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**Attorney Advertising - First Amendment - Pennsylvania Code of Professional Responsibility - Model Rules of Professional Conduct**

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ATTORNEY ADVERTISING—FIRST AMENDMENT—PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY—MODEL RULES OF PROFESSIONAL CONDUCT—A federal court for the Eastern District of Pennsylvania has held that portions of the Pennsylvania Code of Professional Responsibility relating to attorney advertising are violative of the first amendment to the United States Constitution.


W. Boyd Spencer III, an attorney admitted to practice law in Pennsylvania, initiated a § 1983 action in the United States District Court for the Eastern District of Pennsylvania seeking a declaratory judgment that several provisions of the Pennsylvania Code of Professional Responsibility were unconstitutional. He also sought to enjoin their future enforcement. Spencer, a certified pilot, held a master's degree in computer science along with his license to practice law. Spencer wished to utilize advertisements and direct mailings to convey these credentials both to the general public and to specific segments of the populations.

Judge Lord, ruling upon the declaratory judgment, first acknowledged Spencer's contentions that portions of the Code prohibiting the desired advertising violated the first and fourteenth amendments of the United States Constitution as unfairly limiting the content as well as the time, place and manner of lawyer advertising and/or solicitation. Judge Lord then briefly addressed the state's assertion that Spencer lacked standing in that he failed to raise a justiciable case or controversy. Judge Lord remarked that Spen-

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
2. 579 F. Supp. at 882.
3. Id.
4. Id.
5. Id. U.S. Const. amend. I; XIV, § 1.
cer's position took on significance in light of the fact that his
claims would have been decided by the very court that maintained
the constitutionality of the rules. He then concluded that Spencer
had the requisite personal stake in the suit, and that there was a
substantial controversy between parties who had adverse legal
interests.

Judge Lord, resolving the constitutionality of the challenged dis-
ciplinary rules, noted that first amendment protection was earlier
extended to commercial speech in Virginia Pharmacy Board v.
Virginia Consumer Council, and later enveloped lawyer advertis-
ing in Bates v. State Bar of Arizona. The consumer's right to
receive useful information, according to Judge Lord, was one value
sought to be vindicated in Bates, which also held that fraudulent,
deceptive or misleading advertising would not be protected. De-
spite the protection afforded a newspaper advertisement for lawyer
services in Bates, Judge Lord noted that such protection had been
specifically denied to in-person solicitation by lawyers in another
Supreme Court ruling, Ohralik v. Ohio State Bar Association. Judge Lord
maintained that in-person solicitation, unlike newspaper
advertising, has the potential to create situations involving co-
ercion, undue influence, intimidation or overreaching, the preven-
tion of which is within the legitimate interests of the state and
permits it to regulate a lawyer's conduct. Judge Lord thus con-
cluded that although certain commercial speech is protected, some
state regulation is permitted.

standing, one must possess a "personal stake in the outcome of the controversy [which as-
sures] concrete adverseness which sharpens the presentation of issues..." 579 F. Supp. at 883. See Baker v. Carr, 369 U.S. 186, 204 (1962). Judge Lord observed that it must be
also noted that the threatened prosecution must be more than "imaginary or speculative." 579 F. Supp. at 883. See Steffel v. Thompson, 415 U.S. 452, 459 (1974).
7. 579 F. Supp. at 884. See Adler v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978), ap-
declaring that it was prohibited unprofessional conduct for licensed pharmacists to advertise
the price of prescription drugs. Id. at 771-73.
10. 433 U.S. 350, 384 (1977) (prohibition of newspaper advertisement of lawyer's fees
and services which were neither fraudulent nor misleading held unconstitutional). See also infra notes 54-69 and accompanying text.
11. 579 F. Supp. at 885.
Judge Lord allotted special attention to *Central Hudson Gas and Electric Corp. v. Public Service Commission*,\(^{16}\) which clarified the scope of first amendment protection afforded commercial speech and emphasized the importance of an informed public.\(^{16}\) The *Central Hudson* court determined that since the function of commercial speech is to inform, the government can prohibit false and misleading advertising.\(^{17}\) Any regulation of commercial speech which is *not* misleading, according to the *Central Hudson* court, must advance a substantial state interest and must be narrowly drawn.\(^{18}\)

