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## Advertising, Solicitation, And Indication Of Specialization: recent Proposed Rules And Supreme Court Mandate

Steven J. Greenwald\*

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## **Abstract**

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**KEYWORDS:** advertising, specialization, rules

# Advertising, Solicitation, And Indication Of Specialization: Recent Proposed Rules And Supreme Court Mandate

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A Lawyer who advertises or solicits . . . is regarded by his brethren at the bar as one with whom it is not pleasant to associate on the terms of cordial intimacy characteristic of the relationship of Lawyers to one another.<sup>1</sup>

## INTRODUCTION

The American Bar Association (ABA), on January 3, 1980, circulated a proposed draft for the complete revision of the Model Rules of Professional Conduct.<sup>2</sup> The proposal, now under consideration, contains a section which would expand the permissible scope of attorney advertising and solicitation. This new tolerance is the result of a growing interest in expanding public awareness to legal services.

The limitations upon advertising and solicitation have, in the past, been intended to deter overreaching by unscrupulous lawyers. These restrictions, however, have been limited by three recent United States Supreme Court cases which have limited the scope of the ban on commercial advertising: *Bates v. State Bar of Arizona*,<sup>3</sup> *Ohralik v. Ohio State Bar Association*,<sup>4</sup> and *In re Primus*.<sup>5</sup> According to these cases,

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\* General Counsel to F.C. Reiser Co.; B.A. Michigan State; J.D. Univ. of Detroit.

1. H. DRINKER, *LEGAL ETHICS* 211 n.6 (1953).

2. This discussion draft, circulated by the ABA Commission on Evaluation of Professional Standards, has not yet been officially adopted. The final version of the Rules were scheduled for submission to the ABA's House of Delegates at its February, 1981 meeting.

3. 433 U.S. 350 (1977).

4. 436 U.S. 447 (1978).

5. 436 U.S. 412 (1978).

(1) commercial speech, which includes attorney advertising, is entitled to first amendment protection; (2) a state may constitutionally regulate potentially harmful in-person solicitation; and, (3) only upon a showing of a compelling interest and requisite specificity may a state regulate solicitation implicating political or associational freedoms. After analyzing these cases, this article will examine the ABA Proposed Model Rules to determine whether the limitations it places upon attorney advertising and solicitation are constitutional in light of these recent Supreme Court decisions.

### **Bates: THE SUPREME COURT PERMITS ATTORNEY ADVERTISING**

In *Bates v State Bar of Arizona*,<sup>6</sup> the Supreme Court considered whether a newspaper advertisement which listed prices for routine legal services fell within the confines of protected speech, or constituted a form of commercial speech which remained outside the scope of first amendment protection. J. Bates and Van O'Steen were attorneys licensed to practice in Arizona. They operated a legal clinic which provided standardized legal services for moderate fees. In an attempt to attract clients for their clinic, they placed an advertisement in a newspaper, offering routine legal services<sup>7</sup> at reasonable rates. The state bar considered the ad to be in violation of the Arizona Code of Professional Responsibility,<sup>8</sup> and recommended a six-month suspension.<sup>9</sup> The United States Supreme Court, however, reversed, basing its decision on first amendment issues which it had reserved in two earlier cases: *Valentine v Chrestensen*<sup>10</sup> and *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*.<sup>11</sup>

In *Chrestensen*, the Supreme Court stated that although the Con-

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6. 433 U.S. 350.

7. Routine legal services were deemed to include such matters as personal bankruptcies, name changes, uncontested divorces, and uncontested adoptions. *Id.* at 354.

8. "[A] lawyer shall not publicize himself, or his partner, or associate as a lawyer through newspaper or magazine advertisements, radio and television announcements or other means of commercial publicity." ABA CANONS OF PROFESSIONAL ETHICS, DR 2-101(B) (incorporated into Rule 29(a) of the Supreme Court of Arizona).

9. The Arizona Supreme Court's final sanction was only a censure.

10. 316 U.S. 52 (1942).

11. 425 U.S. 748 (1976).

stitution afforded protection to speech concerning social, political, and economic ideas, the first amendment did not restrain government regulation of purely commercial advertising.<sup>12</sup> This view continued until 1975, when the Court held in *Bigelow v. Virginia*<sup>13</sup> that the first amendment guarantees of speech and press were applicable to a paid commercial advertisement. The transition from its prior position in *Chrestensen* was made complete one year later when the Court in *Virginia Pharmacy* held that commercial speech did indeed come within the ambit of the first amendment.<sup>14</sup> This case involved a challenge by a consumer group to a statute which prohibited pharmacists from advertising prices of prescription drugs, declaring such advertising to be unprofessional conduct of the type that could result in disciplinary action.<sup>15</sup> In support of the statute, the Virginia Board of Pharmacy maintained that the ban on advertising was necessary to preserve the professional character of the occupation. In addition, the Board speculated that advertising would have such an adverse effect on prices as to destroy some pharmacists' profit margin.<sup>16</sup> Although these considerations were viewed as adequate to justify regulation absent first amendment protection, the Court found them to be unconvincing when balanced against the need of the consumer for the information; especially since the effect of the regulation would be to totally suppress information concerning the prices of prescription drugs.<sup>17</sup>

The majority opinion in *Virginia Pharmacy* was the first clear indication that the interests of the listener (i.e., the consumer) could be considered in deciding whether to extend protection to commercial

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12. 316 U.S. at 54.

