 470 (Brennnan, J., plurality).

119. *Id.* at 470. When his case was first heard, Shapero challenged Rule 3.135(5)(b)(i) of the Kentucky Supreme Court Rules. *Id.* at 469. Rule 3.135(5)(b)(i) provided:

> A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id. at 470 n.2, *citing* Ky. Sup. Ct. Rule 3.135(5)(b)(i) (1988). The Kentucky Attorneys Advertising Commission (the Commission) refused to approve Shapero's letter, even though the Commission did not find the letter false or misleading. *Id.* at 469. The Commission "registered its view that Rule 3.135(5)(b)(i)'s ban on targeted, direct-mail advertising violated the First Amendment [based on *Zauderer*] and recommended that the Kentucky Supreme Court amend its rules." *Id.* at 470. Shapero then petitioned his case to the Committee on Legal Ethics of the Kentucky Bar Association, which came to the same conclusions as the Commission and, in addition, upheld Rule 3.135(5)(b)(i) because it was consistent with Rule 7.3 of the Model Rules of Professional Conduct. *Id.* Subsequently, the Kentucky Supreme Court deleted Rule 3.135(5)(b)(i) and added Rule 7.3 to its Rules. *Id.* Rule 7.3 provides:

> A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

Id. at 470-71 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984)). Although the Kentucky Supreme Court granted Shapero relief by deleting Rule 3.135(5)(b)(i), the Court effectively left Shapero in the same position by adopting Rule 7.3. *Id.* at 471 n.3. The United States Supreme Court granted certiorari "to resolve whether such a blanket prohibition is consistent with the First Amendment." *Id.* at 471. The Court's main concern was that Rule 7.3 "prohibits targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false and misleading." *Id.*

120. *Id.* at 472.

could have the same harmful implications as the in-person solicitation in *Ohralick*,[121] the Court distinguished written solicitations.[122]

The Court wrote: "The relevant inquiry is not whether there exist potential clients whose 'condition' makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility." Furthermore, the Court reiterated:

> The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: 'Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.' . . . Since state regulation of commercial speech 'may extend only as far as the interest it serves,' state rules that are designed to prevent the 'potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the' perceived evil.[123]

The Court thus held that the state could regulate the advertising in *Shapero* by "less restrictive and more precise means."[124]

J. Peel

In its most recent decision, *Peel v. Attorney Registration & Disciplinary Commission of Illinois*,[125] the Supreme Court held that use of the phrase "Certified Civil Trial Specialist" on an attorney's letterhead was protected from blanket prohibition under First Amendment commercial speech standards.[126] The Attorney Registration and Disciplinary Commission of Illinois brought disciplinary proceedings against petitioner Peel for violating Rule 2-105(a)(3) of the Illinois Code of Professional Responsibility.[127] The Rule stated: "A lawyer or law firm may specify or designate any area or field of law in which he or its partners concentrates or limits his or its practice. Except as set forth in Rule 2-105(a), no lawyer may hold himself out as 'certified' or a 'specialist.' "[128] The Commission believed that by adding the phrase "Cer-

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121. *See supra* notes 80-90 and accompanying text.

122. *Shapero*, 478 U.S. at 472-74 (Brennan, J., plurality).

123. *Id.* at 472 (citations omitted).

124. *Id.* at 476. The Court suggested that the state could possibly require lawyers to file their solicitation letters with a state agency or their bar association. *Id.* at 476, 478. The Court then reversed the Kentucky Supreme Court's decision and remanded the case for a determination whether Shapero's letter was false or misleading under Rule 7.3. *Id.* at 478-80.

125. 110 S. Ct. 2281 (interim ed. 1990).

126. *Id.* at 2291.

127. *Id.* at 2286.

128. *Id.* (citing ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(a)(3) (1988)). Exceptions to this rule are made for patent, trademark, and admiralty lawyers who may hold

tified Civil Trial Specialist by The National Board of Trial Advocacy" to his letterhead, petitioner was publicly holding himself out as a certified legal specialist.[129] The Commission did not find petitioner's statement deceptive, but concluded it was misleading because the Illinois Supreme Court had never recognized or approved a certification process.[130] In so ruling, the Commission rejected petitioner's First Amendment argument that reference to a lawyer's certification as a specialist was a form of commercial speech not subject to absolute suppression.[131]