Judge Lord noted that the first case challenging regulation of attorney advertising and solicitation that applied the *Central Hudson* test was *In Re R.M.J.*.\(^{19}\) In that case the Missouri disciplinary rules were held unconstitutional, as the advertisement in question was found not to be misleading and no substantial state interest was advanced that would justify the regulation.\(^{20}\) Judge Lord observed that although the Court found that the direct mailings undertaken by the petitioner constituted a "troubling issue," the state failed to show that it was unable to supervise the mailings, thereby making a complete ban on the activity constitutionally prohibited.\(^{21}\)

Judge Lord addressed Spencer's first contention that Disciplinary Rule (DR) 2-101(A)\(^{22}\) unfairly prevented him from using the word "experienced" in his advertising as related to his position as

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16. Id. at 562.
17. Id. at 563.
18. Id. at 564. To determine whether a regulation violated first amendment rights, the *Central Hudson* Court proposed submitting the regulation to a four part test. The test consists of determining: (1) whether the commercial speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interests asserted; and (4) whether the regulation is more extensive than is necessary to serve that interest. Id. at 566.
19. 455 U.S. 191 (1982). In *In re R.M.J.*, a lawyer had mailed announcement cards to a selected group of people and had advertised in the newspaper and the yellow pages, stating the jurisdictions in which he was admitted and the areas of his practice. Id. at 196-97. See also infra notes 95-105 and accompanying text.
21. Id. The court in *In re R.M.J.* indicated that submission of a copy of the proposed advertisement to an advisory committee would be one method of supervision less restrictive than a complete ban. Id. See *In re R.M.J.*, 455 U.S. at 206.
22. 579 F. Supp. at 857. Section (A) provides: "No lawyer shall engage in, utilize, or allow any form of advertising that is knowingly false, fraudulent or misleading." Code of Professional Responsibility DR 2-101(a), 42 PA. CONS. STAT. ANN. (Purdon 1984).

The provisions of the disciplinary code found unconstitutional by the court were suspended shortly thereafter by the Pennsylvania Supreme Court. See infra note 106.
a pilot and computer programmer. Judge Lord agreed with the state, however, that words such as "experienced" were subjective and misleading by nature. Citing Bates and Bishop v. Committee on Professional Ethics, Judge Lord reaffirmed the position that the state possesses a substantial interest in the professional standards of lawyers. He then emphasized that consumers had to be protected by the state against misstatements caused by subjective descriptions of the quality of a lawyer's services. Judge Lord went on to note that subjective claims, such as "experienced" or "competent" were difficult to measure or verify and could easily be applicable either to a lawyer who handled a small number of a particular type of case, or a lawyer who handled substantially more of the same type of case. Judge Lord concluded that Spencer could convey his particular skills both as a pilot and a lawyer in a more objective manner. Judge Lord thus determined that prohibition of a subjective term, such as "experience," worked to advance a substantial state interest and was not more extensive than necessary.

Judge Lord next addressed Spencer's challenge of the constitutional validity of DR 2-103(A) and DR 2-104(A) which provided for a blanket ban on lawyer solicitation. The intended solicitation by Spencer was direct mailing to those whom he learned were pos-

23. 579 F. Supp. at 887. DR 2-102(D) and 2-102(E), concerning the advertising by an attorney that he practices another profession in addition to practicing law, were considered nonjusticiable, since the state agreed that these rules did not prohibit such advertising so long as it was not false, fraudulent or misleading. 579 F. Supp. at 887 n.7.


25. Id. See also supra note 10.


27. 579 F. Supp. at 887-88. According to Judge Lord, Spencer could objectively convey his experience as a pilot by indicating the hours flown and his certification by the Federal Aviation Administration. He could also objectively convey his experience as a lawyer by indicating his years in practice or the number of cases handled. Id.

28. Id. at 888. See Central Hudson, 447 U.S. at 566.

29. 579 F. Supp. at 888. Section (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." CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A), 42 PA. CONS. STAT. ANN. (Purdon 1984).

30. 579 F. Supp. at 888. Section (A) 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 . . . ." CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A), 42 PA. CONS. STAT. ANN. (Purdon 1984).

31. 579 F. Supp. at 888. Spencer's challenge to DR 2-103(C) was held non-justiciable since the state maintained that this rule did not prevent uncompensated third parties, with whom Spencer had contact, from recommending his services. Id. at n.8.
sibly in need of legal assistance and were at the same time participants in his areas of interest. Judge Lord acknowledged the state's explanation that direct mailing was allowed as long as it did not constitute solicitation, but nevertheless maintained that the state had failed to demonstrate how and when direct mailing crosses from advertising to solicitation. This failure, Judge Lord asserted, did not give Spencer the requisite notice as to what conduct was prohibited. Therefore, in light of DR 2-101(A), which permitted all but fraudulent and misleading advertising, Judge Lord found the challenged disciplinary rules involving solicitation to be unconstitutionaly vague.