13. 421 U.S. 809 (1975). The Court held as unconstitutional a Virginia statute which made it a misdemeanor to encourage or prompt the procuring of an abortion through the sale or circulation of any publication.

14. 425 U.S. at 761.

15. VA. CODE § 54-524.35 (1974) provides in part:

Any pharmacist shall be considered guilty of unprofessional conduct who

(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit term for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by a prescription.

16. 425 U.S. at 766-68.

17. *Id.* at 770.

speech. The free flow of commercial information was seen as necessary to aid consumers in making intelligent, well-informed economic decisions.<sup>18</sup>

Relying upon the rationale advanced in *Virginia Pharmacy*, the Court in *Bates* held that the justifications for prohibiting the advertising of "routine legal services" were insufficient to override the public interest in maintaining the free flow of information.<sup>19</sup> As the Court stated in *Griswold v. Connecticut*,<sup>20</sup> "[t]he right of freedom of speech and press include not only the right to utter or print, but [also] . . . the right to receive, [and] the right to read. Without these peripheral rights, the specific rights would be less secure."<sup>21</sup> Proponents for the continued restrictions upon attorney advertisement, however, argued that the public would lose respect for the profession (as one geared to the concerns of justice) if lawyers were allowed to advertise for financial gain. Rejecting this argument, the Supreme Court stated that the relation between advertising and loss of professional respect was quite tenuous since respect for a lawyer is determined to a great extent by the individual lawyer's own competency.<sup>22</sup>

Also argued was the possibility that misrepresentation through advertisement would become so prevalent that a regulation short of an outright ban would be impossible to enforce. The Court, however, felt that most lawyers would behave as they always have:

they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system 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 who abuse their trust.<sup>23</sup>

Moreover, the Court determined that the states have in the past been able to regulate the professions quite sufficiently.<sup>24</sup>

The Court, however, did not rule out all regulation of advertising,

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18. *Id.* at 763.

19. 433 U.S. at 363.

20. 381 U.S. 479 (1965).

21. *Id.* at 482-83.

22. 433 U.S. at 369.

23. *Id.* at 381.

24. *Id.* at 384.

stating that speech which is false, deceptive, or misleading is still subject to restraint.<sup>25</sup> Even truthful statements may warrant restraint if they have a potential to mislead the public; e.g., statements relating to the "quality of services," which are often incapable of measurement or verification.<sup>26</sup> This problem provided the genesis to another argument in support of the ban: that the advertisement of legal services will inevitably be misleading due to the consumer's inability "to determine in advance just what services he needs."<sup>27</sup> The Court, however, did not believe that the present alternative (the prohibition of advertising) left the client with any better information with which to select an attorney. Instead the Court believed that the organized bar should educate the public about legal services, especially the kind of "routine" services at issue. The Court also felt that although laymen may not understand the technicalities of a certain legal problem, they usually are aware of the general nature of the service to be performed. As such, the advertisement of an understandable schedule of services and their corresponding prices could aid the consumer in making an initial decision to hire a particular lawyer.<sup>28</sup> A binding agreement as to price could then be reached during the lawyer's initial consultation with the client.

The Court was also concerned with the ABA's estimate that "the middle 70% of [the] population [was] not being reached or served adequately by the legal profession."<sup>29</sup> The Court noted that the reasons for this underutilization included the fear of prohibitive costs and the inability to locate a suitable lawyer.<sup>30</sup> The Court maintained that the disciplinary rule in question, DR 2-101(B),<sup>31</sup> served to restrict the public's access to legal services, especially for the "not-quite-poor and

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25. *Id.* at 383.

26. *Id.* at 383-84.

27. *Id.* at 374.

28. Generally speaking, the public's failure to engage the legal profession is due to their misapprehension of the cost of legal services and their unawareness of "contingency" payment possibilities. See Smith, *Making the Availability of Legal Services Better Known*, 62 A.B.A. J. 855 (1976).

29. 433 U.S. at 376.

30. *Id.* See also Smith, *Cannon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,"* 48 TEX. L. REV 285 (1970).

