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FIVE YEARS AFTER *BATES*: LAWYER ADVERTISING IN LEGAL AND ETHICAL PERSPECTIVE

ROBERT F. BODEN*

I. PREFACE: AN HISTORICAL NOTE

One of the most celebrated and important cases determined in the Supreme Court of Illinois during the formative years of that state's jurisprudence was *Illinois Central Railroad v. County of McLean*,¹ decided in 1855. The case established that counties in Illinois were without power to levy and collect taxes upon the property of railroad corporations chartered by the state and located within the borders of those counties. It was a case which not only established an important principle of law but which had a positive impact upon the ability of Illinois railroads to expand their networks of lines throughout the state. One of the principal attorneys for the Illinois Central in that litigation was Abraham Lincoln, then at the zenith of his professional career, a leading member of the Illinois Bar and a widely known and respected trial and appellate lawyer but five years away from the Presidency.

History teaches that Abraham Lincoln was not a man who lightly regarded professional ethics or moral obligations of any kind. We remember his famous advice to the young man aspiring to the bar that he should resolve to be an honest lawyer, and that if he could not do that, he should resolve to be honest and not to be a lawyer. But history also teaches us how Abraham Lincoln came to be attorney for the Illinois Central Railroad in that famous case, and in doing so it provides us with an insight into the attitudes of the nineteenth century American Bar toward the subjects of advertising and solicitation.

When the *McLean County* case was brewing as a result of the efforts of the county board to tax the railroad, Lincoln apparently discussed with county officials his representation

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1. 17 Ill. 291 (1855).

of McLean County in the impending litigation. Then, he wrote a letter to the county clerk of neighboring Champaign County which read in part:

[T]he question, in its magnitude, to the Co. [sic] on the one hand, and the counties in which the Co. [sic] has land, on the other, is the largest law question that can now be got up in the State; and therefore, in justice to myself, I can not afford, if I can help it, to miss a fee altogether. If you choose to release me; say so by return mail, and there an end. If you wish to retain me, you better get authority from your court [county board], come directly over in the Stage, and make common cause with this county.²

After three weeks, having no reply, Lincoln wrote to the General Solicitor of the Illinois Central, saying in part:

Neither the county of McLean nor any one on it's [sic] behalf, has yet made any engagement with me in relation to it's [sic] suit with the Illinois Central Railroad, on the subject of taxation. I am now free to make an engagement for the Road, and if you think fit you may "count me in." Please write me, on receipt of this. I shall be here [on the circuit at Pekin, Illinois] at least ten days.³

Four days later Abraham Lincoln was retained by the Illinois Central Railroad Company.⁴ At any time after 1908, in probably any state of the Union, Abraham Lincoln could have been disbarred merely upon the evidence contained in his correspondence file for the McLean County case.

The example is given because it involves a nineteenth century lawyer of unquestionable integrity and morality. At the worst, Lincoln's preretainer activities in this case could be barratry, solicitation or "ambulance chasing." Viewed in the best light, they could be called examples of "direct mail" advertising. Generally speaking, twentieth century commentators have looked upon such conduct as an example of the low ebb in professional ethics reached by American lawyers in an era roughly described as under the influence of "Jacksonian

2. The account and the quotes from Lincoln's correspondence are from J. DUFF, A. LINCOLN, PRAIRIE LAWYER 31 (1960).

3. *Id.* at 31.

4. *Id.*

democracy."⁵ Most legal historians record a decline in professional ethics and relate it to the lowering of standards for admission to the bar associated with western expansion and the rise of popular sovereignty following the War of 1812.⁶ These views have been generally accepted by lawyers of the twentieth century, schooled in the code of ethics promulgated by the American Bar Association (ABA) in 1908.⁷ Therefore, it hurts us to discover, for example, that advertising and solicitation were tools, not just of the pettifoggers of the era, but of leaders of the bar as well, including one whom hundreds of thousands may claim as the ideal upon which American lawyers of all generations ought to model their standards of professional conduct and responsibility.

The *Canons of Professional Ethics* of the American Bar Association to a considerable extent codified earlier statements of ethical standards for attorneys. They were adopted in 1908 by the ABA and, over time, came to have the force of law in most American jurisdictions.⁸ Reacting to widespread abuse and overreaching in the solicitation of legal business by lawyers, the ABA Canons contained a flat prohibition against advertising and solicitation.⁹ Excepted from the prohibition were certain customary communications of lawyers to relatives, friends and clients as well as directory (as opposed to advertising) listings in telephone books.¹⁰ Regulation extended to law lists and to the size and type of shingles, signs and office building directory listings.¹¹

II. *Bates* AND THE PROPHECIES PRECEDING IT

Five years have passed since the United States Supreme Court shocked the American Bar with its decision in *Bates v.*

5. See, e.g., L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 265-78 (1973); R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223-69 (1953).

6. *Id.*

7. The view prevailing at mid-century is well stated in H. DRINKER, *LEGAL ETHICS* 210-15 (1953).

8. The history is traced in H. DRINKER, *supra* note 7, at 23-26.

9. *CANONS OF PROFESSIONAL ETHICS* Canon 27 (1908). See also subsequently adopted Canons 40, 43 and 46. H. DRINKER, *supra* note 7, at 215-73, carries the original and amended texts of these canons up to 1953 and contains a discussion of their interpretation over the years they were in effect.

10. *CANONS OF PROFESSIONAL ETHICS* Canon 27 (1908).

