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Attorney Advertising in Minnesota

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ATTORNEY ADVERTISING IN MINNESOTA

Regulation of attorney advertising and solicitation is a rapidly changing area of professional responsibility. Most forms of advertising formerly prohibited, are now constitutionally protected; only misleading or coercive contacts remain banned. This Note identifies the major decisions that have instigated the changes, and projects the future for attorney advertising in Minnesota.

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I. INTRODUCTION: RESTRICTIONS ON ADVERTISING HAVE BEEN RECEDING

Prior to the 1970s, a strict proscription of advertising, solicitation, and publicity efforts by attorneys was a fundamental part of the various ABA Codes of Professional Responsibility.¹ This fundamental position was eroded considerably during the 1970s, leaving only skeletal remains of

1. See CANONS OF PROFESSIONAL ETHICS Canon 27 (1908); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1969) [hereinafter cited as MODEL CODE].

Broad limitations on lawyers' communications to the public were first adopted in 1908, when the American Bar Association promulgated its Canons of Professional Ethics. Canon 27 declared that "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

Shadur, *Publicity, Advertising, and Solicitation*, in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 45 (1978). Shadur further notes that the 1908 Canons of Professional Ethics "also stated that indirect advertising, such as newspaper comments, publicity photos, and 'like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.'" *Id.* From 1908 to 1977, all states that codified lawyer disciplinary rules had also adopted the essence of the American Bar Association's restrictions on lawyer advertising. *See id.* at 45-46.

the older taboos for the 1980s.² The residues of earlier absolute prohibitions are not likely to disappear, and respect for the motives behind the older rules still guides the formation of the rules that are taking their place.³

II. INITIAL BREAKTHROUGHS UNDER *GOLDFARB V. STATE BAR*

Like the older rules themselves, the seminal case, *Goldfarb v. State Bar*,⁴ which set the foundation for much of the change that has followed, has receded into the background in comparison to other landmark decisions.⁵ The *Goldfarb* Court in essence found the practice of law to be commerce subject to antitrust standards. The *Goldfarb* decision spearheaded the public reaction to professional standards for the distribution of legal services that has, ultimately, opened up attorney advertising.⁶ The *Goldfarb* Court found that mandatory minimum fee schedules indirectly imposed and enforced by a state bar were in violation of the Sherman Antitrust Act.⁷ The realization that professional guidelines could severely impair the distribution of legal services caused the public to critically scrutinize other guidelines or codes dealing with service availability.⁸ Advertising and solicitation were in the direct path of this new scrutiny.

In an attempt to first establish its own position in response to the scrutiny of professional standards, the ABA Standing Committee on Ethics and Professional Responsibility proposed limited expansion of attorney advertising after *Goldfarb*.⁹ The focus of these early proposals was on making legal services more readily available, rather than on encouraging

2. See MODEL CODE EC 2-6 to EC 2-15, DR 2-101 (1980).

3. See *Resolution Regarding Lawyer Advertising*, 32 BENCH & B. MINN., Jan. 1976, at 3 (reaction of Minnesota Bar to the ABA discussion draft of December 6, 1975, which proposed to lift the ban on some forms of advertising, was very much against the suggested changes).

4. 421 U.S. 773 (1975).

5. See Hoover, *Lawyer Advertising—Minnesota Supreme Court Action*, 37 BENCH & B. MINN., July 1980, at 11. "Prior to the 1977 *Bates* decision, virtually all advertising and solicitation was prohibited. In April, 1978, the Minnesota Supreme Court amended DR 2-101 of the *Code of Professional Responsibility*, to permit certain forms of advertisements." *Id.*

6. See, e.g., *Bates v. State Bar*, 433 U.S. 350 (1977) (advertising by attorneys in legal clinic allowed).

7. See *Goldfarb v. State Bar*, 421 U.S. 773, 792-93 (1975). "In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." *Id.* at 788.

8. See R. ARONSON & D. WECKSTEIN, *PROFESSIONAL RESPONSIBILITY* 32, 115, 132, 163, 233 (1980) (doors to public and legislative scrutiny were opened by Supreme Court classification of law firms and their business as interstate commerce).

9. See *Lawyer Advertising*, 32 BENCH & B. MINN., Feb. 1976, at 2, 19 (the initial response to *Goldfarb* by the Minnesota Bar was neutral until differences emerged in proposals offered).

active commercial dissemination of information.¹⁰ Yet, members of the Minnesota State Bar were reluctant to support any effort to make advertising presumptively ethical, even within a context of proposed code provisions which were still decidedly regulative.¹¹

III. FURTHER EXPANSION UNDER *BATES V. STATE BAR*

Perspectives began to change more rapidly after *Bates v. State Bar*.¹² In *Bates*, the United States Supreme Court ruled that an Arizona attorney who placed a newspaper ad listing his fees for routine, standardized legal services could not be disciplined by his state bar.¹³ Under this ruling, states may only prohibit false or misleading advertising by attorneys. The state bar association ban on advertising by lawyers as a class, and individually, was held to violate the first and fourteenth amendments to the Constitution.¹⁴ Overnight, the more limited proposals of the ABA became obsolete and the states were forced to liberalize their attitudes towards advertising.¹⁵ Minnesota was no exception.¹⁶