31. See ABA CANONS OF PROFESSIONAL ETHICS, DR 2-101(B), *supra* note 8.

unknowledgeable.”<sup>32</sup> The rule was seen as being in conflict with the bar’s ethical obligation to “facilitate the process of intelligent selection of lawyers, and to assist in making legal services available.”<sup>33</sup> In addressing this issue, along with the first amendment issue of the consumer’s interest in the free flow of commercial information, the Court determined that the lawyer’s professional duty to make counsel available outweighed the restriction imposed by DR 2-101(B), and that permitting “restrained advertising” might well contribute to greater availability of legal services.<sup>34</sup>

This policy argument provided the basis for the *Bates* decision: advertising could no longer be considered an unmitigated source of harm to the administration of justice; rather, advertising might offer great benefits. Even though advertising may increase the use of judicial machinery, the notion that “it is always better for a person to suffer a wrong silently than to redress it by legal action” could no longer be accepted.<sup>35</sup>

Recently, however, the United States Supreme Court has indicated what arguably is a mounting reluctance to protect commercial speech. The 7 to 2 decision in *Friedman v. Rogers*<sup>36</sup> rejected a first amendment attack on a Texas law prohibiting the practice of optometry under a trade name. The Court was convinced that the law was a constitutionally permissible state regulation which protected the public from deceptive and misleading use of optometrical trade names. The Court insisted that a trade name is “a significantly different form of commercial speech from that considered in *Virginia Pharmacy* and *Bates*. Here we are concerned with a form of commercial speech that has no intrinsic meaning.”<sup>37</sup> Unlike the advertisements in those cases, the advertisement of a trade name conveys no information about prices, products, or services offered.<sup>38</sup>

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32. 433 U.S. at 376-77.

33. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1976).

34. 433 U.S. at 376-77

35. *Id.* at 376.

36. 440 U.S. 1 (1978).

37. *Id.* at 12.

38. *Id.*



## *Ohralik*: ADVERTISING AND SOLICITATION ARE DISTINGUISHABLE

Although the Supreme Court's decision in *Bates* granted first amendment protection to the commercial speech of attorneys, questions still remained as to exactly what *kind* of speech could be afforded protection, and in what *contexts*. The Court in *Bates* held only that the justifications advanced for prohibiting truthful advertising of the availability and terms of "routine legal services" are insufficient to override the public interest, protected by the first amendment, in maintaining the free flow of information.<sup>39</sup> The *Bates* decision did not, and its authors expressly declined to consider, the state's right to ban attorney solicitation of clients.<sup>40</sup> In spite of this silence, however, proponents of solicitation have been encouraged by the Court's handling of the commercial speech concept.<sup>41</sup> In citing a line of cases including *Virgma Pharmacy* and *Chrestensen*, the Court in *Bates* demonstrated that it had never withdrawn protection from speech "merely because it proposed a mundane commercial transaction."<sup>42</sup> Commentators have argued that the Court's analysis could apply to solicitation as well, in that solicitation involves the same relation-of-interests between the speaker and the consumer as direct advertising.<sup>43</sup>

The distinction between advertising and solicitation has long been a point of controversy.<sup>44</sup> However, although gray areas may occasionally appear which will fit within both contexts, the characteristics of the terms are distinguishable: advertising is a form of notice-giving or information-giving,<sup>45</sup> while solicitation is the equivalent of asking or enticing or making an urgent request.<sup>46</sup> Solicitation clearly portends a more aggressive and more direct form of communication than advertising. It is this aggressiveness and directness of contact on which the fears of lawyer overreaching are based.

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39. 433 U.S. at 384.

40. *Id.* at 366.

41. See Simet, *Solicitation of Public and Private Litigation Under the First Amendment*, 1978 WASH. U.L.Q. 93.

42. 433 U.S. at 363-64.

43. Simet, *supra* note 41, at 104.

44. See Suchman, *Ethics and Legal Ethics*, 37 GEO. WASH. L. REV. 244 (1968).

45. WEBSTER'S THIRD NEW WORLD DICTIONARY 31 (1971).

46. *Id.* at 2169.

In *Ohralik v Ohio State Bar Association*<sup>47</sup> the defendant (Ohralik) argued that his solicitation was indistinguishable from the advertising in *Bates*. Ohralik, an Ohio lawyer, personally approached the victims of an automobile accident and succeeded in obtaining them as clients for the prosecution of their claims arising out of the accident. He even approached one of the victims while she was still in traction in the hospital and offered to represent her. The Supreme Court considered the attorney's behavior to be a blatant example of "in-person solicitation," prohibited under the Code of Professional Responsibility<sup>48</sup>

The Court pointed out that because the potential for abuse is greater when a lawyer, a "professionally trained person in the art of persuasion," is doing the selling, for purposes of constitutional analysis, in-person solicitation will not be considered the equivalent of advertising.<sup>49</sup> As such, if information concerning a lawyer's availability (including such items as telephone number, address, and office hours) was to be disseminated to the general public or a large group of people, the communication would be considered an allowable advertisement; however, an in-person communication suggesting the quality of a lawyer's work and directed to one person or a small group of people goes beyond the dissemination of general information and thus would be considered an unallowable solicitation.<sup>50</sup>

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47 436 U.S. 447 (1978).

48. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104(B) provides in pertinent part: "A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice" (Adopted by the Supreme Court of Ohio.)