11. *Id.*

State Bar of Arizona.¹² After 1908 and until *Bates*, it had been an article of faith for American lawyers that the commandment "Thou shalt not advertise" was at least a precept of the essence of legal ethics, at best a principle derived from the natural law itself. These ideas about lawyer advertising would have been totally foreign to our professional predecessors of the nineteenth century. But few of us bothered to search behind the 1908 *Code* which had governed us from then until 1969¹³ and from which the American Bar Association's 1969 *Code of Professional Responsibility* had continued the prohibition on most advertising.¹⁴ The prevailing theory, from 1908 to *Bates* in 1977, was that advertising by lawyers was a form of solicitation of legal business, equally to be condemned with "ambulance chasing" and other forms of direct or personal solicitation.¹⁵ Long before 1977, advertising had come to be considered unprofessional conduct of the worst order, and there had developed a substantial body of law and opinion which regulated in great detail what lawyers could and could not do in drawing the attention of the public to the availability of their services. Since simple necessity required some form of communication with clients, potential clients and the public, and since the 1908 *Code* allowed some advertising, regulation took the form of defining and listing those things which were permitted, all as exceptions to the general prohibition.¹⁶ Three generations of lawyers were educated on this basis, and we were preoccupied with what is now commonly called a "laundry list" of permitted advertising activity. Practically no one gave serious thought to the idea that lawyers might have, on free speech grounds, a general constitutional right to advertise. We thought that lawyer advertising certainly was subject to state regulation of sufficient breadth to preserve high standards of professionalism in the legal community. High standards and advertising did not mix.

12. 433 U.S. 350 (1977).

13. The 1908 Canons, amended and added to from time to time, were in effect for 61 years as official ABA policy for the governance of its members.

14. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, 2-102, 2-103, 2-104, 2-105 (1969).

15. See H. DRINKER, *supra* note 7, at 210-20.

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), 2-102, 2-103 (1969).

As early as 1963, the United States Supreme Court began to give notice that it did not regard the ethical standards of the legal profession, even where cast in terms of law by state supreme courts as disciplinary bodies, to be necessarily controlling over rights of speech and assembly guaranteed by the United States Constitution. As the constitutional doctrine began to emerge and develop, the class protected was not the lawyers, but rather their clients or potential clients. The Court struck down Virginia's rules against solicitation of legal business when the object of proposed litigation was political expression by the National Association for the Advancement of Colored People, involving the use of the court system to enforce constitutional rights in school integration cases.¹⁷ In rapid succession this principle was extended to include the right of groups to assemble and inform themselves concerning their legal rights and to receive recommendations concerning the identity of the most qualified legal counsel to serve them.¹⁸ These cases made it clear that the rules of legal ethics pertaining to solicitation could not be used to prevent a wide variety of activities by groups of clients or potential clients and by lawyers when tied to the concept of educating people about their rights and about the availability of lawyers to protect those rights.

At the same time, the American Bar Association was at work rewriting its ethical code. The 1969 *Code of Professional Responsibility* announced, in Canon 2, that every lawyer "should assist the legal profession in fulfilling its duty to make legal counsel available."¹⁹ This Canon, like the other eight in the 1969 *Code*, was cast in positive terms to meet a general objection to the old Code that the ethical responsibilities of lawyers were, almost without exception, expressed entirely in prohibitory terms. Canon 2 of the 1969 *Code*, a very general statement of multifaceted responsibility, covered a number of ideas concerning how individual lawyers (as distinguished from the organized bar) might participate in the recognized obligation of the profession to make legal services

17. NAACP v. Button, 371 U.S. 415 (1963).

18. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1976); United Transp. Union v. Michigan Bar, 401 U.S. 576 (1971); Brotherhood of R.R. Trainmen v. Virginia, 371 U.S. 1 (1964).

19. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969).

available and accessible.²⁰ But, while it encouraged participation in educational efforts and similar activities in its Ethical Considerations, the new Code continued to regulate in the "black letter" Disciplinary Rules all individual activities which might have as their objective the attraction of legal business. The Rules excepted only the solicitation which had already received constitutional protection from the Supreme Court in the cases discussed above.²¹ In the drafting and adoption of the Disciplinary Rules of Canon 2, the general principle of individual lawyer cooperation in the discharge of the collective responsibility of making legal counsel available obviously collided head on with the traditional prohibitions on advertising and solicitation. The old traditions prevailed, providing grist for the mills of bar critics, who could and did assert that the lofty language of Canon 2 was largely meaningless rhetoric in its application to individual practitioners. For all practical purposes, the individual lawyer's activity was limited to educational efforts, Law Day speeches, and the things permitted under the 1908 *Code*.

The 1969 *Code* sought to regulate the individual lawyer's activity in making known the need for and availability of legal services in two ways:

1. By allowing solicitation of legal business only in those circumstances where solicitation was protected by the United States Constitution;²² and
2. By a continuing general prohibition of advertising which retained most of the "laundry list" of permitted advertising practices.²³

It was this Code that attorneys John Bates and Van O'Steen of Arizona challenged in litigation beginning in 1974 which led to the United States Supreme Court decision of 1977.²⁴

While their case was proceeding through the courts, the Supreme Court was deciding other cases affecting advertising by lawyers. In the 1975 case of *Goldfarb v. Virginia State*

20. *Id.* at EC 2, 2-3, 2-4, 2-5, 2-15.

21. *Id.* at DR 2-101, 2-102, 2-103, 2-104.