Judge Lord also maintained that, in addition to being prohibitively vague, the challenged disciplinary rules concerning direct mail solicitation did not pass the four part test of Central Hudson. Judge Lord first pointed out that the blanket ban on all direct mail solicitation necessarily encompassed both protected and unprotected speech and was thus violative of the first amendment, but continued on to apply the remaining portions of the Central Hudson test, which he stated were applicable to advertising which was neither false nor misleading. The state had advanced three interests in order to legitimize the regulation of mail solicitation: (1) protecting the public from invasion of privacy; (2) protecting the public from undue influence and overreaching; and (3) protecting the public from conflicts of interest. Judge Lord maintained that protection from invasion of privacy was not a substantial state interest. He further concluded that protecting the public from undue influence and overreaching was a substantial interest, but nevertheless held that a total ban on direct mailing could not be justified. Finally, although Judge Lord found protection from

32. 579 F. Supp. at 888.
33. Id.
34. Id. See Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).
35. 579 F. Supp. at 888. For the text of DR 2-101(A), see supra note 22.
36. 579 F. Supp. at 889.
37. Id. Judge Lord conceded that some direct mail solicitation may be misleading and that the state possessed a substantial interest in protecting the public from such deception, but still held that the state cannot prohibit both protected and unprotected speech. Id.
38. Id.
39. Id. at 890. Judge Lord recognized that while in-person solicitation necessarily involves a captive audience, those who receive direct mail solicitations are by contrast free to discard them. He therefore concluded that protection of the public from invasion of privacy was not a substantial state interest. Id. at 890 n.13.
40. Id. at 890. Additionally, Judge Lord determined that the forces of in-person solicitation—pressure, intimidation, lack of time for response, reflection or education—were not
conflicts of interest to be as a substantial interest, he also found that the state had failed to show how such a conflict could occur. Still, Judge Lord held that the state could regulate direct mail solicitation when an actual conflict could be identified.\(^\text{41}\)

Judge Lord next addressed Spencer's challenge of the disclaimer requirement of DR 2—105(B).\(^\text{42}\) Judge Lord discerned as the state interest in the disclaimer requirement the importance of preventing the general public from construing the advertisement as an implied assertion of expertise or specialization, this conclusion being reached in light of Pennsylvania's refusal to recognize specialists.\(^\text{43}\) Judge Lord noted that Spencer had contended that a strong disclaimer of certification or recognition of the lawyer as a specialist may itself be misleading.\(^\text{44}\) Judge Lord acknowledged that a disclaimer requirement concerning lawyer advertising can prevent misleading advertising,\(^\text{45}\) but nonetheless found the Pennsylvania requirement to be more extensive than necessary since compliance with such a requirement could conceivably give rise to the negative inference that those advertising and using a disclaimer were not certified or recognized specialists, while others not advertising were.\(^\text{46}\) Judge Lord then ruled that the challenged disciplinary rule present in direct mail solicitation, since the recipient was not under pressure or intimidation and had time for reflection and education. Further, the state failed to persuasively enumerate situations involving susceptible recipients and, even if such recipients were identifiable, any absolute prohibition would be too broad. \(^\text{Id.}\)

41. \textit{Id.} See Greene v. Grievance Comm., 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), cert. denied, 455 U.S. 1035 (1982). Judge Lord indicated that the regulation must only extend to action necessary to prevent the conflict of interest. Reasoning that direct mail solicitation provided the public with valuable information, and recognizing the constitutional protection of this public interest, the potential problem of an increase in litigation caused by direct mailing was held not to be of sufficient weight to ban the action. 579 F. Supp. at 890-91. See Bates, 433 U.S. at 376; \textit{In re Primus}, 436 U.S. 412, 436-37 (1978).

42. 579 F. Supp. at 891. Section (B) provides:

A statement, announcement, or holding out as limiting practice to one or more particular fields of law or as concentrating practice in one or more particular fields of law does not constitute a violation of DR 2-105(A) if the statement, announcement or holding out is factually correct and clearly states that the lawyer or law firm is not recognized or certified as a specialist in the field or fields of law in which the lawyer or law firm limits or concentrates its practice; provided, however, no such disclaimer of recognition or certification shall be required of the lawyer or law firm if the publication in which the statement, announcement or holding out appears contains general information to the same effect.