The Illinois Supreme Court adopted the Commission's recommendation for censure and held that the First Amendment did not protect petitioner's letterhead.[132] The court found the statement on the letterhead misleading in three ways.[133] First, the position of the phrase "Certified Civil Trial Specialist by The National Board of Trial Advocacy" above the words "Licensed: Illinois, Missouri, Arizona" could mislead the general public into the belief that it was only the NBTA certification which allowed petitioner the right to practice in the field of trial advocacy.[134] The Illinois Supreme Court determined that the phrase encroached on its exclusive authority to license attorneys because the phrase failed to differentiate between licensure by an official organization and voluntary certification by an unofficial group.[135] Second, the phrase was misleading because it was equivalent to an implied claim that petitioner's legal services were superior and, therefore, restriction was justified under the *In re R.M.J.* decision.[136] Finally, the court held that petitioner's use of the term "Specialist" with the word "Licensed" would mislead one to believe that Illinois formally authorized certification of specialists in trial advocacy when such was not the case.[137]

The Supreme Court, however, reversed and held that a lawyer has a constitutional right, under commercial speech standards, to advertise his or her certification as an NBTA trial specialist.[138] The Court also referred to *In re R.M.J.* stating that: "[T]he 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

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themselves out as specialists in those fields. *Id.* at n.8 (citing ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(a)(1)(2) (1988)).

129. *Id.* at 2285-86.
130. *Id.* at 2286.
131. *Id.*
132. *Id.*
133. *Id.* at 2286-87.
134. *Id.* at 2286.
135. *Id.*
136. *Id.* at 2286-87.
137. *Id.* at 2287.
138. *Id.* at 2287-93.

presented in a way that is not deceptive."[139] The Court found that the statements made in petitioner's letterhead were true and verifiable facts, not unsubstantiated opinion as to the ultimate quality of his work.[140] The Court held that the phrase here was no more misleading than those found in *In re R.M.J.*, *Shapero*, and *Zauderer*, and that the phrase produced the same risk of deception as the use of "Registered Patent Attorney" or "Proctor in Admiralty," titles permissible under exceptions in Rule 2-105(a).[141]

The Court noted that the Commission's authority was limited "by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information."[142] The Court also acknowledged that the public could be misled by attorney advertising, but stated it is the bar's responsibility to see that the public " 'is sufficiently informed as to enable it to place advertising in its proper perspective.' "[143] The Court then concluded that petitioner's letterhead was neither actually nor inherently deceptive, and that there was no dispute about the authenticity and relevance of certification by the NBTA.[144]

In summary, from *Bates* to *Peel*, the Supreme Court has held that attorney advertising is a form of constitutionally protected commercial speech. Under the *Central Hudson* test, states can prohibit commercial speech if it is false, deceptive, or if it encourages an unlawful action.[145] If the speech does not encourage an unlawful act, or if it is not false or misleading, it may be restrained only to advance a substantial governmental interest, and only by methods that directly advance that interest.[146] In *Shapero,* the Supreme Court expressly affirmed the State's right to restrict in-person solicitation.[147] Under *Peel*, however, a statement's potential to mislead does not justify its complete suppression.[148] Thus, truthful print, direct-mail, radio, and television advertisements all appear to be permissible methods of legal advertising.

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139. *Id.* at 2287 (emphasis omitted).

140. *Id.* at 2287-88.

141. *Id.* at 2291.

142. *Id.* at 2292.

143. *Id.* (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 375 (1977)).

144. *Id.* at 2293.

145. *See supra* note 65 and accompanying text.

146. *Id.*

147. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 472 (1988).

148. One month after the Supreme Court handed down the *Peel* decision, the Illinois Supreme Court amended Rule 7-4 (formerly Rule 2-105) to require a disclaimer stating that certification is not a requirement to practice law in Illinois and that certification of specialties in the practice of law remain unrecognized by the Illinois Supreme Court. Randall Samborn, *Post-'Peel' Battles*, NAT'L L.J., Dec. 30, 1991, at 1, 11.