22. *Id.* at DR 2-103, 2-104.

23. *Id.* at DR 2-101, 2-102, 2-105.

24. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

*Bar*²⁵ the Court, in striking down lawyers' minimum fee schedules, held that there was no "learned profession" exception to federal antitrust law, leaving the clear implication that lawyer advertising would probably be judged no differently from commercial advertising. In an important 1976 case involving restrictions on advertisements by pharmacists, the Court held that first amendment protection extended to commercial speech or advertising.²⁶

When *Bates* reached the United States Supreme Court, the Court reversed a decision for the state bar in the Supreme Court of Arizona and held that a ban on advertising in the *Arizona Code of Professional Responsibility* violated the rights of free speech of lawyers, guaranteed by the United States Constitution. The Court's majority opinion swept aside arguments by the Arizona Bar that extending constitutional protection to lawyer advertising would adversely affect professionalism, would be inherently misleading, would stir up unnecessary litigation, would unnecessarily increase the overhead costs of the profession, would diminish the quality of legal service and would lead to difficulties of enforcement. The Court declared that none of these concerns rose "to the level of an acceptable reason for the suppression of all advertising by attorneys."²⁷ The Court noted that it was not called upon to "address the peculiar problems associated with advertising claims relating to the quality of legal services . . . [which] might well be deceptive or misleading to the public, or even false."²⁸ It also pointed out that the problem of in-person solicitation of clients was not before it.²⁹ Noting that the states might still regulate false, deceptive or misleading advertising by lawyers and "that there may be reasonable restrictions on the time, place and manner of advertising,"³⁰ the Court summed up its holding as follows:

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and

25. 421 U.S. 773 (1975).

26. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

27. *Bates*, 433 U.S. at 379.

28. *Id.* at 366.

29. *Id.*

30. *Id.* at 384.

terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.³¹

III. LAWYER ADVERTISING IN THE POST-*Bates* ERA: THE WISCONSIN APPROACH

Bates struck the American Bar like a thunderbolt. It erased from American legal ethics the general principle that advertising was unprofessional and the idea that the preservation of professionalism through a prohibition on advertising, except in specifically permitted instances, was a constitutional means of restricting lawyers' speech. This radical departure from old and accepted norms of conduct by lawyers raised a chorus of protest nationwide. At the same time, critics of the bar opined that opposition to the *Bates* doctrine was motivated by the selfish desires of the bar "establishment" to prevent young lawyers from acquiring a share of legal business and to prevent information about the availability of legal services from reaching the masses. While some may have held those views, it was certainly apparent to any objective observer with an appreciation for the thought processes and traditions of lawyers that most concern over *Bates* arose from: 1) its repudiation of a long held and deeply rooted aversion to the commercialism which advertising epitomizes; 2) a genuine concern for the preservation of professional standards; 3) a fear that the decision would be a forerunner for approval of solicitation in general; and 4) worry concerning the impact of advertising overhead on the cost of legal services.

Bates did not definitively fix the boundaries of state regulation and control of lawyer advertising, but it did reduce to shambles the advertising provisions of Canon 2, and it did cast doubt upon the power of the states to control solicitation in general. Following this decision the American Bar Association, each of the states and the District of Columbia were put to the task of reexamining the advertising and solicitation rules of their codes of professional responsibility. This article is not intended to provide a complete review of how each jurisdiction and the ABA responded. It is sufficient to say that

31. *Id.*

the prevailing notion, in the immediate post-*Bates* era, was to construe the decision as narrowly as possible and rewrite the rules preserving as much of the old tradition as could be rationalized constitutionally. This approach was manifest as early as two months after *Bates*, in August, 1977, in the new language approved for Canon 2 by the House of Delegates of the ABA for its model or prototype Code.³² The states and the District of Columbia in due course followed, and according to one analysis, thirty-one of the fifty-one American jurisdictions adopted modified advertising regulations of this type.³³

One commentator noted that the majority of post-*Bates* amendments of Canon 2 amounted to "unprecedented attempts to regulate speech that the state knows is protected or could be protected (by the U.S. Constitution)" and that the actions of these courts in continuing restrictions on advertising were attempts "bordering on judicial civil disobedience."³⁴ While such opinions, considered in the light of the language of *Bates*, seem somewhat extreme, the fact remains that most state disciplinary authorities did indeed try to salvage as much of the pre-*Bates* regulatory scheme as could be accomplished, while giving lip service to the constitutional right identified in *Bates*. Underlying all of the post-*Bates* amendments is the theory that *Bates* declared a general right to advertise, leaving to the states a regulatory power to prescribe the form, content and forum of lawyer advertising. Since the United States Supreme Court had not defined the scope of state regulation, and since these courts were acting against the backdrop of a long tradition of permissible regulation,³⁵ it is difficult to sustain the charge of "civil disobedience" to the *Bates* rule. There was hardly a sufficiently articulated rule to "civilly disobey."³⁶

The State Bar of Wisconsin, after a study by its Committee on Professional Ethics, came forward with a modified "laundry list" which the State Bar presented to the supreme

