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PROFESSIONAL RESPONSIBILITY—LAWYER ADVERTISING—RESTRICTIONS MUST BE NARROWLY DRAWN TO SERVE SUBSTANTIAL STATE INTEREST. *In re R.M.J.*, 102 S. Ct. 929 (1982).

R.M.J., an attorney, placed advertisements¹ in local newspapers and the yellow pages of the local telephone directory, which contained information other than that specifically permitted by Disciplinary Rule 2-101(B) of Rule 4 of the Missouri Supreme Court.²

1. The advertisements contained a statement that the attorney was licensed to practice in Illinois and Missouri, and before the Supreme Court of the United States. He stated as areas of practice: Corporations, Partnerships, Tax, Securities-Bonds, Pensions-Profit Sharing, Trials & Appeals, Criminal, Real Estate, Wills, Estate Planning, Probate, Bankruptcy, Personal Injury, Divorce, Separation, Custody, Adoption, Workman's Compensation, and Contracts. In his advertisement in the telephone directory he added the categories of Anti-Trust and Labor. *In re R.M.J.*, 102 S. Ct. 929, 940 (1982).

2. Missouri Rule DR 2-101(B) reads as follows:

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish, subject to DR 2-103, the following information in newspapers, periodicals, and the yellow pages of telephone directories distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a substantial part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(A), and is presented in a dignified manner:

- (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
- (2) One or more particular areas or fields of law in which the lawyer or law firm practices if authorized by and using designations and definitions authorized for that purpose by The Advisory Committee;
- (3) Date and place of birth;
- (4) Schools attended, with dates of graduation and degrees;
- (5) Foreign language ability;
- (6) Office hours;
- (7) Fee for an initial 30-minute consultation;
- (8) Availability upon request of a schedule of fees;
- (9) Credit arrangements for payment of fees will be given consideration;
- (10) The fixed fee to be charged for the following specific routine legal services:
 1. An uncontested dissolution of marriage;
 2. An uncontested adoption;
 3. An uncontested personal bankruptcy;
 4. An uncomplicated change of name;
 5. A simple warranty or quitclaim deed;
 6. A simple deed of trust;
 7. A simple promissory note;
 8. An individual Missouri or federal income tax return;
 9. A simple power of attorney;
 10. A simple will;
 11. Such other services as may be approved by The Advisory Committee; the description of which would not be misunderstood or be deceptive, pro-

He also sent a card to selected persons announcing the opening of his office, in violation of Disciplinary Rule 2-102 of Rule 4. As a result, the Advisory Committee of the Supreme Court of Missouri charged the attorney with unprofessional conduct.³

In the subsequent disciplinary proceeding, the Supreme Court of Missouri upheld the constitutionality of the advertising restrictions, justifying its finding on the fact that an in-depth constitutional study of Disciplinary Rule 2-101 was performed before it was adopted.⁴ R.M.J. appealed the private reprimand to the United States Supreme Court, claiming that the restrictions on advertising were unconstitutional under the first⁵ and fourteenth⁶ amendments to the United States Constitution. The Supreme Court reversed and held that the restrictions did infringe the first amendment rights of R.M.J. *In re R.M.J.*, 102 S. Ct. 929 (1982).

In re R.M.J. involved two legal doctrines, the traditional prohibition on attorney advertising and the commercial speech doctrine.⁷

vided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

In re R.M.J., 609 S.W.2d 411, 412-13 (Mo. 1980).

The areas of the law permitted by the Advisory Committee under Missouri DR 2-101(B)(2) were: Administrative Law, Anti-Trust Law, Appellate Practice, Bankruptcy, Commercial Law, Corporation Law and Business Organizations, Criminal Law, Eminent Domain Law, Environmental Law, Family Law, Financial Institution Law, Insurance Law, Labor Law, Local Government Law, Military Law, Probate and Trust Law, Property Law, Public Utility Law, Taxation Law, Tort Law, Trial Practice, and Workers' Compensation Law. *In re R.M.J.*, 102 S. Ct. 929, 933 n.6 (1982).

3. The four grounds were: (1) he published advertisements in which he listed areas of practice in words other than those permitted by the Advisory Committee, (2) he failed to include a required disclaimer in conjunction with his listing of areas of practice, (3) he listed the courts before which he was authorized to practice, including the Supreme Court of the United States, and (4) he mailed announcement cards to persons other than lawyers, clients, friends, and relatives. 102 S. Ct. at 934.