\textbf{CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(B), 42 PA. CONS. STAT. ANN. (Purdon 1984).}

43. 579 F. Supp. at 891 n.18.

44. 579 F. Supp. at 891.


46. 579 F. Supp. at 891-92. Judge Lord also believed that fear of such an inference
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was not the least restrictive means for the state to protect the public interest and thus held that it was violative of the first amendment.\(^47\)

In conclusion, Judge Lord addressed Spencer's challenge of the constitutionality of DR 2-105(A)(3).\(^48\) Spencer's objections, Judge Lord noted, were that under this rule he was unfairly limited to merely informing other lawyers of his availability to be a consultant in particular areas, and that the requirement that the advertisement be "dignified" was unconstitutionally vague.\(^49\) In response, Judge Lord first maintained that the asserted state interest in protecting the reader of the advertisement was not tenable, since the targets of the advertisement were other lawyers.\(^50\) Although agreeing with Spencer's first argument, Judge Lord took a different view concerning the alleged vagueness of the "dignified" requirement, maintaining that such a requirement indicated that the lawyer was to use caution in his advertisements, further advancing the state's legitimate interest in maintaining a positive image of the legal profession.\(^51\) Judge Lord thus found that the section did not violate the constitution.

Judge Lord then directed that relief be given to Spencer, granting his motion for summary judgment to the extent of those provisions of the code found to be unconstitutional.\(^52\) Injunctive relief, however, was denied.\(^53\) Spencer thus worked to invalidate some, but not all, of the challenged Pennsylvania disciplinary provisions.

One of the earliest cases with significant impact on the issue of lawyer advertising was Bates v. State Bar of Arizona,\(^54\) in which could cause the advertising lawyer to forego advertising otherwise useful information concerning his practice. \(\text{Id. at } 892.\)

\(^{47}\) \(\text{Id. at n.19.}\)

\(^{48}\) 579 F. Supp. at 892. Section (A)(3) provides, in pertinent part:
A lawyer shall not hold himself out publicly as, or imply that he is a recognized or certified specialist, except as follows: [a] lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience.

\text{CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(3), 42 PA. CONS. STAT. ANN. (Purdon 1984).}

\(^{49}\) 579 F. Supp. at 892.

\(^{50}\) \(\text{Id.}\)

\(^{51}\) \(\text{Id.}\)

\(^{52}\) \(\text{Id. at } 893.\)

\(^{53}\) \(\text{Id.}\)

\(^{54}\) 433 U.S. 350 (1977). \(\text{See supra note } 10.\) For analysis and discussion of Bates, see Boden, \text{Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective, } 65
the blanket prohibition of lawyer advertising as set forth in the Arizona disciplinary code was challenged. Bates, an attorney, had placed an advertisement in an Arizona newspaper announcing the establishment of a "legal clinic" and stating the cost of certain routine legal matters. Because this advertisement was violative of DR 2-101(B), the Arizona Supreme Court ruled that Bates was to be publicly censured. On appeal, however, the United States Supreme Court, in an opinion by Justice Blackmun, took special notice of the dissent filed by Justice Holohan of the Arizona Supreme Court. Justice Holohan had maintained that the consumers' right to information was paramount and that regulation of lawyer advertising should be limited to advertisement that was deceptive or misleading. The Bates court essentially adopted the view of Justice Holohan's dissent. This view echoed one previously espoused by the Court in the area of commercial speech in Virginia Pharmacy Board v. Virginia Consumer Counsel.

The issue decided in Bates was narrow, dealing specifically with an attorney's right to advertise prices of routine services. The various reasons offered to the Court for upholding a complete ban on lawyer advertising were found untenable. The Court found that advertising services would not turn a lawyer into a "hustler" in the marketplace, nor lead inevitably to misleading the public. Further side notes are as follows:


56. 433 U.S. at 354. The routine matters involved standard services, such as uncontested divorces, uncontested adoptions, name changes and simple personal bankruptcies. Id.

57. Id. at 355. Section (B) provided, in pertinent part, that:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisement in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.


58. 433 U.S. at 356-58.

59. Id. at 358.

60. Id.


62. 433 U.S. at 367-68. The Court specifically decided not to address the issues of advertising concerning quality of legal services or in-person solicitation. Id. at 366.