The Minnesota State Bar Association set up a task force to review the impact of the *Bates* case and to draft an amendment to the Minnesota Code of Professional Responsibility to accommodate the *Bates* holding.¹⁷ Interestingly enough, the *Bates* Court concluded that the Sherman Antitrust Act does not forbid limitations on lawyer advertising that are part of a state's system of lawyer regulation policed by the state's supreme court.¹⁸ Thus, after the *Bates* opinion, the *Goldfarb* holding has had less direct impact upon advertising than upon fee setting.¹⁹ Furthermore, *Bates* recognizes that states have a legitimate interest in regulating the

10. See Brink, *Lawyer Advertising*, 32 BENCH & B. MINN., Jan. 1976, at 20, 21. "To the extent that there is a public need for better information about lawyers, it would be better to expand affirmatively the list of what lawyers can do than to permit everything, restrained only by relatively subjective judgments about what may be prohibited as misleading." *Id.* at 21.

11. See *id.* at 21. "As a consequence, under the existing Rule, conduct not expressly sanctioned was presumptively unethical; under the Draft, the many doubtful cases are presumptively ethical." *Id.* See also MODEL CODE DR 2-101 (1969).

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

13. See *id.* at 383-84.

14. See *id.* at 363-82; see also Comment, *Attorney Advertising is Commercial Speech Protected by the First Amendment: Bates v. State Bar*, 37 MD. L. REV. 350, 363-64 (1977).

15. See Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor, and Bates*, 77 COLUM. L. REV. 898 (1977).

16. See *Bates and O'Steen . . . Where Do We Go From Here? The Task Force on Lawyer Advertising—An Update*, 34 BENCH & B. MINN., Oct. 1977, at 19 [hereinafter cited as *Task Force Update*]. "Beyond [the] specific holding the Court recognized a general constitutional principle that a lawyer has a right to publish, and the public has a right to know, truthful commercial statements that assist members of the public in the selection of a lawyer." *Id.* at 20.

17. See *id.*; see also *Lawyer Advertising*, 34 BENCH & B. MINN., Dec. 1977, at 14.

18. See *Bates*, 433 U.S. at 359-63.

19. See *id.* at 359.

time, place, and manner of lawyer advertising.²⁰ Hence, the ABA proposals regulating advertising, before and after their modification by the Minnesota bar, were not invalidated by *Bates*,²¹ and provided legitimate time, place, and manner guidelines.

IV. COMPETING PROPOSALS SUGGESTED BY THE ABA STANDING COMMITTEE ON ETHICS

The *Bates* decision permits lawyers to advertise factual information in newspapers and print media but does not rule on the propriety of using the broadcast media or of using assertions regarding quality by attorneys.²² The ABA directed its attention to the permissible scope of factual advertising and the ABA Standing Committee on Ethics developed proposals for consideration.²³ The competing proposals were entitled Proposals A, B, and C. Proposal C was a modified pre-*Bates* proposal that made advertising presumptively ethical within a regulative context,²⁴ received serious consideration by the Minnesota bar after the *Bates* opinion. The two post-*Bates* proposals, however, Proposal A (regulative) and Proposal B (directive), have dominated discussion and have been adopted by numerous states and bar associations.²⁵

V. THE MINNESOTA APPROACH

Initially taking an apparently restrictive approach, the Minnesota bar favored Proposals A and C,²⁶ finding the open-ended approach of Proposal B to be without sufficient regulative guidelines.²⁷ After the ABA had adopted Proposal A into the ABA Model Code of Professional Responsibility (Model Code), the following observations were made by the Minnesota State Bar task force on the merits of Proposal C:

20. *See id.* at 362, 383-84.

21. *See 1980 Panel Actions*, 37 BENCH & B. MINN., May 1981, at 14 (The Board of Professional Responsibility processed six claims for misleading advertising in 1980).

22. *See Bates*, 433 U.S. at 384; *see also* AMERICAN BAR FOUNDATION, ANN. C. PROF. RESP. 28-29 (1979).

23. *See Task Force Update*, *supra* note 16, at 20, 22.

24. *See id.* at 22.

25. *See REGULATION OF ADVERTISING BY LAWYERS: COMPARISONS OF THE ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND STATE CODES* (1977) (sets forth the various state rules regulating attorney advertising); Blackmar, *The Missouri Supreme Court and Lawyer Advertising: RMJ and its Aftermath*, 47 MO. L. REV. 621, 629 (1982) (most of the states that considered the problem of advertising after *Bates* expressed a preference for the Proposal A form of regulation).

26. *See Task Force Update*, *supra* note 16, at 19. "Proponents of both Proposals [A and C] are seeking the public good and, consistent with that, to retain wholesome standards of professionalism." *Id.* at 20.

27. For a discussion of various weaknesses of the early drafts of the proposals, see Brink, *supra* note 10, at 21-24. It was thought that "the Draft should be equally severe and equally definite on such things as use of large and frequent displays, costly or 'unprofessional' media and overuse of biographical matter." *Id.* at 23.

The proponents of Proposal C urge that the bar recognize its engagement in a truly commercial activity, and that today, advertising is part and parcel of that commercial activity. Thus, Proposal C would only prohibit a lawyer from advertising in a manner inimical to the public interest, leaving to the individual lawyer the determination of form and place for any public communication concerning his practice, his fees, and his background. Certainly, from a public relations point of view, it would be far better for the bar to take the lead on the advertising issue rather than doing only the bare minimum the U.S. Supreme Court requires. . . .