4. *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1980). The court did not mention the use of the announcement cards or the lack of a disclaimer in its opinion.

5. U.S. CONST. amend. I states in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"

6. U.S. CONST. amend. XIV states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"

7. The commercial speech doctrine was the rule that "[s]peech that was categorized as 'commercial' in nature (*i.e.* speech that advertised a product or service for profit or for business purpose) was formerly not afforded First Amendment freedom of speech protection, and as such could be freely regulated by statutes and ordinances." BLACK'S LAW DICTIONARY 245 (5th ed. 1979).

These two principles clashed prior to *R.M.J.* in *Bates v. State Bar of Arizona*,⁸ in which lawyer advertising was held to be constitutionally protected speech. *Bates* overturned the absolute ban which the rules of professional responsibility had placed on attorney advertising.

The pre-*Bates* prohibition on attorney advertising began not as a rule of ethics but as a rule of etiquette.⁹ It developed into a rule of ethics in America near the turn of the century. In *People ex rel. Attorney General v. MacCabe*¹⁰ the Colorado Supreme Court stated that "[t]he ethics of the legal profession forbid that an attorney should advertise his talents or his skills as a shopkeeper advertises his wares."¹¹ The publication of simple business cards¹² was at one time permissible,¹³ but even this kind of advertising fell into disfavor.¹⁴ It soon became established that any published advertising by attorneys was unprofessional.¹⁵ Strict prohibition was the rule until

8. 433 U.S. 350 (1977).

9. H. DRINKER, *LEGAL ETHICS* 210-11 (1953).

10. 18 Colo. 186, 32 P. 280 (1893).

11. *Id.* at 188, 32 P. at 280. The court in this case dealt with several issues raised by MacCabe's advertisement. The major concern was that he was advertising for clients interested in procuring a divorce. Some states passed statutes prohibiting divorce advertising, and the issue of promoting divorce, rather than lawyer advertising per se, became a major focus in many opinions. *E.g.*, *Mayer v. State Bar of California*, 2 Cal. 2d 71, 39 P.2d 206 (1934) (violation of statute); *In re Cohen*, 261 Mass. 484, 159 N.E. 495 (1928) (violation of statute); *State v. Giantvalley*, 123 Minn. 227, 143 N.W. 780 (1913) (in which the court dealt only with violation of a statute, and did not mention the ethics issue); *In re Tall*, 339 Mo. 11, 93 S.W.2d 922 (1936); *In re Scoular*, 34 Nev. 313, 123 P. 13 (1912) (in which the court mentioned a new statute prohibiting advertising for divorce); *In re Schnitzer*, 33 Nev. 581, 112 P. 848 (1911). A general discussion of the prohibition on lawyer advertising can be found at ANNOT., 39 A.L.R.2d 1055 (1955).

12. "A published note, containing a short statement, request, explanation, or the like." 2 OXFORD ENGLISH DICTIONARY 111 (1933).

13. "The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper." *Canons of Professional Ethics*, Canon 27 (1908), reprinted in H. DRINKER, *supra* note 9, at 316-17 n.6. Similarly in *People ex rel. Chicago Bar Ass'n v. Berezniak*, 292 Ill. 305, 127 N.E. 36 (1920), an attorney was disciplined for his flamboyant advertisements designed to attract show business clientele. The court stated in dicta that publication of a simple card, giving limited information, was not improper. The advertisements involved in this case could not possibly fit the description of a simple card.

14. Canon 27 was amended in 1937 to no longer permit publication of business cards. H. DRINKER, *supra* note 9, at 316-17 n.6.

15. "No infringement of the canons, other than those involving sheer dishonesty, have called forth stronger judicial and professional denunciation than violations of Canon 27 prohibiting advertising and soliciting." *In re Rothman*, 12 N.J. 528, 549, 97 A.2d 621, 632 (1953). "[I]t is not now debatable that any form of advertising is improper . . . and the only possible question is whether the matter complained of constitutes advertising." *In re Anonymous*, 32 A.D.2d 37, 39, 299 N.Y.S.2d 240, 243 (1969). Canon 27 in its amended form

the landmark case of *Bates v. State Bar of Arizona*.¹⁶

The commercial speech doctrine evolved from *Valentine v. Chrestensen*.¹⁷ In *Chrestensen*, the plaintiff was informed by the Police Commissioner of New York City that he could not distribute handbills advertising the public display of his submarine for profit. Chrestensen then printed a handbill which contained his advertisement on one side and a protest against the New York ordinance on the other. He sued to enjoin enforcement of the ordinance after being arrested for distributing the double-faced handbill. The police informed him that the protest alone could be distributed, but the advertisement could not. The Supreme Court held that the Constitution did not limit the state's power to regulate purely commercial advertising.¹⁸ In this short opinion, the Supreme Court distinguished commercial speech from other kinds of speech and brought the commercial speech doctrine into being.