63. Id. at 368-75. With respect to the argument concerning the inevitable appearance of misleading advertising, the Court determined that unique services applicable to only a very specific populous would, in all probability, not be advertised. Further, the Court doubted that consumers would be induced to retain an attorney merely because services were advertised. Finally, the Court observed that advertising cannot provide a complete foundation upon which to select an attorney, since no advertisement can completely address
ther, an increase in litigation or an increase in cost of lawyer services to the consumer seemed dubious reasons for prohibiting all lawyer advertising. Finally, neither poor work quality by the lawyer nor practical difficulties in overseeing advertising offered enough substance to uphold the complete ban.

Despite the Supreme Court's rejection of the proffered justifications for upholding the total ban on lawyer advertising, some regulation in this area was permitted. In particular, advertising that was false, fraudulent or misleading, along with advertisements which encouraged criminal activity, were held to be subject to restraint.

Chief Justice Burger's concurring and dissenting opinion in Bates emphasized the problem of what constituted "routine" services, an issue which he believed the Court had ignored. Because of the undefined nature of the term "routine," according to Chief Justice Burger, incomplete information could be given to the public in some advertisements that would be more harmful than the Court was willing to admit.

Justice Powell, in a separate dissent, disagreed with the Court's reliance on Virginia Pharmacy. In the latter case, Justice Powell asserted, the Court ruled on price advertising for standardized, fungible drug products, a commodity quite different from the individual services offered by lawyers. The type of advertising now permitted by Bates, he concluded, lent itself to deception and ineffective regulation. Justice Powell concluded that bar associations on the state and national level, and not individual lawyers, should undertake to inform the public of services available.

Although Bates opened the door for lawyer advertising, certain

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64. Id. at 376-78. On the contrary, the Court maintained, increased advertising could prevent an injured party from suffering needlessly and could very well result in lower prices for the consumer because of increased competition. Id.

65. Id. at 378-79. The Court observed that advertising would not prevent shoddy work by a lawyer predisposed to offering such work product nor would the volume of advertising lawyers prevent competent supervision by a disciplinary agency. Id.

66. Id. at 383-84.

67. Id. at 387 (Burger, C.J., concurring and dissenting).

68. Id. at 350, 390-91 (Powell, J., concurring and dissenting). Justice Powell observed that the individual services required of any lawyer when confronted by a legal problem operated to prohibit totally accurate price advertising for "routine" services. He further stated that the sheer volume of lawyers and diversity of jurisdictions could prohibit effective regulation of advertising. Id. at 392.

69. Id. at 398.
conduct was still subject to restraint, as indicated in the Supreme Court's consideration of *Ohralik v. Ohio State Bar Association.*\(^{70}\) *Ohralik* involved in-person solicitation, an issue deliberately not addressed in *Bates.*\(^{71}\) In *Ohralik,* the petitioner-attorney, upon hearing of an automobile accident, appeared at the home of the 18 year old driver offering legal assistance. The attorney, Ohralik, subsequently visited the driver in her hospital room and also visited her passenger on the day of her release from the hospital. Ohralik secured acquiescence from both women to his representation of them and to a contingent fee agreement.\(^{72}\) Because of this solicitation, violative of DR 2-103(A) and DR 2-104(A), the Supreme Court of Ohio ordered that Ohralik be indefinitely suspended.\(^{73}\)

In affirming the Ohio court's ruling, the Court identified as the critical distinction between *Bates'* and Ohralik's conduct the inherent pitfalls of in-person solicitation, the Court concluding that such activity was by its very nature productive of coerced and harried decisions.\(^{74}\) In terms of regulatory propriety, the court continued, the state was able to advance stronger legitimate interests against in-person solicitation than against a general advertisement scheme: the state clearly must protect the public from coercive, fraudulent and intimidating tactics by the legal profession.\(^{75}\) In so doing, the court continued, the state need not await actual injury by some member of the populace from the solicitation.\(^{76}\) The purpose of the solicitation ban was preventive in nature, meant to deter invasion of a person's privacy by a lawyer seeking purely monetary gain.\(^{77}\)

At the opposite end of the solicitation scale was similar conduct

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72. 436 U.S. at 449-52. Both women later attempted to discharge Ohralik. The driver, however, was forced to pay Ohralik one third of her ultimate recovery as settlement of his suit against her for breach of contract. *Id.* at 452 n.5.

73. *Id.* at 454. For the text of DR 2-103(A) and DR 2-104(A), see supra notes 29 and 30. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio had recommended only public reprimand. 436 U.S. at 454.

74. *Id.* at 457.

75. *Id.* at 462.

76. *Id.* at 464.