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A) provides: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate, to a non-lawyer who has not sought his advice regarding employment of a lawyer." (Adopted by the Supreme Court of Ohio.) 436 U.S. at 453 n.9.

49. 436 U.S. at 465. The Court noted that, unlike advertising, there is little opportunity to publicly scrutinize in-person solicitation, because there are often no witnesses other than the person being solicited. *Id.* at 466.

50. *Id.* See also ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 and DR 2-104.

### *Primus*: "BENIGN" SOLICITATION IS ALLOWED

In *In re Primus*,<sup>51</sup> the companion case to *Ohralik*, the Supreme Court considered whether any special dispensation should be given to solicitation if done for purposes of political expression. *Primus* was a lawyer affiliated with the American Civil Liberties Union (ACLU). The ACLU had been acknowledged by the Supreme Court to engage in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. *Primus* presented a briefing to certain welfare recipients, informing them of their legal rights with respect to a sterilization program which was instituted as a condition to their continued receipt of medical assistance. Subsequently, he mailed a letter to a woman who had attended the briefing, informing her that free legal assistance was available from the ACLU. The Disciplinary Board of the South Carolina Supreme Court found the mailing of the letter constituted solicitation, for which *Primus* was given a public reprimand. The United States Supreme Court reversed, stating that "[w]here political expression or association is at issue, this Court has not tolerated the degree of imprecision that often characterizes government regulation of the conduct of commercial affairs."<sup>52</sup>

Justice Marshall, in his concurring opinion, noted that, unlike the situation in *Ohralik*, the solicitation in *Primus* "[was] presented in a noncoercive, non-deceitful, and dignified manner to a potential client who [was] emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that [was] not frivolous."<sup>53</sup> Justice Marshall called this kind of solicitation "benign" commercial solicitation and contended that since there are significant benefits that can accrue to society from benign solicitation, such activity should not be stifled with a sweeping non-solicitation rule.<sup>54</sup> In addition, he stated that when directly confronted with the question of the extent to which benign commercial solicitation can constitutionally be restricted, the courts might afford greater protection to such solicitation than would be allowed

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51. 436 U.S. 412 (1978).

52. *Id.* at 434.

53. *Id.* at 472 n.3 (Marshall, J., concurring).

54. *Id.* at 473.

under traditional court doctrine or the current ABA Disciplinary Rules.<sup>55</sup> Thus, while a showing of potential abuse was sufficient to justify the disciplinary action taken in *Ohralik*, the Court required a showing of actual harm, in light of the protection afforded by the first amendment, to justify the disciplinary action taken in *Primus*.

These cases reflect the latest views of the Court on the propriety of attorney solicitation. However, although the two cases may be helpful in predicting the outcome of solicitation cases involving "ambulance-chasing" or civil liberties activity, they offer little guidance in determining the outcome of cases which fall between these polar extremes. In an effort to solve this problem, the ABA has indicated that it may adopt a rule which would expand the permissible scope of attorney solicitation.

### ABA PROPOSED RULES ALLOWING ADVERTISING BY LAWYERS

In January, 1980, the American Bar Association Commission on Evaluation of Professional Standards circulated a proposed draft for a complete revision of the Model Rules of Professional Conduct. In this proposal are several subsections which have a strong bearing on advertising and solicitation. Proposed Rule 9 is designed to "assist the public in obtaining legal services."<sup>56</sup> Specifically, Proposed Rule 9.2 is directed to permitting public dissemination of information "that directs attention to the need for legal services or which might assist in finding a lawyer."<sup>57</sup> The rule would permit a lawyer to advertise services through various public communications media, such as radio, newspaper, television, direct mailing, and telephone directories.<sup>58</sup> In addition, the advertisement may include lawyer's fees for specific services, names of references, and, with their consent, names of regularly represented clients.<sup>59</sup> The proposed rule is an attempt to codify the *Bates* and *Virginia Pharmacy* mandates that the public be provided with

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55. *Id.* at 477

56. See ABA PROPOSED MODEL RULES OF PROFESSIONAL CONDUCT Rule 9, Introduction (Discussion Draft 1980) [hereinafter referred to as PROPOSED MODEL RULES].

57. See PROPOSED MODEL RULE 9.2, Comment.

58. *Id.* 9.2(a).

59. *Id.* 9.2, Comment.

complete information on the availability, nature, and prices of products and services.<sup>60</sup>

“The First Amendment, . . . [however], does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”<sup>61</sup> Since the adoption of the first Canons of Professional Ethics, the ABA has been concerned with the possibility that unscrupulous lawyers could mislead the public through inflated claims of legal skills.<sup>62</sup> Following the recognition in *Virginia Pharmacy* that freedom of speech is not an unlimited license to talk,<sup>63</sup> all attorney advertisements allowed under Proposed Rule 9.2 will be subject to the requirements of Proposed Rule 9.1, which makes clear that misleading or untruthful speech will not be allowed.<sup>64</sup> These limitations are well within that allowed by the Supreme Court, which has recognized that the *content* of a communication may affect the measure of protection afforded to the speech.<sup>65</sup> As the Court pointed out in *Virginia Pharmacy*, “[s]ome forms of commercial speech regulation are surely permissible. . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake.”<sup>66</sup>

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60. In *Bates*, Justice Blackmun, delivering the opinion of the Court, stated: “[t]he only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, [and] the uncontested personal bankruptcy. ” 433 U.S. at 372.