Chrestensen stood for the proposition that the Constitution did not protect commercial speech. Doubts about the validity and scope of the decision soon arose.¹⁹ The holding in *Chrestensen* was not extended to every case in which someone made a profit from the communication. In later cases the Court distinguished the distribution of religious papers,²⁰ movies,²¹ and books.²² Even the fact that advertisements were sold did not make their contents unprotected

prohibited all publication except in approved law lists. Solicitation of professional employment by advertisements was forbidden. The strict prohibition was continued in the American Bar Association Code of Professional Responsibility. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1969).

16. 433 U.S. 350 (1977).

17. 316 U.S. 52 (1942).

18. *Id.* at 54. The Court stated:

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

19. See *Cammarano v. United States*, 358 U.S. 498 (1959) (Douglas, J., concurring) in which Justice Douglas stated, "*Valentine v. Chrestensen* . . . held that business advertisements and commercial matters did not enjoy the protection of the First Amendment made applicable to the States by the Fourteenth. The ruling was casual, almost offhand. And it has not survived reflection." *Id.* at 513-14. Justice Douglas also expressed his view that *Chrestensen* was incorrect in *Dun & Bradstreet, Inc. v. Grove Trustee*, 404 U.S. 898 (1971).

20. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943).

21. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

22. *Smith v. California*, 361 U.S. 147 (1959).

commercial speech,²³ however, advertisements which proposed illegal transactions could be banned.²⁴

In *Bigelow v. Virginia*²⁵ the Supreme Court limited the holding of *Chrestensen* to a regulation of the manner of commercial advertising.²⁶ The decision in *Bigelow*, however, did not put an end to the old commercial speech doctrine, because the advertisement in *Bigelow* was political as well as commercial in nature.²⁷ It was not until the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²⁸ that the old commercial speech doctrine was finally put to rest. In that case the Court held that the State of Virginia could not constitutionally prohibit pharmacies from advertising prescription drugs.²⁹ Unlike the advertisement in *Bigelow*, the idea expressed in the *Virginia Pharmacy* advertisement was totally commercial.³⁰ The Court ruled that purely commercial speech was protected by the Constitution.³¹ The final footnote in *Virginia Pharmacy* reserved the question of advertising by other professionals. It indicated that other professionals render services, as opposed to products, and therefore different factors must be considered.³²

The concurring and dissenting opinions in *Virginia Pharmacy* foreshadowed *Bates*. Justice Burger in his concurring opinion distinguished the situation of attorneys and physicians from that of pharmacists.³³ He pointed out that attorneys and physicians provide services in which professional judgment is a large component, and thus their services are distinguishable from the retail sale of drugs.³⁴ In his dissent, Justice Rehnquist expressed the belief that the decision had far wider significance than the rest of the Court

23. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

24. *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973).

25. 421 U.S. 809 (1975).

26. *Id.* at 819-20. The Court discussed *Chrestensen* as follows:

But the holding is distinctly a limited one; the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

27. *Id.* at 822.

28. 425 U.S. 748 (1976).

29. *Id.* at 770.

30. *Id.* at 760.

31. *Id.* at 770.

32. *Id.* at 773, n.25.

33. *Id.* at 774-75 (Burger, J., concurring).