77. *Id.* at 464-65. In the words of the Court, "the Rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert." (emphasis added). *Id.* at 464.
in *In Re Primus*, the companion case of *Ohralik*. Justice Powell, delivering the opinion of the Court, classified the attorney’s conduct as political expression, protected by the first and fourteenth amendments because of its associational character.

Primus, an attorney with the American Civil Liberties Union (ACLU), was called to Aiken County, South Carolina to review the possibility of a lawsuit, after it had been discovered that, as a condition for continuance of medical assistance under the Medicaid program, various women in that county were being sterilized. After her visit, Primus wrote a letter to one particular woman who Primus believed was interested in initiating the suit. Primus advised the woman that the ACLU offered free legal assistance to any woman who had been sterilized and who wished to file suit.

As a result of her letter, Primus was charged with violating DR 2-103(D)(5)(a) and DR 2-104(A)(5), prohibiting solicitation. Thereafter, the Supreme Court of South Carolina entered an order imposing a public reprimand, which was subsequently overruled by the Supreme Court.

The Court in *Primus* rested its decision on a previous rationale espoused in *NAACP v. Button*. The Court found that the conduct in the latter case was political in nature, with its aim the advancement of political ideas and beliefs. This aim, the *Primus* court held, was precisely that possessed by the petitioner. Like the NAACP in *Button*, the ACLU was found by the court to do more than merely represent legal claims. Rather, the ACLU carried on extensive educational and lobbying efforts and represented many unpopular claims. Although the ACLU may be awarded counsel fees, the Court pointed out, such awards go to the main...

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78. 436 U.S. 412 (1978). For analysis and discussion of *Primus*, see supra note 70.
79. 436 U.S. at 414.
80. *Id.* at 414-17. The woman whom Primus was alleged to have solicited eventually released her doctor of all liability and failed to participate in any suit concerning the sterilization. *Id.* at 417.
81. *Id.* at 418-20 nn.10-11.
82. 436 U.S. at 421. The Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina had recommended only a private reprimand. *Id.*
83. 371 U.S. 415 (1963). In *Button*, staff attorneys for the NAACP joined with its affiliates to offer legal advice concerning racial discrimination to a group of prospective litigants. *Id.* at 415-16.
84. 436 U.S. at 422-26.
85. *Id.* at 422. In the words of the Court, “her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain.” *Id.*
86. 436 U.S. at 427-28.
treasury of the ACLU and are usually subject to court approval.87 Thus, any financial gain by Primus was found not to be personal and probably not as remunerative as any that might have been realized in a case such as Ohralik. Finally, because of the Court’s determination that Primus’ conduct was primarily political and associational in nature, any regulation affecting it was constitutionally required to be narrowly drafted. The disciplinary rules under consideration, which provided for complete prohibition of solicitation, were thus found to sweep too broadly.88

Justice Marshall filed one opinion for both Ohralik and Primus, concurring in both outcomes. Justice Marshall, however, expressed some reservation, since he saw these two cases as opposite ends of a spectrum.89 He asserted that the ban on solicitation hindered the flow of important information to those who needed it—consumers. Further, it hindered the ability of sole practitioners from advancing their practice.90 Therefore, if the questioned solicitation fell into neither category advanced by Ohralik or Primus, but rather was “honest, unpressured ‘commercial’ solicitation,” Justice Marshall did not believe that it should be subject to restraint.91

Justice Rehnquist, meanwhile, dissented in both Ohralik and Primus, maintaining that the “constitutional inquiry must focus on the character of the conduct . . . and not on the motives of the individual lawyers or the nature of the particular litigation involved.”92 Justice Rehnquist claimed that because the Court in Primus seemed to rest its decision on the political activity of the ACLU, any lawyer now charged with solicitation will clothe the involved controversy in political garb.93 The distinction between the two cases, according to Justice Rehnquist, was unnecessary; rather, the state should be left to determine when solicitation interferes with the state’s legitimate interest of protecting consumers from

87. Id. at 428-30.
88. Id. at 432-33. The key to determining whether the conduct is in-person solicitation or political activity is the nature of the conduct. Ohralik involved a purely commercial venture resulting in possible large pecuniary gain to the attorney. See Ohralik, 436 U.S. at 467-68. The activity in Primus, on the other hand, offered little pecuniary gain to the individual lawyer; rather, it advanced political beliefs. See Primus, 436 U.S. at 422. The latter was, of course, entitled to greater protection than the former. Id. at 437-38.
90. Id. at 473-76.
91. Id. at 476.
93. Id. at 442.
coercive activity by lawyers.\textsuperscript{94}