61. *Virginia Pharmacy*, 425 U.S. at 771-72.

62. See *DRINKER*, *supra* note 1, at 112.

63. 425 U.S. 748. See also *Konigsberg v. State Bar of Cal.*, 336 U.S. 36, 50 (1960).

64. PROPOSED MODEL RULE 9.1 provides:

A lawyer shall not make any false, fraudulent, or misleading statement about the lawyer or the lawyer’s services to a client or prospective client. A statement is false, fraudulent or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not misleading;
- (b) is likely to create an unjustified expectation, or states or implies that the lawyer can achieve results by legally improper means; or
- (c) compares the quality of the lawyer’s services with that of other lawyers’ services, unless the comparison can be factually substantiated.

65. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976).

66. 425 U.S. at 770-71.

## ABA PROPOSED RULES ALLOWING SOLICITATION

As noted above, the Court in *Primus* held that the solicitation of prospective litigants by nonprofit organizations which engage in litigation as a form of political expression and political association is entitled to first amendment protection. In response to this mandate, the ABA has included within its proposal Rule 9.3(b)(3), which permits a lawyer to *initiate contact* with a prospective client if "under the auspices of a public or charitable legal services organization or a bonafide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal services."<sup>67</sup> Clearly this rule goes beyond what was called for in *Primus*, for not only would the provision encompass those organizations who engage in litigation as a vehicle for political expression and association, such as the ACLU and the NAACP, but would also extend to a host of other organizations *whose purposes are not limited to providing or recommending legal services* (e.g., labor unions, college or professional fraternities, and religious organizations). The proposed rule, however, does not specify exactly what relationship the attorney must have to the organization or define *under the auspices*. It invites much abuse by lawyers whose sole purpose in associating with such an "approved" organization is to find a loophole in the rule against in-person solicitation.

There are, however, certain limitations placed upon allowable forms of solicitation. Since the common law originally banned solicitation proponents for the continued ban have asserted that solicitation may harm the client by hindering his free choice in the selection of a lawyer.<sup>68</sup> Recognizing these concerns, the Court in *Primus* took great care in pointing out that the solicitation in that case was allowed to go undisciplined only because there was no overreaching, misrepresentation, coercion, duress, or harassment involved.<sup>69</sup> In light of these considerations, Proposed Model Rule 9.3(a) provides that:

A lawyer shall not initiate contact with a prospective client if: (1) The lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person solicited could not

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67 PROPOSED MODEL RULE 9.3(b)(3).

68. DRINKER, *supra* note 1, at 210-12.

69. 436 U.S. at 434-37.

exercise reasonable judgment in employing a lawyer; (2) the person solicited has made known a desire not to receive communications from the lawyer; or (3) the solicitation involves coercion, duress, or harassment.<sup>70</sup>

Although these provisions will work to bar those forms of solicitation characteristic of harassment, undue influence, and "ambulance chasing," they by no means speak to all of the problems. Advocates for the continued ban on solicitation maintain that the restrictions are necessary in order to avoid the stirring up of litigation.<sup>71</sup> Although Proposed Rule 9.3 does not address this issue, there are other provisions within the Proposed Model Rules which will provide a sufficient hedge against such improper behavior.<sup>72</sup> In any event, however, the United States Supreme Court has indicated that the interest in preventing the "stirring up" of frivolous or vexatious litigation no longer offers a reasonable justification for the discipline administered to the lawyer who solicits.<sup>73</sup>

#### ABA MODEL RULES AND RECENT STATE CASES ON SOLICITATION BY MAIL

The ABA Proposed Model Rules also address the issue of whether and in what situations an attorney may solicit clients by mail. Specifically, Proposed Rule 9.3(b)(2) states that a lawyer may initiate contact with a prospective client "by a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee."<sup>74</sup> The rule clearly extends the scope of protection afforded by *Primus* since it does not require the solicitation to be under the auspices of a non-profit "political" organization. In addition, the

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70. PROPOSED MODEL RULE 9.3(a).

71. The common law referred to this type of behavior as "barratry." See Note, *Advertising, Solicitation, and Prepaid Legal Services*, 40 TENN. L. REV 439, 451 (1973).

72. See, e.g., PROPOSED MODEL RULE 3.2 (mandating a spirit of fairness in dealing with opposing party and counsel), PROPOSED MODEL RULE 2.3 (proscribing the giving of advice to a client concerning wrongful conduct), and PROPOSED MODEL RULE 3.1 (mandating a high degree of candor in the lawyer's representations to a tribunal).