32. PROFESSIONAL RESPONSIBILITY — A GUIDE FOR ATTORNEYS 54-66 (1978).

33. Andrews, *The Selling of a Precedent*, STUDENT LAW., Mar. 1982, at 12, 14.

34. Howard, *Going About Suppressing Speech: A Comment on the Matter of R.M.J.*, 26 ST. LOUIS U. L.J. 328 (1982).

35. H. DRINKER, *supra* note 7, at 210-73.

36. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

court as a recommended amendment of Canon 2.³⁷ The Supreme Court of Wisconsin, wisely as it turned out, rejected the modified "laundry list" approach and adopted a very simple and straight forward rule: "A lawyer may advertise the lawyer's availability to provide legal services except use of any advertisement which is false, misleading, deceptive or unfair shall constitute professional misconduct."³⁸ The court's order contained the following comment pertaining to this rule:

Lawyers are officers of the court system, and their advertising should merit the public's confidence in and respect for the administration of justice. The rule permits the dissemination of objective, relevant information on which a person may base an informed selection of competent counsel. Because there presently is no state regulated plan to insure the existence of a lawyer's specialized competence, it is misleading or deceptive to advertise that a lawyer is a specialist in a particular field of practice other than the historically recognized fields of patent, trademark and admiralty law. It is permissible for a lawyer to advertise that he or she practices or does not practice in specified fields. The use of the word "specialization" or a synonym that connotes certified expertise is misleading or deceptive.³⁹

The court suspended any provision of the Wisconsin *Code of Professional Responsibility* which conflicted with this order. In common with all other states, Wisconsin at the same time provided that nothing in the order affected the prohibition in the statutes⁴⁰ on solicitation of legal business, a violation of which the court declared would continue to constitute professional misconduct.⁴¹

The Wisconsin rule on lawyer advertising, as a response to *Bates*, represented the most liberal view in the country. It put advertising by lawyers on no different basis than advertising generally, at the same time preserving a rigorous and strict approach to other forms of solicitation of legal business by attorneys. Critics of the action of the Wisconsin Supreme Court

37. Petition by State Bar of Wisconsin to Supreme Court (Sept. 19, 1977) and order 82 Wis. 2d xxvii (1977).

38. Wis. Sup. Ct. R. 20.08(7)(a) (1982).

39. *Id.* at 20.08(7) comment.

40. *Id.* at 20.08(8).

41. *Id.* at 20.08(7) comment.

thought that the court read *Bates* much too broadly and that there was no need for an "opening of the floodgates" to lawyer advertising. The State Bar made a second attempt to have the court adopt a "laundry list" type rule; but the court stood firm.⁴²

IV. DISTINGUISHING SOLICITATION FROM ADVERTISING IN THE POST-*Bates* ERA

Though the Court in *Bates* had expressly declared that the holding did not extend to one-on-one or personal solicitation of clients,⁴³ there was a general concern in the months immediately following that the *Bates* doctrine might open the door to constitutional protection of one-on-one or personal solicitation of legal business on free speech or assembly grounds without regard to the limitations imposed by the earlier cases.⁴⁴ This concern was put to rest, at least for these forms of solicitation, by two cases decided by the United States Supreme Court in 1978.

*In re Primus*⁴⁵ involved a South Carolina lawyer who was disciplined by the state authorities for sending a letter to a potential client soliciting participation in litigation proposed to be conducted by the American Civil Liberties Union, with which she was affiliated. The court said:

[T]his was not in-person solicitation for pecuniary gain [by the lawyer]. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain.⁴⁶

The Court held that the case was ruled by *NAACP v. Button*⁴⁷ and that the state of South Carolina did not have a state

42. Petition by State Bar of Wisconsin to Supreme Court (Feb. 2, 1979) and order 88 Wis. 2d xxiv (1979).

43. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977).

44. *United Transp. Union v. Michigan Bar*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

45. 436 U.S. 412 (1978).

46. *Id.* at 422.

47. 371 U.S. 415 (1963).

interest in the matter to which it might subordinate the constitutional free speech rights of the lawyer. The application of South Carolina's disciplinary rules relative to solicitation was, in these circumstances, declared unconstitutional.

In the second case, *Ohralick v. Ohio State Bar*,⁴⁸ the Court was confronted with a classic situation of an attorney's personal solicitation of two personal injury plaintiffs and signing them up to contingent fee contracts. The Court held that a state can constitutionally "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."⁴⁹ *Bates* was distinguished on the ground that it applied to advertising in a newspaper, which was purely speech, but that in-person or one-on-one solicitation was commercial activity of which speech was merely a component. The Court held that the state did not lose its power to regulate such activity merely because speech was a part of it, affirming the doctrine of *Giboney v. Empire Storage & Ice Co.*⁵⁰ that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."⁵¹ The Court also said:

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.⁵² The substantive evils of solicitation have been stated over the years in sweeping terms: Stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation.⁵³

In this case the defendant conceded that the state of Ohio had a "legitimate and indeed 'compelling' interest in prevent-

48. 436 U.S. 447 (1978).

49. *Id.* at 449.

50. 336 U.S. 490 (1949).

51. *Id.* at 502, *quoted in* *Ohralick v. Ohio State Bar*, 436 U.S. 447, 456 (1978).

52. 436 U.S. at 460.

53. *Id.* at 461 (footnote omitted).

ing those aspects of solicitation that involved fraud, undue influence, intimidation, overreaching and other forms of 'vexatious conduct.'"⁵⁴ But he contended that, despite this compelling interest, proof of actual damage was essential in a disciplinary proceeding in order to overcome the free speech immunity which he enjoyed under the first and fourteenth amendments. The Court rejected this argument, saying:

We agree that the appropriate focus is on appellant's conduct. And, as appellant urges, we must undertake an independent review of the record to determine whether that conduct was constitutionally protected. . . . But appellant errs in assuming that the constitutional validity of the judgment below depends on proof that his conduct constituted actual overreaching or inflicted some specific injury

Appellant's argument misconceives the nature of the State's interests. The Rules prohibiting solicitation 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 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.⁵⁵

. . . .