IV. CONCLUSION

One could reasonably argue, in light of the *Peel* decision, that an attorney's letterhead and business cards are a form of print advertising which has been found by the United States Supreme Court to be constitutionally protected commercial speech. Truthful, non-deceptive statements may be restricted, but not suppressed, if warranted by a substantial governmental interest. In Ohio, although lawyers are permitted to practice in their legal and non-legal professions at the same time, a conflict exists in Ohio Disciplinary Rule 2-102(E) which states: "A lawyer who is engaged in both the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business."[149]

If the commercial speech is not false or misleading, then, according to the *Central Hudson* test, the speech may only be restricted to advance substantial governmental interests, and only by means that directly advance those interests.[150] Ohio's governmental interest revolves around the concern that the non-legal profession will feed the attorney's legal profession. As stated previously, however, the non-legal profession could easily act as a feeder even without using dual degrees on letterheads or business cards.[151] Simply by word of mouth, health care professionals know who the attorney-nurses or attorney-physicians are in a city. Therefore, it is doubtful that the means the government has chosen, an outright ban, directly advances its interest in preventing the non-legal profession from acting as a feeder. There is little doubt that if an attorney-nurse distributed her business card with or even without the initials J.D./R.N. to hospital patients with whom she has come in contact while working as a nurse, she could be disciplined under *Ohralik* for in-person solicitation. Were she to mail a letter with J.D./R.N., however, on the letterhead, she would simply be informing the public of her credentials. The receiver would have time to reflect on the information and would not be coerced into utilizing her legal services. Even under *Shapero*, the state could not prevent lawyers from soliciting legal services for pecuniary gain by sending truthful letters to potential clients who were involved in the initial stages of legal difficulties.[152]

When an attorney with a dual practice has letterhead and business cards printed with both degrees, he is informing the public that he is

149. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(E) (Anderson 1992).
150. *See supra* note 65 and accompanying text.
151. *See supra* note 38-39 and accompanying text.
152. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

qualified in two professions. He is in no way misleading the public or falsifying his credentials; like certification by The National Board of Trial Advocacy, whether an attorney is an R.N., M.D., C.P.A., or Ph.D., is a fact which can be verified. In actuality, the potential to mislead arises under DR 2-102(E) when an attorney, who does not actively maintain his skills in the other profession, is permitted to advertise himself as a J.D./M.D. or a J.D./C.P.A. The Ohio Board of Nursing sees no problem with an attorney-nurse who practices in both fields and desires to use J.D./R.N. on business stationery. Similar to the Supreme Court in *Peel*, the Board felt that such information would be helpful to the public at large and in particular to a health care professional in need of legal services.[153]

Two recent ethics opinions also cast doubt on the continuing viability of DR 2-102(E). The Cincinnati Bar Association's Committee on Ethics and Professional Responsibility implied in its Ethics Opinion 89-90-06 that retaining the present DR 2-102(E) may be inappropriate in light of the *Bates* decision and DR 2-101.[154] The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio also advocates the deletion of DR 2-101 from Ohio's Code of Professional Responsibility because it is "arguably inconsistent" with other disciplinary rules regarding advertising.[155] Both of these opinions were issued prior to the Supreme Court's *Peel* decision.

As a result of *Peel*, a recommendation was unanimously made to the Council of Delegates of the Ohio Bar Association to amend Disciplinary Rule 2-105. The amendment would permit an attorney to communicate his certification from a private organization of special training as long as certain criteria were met.

The inclusion of dual degrees on an attorney's letterhead or business card does not mislead the public. It is truthful, verifiable information that serves to inform the public of an attorney's credentials. DR 2-

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153. Telephone interview with Rachel Reardon, Board of Directors, Ohio State Board of Nursing (Feb. 15, 1991).

154. Cincinnati Bar Ass'n Comm. on Ethics and Professional Responsibility, Op. 89-90-06 (1989).

155. Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Op. 88-23 (1988).

> Disciplinary Rule 2-102(E) was adopted at a time when other Disciplinary Rules and the predominant sentiment within the legal profession made it impermissible for lawyers to advertise. ABA Committee on Ethics and Professional Responsibility, Informal Op. 1422 (1978). Now that the restrictions on lawyers advertising have been substantially reduced, we agree with the ABA when they state that DR 2-102(E) is 'plainly inconsistent with the content and tenor of DR 2-102(E) as amended.' . . . Therefore, it is our position that DR 2-102(E) is arguably inconsistent with the other Disciplinary Rules relating to advertising and should be deleted from Ohio's Code of Professional Responsibility.

Id.

102(E) does not prevent feeding, nor is it consistent with other disciplinary rules on advertising. The Supreme Court's recent line of cases broadening permissible legal advertising, the ABA's deletion of DR 2-102(E) from its own code, and the two ethics opinions from Ohio have created the motive for deletion of DR 2-102(E). The proposal to amend **DR 2-105 has presented us with the opportunity. Hasn't the time for change arrived?**