73. See 436 U.S. at 436-37.

74. PROPOSED MODEL RULE 9.3(b)(2).

letter may even concern a specific event, such as a traffic accident; and the purpose of any resulting litigation would not have to amount to a form of "political expression," as was required in *Primus*. However, although *Primus* involved a solicitation by mail, the Court did not specifically address this issue, as the case was decided on the basis of first amendment rights of association and political expression. The issue has been addressed, however, in several post-*Primus* state court decisions.

In *Kentucky Bar Association v. Stuart*,<sup>75</sup> the Kentucky Supreme Court cited *Bates*, *Ohralik*, and *Primus* in holding that a law firm's letter to real estate agencies describing the firm's qualifications, services, and process for title searches and deed and mortgage preparations did not constitute a violation of the Kentucky State Bar Association's rule prohibiting "in-person solicitation,"<sup>76</sup> but rather fell within the confines of constitutionally protected advertisements.<sup>77</sup> In dismissing the complaint, the court stated that the letters did not pose the threats of any of the noted evils of solicitation since there was no pressure or demand which would encourage a person to make a hasty, uninformed decision.<sup>78</sup> The court pointed out that the potential for deception exists in all forms of advertising, not just letters, and the fact that this case was prosecuted demonstrated that the enforcement of ethical standards would not be impossible.<sup>79</sup> This was the rationale used to codify Proposed Model Rule 9.3(b)(2). The reasoning stems from the fact that solicitation by mail appears reasonably subject to control and therefore can be made almost completely free of the potential for overreaching of in-person solicitation.

It should be noted that the letters sent in *Stuart* were of a "generalized" nature, i.e., the letters were not directed to potential clients with an identified present need for legal services. As mailings become more specifically drafted and provide more of a quasi-personal link, however, courts have been less tolerant of them as a form of solicitation. Letters which are directed to targeted potential clients concerning "specific events or transactions" have been held to constitute improper

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75. 568 S.W.2d 933 (Ky. 1978).

76. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A), *supra* note 48 (adopted by the Supreme Court of Kentucky).

77. 568 S.W.2d at 934.

78. *Id.*

79. *Id.*



solicitation.<sup>80</sup>

Although such letters would be allowed under Proposed Rule 9.3(b)(2), it is not clear whether the states would be quick to adopt its provisions. In *Allison v. Louisiana State Bar Association*,<sup>81</sup> the Louisiana Supreme Court reached a holding that was directly antithetical to the ABA proposed codification. In that case, a group of attorneys had mailed to certain employers a letter describing services offered as part of a prepaid employees' "legal plan" which the attorneys were attempting to market. Although there was no direct solicitation to the employees, the court found that there was a "private" solicitation (by letter) to the employer to engage in a specific transaction.<sup>82</sup> Considering the difficulties in regulating the potential for abuse, the court denied the injunctive relief requested by the attorneys that would have prevented the Louisiana State Bar Association from enforcing its disciplinary rule.<sup>83</sup> In addition, the court held that the state's prohibition against direct solicitation of this kind had no adverse impact upon the attorney's first amendment rights.<sup>84</sup>

The *Allison* and *Stuart* cases, however, are distinguishable. The letters in *Allison* were not of a "generalized" nature as they were in *Stuart*; rather, the letters were directed to potential clients with an identified present need for legal services. In addition, the offer in the *Allison* letter was privately made and not in the public domain for all to receive, as in *Bates* (newspaper ad) and *Stuart* (real estate agencies).

New York has also indicated its reluctance to expand the permissible scope of solicitation by mail beyond that of a "generalized" letter. *In re Koffler*<sup>85</sup> concerned a group of attorneys who mailed approximately eight thousand letters to homeowners and real estate brokers.

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80. See, e.g., *In re Lee*, 242 Or. 302, 409 P.2d 337 (1965) (holding as improper a solicitation by letter to represent an accident victim); *Bayton Bar Ass'n v. Herzog*, 173 Ohio St. 313, 181 N.E.2d 880 (1962) (holding as improper the solicitation by mail of individuals who had filed claims for workmen's compensation benefits).

81. 362 So. 2d 489 (La. 1978).

82. *Id.* at 496.

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103 (adopted by the Supreme Court of Louisiana).

84. 362 So. 2d at 496.

85. 70 A.D.2d 252, 420 N.Y.S.2d 560 (App. Div. 1979).