34. *Id.* at 774.

recognized.³⁵ He felt that the rule adopted by the Court would necessarily extend to the medical, legal, and other professions.³⁶

In *Bates v. State Bar of Arizona*³⁷ the *Virginia Pharmacy* version of the commercial speech doctrine was applied to the traditional prohibition on attorney advertising. The Supreme Court held that two attorneys who printed an advertisement containing their names, addresses, and the prices charged for routine legal services could not be disciplined for their action.³⁸ The Court in *Bates* recognized that lawyer advertising could be limited and regulated, but the absolute prohibition on lawyer advertising was not constitutional.³⁹

Anticipating the *Bates* decision, the American Bar Association (ABA) created a Task Force on Lawyer Advertising.⁴⁰ The Task Force reported to the ABA Board of Governors and presented two proposed versions of the rule governing lawyer advertising.⁴¹ Proposal A was the more restrictive. It specified what attorneys could say in their advertisements.⁴² Proposal B set out specific restrictions on what attorneys could not say in their advertisements.⁴³ The ABA House of Delegates adopted Proposal A,⁴⁴ but it also authorized distribution of Proposal B to the highest state appellate courts.⁴⁵

The reported decisions and rule changes following *Bates* indicated that many issues remained unresolved. Some states imposed strict limits on lawyer advertising.⁴⁶ Even advertisements similar to the one in *Bates* were prohibited in some jurisdictions.⁴⁷ There also

35. *Id.* at 785 (Rehnquist, J., dissenting).

36. *Id.* at 783.

37. 433 U.S. 350 (1977).

38. *Id.* at 382.

39. *Id.* at 383-84. (The Court mentioned several permissible limits on advertising. Misleading advertisement may be prohibited. Reasonable time, place, and manner restrictions may be imposed. Advertising concerning illegal transactions may be prohibited.)

40. AMERICAN BAR ASSOCIATION, ANNOTATED CODE OF PROFESSIONAL ETHICS 28 (1979).

41. *Report 177B of Board of Governors, American Bar Association* (1978), reprinted in AMERICAN BAR ASSOCIATION COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS [hereinafter cited as *Report 177B*].

42. *Id.* at 6. Proposal A is set out in full, at pages 11-30 of *Report 177B*.

43. *Id.* at 7. Proposal B is set out in full, at pages 31-47 of *Report 177B*.

44. *Id.* at 1.

45. *Id.*

46. *E.g.*, Provisional Order No. 11, 382 A.2d 194, *modified*, 409 A.2d 1226 (R.I. 1979); *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (rule forbade advertising areas of practice).

47. *E.g.*, *Bishop v. Committee on Professional Ethics and Conduct*, 521 F. Supp. 1219 (S.D. Iowa 1981) (The district court upheld an Iowa restriction on the use of logos, holding that although there was a logo in the advertisement in *Bates*, the logo was apparently not raised as an issue in the case.); *Foley v. Alabama State Bar*, 481 F. Supp. 1308 (N.D. Ala.

remained a question of what would be "misleading" in an attorney's advertisement.⁴⁸

While the state courts and lower federal courts were interpreting *Bates*, the United States Supreme Court was developing a new commercial speech doctrine. In *Ohralik v. Ohio State Bar Association*⁴⁹ the Court held that the protection of *Bates* did not extend to in-person solicitation by an attorney for personal gain.⁵⁰ In a companion case the Court held that an attorney who sent a letter to an individual offering free representation on behalf of the American Civil Liberties Union, with the purpose of furthering political and social concerns, could not be disciplined for solicitation of clients.⁵¹ Similarly, the Court allowed the State of Texas to prohibit optometrists from practicing under a trade name in view of actual abuses.⁵² Finally, the Court pulled together all the commercial speech cases since *Virginia Pharmacy* and promulgated a new commercial speech doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁵³ In *Central Hudson Gas* the Court developed a four-part test for determining whether a state's action infringes the right to commercial speech. It recognized the distinction between commercial speech and other varieties of speech, and that commercial

1979), *rev'd on other grounds*, 648 F.2d 355 (5th Cir. 1981) (The plaintiffs sought an injunction against enforcement of an Alabama disciplinary rule which would have prevented them from using the name "Legal Clinic" in their advertisements. The term "Legal Clinic" appeared in the *Bates* advertisement. The district court granted summary judgment but the court of appeals reversed and remanded for trial).

48. Some courts prohibited advertising areas of practice unless accompanied by a price. The courts theorized that listing an area of practice without a price would lead the public to believe that the attorney was an expert in the area listed. Rhode Island promulgated such a prohibition in Provisional Order No. 11, 382 A.2d 194, *modified*, 409 A.2d 1226 (R.I. 1979). In *Carter v. Lovett and Linder, Ltd.*, 425 A.2d 1244 (R.I. 1981), the Rhode Island Supreme Court enforced this provision, and the constitutionality of the limitation was upheld in *Lovett and Linder, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981). The Tennessee Supreme Court also adopted this reasoning in *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978). This limitation was later struck down in *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980).