Proposal C, on the other hand, focuses not on mechanics or form, but on substance. What it attempts to prevent is real harm to the public which would result from claims which are fraudulent or deceptive or which raise matters specifically prohibited in the list of nine "do nots"²⁸

Under Proposal C, an advertisement would have been prohibited only if it:

- (1) contains a misrepresentation of fact;
- (2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
- (3) contains laudatory statements about a lawyer;
- (4) is intended or is likely to create false or unjustified expectations of favorable results;
- (5) implies unusual legal ability, other than as permitted by DR 2-105;
- (6) conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
- (7) is intended or likely to result in a legal action or legal position being taken or asserted merely to harass or maliciously injure another;
- (8) is intended or is likely to appeal primarily to a lay person's fears, greed, desires for revenge, or similar emotions;
- (9) contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived.²⁹

In addition, DR 2-105 would have allowed a lawyer to set forth a specialization in fair, non-misleading terms.³⁰

Provisionally, with input from the practicing bar, the Minnesota State Bar Association Board of Governors recommended to the Minnesota Supreme Court that Proposal A be adopted.³¹ This proposal would have made Minnesota consistent with the Model Code. At the time Proposal A was thought to give the well-intentioned lawyer more guidance about

28. See *Task Force Update*, *supra* note 16, at 24.

29. *Id.* at 22.

30. See *id.* at 21. Proposal C allows, without restriction or guidance, lawyers to indicate the fields of law in which they practice.

31. See *Lawyer Advertising*, *supra* note 17, at 14.

the kinds of permissible advertising.³²

Ultimately Minnesota adopted Proposal B, in favor of constitutional defensibility, and rejected the regulative language found in both Proposals A and C.³³ These other proposals would limit certain aspects of lawyer advertising before it could be evaluated as commercially false or misleading. Proposal C was regulative as to quality, while Proposal A, as incorporated into the Model Code, is regulative as to means.³⁴ Following the *Bates* holding on advertising, the Proposal B approach adopted in Minnesota, also known as the "directive" approach, requires only that advertising avoid being untruthful or misleading.³⁵

Compared to Proposals A and C, DR 2-101 of the Minnesota Code of Professional Responsibility now simply provides attorneys with commercial directives:

- (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 advertisement or written communication containing a false, fraudulent, misleading or deceptive statement or claim.
- (B) A false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:
 - (1) Contains a misrepresentation of fact;
 - (2) Is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
 - (3) Is intended or is likely to create false or unjustified expectations of favorable results;
 - (4) Conveys the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
 - (5) Is intended or likely to result in a legal action or legal position being taken or asserted merely to harass or maliciously injure another; or
 - (6) Contains other representations or implications that in reasonable probability will cause an ordinary, prudent person to misunderstand or be deceived.³⁶

The current Minnesota Code provision on advertising has much in common with the old Proposal C. The major difference is that the Minnesota Code does not attempt to directly meddle with "taste" and "dig-

32. *See id.*

33. *See* ANN. C. PROF. RESP., *supra* note 22, at 30-31; *see also* *Some Answers to Questions about Lawyer Advertising*, 35 BENCH & B. MINN., Dec. 1978, at 21; *Task Force Update*, *supra* note 16, at 21.

34. *See* MODEL CODE DR 2-101, DR 2-102 (1980); *see also supra* note 29 and accompanying text.

35. *See* Hoover, *supra* note 5, at 11; MINN. C. PROF. RESP. DR 2-101(A) (1982).

36. MINN. C. PROF. RESP. DR 2-101 (1982) (this provision was adopted April 14, 1978 and was left unchanged in essential substance by the amendments of 1980).

nity” in a regulative fashion.³⁷

The regulative approach adopted by the Model Code (Proposal A) specifically delineates the guidelines an attorney must follow with respect to the mechanics of his or her advertising.³⁸ The Model Code also attempts to indirectly regulate quality of attorney advertising³⁹ by setting forth a compendium of approved factual contents of advertising, often called the “laundry list” approach. Since the original adoption of this regulative list in 1969, the list has grown more inclusive.⁴⁰ For instance, broadcast media advertising, formerly prohibited, is now permitted under the Model Code.⁴¹

With the regulative laundry list, however, the Model Code’s constitutional defensibility with respect to advertising has been weakened in an attempt to gain clarity. By directly limiting the scope of attorney advertising, the Model Code invites first and fourteenth amendment constitutional challenges under *Bates*. After the *Bates* decision, attorney advertising is recognized as a form of protected commercial speech. Any attempt by a state to set out time, place, and manner restrictions may be subject to constitutional scrutiny.⁴² By avoiding the regulative approach, Minnesota steered clear of potential constitutional challenges and apparently gave Minnesota attorneys carte blanche to advertise within the limits of truth and accuracy. The only exception to this broad approach was the restriction against advertising of specialties within the legal profession, which was recently declared unconstitutional by the Minnesota Supreme Court in *In re Johnson*.⁴³

37. See Hoover, *supra* note 5, at 11. “The standard of regulation is, however, truth or falsity, rather than ‘taste’ or ‘dignity.’” *Id.*

38. See MODEL CODE DR 2-101 to 2-104 (1980).

39. See *Task Force Update*, *supra* note 16, at 20. “[P]roposal A regulates, not merely by prohibiting what is false or misleading, but with respect to those other matters—quality, solicitation, the electronic media and time, place and manner—that the Supreme Court suggested could be appropriately regulated.” *Id.*

40. Compare MODEL CODE DR 2-101 (1969) (containing three sections and six categories regulating means) with MODEL CODE DR 2-101 (1980) (containing nine sections and thirty categories regulating means).