[U]nder our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial.⁵⁶

Primus and *Ohrlick* do not draw the lines separating constitutionally protected solicitation from that which may be prohibited by state codes of professional responsibility enforced by state action in disciplinary proceedings against attorneys. Such forms of solicitation approved by the Court in *Brotherhood of Railroad Trainmen* and its progeny,⁵⁷ are pro-

54. *Id.* at 462.

55. *Id.* at 463-64.

56. *Id.* at 468.

57. *See supra* note 18.

tected even though pecuniary gain is one of the objectives of the attorney. Rather, the teaching of these cases, taken with the *Railroad Trainmen* line of cases is that the state continues to have a compelling interest in preventing one-on-one solicitation for pecuniary gain where it is not coupled with circumstances identified by the court as subordinating the state's interest to the free speech rights of lawyers, clients and potential clients. In short, the *Ohrlick* Court dispelled fears that *Bates* would be extended to provide constitutional protection to plain old-fashioned "ambulance chasing," and in doing so it acknowledged that the interests of the state extend to flat prohibitions on that activity regardless of the actual damage done in specific instances of that form of solicitation.

V. THE *R.M.J.* CASE

Missouri responded to *Bates* in a way directly opposite to the approach taken in Wisconsin. The Missouri Bar recommended, and the Supreme Court of Missouri adopted, a modified "laundry list" of the items a lawyer might advertise. It specified that this might be done in newspapers, periodicals and the yellow pages of telephone directories. In addition, it permitted lawyers to list in advertisements certain areas of practice, requiring the exact words of the rule to be used and also requiring a disclaimer of certification of expertise in conjunction with any listing of specific areas of practice.⁵⁸ Missouri also continued a pre-*Bates* restriction which limited the mailing of professional cards to "lawyers, clients, former clients, personal friends, and relatives."⁵⁹

"R.M.J.," as he came to be known anonymously in the litigation now to be discussed, graduated from law school and was admitted to the Missouri and Illinois Bars in 1973. In 1977 he established a solo practice in St. Louis. In 1978, after Missouri's response to *Bates* was in effect, R.M.J. ran several advertisements in local newspapers and in the yellow pages, and also sent out announcement cards. His advertisements violated the Missouri rule in three respects. First, the advertisements included information not on the approved Missouri

58. Vernon's Ann. Mo. Rules, Rule 4, DR 2-101(B); Addendum III to Rule 4 (1977).

59. Vernon's Ann. Mo. Rules, Rule 4, DR 2-102.

"laundry list." He included his admission in Illinois and to the Bar of the United States Supreme Court. Second, those advertisements listed areas of practice in terms other than those on the approved list. He said "personal injury" instead of "tort law," "real estate" instead of "property law," and he included "contract," "zoning and land use," "communication," and "pension and profit sharing plans," none of which were on the list. Third, he sent his announcement cards to persons other than "lawyers, clients, personal friends, and relatives."⁶⁰ In disciplinary proceedings brought by the Missouri authorities, R.M.J. was issued a private reprimand by the Supreme Court of Missouri.⁶¹

The United States Supreme Court reversed this judgment, saying:

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 proven 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.⁶²

R.M.J. teaches that *Bates* meant what the Wisconsin Supreme Court supposed it to mean in adopting its rule in the wake of *Bates*. It suggests that there will be very little advertising by lawyers for the states to regulate, beyond the area announced in the Wisconsin rule declaring advertisements

60. Matter of R ____ M. J ____, 102 S. Ct. 929, 934 (1982).

61. In the Matter of R.M.J., 609 S.W.2d 411 (Mo. 1981), *rev'd* Matter of R ____ M. J ____, 102 S. Ct. 929 (1982).

62. Matter of R ____ M. J ____, 102 S. Ct. at 939.

which are "false, misleading, deceptive or unfair" to constitute professional misconduct.⁶³

VI. THE END OF THE LINE FOR "LAUNDRY LISTS"

R.M.J. has sounded the death knell for "laundry list" type regulation of lawyer advertising. The Court flatly declared that such absolute prohibitions on speech are unconstitutional. To sustain a "laundry list" type rule, a state plainly has cast upon it the burden of showing that the prohibited speech was misleading in fact, "inherently misleading or . . . misleading in practice," or "that restrictions short of an absolute prohibition would not have sufficed to cure any possible deception."⁶⁴ Since it is in the nature of a rule such as this to prohibit all advertising except that expressly authorized by the "laundry list," the impossibility of meeting the federal standard of constitutionality is obvious. Presumably a state might devise a "reverse laundry list" of prohibited forms of speech in advertising, and this may come to pass in time. Indeed, the case-by-case handling of complaints against lawyer advertising under a general rule such as Wisconsin's will produce a kind of "common law laundry list" of what is inherently misleading, subject always to review on federal constitutional grounds. But it seems safe to conclude, at this juncture, that the type of "laundry list" to which we have become accustomed since 1908 is no longer viable.