The Arkansas Supreme Court dealt with what it thought to be a misleading advertisement in *Eaton v. Supreme Court of Arkansas Committee on Professional Conduct*, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981). The court held that an advertisement which offered a first appointment with "no time or subject limitation" and ended a series of questions about whether the reader had specific legal problems with the question "Other legal problems?" could give the impression that the attorneys were competent to consult and advise on any legal problem.

49. 436 U.S. 447 (1978).

50. *Id.* at 466.

51. *In re* Primus, 436 U.S. 412 (1978).

52. *Friedman v. Rogers*, 440 U.S. 1 (1979).

53. 447 U.S. 557 (1980).

speech is afforded limited protection under the Constitution.⁵⁴ The Court stated:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁵⁵

In *In re R.M.J.*⁵⁶ the Supreme Court of the United States applied the four-part test announced in *Central Hudson Gas* to the restrictions placed on attorney advertising under the Missouri Rule.⁵⁷ The information charged R.M.J. with four violations of the Rule, three of which were before the Supreme Court:⁵⁸ (1) listing areas of practice in words other than those permitted by the Advisory Committee of the Missouri Supreme Court, (2) listing the jurisdictions and courts before which he was admitted to practice, and (3) mailing announcement cards to persons other than lawyers, clients, friends, and relatives.⁵⁹ The Court held that each of these restrictions was an impermissible limitation on R.M.J.'s constitutional rights.⁶⁰

Applying the *Central Hudson Gas* test to the first violation, the Court agreed with Chief Justice Bardgett's dissent from the Missouri Supreme Court that the words chosen by R.M.J. were less mislead-

54. *Id.* at 562-63.

55. *Id.* at 566.

56. 102 S. Ct. 929 (1982).

57. *Id.* at 938.

58. The violation not before the Supreme Court was R.M.J.'s failure to include a required disclaimer of certification. *Id.* at 938 n.18. In the Missouri Supreme Court decision, Judge Seiler's dissent noted that R.M.J. did not have notice of the disclaimer requirement until it was too late for him to have it included in one of the newspaper advertisements and in the telephone directory, and that the other newspaper advertisement, published after R.M.J. had notice of the requirement, contained the disclaimer. Judge Seiler also pointed out that judging from the yellow pages in the telephone directories of Kansas City and St. Louis, numerous attorneys were unaware of the requirement. *In re R.M.J.*, 609 S.W.2d 411, 415 (Mo. 1980) (Seiler, J., dissenting).

59. 102 S. Ct. at 938.

60. *Id.* at 939.

ing than those prescribed by the Advisory Committee.⁶¹ Since the Advisory Committee did not argue that any substantial interest was promoted by the first restriction,⁶² the Court concluded that this portion of the rule was an invalid restriction on speech as applied in this case.⁶³

The Court held with regard to the second violation that the information that R.M.J. was licensed to practice in both Illinois and Missouri was not misleading on its face, and in light of the location in which R.M.J. practiced, the information was highly relevant.⁶⁴ The Advisory Committee had failed to identify any substantial state interest in prohibiting a lawyer from advertising the jurisdictions in which he is licensed to practice.⁶⁵ Although the Court was disturbed by the fact that R.M.J. advertised that he was admitted to practice before the Supreme Court of the United States, it held that there was nothing to indicate that the information was misleading.⁶⁶

With regard to the third violation, the Court stated there was nothing in the record to indicate why the rule restricted direct mailing of the announcement cards.⁶⁷ Looking to the fourth part of the *Central Hudson Gas* test, the Court reasoned that there were certainly less restrictive ways available to prevent abuse than total prohibition, such as requiring a filing of all copies of general mailings.⁶⁸

A significant factor in the decision was the failure of the Advisory Committee and the Missouri Supreme Court to apply the test of *Central Hudson Gas* to their restrictions on lawyer advertising.⁶⁹ For this reason, the first question of the test, whether the advertisement was misleading, was never raised by the Advisory Committee.⁷⁰ The United States Supreme Court, however, elaborated on

61. *Id.* at 938. The Advisory Committee did not argue that the terms used were misleading. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 939.

67. *Id.*

68. *Id.* at n.19. The Court gave as an example the solution of the MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2(b) (Proposed Final Draft, 1981). That rule requires an attorney to keep a copy of any written communication for one year after it is sent.