41. See MODEL CODE EC 2-8, DR 2-101 (B), (D), and (I) (1980).

42. See *Bates*, 433 U.S. at 363-83; see also ANN. C. PROF. RESP., *supra* note 22, at 28-29. The source of the directive language in Proposal B and the MINN. C. PROF. RESP. is derived from *Bates*: “Advertising that is false, deceptive, or misleading of course is subject to restraint.” See 433 U.S. at 383.

43. 341 N.W.2d 282 (Minn. 1983). The Minnesota Supreme Court held unconstitutional a state disciplinary rule prohibiting lawyers from advertising of a “legitimate specialization” certification. Richard Johnson had been admonished by the Minnesota Board of Professional Responsibility for advertising his certification by the National Board of Trial Advocacy as a civil trial specialist in violation of Disciplinary Rule 2-105(B) of the Minnesota Code of Professional Responsibility. Rule 2-105(B) stated: “A lawyer shall not hold out himself or his firm as a specialist unless and until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so.” MINN. C. PROF. RESP. DR 2-105(B) (1980). The court relied on *In re R.M.J.*, 455 U.S. 191 (1982) and concluded

By choosing the directive approach, Minnesota has put both its attorneys and its regulatory body, the Board of Professional Responsibility, in the strongest possible economic and political position. The state has assured the public of being well informed and of having competent legal services available at an economically competitive price. Further, under the directive approach, law firms can effectively compete for potential clients and clients can choose their attorneys intelligently by selecting among known alternatives.⁴⁴ The new element in open-ended attorney advertising is not that it is commercial but that the consumer can be more selective because of the availability of more information. The open-ended approach to advertising neither forces liberalization of the scope of attorney advertising nor does it leave attorneys without standards.⁴⁵

VI. FURTHER EXPANSION AND ACCEPTANCE BY THE MINNESOTA PROFESSIONAL RESPONSIBILITY BOARD

With respect to advertising in Minnesota, the director of the Board of Professional Responsibility has recently presented a concise summary of what the Rules of Professional Responsibility allow in Minnesota:

1. Lawyers may advertise.
2. Lawyers may engage in direct mail and other written solicitation.

that DR 2-105(B) was too restrictive. See 341 N.W.2d at 285; see also MODEL CODE EC 2-14, DR 2-105(A) (1980); MINN. C. PROF. RESP. DR 2-105(A) (1980); Heggland, *Legal Specialization: The Need for Uniformity*, 39 BENCH & B. MINN., Sept. 1982, at 15 (historical survey of the status of attorney specialization).

The *In re Johnson* decision has been highly publicized and is likely to have national ramifications. See, e.g., Ashman, *Minnesota OKs Advertising a Specialty Certification*, 70 A.B.A. J. 118 (1984); *Rule Against Specialty Advertising Struck Down*, 10 A.T.L.A. ADVOC., Feb. 1984, at 1, 8; Kaplan, *Minnesota Lifts Specialty Ad Ban*, NAT'L L.J., Jan. 2, 1984, at 2, col. 4; *Minnesota Lawyers No Longer Barred from Advertising Legal Specialties*, 52 U.S.L.W. 1101 (1984); *Minnesota Ban on Advertising NBTA Trial Certification Held Unconstitutional*, 27 ATLA L. REP. 63 (1984).

44. See Hoover, *Disciplinary Action—Only One Facet of Professional Self-Regulations*, 51 HENNEPIN LAW., Mar.-Apr. 1982, at 10. Bonding of lawyers who handle client funds, continuing legal education, specialization, peer review, and market competition augments the formal rules and regulations. Minnesota lawyers are not limited to the Minnesota Code. Attorneys may voluntarily follow guidelines of the ABA Model Code. Beyond this, they may also follow guidelines disseminated by the Director of the Board of Professional Responsibility. See, e.g., *Opinions—Professional Responsibility Board*, 37 BENCH & B. MINN., Feb. 1981, at 49; Hoover, *Lawyer Advertising—Percentage Discounts on Fees*, 39 BENCH & B. MINN., Dec. 1982, at 51 (the Board issues formal opinions on professional responsibility from time to time and the director issues a limited number of informal letter opinions upon request).

45. An example of the current open-ended information dissemination process in Minnesota is the frequent articles by the Director of the Board of Professional Responsibility that appear in BENCH & B. MINN. See, e.g., *Opinion—Professional Responsibility Board*, *supra* note 43.

3. Advertising and permitted solicitation must refrain from utilization of false, fraudulent, deceptive or misleading information.
4. In person and telephonic solicitation, direct or indirect, is prohibited.
5. The giving of value in exchange for a favorable recommendation or reference is not permitted.