VII. DIRECT MAIL ADVERTISING

R.M.J. unequivocally struck down a flat prohibition on mailing announcement cards to persons other than "lawyers, clients, former clients, personal friends, and relatives."⁶⁵ There is a clear indication that some state regulation in this area is proper, but again the Court made clear that the state cannot take the easy flat prohibition route. In refusing to approve as constitutional the old 1908 limitation upon the persons to whom such announcement could be sent, the Court suggested that it may be necessary, to sustain such a rule, that the state show "an absolute prohibition" to be "the only solu-

63. *Id.* at 938-39.

64. *Id.* at 939.

65. *Id.*

tion.”⁶⁶ At least, the Court thinks the state must show, as a reason for restricting the recipients of such cards “an inability to supervise” such advertising in any other way.⁶⁷ The Court itself suggested that the institution of advance filing requirements and other steps might be sufficient supervision to cure any problem connected with these forms of direct mail advertising, the test being “whether the regulation . . . is not more extensive than is necessary to serve” the state’s interest.⁶⁸

It is perhaps easy, upon first reading *R.M.J.*, to conclude that here is a chink in a heretofore solid wall authorizing blanket prohibition of one-on-one solicitation or “ambulance chasing.” But closer analysis reveals no indication that the Court was intending in any way, by the language in *R.M.J.*, to disturb its earlier ruling in *Ohrlick v. Ohio State Bar*.⁶⁹ The *R.M.J.* Court was dealing with general announcement cards, not with the specific solicitation of a particular piece of legal business for the pecuniary gain of the lawyer-solicitor. There is nothing in the case to suggest that the Court was contemplating a different rule for one-on-one written solicitation than that already established for one-on-one oral solicitation. It will take stronger statements than those to be found in *R.M.J.*, and a wholly different set of facts, to warrant a conclusion that the Supreme Court is any nearer to constitutional protection for “ambulance chasing” than it was in *Ohrlick*.

VIII. ADVERTISING THE QUALITY OF LEGAL SERVICE AND SPECIALIZED EXPERTISE

Along with Missouri’s older and more traditional “laundry list,” its new post-*Bates* list of permitted subject matters for advertising the concentration of practice came tumbling down in *R.M.J.*⁷⁰ The factual basis for the announcement of the constitutional principle assumes almost comic proportions. Missouri allowed lawyers to declare their concentration of practice to be in “torts,” but not in “personal injury,” in “property,” but not in “real estate.” At least this absurdly rigid rule clearly framed the issue. We may safely conclude

66. *Id.*

67. *Id.*

68. *Id.*

69. 436 U.S. 447 (1978).

70. 102 S. Ct. at 938.

that the lawyer-advertiser is now at liberty to describe in his own words the area of the concentration of his practice, as long as it is truthful and not misleading or deceptive. This should put an end to substantial wastes of time by professional ethics committees of bar associations trying to describe, generically or subgenerically or in whatever degree of particularity, permissible areas of advertising concentration. In this regard, the opinion speaks for itself. But the interesting question of constitutional law which springs from *R.M.J.*, and which is unanswered by it, is the impact of the holding upon the entire subject of advertising lawyer "specialization" as that term is artfully distinguished from "concentration of practice."

The difference between advertising a specialty and advertising a concentration of practice is the difference between claiming, in an advertisement, special expertise in a given field of law and a mere limitation of practice under a general license. The distinction is best illustrated by reference to the rule now obtaining in Wisconsin. The Supreme Court of Wisconsin adopted, in the wake of *Bates*, a rule generally allowing truthful advertising, but subject to the restriction contained in the following comment to the rule:

[B]ecause there presently is no state regulated plan to insure the existence of a lawyer's specialized competence, it is misleading or deceptive to advertise that a lawyer is a specialist in a particular field of practice other than the historically recognized fields of patent, trademark and admiralty law. It is permissible for a lawyer to advertise that he or she practices or does not practice in specified fields. The use of the word "specialization" or a synonym that connotes certified expertise is misleading or deceptive.⁷¹

The difference, therefore, between the two concepts is that advertising a specialty, because it connotes special expertise, is a qualitative assertion, whereas advertising a limitation or concentration of practice is a mere quantitative assertion of a willingness to accept retainers.

Because Missouri sought detailed regulation of what a lawyer could say quantitatively about his practice, its rule was

71. Wis. Sup. Ct. R. 20.08(7) comment (1982).

declared unconstitutional as an unnecessary infringement upon free speech. This is an issue that could not have arisen under the post-*Bates* Wisconsin rule which, in its commentary, expressly authorizes lawyers to quantitatively describe the limits of their practices as long as those assertions are truthful. Nevertheless, as seen from the language of the Wisconsin commentary, both Wisconsin and Missouri continued an express prohibition upon the advertisement of special expertise, except in the "historically" recognized fields of intellectual property and admiralty.

Part of the Missouri rule struck down in *R.M.J.* required the lawyer advertising his area of concentration to state a disclaimer of special expertise.⁷² *R.M.J.* failed to include the required disclaimer in his ads proclaiming a concentration of practice, and this was one of the charges in the disciplinary proceedings against him.⁷³ However, this fourth charge of professional misconduct was not litigated at the level of the United States Supreme Court, because *R.M.J.* made no claim that this portion of the Missouri rule was unconstitutional.⁷⁴

Thus, the decision in *R.M.J.* does not answer, as indeed it could not, the most significant question of constitutional law which can possibly arise in the post-*Bates* era. The issues in *R.M.J.* pale in comparison, and the resolution of this question may chart the course for the legal profession well into the twenty-first century. Even as liberal a rule as that prevailing in Wisconsin restricts a lawyer from being the judge of his own expertise and from advertising the same; the Wisconsin court's commentary draws an inference that a declaration of special expertise, in the absence of a state-sponsored plan of certifying specialists, "is misleading or deceptive."⁷⁵ The issue which arises under an approach such as this is: Does a lawyer have a constitutionally protected right of commercial free speech to truthfully advertise the quality of his legal services and his special expertise in particular fields of law even where no state-sponsored system for the testing and certification of legal specialists has been adopted?