69. 102 S. Ct. at 938-39. The Missouri Supreme Court explicitly refused to apply the test, stating, "We are urged now by respondent to follow the *Central Hudson* model. We respectfully decline to enter the thicket of attempting to anticipate and to satisfy the *subjective ad hoc* judgments of a majority of the justices of the United States Supreme Court." *In re R.M.J.*, 609 S.W.2d 411, 412 (Mo. 1980) (emphasis in original).

70. 102 S. Ct. at 938-39.

this issue stating:

[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive.⁷¹

Another significant factor was the failure of the Advisory Committee to assert any substantial state interest which might justify any of the limitations.⁷²

In re R.M.J. leaves two questions unanswered. The first is what constitutes a misleading advertisement in the field of legal advertising. The preferable rule would be one which is designed to prohibit only those statements which are likely to mislead a layperson and to otherwise allow maximum freedom of expression in advertisements. The second question is what state interests are substantial enough to prohibit inclusion of non-misleading statements in advertisements. Once an interest is found to be substantial, further questions will arise: whether the specific limitation is narrow enough, and whether it directly advances the substantial state interest.

The major significance of *R.M.J.* is that it applies the new commercial speech doctrine of *Central Hudson Gas* to professional advertising. If the information is not misleading and does not deal with illegal activity, any restriction on advertising of the information must be designed to narrowly and directly advance a substantial government interest. This is the new test which all restrictions on commercial speech must meet.

The decision probably invalidates the rules of professional responsibility dealing with lawyer advertising in many states.⁷³ The approach of the ABA Code of Professional Responsibility,⁷⁴ adopted by Arkansas,⁷⁵ is to list that information that may be in-

71. *Id.* at 937.

72. *Id.* at 939. In the area of direct mailings, the United States Supreme Court itself supplied a possible substantial state interest in restricting direct mailings. As mentioned above, the Court overturned the restriction on the ground it was over-extensive. *Id.*

73. Young, *Supreme Court Report*, 68 A.B.A. J. 342 (1982).

74. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981).

75. Rules of the Court Regulating Professional Conduct of Attorneys at Law, 260 Ark. 910 (1976) (per curiam), *amended*, 263 Ark. 948 (1978). The Arkansas version of DR 2-101(A) and (B) reads as follows:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other

cluded in an advertisement and forbid the use of any other informa-

lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A).

- (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
- (2) One or more fields of law in which the lawyer or law firm practices or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
- (3) Date and place of birth;
- (4) Date and place of admission to the bar of state and federal courts;
- (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
- (6) Public or quasi-public offices;
- (7) Military service;
- (8) Legal authorships;
- (9) Legal teaching positions;
- (10) Memberships, offices, and committee assignments, in bar associations;
- (11) Membership and offices in legal fraternities and legal societies;
- (12) Technical and professional licenses;
- (13) Memberships in scientific, technical and professional associations and societies;
- (14) Foreign language ability;
- (15) Names and addresses of bank references;
- (16) With their written consent, names of clients regularly represented;
- (17) Prepaid or group legal services programs in which the lawyer participates;
- (18) Whether credit cards or other credit arrangements are accepted;
- (19) Office and telephone answering service hours;
- (20) Fee for an initial consultation;
- (21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
- (22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs; and that the client is responsible for the costs regardless of the outcome of the litigation;
- (23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth fee information;
- (24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be

tion.⁷⁶ Disciplinary Rule 2-101(A) prohibits the use of "false, fraudulent, misleading, deceptive, self-laudatory, or unfair" advertisements.⁷⁷ Disciplinary Rule 2-101(B) allows the publication of twenty-five categories of information.⁷⁸ This is the scheme of the regulation struck down in *R.M.J.*⁷⁹ The portion of the rule prohibiting deceptive and misleading advertisements⁸⁰ will stand under *R.M.J.* It will be impossible, however, for a state to defend the rest of the rule on the ground that any information not permitted by the rule is inherently and incurably deceptive,⁸¹ as the relevance and clarity of advertisement of any information depends on the circumstances.⁸² It is equally difficult to imagine a substantial state interest which could be narrowly and directly furthered by a blanket prohibition on advertisement of any information not permitted by the rule.⁸³

There are two proposed alternatives to the ABA rule. One is Proposal B of the ABA Task Force on Lawyer Advertising which was rejected by the House of Delegates.⁸⁴ The other is the proposal

charged, in print size at least equivalent to the largest print used in setting forth the fee information;

- (25) Fixed fees for specific legal services, which must be accompanied by a description of the services which shall not be misleading or deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

Robinson, *The Arkansas Code of Professional Responsibility*, 33 ARK. L. REV. 605, 657-59 (1980) (footnotes omitted).