Questions of taste, dignity, and self-laudation are not usually relevant to the question of whether discipline is appropriate.⁴⁶

Although these guidelines are highly persuasive authority for interpreting the Minnesota Code of Professional Responsibility, the ultimate binding authority rests with the Minnesota Supreme Court's rulings on proposed changes in the Code and opinions on petitions for disciplinary action.⁴⁷

VII. COMPARISON OF THE ADVERTISING AND SOLICITATION RULES

As is evident from the most recent guidelines from the Minnesota director, much of the latest activity in the area of advertising has occurred in the area of solicitation.⁴⁸ Although advertising and solicitation have much in common, they are not identical. Solicitation is direct communication and advertising is indirect communication. The guidelines above demonstrate that solicitation is more carefully monitored by the Professional Responsibility Board than is advertising. Solicitation, also, focuses primarily on the one-to-one aspect of communications rather than on mass media marketing. Solicitation can be mass-produced, as in mass mailing; but because the primary concern of the Minnesota Supreme Court is the ultimate impact of one-to-one communications on the consumer of legal services all solicitation will be closely scrutinized.⁴⁹

The most recent decisions on attorney advertising and solicitation since *Bates* are directed more towards solicitation than advertising.⁵⁰ In

46. Hoover, *Attorney Advertising is Here to Stay*, 38 BENCH & B. INTERIM, Mar. 1982, at 6.

47. See *In re Appert*, 315 N.W.2d 204 (Minn. 1981). The *Appert* court noted, "While we are determined to comply with both the spirit and the letter of the United States Constitution as delineated by the United States Supreme Court in *Bates*, *Primus* and *Ohralik*, we are equally determined to do what we can to prevent and discourage abuses that may occur." *Id.* at 215.

48. See *supra* note 45 and guidelines in the accompanying text.

49. See Hoover, *Attorney Advertising in Minnesota—Expanded Horizons for the '80s*, 50 HENNEPIN LAW., Sept.-Oct. 1980, at 6-7. The object of solicitation can be either an individual or a group addressed as having similar legal concerns, though usually not the members of a class action. See *id.*; see also *In re Appert*, 315 N.W.2d at 215. The Minnesota court defines solicitation as overbearing and intrusive practices by mail, telephone, or face-to-face contact, and the giving of value in exchange for a favorable commendation or reference by a third party. *Id.*

50. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978); *In re Appert*, 315 N.W.2d 204 (Minn. 1981).

In re R.M.J.,⁵¹ the United States Supreme Court attacked regulative restrictions on marketing in Missouri.

Missouri followed a modified regulative model, as adopted in the ABA Model Code, that set forth a laundry list of information which an attorney could include in an advertisement or communicate in the solicitation of his or her business.⁵² In violation of the Missouri Code, the appellant in *R.M.J.* sent out announcement cards including more information than was specifically permitted and sent the cards to a general, though select, audience of potential clients or referrals beyond the limited audience allowed in the Missouri Code.⁵³ Faced with the disciplinary charges of unprofessional conduct and a potential reprimand, he argued against the regulatory restrictions of the Missouri Code. Even though he violated the Code, the United States Supreme Court said that his actions had not been deceptive, misleading, or dishonest to the extent requiring prohibition.⁵⁴

Restated in terms of a widely recognized constitutional standard of review for commercial speech, the *R.M.J.* opinion applied the four-point balancing test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵⁵ The *R.M.J.* Court stated:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that

51. 455 U.S. 191 (1982).

52. See 42 MO. ANN. STAT. Missouri Supreme Court Rule 4, DR 2-101(A)&(B) (Vernon 1981); see also 455 U.S. at 193 n.1. For an article discussing the *In re R.M.J.* decision, the events leading up to it, and its implications for the future of lawyer advertising, see Blackmar, *supra* note 25. See also Whitman & Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of In re R.M.J.*, 57 ST. JOHN'S L. REV. 445 (1983).

53. See 455 U.S. at 196.

Appellant graduated from law school in 1973 and was admitted to the Missouri and Illinois Bars in the same year. After a short stint with the Securities and Exchange Commission in Washington, D.C., appellant moved to St. Louis, Mo. in April 1977, and began practice as a sole practitioner. As a means of announcing the opening of his office, he mailed professional announcement cards to a selected list of addresses. In order to reach a wider audience, he placed several advertisements in local newspapers and in the yellow pages of the local telephone directory. . . . [T]hey contained, in large capital letters, a statement that the appellant was "Admitted to Practice Before the United States Supreme Court." And they included a listing of areas of practice that deviated from the language prescribed by the [Missouri Advisory Committee]. . . .

Id.

54. See *id.* at 207.

[A]lthough 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.

Id.

55. 447 U.S. 557 (1980).

provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁵⁶

Within this context, the *R.M.J.* decision explicitly allows states to regulate advertising that is inherently misleading or that has proven to be misleading in practice, but only if serving a substantial interest within the constitutional standard of review.

The Supreme Court found that Missouri had failed to show that the proscribed statements were misleading, that the proscription promoted a substantial state interest, and that possible deception could only be cured by an absolute prohibition.⁵⁷ Hence, the Missouri rules were struck down as violative of the first amendment. Nonetheless, the Court left the door open for legitimate time, place, and manner regulations by the state.⁵⁸

Although *R.M.J.* sets forth the standard of review for scrutinizing state proscriptions, it gives very little insight into the kinds of conduct which states may proscribe. The standard is developed in *Bates*,⁵⁹ *Ohralik v. Ohio State Bar Association*,⁶⁰ and *In re Primus*.⁶¹ Together, these earlier advertising and solicitation cases present a broad range of facts to compare, and help attorneys and regulative bodies develop a better sense of prohibited activities.