72. Vernon's Ann. Mo. Rules, Rule 4, DR 2-101(B); Addendum III to Rule 4 (1977).

73. 102 S. Ct. at 929.

74. 102 S. Ct. at 938, n.18.

75. Wis. Sup. Ct. R. 20.08(7) comment (1982).

This is a constitutional question of first impression. Starting from the present posture of constitutional doctrine in this field, there are two diametrically opposed yet almost equally logical answers to this question. On the one hand, the United States Supreme Court might say that a truthful advertisement of special expertise is constitutionally protected even if the state has no machinery for testing and certifying specialists. In one sense, this would be but a small step forward from the Court's present extension of such protection in *Bates* and *R.M.J.* Such a holding would amount to a declaration by the Court, following the test laid down in *R.M.J.*,⁷⁶ that a state could not justify a total suppression of commercial speech about the special expertise of a lawyer because such a regulation was "more extensive than is necessary to serve" the state's interest in limiting specialty advertisements to truly qualified specialists.⁷⁷ This was the test applied in the case of direct-mail advertisements in *R.M.J.*⁷⁸ The obvious alternative in the case of specialist advertisements, far less drastic in terms of suppressing speech, is state adoption of a plan for testing and certifying specialists who could then be authorized to advertise their specialties, all others being excluded upon grounds that found constitutional support in the earlier cases.⁷⁹

The adoption of this principle of constitutional law would obviously force the states to adopt plans for the testing and certification of specialists in the law. The price for not doing so would be to put each lawyer at liberty to judge his own level of special expertise and to advertise it. The only control would be in disciplinary proceedings where the issue would be whether or not the asserted possession of special expertise was misleading or deceptive.

The wisdom of forcing plans for specialization upon the states in this fashion will be hotly debated. The opponents of de jure recognition of specialties will argue that even the articulation of a constitutional right to advertise de facto possession of special expertise is not a sufficient reason to adopt a

76. 102 S. Ct. at 939.

77. *Id.*

78. *Id.*

79. In the Matter of R_____* M. J_____, 102 S. Ct. 929 (1982); *Ohrlick v. Ohio State Bar*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

formal plan for specialization because disciplinary machinery exists to deal with transgressions of advertising rules. Proponents of plans for specialization will argue that the recognition of a constitutional right to advertise the de facto possession of special expertise demands, in the public interest, a systematic regulation of who can be termed a specialist.

The United States Supreme Court could avoid forcing upon the states decisions with respect to the adoption of plans for specialization by resolving the issue of a constitutional right to advertise de facto expertise in a different way. It could follow the approach it took in *Ohrlick v. Ohio State Bar*,⁸⁰ where it recognized that the regulation of solicitation was more than a matter of "protecting consumers and regulating commercial transactions" because it bore upon the state's "special responsibility for maintaining standards among members of the licensed professions" ⁸¹ In this vein the Court might recognize that, in reaching the question of advertising de facto possession of special expertise, it was entering, as it did in *Ohrlick*, a field involving more than mere speech. In *Ohrlick*, the field was one-on-one solicitation for pecuniary gain; in the instant matter it would be the entire area of state licensure of attorneys, from the resolution of the policy question concerning recognition of specialties, to the selection and definition of those specialties, and finally to the plan for testing and certifying such specialists. Following the rationale of *Ohrlick*, the Court might conclude that these were policy questions best left to the states and that the adoption of certification plans is not, at this point in the history and development of the legal profession, a viable alternative to flat prohibition of commercial speech concerning individual lawyers' possession of de facto special expertise. It could then conclude that prohibition was not a form of regulation more extensive than necessary, at the present time, to serve the states' interest in protecting the public from the evils of misleading or deceptive advertising concerning special expertise.

Which way the Court will go on this issue is anybody's guess in the spring of 1982. In *R.M.J.* the Court showed a strong interest in protecting the free speech rights of the law-

80. 436 U.S. 447 (1978).

81. *Id.* at 460.

yer in defining for himself the areas of his concentration of practice. Conversely, in *Ohrlick*, the Court showed an equally strong interest in protecting the rights of the state to regulate the licensed professions when the individual lawyer's speech became enmeshed with other matters relating to licensure. The issue over advertising de facto possession of special expertise calls for an even more delicate balance of individual and public rights than encountered in any of the previous cases. The better of the two approaches would seem to be the latter, favoring the continued prohibition of advertising of special expertise, pending the resolution of all the troublesome questions surrounding the certification of specialists in the legal profession. These are issues which cannot be decided instantly in response to a sudden declaration from the United States Supreme Court that a constitutional right to advertise expertise exists which can be effectively channelled and controlled through a certification plan. The recent history of the response to *Bates* should be proof enough of this, and the bar faces, in the issue of specialization, a far more difficult issue than any connected with its handling of the problems faced as a result of *Bates*.