A significant case decided after the complete ban on lawyer advertising was lifted in \textit{Bates}, was \textit{In Re R.M.J.}\textsuperscript{95} The Missouri disciplinary rules, revised after \textit{Bates}, allowed limited advertising by lawyers.\textsuperscript{96} The limitation permitted only certain categories of information and the use of specific language.\textsuperscript{97} The rule further limited the advertising lawyer to the use of specific descriptive categories, if the lawyer chose to list the areas of his practice. Additionally, the use of a disclaimer of expertise was required in the advertisement.\textsuperscript{98} Finally, there was a disciplinary rule limiting the mailing of announcement cards to specific groups of people.\textsuperscript{99}

The attorney in \textit{In Re R.M.J.} violated the disciplinary rules in three advertisements which contained language not in accordance with that required by the rules, and which also listed the courts in which he was admitted to practice. In at least two of the advertisements, the attorney failed to include the disclaimer requirement. Additionally, the lawyer mailed announcement cards to persons other than those specifically permitted by the rules.\textsuperscript{100} Despite the attorney's contention that, aside from the disclaimer requirement, the disciplinary rules violated the first and fourteenth amendments, the Supreme Court of Missouri ordered that a private reprimand be imposed. Two justices of the court dissented, however, maintaining that the charges should have been dismissed.\textsuperscript{101}

On appeal, a unanimous U.S. Supreme Court reversed the Missouri court, essentially summarizing the \textit{Bates} decision which permitted regulation of advertising that was false, misleading or fraudulent. Additionally, the Court noted that a state may regulate...
other forms of commercial speech which are not misleading if a substantial state interest is advanced.\textsuperscript{102} In applying this test to the case before it, the Court did not find the lawyer's use of descriptive categories not designated in the rules to be misleading. Indeed, they were viewed as more precise than those categories listed in the rules.\textsuperscript{103} Although the attorney advertising his admission to the Bar of the U.S. Supreme Court was considered somewhat tasteless, it was not found to be misleading. Neither was the lawyer's indication of the state bars in which he was admitted. In fact, the information, at least as to state bar admittance, was deemed highly relevant by the Court, which found that the state court had failed to articulate substantial state interests to legitimate the regulation of this activity.\textsuperscript{104} Finally, the restriction on the mailing of announcement cards to specified groups was deemed violative of the first and fourteenth amendments. The Court drew this conclusion from the lack of evidence in the record that a less restrictive method of supervision had even been attempted.\textsuperscript{105}

If the present Code of Professional Responsibility is maintained in Pennsylvania, the advertising, solicitation and disclaimer regulations contained in the Code must be amended to reflect the holding in \textit{Spencer}.\textsuperscript{106} The Pennsylvania Supreme Court, however, has

\begin{footnotesize}
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    \item 102. \textit{Id.} at 199-203. \textit{See Central Hudson}, 447 U.S. at 563-64.
    \item 103. 455 U.S. at 205. \textit{See supra} note 100.
    \item 104. \textit{Id.} at 205-06.
    \item 105. \textit{Id.} at 206. Because the attorney did not challenge the constitutionality of the disclaimer requirement, it was not addressed by the Court. \textit{Id.} at 204 n.18.

After \textit{Spencer}, the Pennsylvania Supreme Court issued a suspension order affecting the challenged rules. That order was dated April 26, 1984, and provides in pertinent part, as follows:

1. To the extent that notice of proposed rule-making would be required by Rule 103 of the Pennsylvania Rules of Judicial Administration or otherwise, the suspension of the following Rules of disciplinary enforcement pending their deletion, amendment or reinstatement is hereby found to be required in the interest of justice.

2. DR 2-102(D) is suspended and the conduct sought to be regulated thereby shall be governed during the effect of this Order by DR 2-101(A) and any other applicable disciplinary rule.

3. DR 2-103(A) is suspended insofar as it may be interpreted to prohibit advertising whether by direct mail or otherwise which is not violative of DR 2-101(A) or which is not intended to appeal to a person or persons of impaired judgment or reason.

4. DR 2-104(A) is hereby suspended.

5. DR 2-105(B) is hereby suspended and the conduct sought to be regulated thereby shall be governed during the effect of this Order by DR 2-105(A) and any other appli-
\end{itemize}
\end{footnotesize}
pending before it the adoption of the Model Rules of Professional Conduct (MRPC), as adopted by the American Bar Association, which already contain revisions of the relevant Pennsylvania Code provisions.\textsuperscript{107}

cable disciplinary rule.