The *Bates* decision holds that lawyers can advertise fee information for routine legal services as long as the advertising remains essentially objective, and does not make or strongly suggest qualitative comparisons be-

56. 455 U.S. at 203-04.

57. In making its decision, the *R.M.J.* Court relied heavily upon the reasoning of the *Bates* case. The Court pointed out that the *Bates* case rejected a number of justifications for broad restrictions upon advertising including the so-called effects upon professionalism, justice, cost, quality, and enforcement. None of these were held to be sufficient to compel state action. See *id.* at 199-200; *Bates v. State Bar*, 433 U.S. at 363-65, 375.

58. See 455 U.S. at 203.

[The] 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 information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.

Id.

59. 433 U.S. 350 (1970).

60. 436 U.S. 447 (1978).

61. 436 U.S. 412 (1978).

tween providers.⁶² In *Ohralik* the Court holds that a state may discipline an attorney who solicits clients by face-to-face or telephonic contact, especially when the client is vulnerable emotionally or physically, such as during recuperation from accidental injury.⁶³ The Court concluded that a vulnerable "client" is in no position to intentionally select an attorney or resist the direct persuasion of an opportunistic attorney.⁶⁴

Lastly, in *In re Primus*, the Court permitted direct mail and other written solicitation of potential clients as long as the potential client is insulated from in-person contact by the overreaching attorney. Factors supporting direct mail solicitation are the non-profit motive of informing the public of its legal rights and the lack of deception. The profit motive may be present if it does not dominate.⁶⁵ The *Primus* Court reversed a decision to discipline an ACLU attorney for writing to offer free legal counsel to a woman who possibly was sterilized as a precondition to receiving Medicaid benefits.⁶⁶

VIII. THE NEW CODE RULES FOR MINNESOTA

The Minnesota Code of Professional Responsibility was amended by the Minnesota Supreme Court to reflect the holdings of *Ohralik* and *Primus*.⁶⁷ With the exception of the general prohibitions of in-person and telephonic solicitation, coverage under the Minnesota Code DR 2-103 follows the practical precepts that:

[G]eneral direct mail advertising is permitted, as is a specific written communication to a prospective client seeking employment for a spe-

62. See *Bates*, 433 U.S. at 383-84.

63. See *Ohralik*, 436 U.S. 477; see also Hoover, *supra* note 48, at 6. Hoover states that in *Ohralik*

[T]he court held that a state may enforce disciplinary rules against attorneys which prohibit attorneys from solicitation of employment for pecuniary gain under circumstances likely to result in adverse consequences that the regulating state has the right to prevent. In sustaining discipline for in-person solicitation of a hospitalized patient, the Court held that protection of the public from those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct is a legitimate and important state interest.

Id.

64. See *Ohralik*, 436 U.S. at 461; Hoover, *supra* note 48, at 6.

65. See *Primus*, 436 U.S. at 415; Hoover, *supra* note 48, at 6. Hoover states:

[The Court in *Primus*] held that solicitation of prospective litigants by non-profit organizations that engage in litigation as a form of political expression is entitled to First Amendment protection. An attorney who assisted a non-profit agency by advising a gathering of women about their legal rights and by subsequently writing to one of the women about free legal assistance from the organization, was not disciplined.

Id.

66. See *Primus*, 436 U.S. at 436-38.

67. See MINN. C. PROF. RESP. DR 2-101 (1980); see also Hoover, *supra* note 5, at 11 (Director of Lawyers Professional Responsibility Board summarizes the effects of the May 30, 1980, Order of the Minnesota Supreme Court amending DR 2-101 - DR 2-105).

cific legal matter. Attorneys may, for example, send bulk mailings to everyone in an area offering to represent them generally. They may also write a personal letter to an accident victim offering to handle the victim's personal injury case. Both general and direct mail advertising and specific letters soliciting a case must comply with the veracity requirements of DR 2-101, as amended.⁶⁸

Deception and direct overreaching are the targets of the Minnesota Code,⁶⁹ and not the routine dissemination of objective information through indirect media.⁷⁰

In 1982, the Minnesota Supreme Court, in *In re Appert*, adopted the position recommended by the Director of the Board of Professional Responsibility, that expanded and defined contextual limits to advertising and solicitation in Minnesota.⁷¹ The case expands the scope of permissible solicitation to allow multiple referrals by a third party.⁷² It also condones advertising of attorney availability to handle recurrent product litigation on a contingent fee basis.⁷³ Lastly, it emphasizes that litigation directed against obvious social abuses or inequities enjoys the added first

68. Hoover, *supra* note 48, at 7-8.

69. See *In re Appert*, 315 N.W.2d 204, 215 (Minn. 1982). The *Appert* court stated, "We view the right of the general public to know of the availability of professional services as the principle interest involved in advertising for such services. Advertisements designed to achieve less important objectives will be subject to a more critical scrutiny." *Id.*

70. See Hoover, *supra* note 5, at 11; see also MINN. C. PROF. RESP. EC 2-6 to EC 2-15, DR 2-101 to DR 2-102 (1980).

71. See Hoover, *supra* note 46, at 6.

In *Appert* . . . the Supreme Court held that direct mail solicitation and the distribution of brochures describing Respondent's availability for certain kinds of cases were entitled to constitutional protection. In dismissing the disciplinary petitions, the Court embraced fully the principles embodied in *Bates*, making clear that discipline is appropriate only when letters or brochures contain false, fraudulent, deceptive or misleading information.