The court stated that it was concerned not because the mail had been used to contact certain interested individuals, but because the "content" of the letters indicated a seeking out of those people interested in a transaction. The court believed that if such letters are sent, there should not be a statement in the letter asking to establish a "personal and private relationship . . . peculiarly geared to a particular legal transaction."<sup>86</sup> As the court pointed out, "[a] member of the Bar must never forget that he is a lawyer first and only then, if proper, an entrepreneur."<sup>87</sup>

#### COMPARISON: RECENT STATE RULES ALLOWING SOLICITATION

Not all states have been as conservative in their approach toward solicitation as have Louisiana and New York. Since *Primus*, several jurisdictions have attempted to codify extremely liberal and controversial rules toward solicitation.<sup>88</sup> The most dramatic revision has been the District of Columbia Court of Appeals' amendment to its Code of Professional Responsibility. Under these newly enacted provisions, solicitation will be prohibited *only* if it involves the use of "false, fraudulent or deceptive claims, if it involves the use of undue influence or if the potential client is apparently in a physical or mental condition that would make it unlikely that he or she could exercise a reasonable, considered judgment as to the selection of a lawyer."<sup>89</sup> These limitations are quite similar to the ABA Proposed Model Rules' limitation on solicitation. The D.C. rules, however, do not require the lawyer to be "under the auspices" of a public, charitable, or legal services organization, that his solicitation be by letter, or that the lawyer not solicit those who make known a desire not to be solicited.<sup>90</sup> This "right to be let alone" was considered by the United States Supreme Court in *Rowan v Post Of-*

86. *Id.* at \_\_, 420 N.Y.S.2d at 573.

87. *Id.* at \_\_, 420 N.Y.S.2d at 575.

88. See Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV 585 (1978).

89. D.C. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A). (Complete text of D.C. Code of Professional Responsibility is reprinted in Welch, *supra* note 88, at 609.)

90. This requirement is included in PROPOSED MODEL RULE 9.3(a)(2), *infra* note 95.

*fice Department.*<sup>91</sup> In that case, a group of direct mail advertisers challenged a federal statute<sup>92</sup> under which an individual could restrain a particular sender from mailing advertisements to his home if he found such mailings to be offensive. In upholding the statute the Court held that a householder has the right to determine what material enters the zone of privacy surrounding his home and refused to allow any greater protection for material consigned to the mail.<sup>93</sup> To do so would be to permit a form of trespass, a result found to be untenable since the Constitution guarantees only the right to speak, not the right to force others to listen.<sup>94</sup>

The D.C. Rule's disregard for the solicited person's right "to be let alone" would permit offensive behavior on the part of some lawyers. For example, in situations where the need for legal services is readily identifiable (e.g., where there has been an automobile accident or a death in the family), the race to be the first lawyer on the scene may be most offensive to the victim or his family. By including limitations, such as rules 9.3(a)(2) and 9.3(a)(3) against forced solicitation, the ABA's proposed rules seek to avoid these kinds of problems.<sup>95</sup>

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91. 397 U.S. 728 (1970).

92. 39 U.S.C. § 4009 (1970).

93. 397 U.S. at 736.

94. *Id.*

95. PROPOSED MODEL RULE 9.3 reads in its entirety:

(a) A lawyer shall not initiate contact with a prospective client if:

(1) the lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person solicited has made known a desire not to receive communications from the lawyer; or

(3) the solicitation involves coercion, duress, or harassment.

(b) Subject to the requirements of paragraph (a), a lawyer may initiate contact with a prospective client in the following circumstances:

(1) if the prospective client is a close friend or relative of the lawyer;

(2) by a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee; or

(3) [under the auspices] of a public or charitable legal services organization or a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal service.

(c) A lawyer shall not give another person anything of value to initiate contact

The District of Columbia, however, is not alone in its liberal approach toward attorney solicitation. In 1978, the Board of Governors of the California State Bar tentatively approved a change in its Rules of Professional Conduct to permit in-person solicitation. The twelve to six vote tentatively adopted a rule change very similar to that of the District of Columbia. Once finally approved, California lawyers may seek out clients and offer to represent them in specific cases *unless*

the statements the lawyer makes are false, misleading or tend to confuse the client; the potential client is in such a physical, mental or emotional state that he or she would not be expected to exercise reasonable judgment in hiring a lawyer; or the lawyer's approach to the client involves any kind of intrusion, coercion or harassment.<sup>96</sup>

With this last provision, the California rule is very similar to the ABA proposed rule. It is noteworthy that this influential jurisdiction has gone as far as it has toward adopting a rule which is no less radical than the ABA's proposed rule.<sup>97</sup>

The ABA rules would prove a better guide than the District of Columbia or California rules in determining the legality of solicitations falling between these two poles, but all three attempts can be seen as providing some assistance. All three require that the solicitation be truthful and presented in a noncoercive, nondeceitful manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation. In the average case where honest unpressured commercial solicitation is involved, i.e., in a situation not presented in either *Primus* or *Ohralik*, these three attempts will serve their States' interests in protecting the public, while avoiding those sweeping nonsolicitation rules which only prevent the free flow of information.

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with a prospective client on behalf of the lawyer.