6. DR 2-105(A) is hereby suspended insofar as it may be interpreted to prohibit the truthful and accurate announcement in lawyer-to-lawyer advertising of background, education and experience which is not violative of DR 2-101(A) or any other applicable disciplinary rule.


107. \textsc{Model Rules of Professional Conduct} (Draft Adopted by the ABA 1983). The model rules which encompass the lawyer advertising issues dealt with in \textit{Spencer} provide, in pertinent part, as follows:

\textit{Rule 7.1 Communications Concerning a Lawyer's Services}

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

\textit{Rule 7.2 Advertising}

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

\textit{Rule 7.3 Direct Contact with Prospective Clients}

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

\textit{Rule 7.4 Communication of Fields of Practice}

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows: (a) a lawyer admitted to engage in patent practice before the United States patent and trademark office may use the designation "patent attorney"
Disciplinary Rules 2-102(D) and (E), which deal with dual-profession advertising, appear already to be in conformity with Spencer, given the stipulation by the state with respect to the limited scope of application of the sections.\textsuperscript{108} The MRPC apparently would also permit such advertising, because no restrictive language is contained therein, and thus, in this regard, the rules are likewise in line with Spencer.

Disciplinary Rules 2-103 and 2-104, which provide for a total prohibition of attorney solicitation, find their replacement in Rule 7.3 of the MRPC.\textsuperscript{109} The new rule allows for a more relaxed atmosphere for solicitation, allowing direct mail solicitation to the attorney's family or to any person with whom the attorney had previous legal dealings. General mailings announcing legal services are also permissible. However, the rule's use of the phrase "may not," when limiting other types of solicitation, creates a potential loophole in the rule which may lead to difficulties with its enforcement and, in fact, implies that there could be situations where normally prohibited activity would be allowed. It appears that the MRPC's use of "may not," rather than the DR's use of "shall not" in 2-103(A) will result in a rule less restrictive than that found by Judge Lord to infringe on the first amendment rights of attorneys; thus the rule is permissible under Spencer. Still, the very nature of solicitation is fraught with potential for coercion and the exertion of undue influence—contingencies also recognized by Judge Lord. Therefore, the scope of permitted solicitation should be specifically outlined, with the words "shall not" applying to all nonpermitted solicitation.

As an additional matter, Rule 7.3 in its current form prohibits solicitation only when a "significant motive" of the attorney is pecuniary gain. This adjective—"significant"—indicating the level below which actions do not constitute solicitation, renders the rule unenforceable. Its meaning is completely subjective, producing the

\textsuperscript{108} See supra note 23.
\textsuperscript{109} See supra note 107.
same pitfalls as those noted by Judge Lord in describing the difficulty of discerning the meaning of a "competent" or "experienced" attorney. The term is thus susceptible to challenge as unconstitutionally vague.

Disclaimer requirements, such as those found in DR 2-105(A)(3) and (B) are addressed in Rule 7.4 of the MRPC,\textsuperscript{110} which prohibits language indicating or implying a specialized area of practice, other than those of patent or admiralty.\textsuperscript{111} The prohibition of words implying practice in a specialized area is an important and vital characteristic of the proposed rule. Failure to include this prohibition in the final rule would leave the rule open for potential abuse by a lawyer who could imply his expertise by indicating that his practice is "exclusively limited to "designated areas."\textsuperscript{112} The disclaimer requirement may indeed have a negative implication attached to it;\textsuperscript{113} nevertheless, because advertising is now less subject to judicial scrutiny, and because Pennsylvania continues to recognize only patent and admiralty law as specialties, Rule 7.4, if adopted, should not be altered.

Since the late 1970's, the legal profession has undergone substantial change in one of its most traditionally sensitive areas—advertising. That change is surely not yet complete. In the future, advertising rules must be designed to give the minimum constitutional protection to the lawyer and the maximum constitutional protection to the lay public.

Rose Marie Albarano

\textsuperscript{110} Id.

\textsuperscript{111} The lawyer-to-lawyer advertising addressed in \textit{Spencer}, see \textit{supra} note 50 and accompanying text, is not addressed by the rule.

\textsuperscript{112} \textit{Model Rules}, \textit{supra} note 107. Adoption of Rule 7.4 would prohibit the use of such language; the Comment to Rule 7.4 states that phrases such as "concentrate in" or "limited to" have taken on a meaning indicating a specialty, and thus should also be prohibited. \textit{Id}.

\textsuperscript{113} \textit{See supra} note 46 and accompanying text.