IX. AN ETHICAL PERSPECTIVE UPON THE CURRENT STATE OF THE LAW OF LAWYER ADVERTISING

The profession has suffered over the past nineteen years from a long line of constitutional decisions about lawyer advertising and solicitation. This is not to judge that those decisions were wrong or unnecessary, but only to assert that this series of developments has left many lawyers of good will and good faith wondering whether the underpinnings of professionalism were being knocked out from under the American Bar in the name of the constitutional rights of clients and some colleagues. There is no reason for any lawyer to fear that these constitutional decisions, or the changes in the rules brought about as a result of these decisions, have adversely affected lawyers' ethics as that term ought to be understood.

We have for a long time confused the law governing the manner in which we practice with the principles of ethics. Perhaps this is the natural result of the legal positivism which has pervaded legal education and the practice for a good portion of the twentieth century. The 1908 *Code*, while not ex-

pressly declaring itself to be a set of ethical principles, was nevertheless denominated *Canons of Professional Ethics*,⁸² and in time came to be regarded as a statement of principle rather than of law. The word "Ethics" was taken out of the 1969 *Code*, and an effort was made in its text to differentiate between "ethical considerations" and "disciplinary rules."⁸³ However these rules were denominated in the past, and for that reason, lawyers have come to think of the rules of the prevailing code as the principles of ethics. The Kutak Commission, by attempting to rewrite a code for the American Bar Association in the 1980's, is trying (perhaps too hard) to write a set of rules which will be merely rules of professional conduct.⁸⁴

The job of the American lawyer, facing the incursions of constitutional law into his old set of rules as well as the efforts of the Kutak Commission to write ethical considerations out of the new Code, is to realize and understand that the body of doctrine under which we have been operating, whether the 1908 version or the 1969 version, was a "mixed bag." Of course there are principles of ethics to be found in the old and the present Code, as well as in anything being offered by the Kutak Commission. But a great deal of what appears in those codes in "black letter" rules represents legislation which is morally indifferent.

The rules of advertising, or such of them as remain, need to be distinguished from principles of ethics relating to advertising by lawyers. We can no longer disguise all of those rules as principles of ethics. The Supreme Court itself recognized this in *Bates*, saying:

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession But habit and tradition are not in themselves an adequate answer to a constitutional

82. CANONS OF PROFESSIONAL ETHICS (1908).

83. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

84. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1982).

challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.⁸⁵

The rules declared unconstitutional in *Bates* and *R.M.J.* were not, by virtue of placement in a code of professional responsibility, made into principles of ethics. *Bates* and *R.M.J.*, have left our professional regulation of the morals of advertising quite intact, probably stronger, and certainly more visible than heretofore. Until recently that regulation was barnacled over by more than seventy years of attempts to define "habit and tradition." Consider the Court's summation in *R.M.J.* of the current state of the law:

Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading advertising, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.⁸⁶

Those are not the words of a court attempting to subvert moral or ethical principle in order to extend constitutional protection to a form of speech. They are words which enshrine the true moral principle in a constitutional doctrine and extend its protection to our efforts at preventing misleading or deceptive advertising. The ancient injunction, expressed in the Judeo-Christian tradition as "Thou shalt not bear false

85. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1977) (citations omitted).

86. 102 S. Ct. at 937.

witness,"⁸⁷ not only remains intact but emerges, when applied to lawyer advertising, with a constitutional stamp of approval.

In this, as in all things pertaining to changes rapidly occurring in the profession and to the criticism and clamor which swirl about it, we must individually devise plans which will preserve our pride in being lawyers and our devotion to professional ideals. This may have been easier for our predecessors than it is for those of us who live and practice in the 1980's. We must not let the stripping away of some of the trappings of professionalism, as we were used to them, lead us to despair or to the conclusion that professionalism has been lost. Observing the wreckage of the elaborate system devised over the past seventy-five years to regulate in detail the subject of advertising, there is a greater danger in this, than in other areas of change, that some who revere the professional image of the lawyer and whose support is essential to continue it, may lose faith. This cannot be allowed to happen. The legal profession can no more afford the loss of professional idealists because of a change to morally indifferent rules regulating advertising than the Catholic Church could afford to lose a large segment of the faithful because of the change in the time-honored rules of fast and abstinence.

X. CONCLUSION

We are entering a new era in which the regulation of lawyer advertising will center around questions concerning its truthfulness as distinguished from its conformity to "laundry lists" of varying types. Enforcement will deal with substance rather than form. To the degree that our grievance committees and judicial enforcement bodies are overworked and understaffed, much will depend upon voluntary compliance. This, coupled with five years of hindsight since *Bates*, calls to mind the following from that Court's opinion:

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to

87. Exodus 20:16 (Douay-Rheims).

uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straight forward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.⁸⁸

That prophecy seems to have been borne out at least in the geographic area where this writer has had an opportunity to observe the advertising of the bar. With a few spectacular exceptions, there has been very little advertising of which to be ashamed, even though many of us might prefer to see none of it beyond neat rows of names and addresses, all in regular size type, in the telephone directory.

Finally, and perhaps most importantly, the new-found liberty of lawyers to advertise may prove in time to be one of the most effective vehicles for meeting the moral obligation described in Canon 2 of the 1969 *Code* as the responsibility of every lawyer to "assist the legal profession in fulfilling its duty to make legal counsel available."⁸⁹ That is a noble objective and one which can and ought to inspire us even as we attempt to adjust our views of legal ethics and of the customs and traditions of the profession to newly enunciated constitutional doctrine.

88. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977).

89. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1969).