96. St. B. of Cal. Rep., Aug. 1978, at 1.

97 One lawyer-member of the California Board of Governors, who voted for the proposal, commented: "[i]t is about time we give the little guy a chance to hustle and get a little business." *Id.* at 6-7

## INDICATION OF SPECIALIZATION IN ADVERTISEMENT SOLICITATION

Although the current ABA Disciplinary Rules prohibit a lawyer from holding himself out as limiting his practice to specified areas of law, the ABA has recently adopted the position that indications of specialization are useful in assisting the public in obtaining information about legal services<sup>98</sup> and are deserving of first amendment protection.<sup>99</sup> According to Proposed Rule 9.4(b), a lawyer whose practice is limited to a specified area of law may communicate that fact in accordance with the provisions on designation of the particular state.

Seven states currently have specialization programs which permit the lawyer to be "certified" or "designated" in more than one field of law if he meets the established standards.<sup>100</sup> Florida's "designation" program is the current proposed model for most other states.<sup>101</sup> It requires, among other things, the designation of certain board-approved areas of specialty, a minimum of three years practice of law, and substantial experience in the designated specialty area. In addition, no more than three areas of specialty can be designated, and renewal of the right to designate is required every three years.

The "certification" programs alluded to in ABA Proposed Rule 9.4 have their genesis in the pilot programs adopted in Texas, California and Arizona.<sup>102</sup> These programs are limited to only a few areas of law and require recertification, peer ratings, continuing education, specific practice time requirements in the area of specialty, and most importantly, an examination. "Certification" plans obviously involve a more demanding procedure for recognition of specialization than do "designation" plans. This is due to the obvious fact that the states have a different definition of, and different standards for, specialization. This is the reason why Rule 9.4(b) of the ABA Proposed Model Rules re-

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98. See ABA COMM. ON ADVERTISING AND SPECIALIZATION DISCUSSION DRAFT, 35 BUS. LAW. 303 (1979).

99. ABA COMM. ON SPECIALIZATION, INFORMATION BULL. NO. 4 at 8 (Report to the House of Delegates Feb. 1978).

100. *Id.* The states are Florida, Iowa, New Mexico, Connecticut, Arizona, California, and Texas.

101. FLA. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-105.

102. Implemented in 1971, 1975, and 1976 respectively. See Committee Notes, *supra* note 99.

quire the particular state to insert its own provisions of specialization, and therein lies its greatest fault, i.e., the failure to provide uniform standards for attorney specialization programs.<sup>103</sup> The ABA should have included within its proposal some form of compromise specialization plan or choice of plans which would involve elements of both "certification" and "designation." The states, of course, would not be bound to adopt this ABA Model Rule, but at least the states would have some national guide as to how to model their own rules. This is, after all, the purpose of the Model Rules. By leaving Rule 9 4(b) in its present form, however, the ABA will be inviting much confusion as states choose between countless variations of the Florida and California plans.

### CONCLUSION: THE STATES ARE FREE TO CHOOSE

In response to the recent Supreme Court decisions of *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* and *Bates v State Bar of Arizona*, granting commercial speech (which includes attorney advertising) first amendment protection, the ABA has proposed a complete revision of their Model Rules of Professional Conduct. The Proposed Rules are extremely liberal with respect to their applicability to attorney advertising, more than satisfying the mandate in *Bates* that information which brings the public's attention to the need for legal services flow freely. The limitations in the Proposed Rules facilitate this mandate by proscribing only those advertisements which contain misrepresentations or unjustified statements concerning the quality of a lawyer or his services.

The Proposed Rules, however, are more restrictive in their regulation of attorney solicitation. This is due to the greater potential for abuse in permitting a lawyer, a professional trained in the art of persuasion, to initiate in-person contact with a prospective client. The constitutionality of this position is well established, considering the Supreme Court's recognition in *Ohralik v. Ohio State Bar Association* that for purposes of constitutional analysis, in-person solicitation is not equivalent to advertising, and that the State may regulate in-person

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103. Even proponents of bar-operated specialization plans recommend the establishment of uniform national and regional education programs to assist the public in interpreting these designations. See ABA COMM. ON SPECIALIZATION, INFORMATION BULL. No. 5 (Sept. 1978).

solicitation for pecuniary gain under those circumstances likely to result in adverse consequences.<sup>104</sup>

However, the Proposed Rules are still quite liberal in their approach, going beyond the Supreme Court's mandate in *In re Primus*, allowing solicitation as a means of political expression, by permitting an attorney to solicit if done "under the auspices" of a bar-approved organization, and not limiting the organization or the attorney to a strictly non-profit motive. In addition, the Proposed Model Rules would permit an attorney to solicit by mail even though not done under the auspices of a bar-approved organization. Although several states have indicated a willingness to permit solicitations of this nature, most have required that the content of the solicitation be of a generalized nature and not restricted to a specific event or circumstance.

It appears, nonetheless, that the ABA Proposed Model Rules will be considered, in large part, acceptable to many states. Two influential jurisdictions, California and the District of Columbia, have recently adopted solicitation rules which are even more liberal than the Proposed Model Rules. This trend will, in all probability, continue until a more sensible code is adopted which will permit more liberated forms of advertising. That code will in all likelihood have a form quite similar to the ABA Proposed Model Rules.

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104. 436 U.S. at 462.