76. *Report 177B*, *supra* note 41, at 6.

77. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1981).

78. *Id.* DR 2-101(B).

79. 102 S. Ct. at 933.

80. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1981).

81. This would seem to be the requirement. 102 S. Ct. at 937.

82. For an example of non-misleading information not specifically authorized by an ABA Code style disciplinary rule, *see* *Bishop v. Committee on Professional Ethics and Conduct*, 521 F. Supp. 1219 (S.D. Iowa 1981). In *Bishop* an attorney successfully challenged a state rule which prohibited him from mentioning his race in advertisements. Note also that in *R.M.J.* the United States Supreme Court held that in view of the area in which *R.M.J.* practiced, the information placed in his advertisement that he was licensed in both Illinois and Missouri was highly relevant. 102 S. Ct. at 938.

83. Such a prohibition could not meet the fourth requirement of the *Central Hudson Gas* test. It would be more extensive than necessary to serve any substantial government interest, and would not qualify as "carefully drawn," as required by *R.M.J.*, 102 S. Ct. at 939.

84. *Report 177B*, *supra* note 41, at 31-47. This rule was adopted by Florida and is reproduced in *The Florida Bar re Amendment to Florida Bar Code*, 380 So. 2d 435, 438-42 (Fla. 1980).

of the ABA Commission on Evaluation of Professional Standards, the Model Rules of Professional Conduct.⁸⁵ Proposal B prohibits misleading advertising in Disciplinary Rule 2-101(A).⁸⁶ Disciplinary Rule 2-101(B) defines what constitutes a misleading advertisement⁸⁷ while Disciplinary Rule 2-101(C) prohibits mention of other such matters as would be inappropriate or unfair in an attorney's advertisement.⁸⁸ The Proposed Model Rules are more permissive than either the present ABA Code or Proposal B. Rule 7.1 prohibits

85. MODEL RULES OF PROFESSIONAL CONDUCT 7.1, 7.2, and 7.3 (Proposed Final Draft 1981).

86. *Report 177B*, *supra* note 41, at 37. "A lawyer shall not on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim."

87. *Report 177B*, *supra* note 41, at 37-38. It reads as follows:

Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:

- (1) Contains a material misrepresentation of fact;
- (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
- (3) Is intended or is likely to create an unjustified expectation;
- (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;
- (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
- (6) Relates to legal fees other than:
 - (a) A statement of the fee for initial consultation;
 - (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
 - (c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
 - (d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;
 - (e) The availability of credit arrangements; and
 - (f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive; or
- (7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

88. *Report 177B*, *supra* note 41, at 39. It reads as follows:

A lawyer shall not, on behalf of himself, his partner or associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication which:

making any misleading communication concerning a lawyer's services and describes what constitutes a false or misleading statement.⁸⁹ This rule applies both to advertisements and such direct personal contact with potential clients as the Model Rules permit.⁹⁰ Rule 7.2 provides a straightforward general rule permitting lawyer advertising.⁹¹ In general, the Model Rules forbid misleading advertising but do not try to restrict advertising for any other reason. Because of its permissive approach to advertising and its broad recognition of the

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- (1) Is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
 - (2) Contains statistical data or other information based on past performance or prediction of future success;
 - (3) Contains a testimonial about or endorsement of a lawyer;
 - (4) Contains a statements [sic] of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;
 - (5) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion; or
 - (6) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format; or
 - (7) Utilizes television until [the agency having jurisdiction under state law] shall have determined that use of such media is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential customers of legal services.

89. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (Proposed Final Draft 1981).

It reads as follows:

A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (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.

90. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 comment (Proposed Final Draft 1981).

91. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (Proposed Final Draft 1981).

It reads as follows:

- (a) Subject to the requirements of Rules 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.
- (b) A copy or recording of an advertisement or written communication shall be kept for one year after its dissemination.
- (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.

attorney's first amendment rights, the Model Rules' approach is in tune with the spirit of the Supreme Court's recent rulings on lawyer advertising and commercial speech.

James Gerard Schulze