Id.

72. See 315 N.W.2d at 212-15.

No exchange of value took place in this case. The research information and advice given by respondents to Ms. Brown was wholly gratuitous. Additionally, it was only natural for Ms. Brown to look to respondents for background material. They had represented her in her own suit against Robins, respondent Pyle had been one of her instructors, and she was aware that they had a certain expertise in the matter.

. . . Because of her own limited knowledge of attorneys who could handle such involved litigation work, it is not likely that Ms. Brown could have confidently made a referral to anyone other than respondents. The facts indicate that respondent Pyle informed Ms. Brown that such referrals were permissible. There is no suggestion, however, that either of the respondents requested that such referrals be made.

Id. at 214.

73. *In re Appert*, 315 N.W.2d at 209; see 5 HAMLINE L. REV. 453 (1982). This case-note summarizes the holding of the court in *Appert* in the context of the other leading cases of *Bates*, *Primus*, and *Ohralik*. The note is critical, however, of the Minnesota court for not providing regulative guidelines in the areas of advertising and solicitation. The note did not call attention to the fact that if the court had set forth regulative guidelines, it would have been abandoning the directive approach taken by the MINN. C. PROF. RESP. and

amendment protection of political expression under *NAACP v. Button*.⁷⁴

The *Appert* decision clarifies earlier Minnesota positions on attorney advertising. Retrospectively, the *Appert* court struck down as unconstitutional a Minnesota Code of Professional Responsibility disciplinary rule that has long since been discarded and replaced by amendment.⁷⁵ Prospectively, it suggests where Minnesota may be headed in helping to better distribute effective legal services to the public at reasonable cost.⁷⁶ Finally, in terms of policy, the *Appert* opinion suggests that non-deceptive aggressive marketing of legal services is justified to counterbalance aggressive marketing of a product known by its seller, but not its buyers, to be potentially dangerous.⁷⁷ Information, not marketing, has been given policy priority. Legal services advertising is an effective vehicle for giving balanced information to the consumer in an unbalanced marketplace.

IX. THE MODEL RULES .

As *Appert* and the national trend as evidenced in *R.M.J.* suggest, movements in attorney advertising and solicitation have been toward liberalization. The constitutional protections of the individual rights of attorneys to express themselves and to associate freely in society, added to the public's need to have access to useful information regarding legal services, have supported the trend against highly restricted commercial regulation of marketing.⁷⁸

risking the very sort of regulations struck down in *R.M.J.* and *Bates* as being an infringement upon free speech.

74. 371 U.S. 415 (1963). In *Button*, the Court held that regulation of first amendment expression is inherently suspect and that such regulation must be narrowly drawn to avoid unnecessary restriction of political expression, which included litigation within such expression.

75. See 315 N.W.2d at 208-12; Hoover, *supra* note 46, at 6. The *Appert* court held that the former disciplinary rules of DR 2-101 and DR 2-103 were unconstitutionally restrictive of the respondent's first amendment rights to the extent that the rules prescribed discipline for distribution of written materials, irrespective of content. See *id.*

76. See Hoover, *supra* note 44, at 10. The Director of Minnesota Lawyers Professional Responsibility Board suggests that dignity and good taste do not need formal regulation because scrutiny is already provided by self-discipline, peers, and market forces. See *id.*

77. See 315 N.W.2d at 212.

The characterization of respondents' letters and brochures as advertisements or solicitation serves no useful purpose. The analysis to be made in either case is essentially the same. The attorney's right to speak and associate freely and the public's right to receive commercial information must be considered as well as the state's interest in regulating the profession in order to protect the public from abuses by lawyers. The balance is a delicate one and the lines are not easily drawn. In this case, the individual and societal interests are substantial and the state's interests, alone or in combination, are not sufficiently compelling to justify a restriction of those first amendment rights.

Id.

78. See Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 809 (1982). "Lawyer advertising at its best can inform people about their legal rights and help them make

The Model Rules of Professional Conduct recently adopted by the ABA reflect the more lenient treatment of attorney advertising. Within the Model Rules, advertising and solicitation are treated in the section entitled "Information About Legal Services."⁷⁹ Significantly, and in accord with the current treatment of advertising in Minnesota, the Model Rule on advertising is of the directive, as opposed to regulative, approach. The Proposal A laundry list which now distinguishes the Model Code and its progeny from the Minnesota approach, has been dropped from the Model Rules.⁸⁰

In accord with the United States Supreme Court holding in *R.M.J.*,⁸¹ the Model Rules also permit an attorney to accurately describe his practice, without being restricted to often uninformative general headings such as torts, contracts, or securities.⁸² Even the Model Rules, however, stop short of allowing an attorney to claim a speciality or use words, such as "limited to" or "concentrating in," that would imply a speciality.⁸³ Other than the attorney specialization limitation, the Model Rules place no significant limitation upon the format a lawyer might adopt for advertising.⁸⁴ For the most part, the dignity of the particular ad is left to public, not professional, scrutiny as long as it is not deceptive or misleading.⁸⁵

Similarly, the Model Rules do not restrict an attorney to the print media, but allow the use of broadcast media as well.⁸⁶ For some states, this is an innovation over past restrictive practices.⁸⁷ The Model Rules are especially innovative in permitting direct mailings, now widely

an informed choice of attorneys to exercise those rights. Like *Bates* and *In re R.M.J.*, many state court cases have recognized the value of lawyer advertising." *Id.*

79. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1-7.5 (Proposed Final Draft, 1982) [hereinafter cited as MODEL RULES].

80. See *id.* at Rule 7.1. Recently, the Ad Hoc Committee assigned by the Minnesota Bar Association to study the Model Rules, recommended to the bar that the bar petition the Minnesota Supreme Court to adopt a modified version of the Model Rules. See Minn. B. Ass'n, *Report of the Ad Hoc Committee on the ABA Model Rules of Professional Conduct*, 41 BENCH & B. MINN., Apr. 1984, at 31, 34 [hereinafter cited as *Minn. Ad Hoc Comm. Report*].

81. 455 U.S. 191 (1982).

82. See MODEL RULES, *supra* note 79, at Rule 7.4.

83. See *id.* at Comment to Rule 7.4. The Minnesota Ad Hoc Committee recommended modifying Rule 7.4 to remove all restrictions from advertising a specialty except the use of "any false or misleading statement, claim or designation . . ." See *Minn. Ad Hoc Comm. Report*, *supra* note 80, at 35, 56-57.

84. See *Andrews*, *supra* note 78, at 810. "The proposed Model Rules of Professional Conduct do not contain provisions restricting the format of lawyers' advertisements. In fact, the proposed rules specifically reject the current requirement of DR 2-102(A) that communications about legal services be 'dignified.'" *Id.*

85. See MODEL RULES, *supra* note 79, at Rule 7.2 (1982).

86. See *id.*

87. See *Andrews*, *supra* note 78, at 811. "In addition to state advertising rules that

banned as impermissible solicitation.⁸⁸ Yet, the United States Supreme Court itself has drawn deliberate attention to the Proposed Model Rule in its *R.M.J.* decision, which struck down certain mailing prohibitions in Missouri.⁸⁹ The Court has also drawn attention to the fact that mailing inserts sent out with billing statements are not necessarily an invasion of privacy under *Consolidated Edison v. Public Services Commission*.⁹⁰

The one area where the Model Rules could possibly expand the scope of attorney advertising beyond the current Minnesota Code would be in the area of direct contact solicitation. Under the Model Rules, a lawyer may solicit by personal contact while performing within the realm of certain charitable organizations or social political associations that promote the availability of legal services.⁹¹ This position is remarkably similar to that adopted by the Minnesota Supreme Court in *Appert*. Under no circumstances, however, may an attorney solicit either directly or by mail where such solicitation is likely to harass, coerce, or otherwise detrimentally disturb the recipient of the communication.⁹²

X. CONCLUSION

Since the *Bates* decision, the legal profession has progressively overcome the challenges to advertising that advertising would adversely affect professional dignity; be inherently misleading; undermine standards of justice; have undesirable economic effects on costs; reduce quality of legal services; and lead to inadequately policed deception.⁹³ By giving

prevent lawyers from using certain types of mass media, provisions of the various state solicitation rules restrict the lawyers' private promotional activities." *Id.*

Of course, it remains to be seen whether the states that currently have a restrictive approach to attorney advertising will adopt the approach in the Model Rules.

88. See MODEL RULES, *supra* note 79, at Rule 7.3 (direct mailings are still scrutinized for potential harassment impact); see also *In re Alessi*, 60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983) (the court, reconsidering on remand from the United States Supreme Court in light of *In re R.M.J.*, reaffirmed its position that lawyers may be prohibited from sending to real estate brokers letters that state fees for real estate closings and implicitly seek referrals of clients).

89. See 455 U.S. at 201 n.14. The Court points out that the preferred remedy is more disclosures, rather than less, in citing the *Bates* case and the proposed new Model Rule in the context of public ignorance regarding rights and remedies.

90. 447 U.S. 530, 541-42 (1980); see also *In re R.M.J.*, 455 U.S. at 206 n.20 (1982). The *R.M.J.* Court suggests that if a general mailing from a lawyer would be "frightening" that the lawyer could stamp the envelope "this is an advertisement." *Id.*

91. See MODEL RULES, *supra* note 79, at Rule 7.3.

92. See MODEL RULES, *supra* note 79, at Rule 7.3(B). The Minnesota Ad Hoc Committee recommended modifying the Model Rules to permit all solicitation except if made "in person or by telephonic contact." See *Minn. Ad Hoc Comm. Report*, *supra* note 80, at 35, 56.

93. See *Bates*, 433 U.S. at 368-79.

There is currently a deemphasis in regulation of the "commercial" aspects of the profession for both constitutional and practical reasons. . . . Practical reasons require that overtaxed disciplinary resources be directed toward maintaining the

the public credit for the ability to see through all but the most sophisticated deceptive advertising, the profession may have actually enhanced its stature in society and has certainly left the public better informed about its options for legal services.

integrity of the profession leaving to some extent the commercial aspects of practice to regulation by the marketplace.

Hoover, *supra* note 46, at 6.