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Professional Responsibility - The First Amendment's Protection of Commercial Speech and Lawyer Advertising - McLellan v. Mississippi State Bar Association

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PROFESSIONAL RESPONSIBILITY—The First Amendment's Protection of Commercial Speech and Lawyer Advertising—*McLellan v. Mississippi State Bar Association*, 413 So. 2d 705 (Miss.1982).

In October of 1979 a formal complaint was filed by the Complaint Tribunal of the Mississippi State Bar against William E. McLellan, III, alleging violation of the Mississippi Code of Professional Responsibility for causing the publication of an advertisement[1] in the yellow pages of the Jackson, Mississippi telephone book.[2] It was further alleged that these actions constituted a violation of Disciplinary Rule (DR) 2-101[A], DR 2-101[B], and DR 2-102[A][8].[3] In November of the same year McLellan

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1. A copy of the advertisement may be found in Appendix I.

2. McLellan v. Mississippi State Bar Ass'n, 413 So. 2d 705 (Miss. 1982).

3. *Id.* at 706. The relevant parts of those sections of the MISSISSIPPI CODE OF PROFESSIONAL RESPONSIBILITY are:

(1) DR 2-101[A] (1977):

> A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients, ...

(2) DR 2-101[B] (1977):

> A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper (except as provided in DR 2-102[A] [7] and [8]) or magazine, advertisements, radio or television announcements, display advertisements in city or telephone directories or other means of commercial publicity,... .

(3) DR 2-102[A] (1977):

> A lawyer or lay firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:... .
>
> [8] Publication of a notice in a newspaper having general circulation in the county where the advertising attorney maintains an office advertising the availability of routine legal services as defined herein and the fees to be charged therefor. The advertisement must include the following and only the following: Name, including name of law firm, office address and telephone number, one or more routine legal services, as defined herein, which are offered and the fixed fee to be charged therefor. Said notice may also include the names of lawyers in the firm.
>
> Said advertisement shall be of a dignified size and all information allowed by this rule therein shall be printed in no larger than twelve point type.
>
> All advertisements shall contain the following statement in type no smaller than the largest size type used therein: "The Code of Professional Responsibility of the Mississippi State Bar requires that the above services be performed for not more than the advertised fee."
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> The term, "routine legal services," as used herein, shall be limited to the following:
> [1] Uncontested divorces.
> [2] Uncontested adoptions.
> [3] Uncontested personal bankruptcies.
> [4] Change of name.
> [5] Deeds.
> [6] Promissory notes.
> [7] Security agreements and deeds of trust.
> [8] Powers of attorney.
> [9] Individual income tax returns.
> [10] Bills of sale.
> [11] Wills.
> [12] Initial conference with clients.

answered the complaint and admitted the publication of the advertisement in question but denied any violation of any disciplinary rule.[4] McLellan then affirmatively alleged that any sections of the Code of Professional Responsibility which prohibited his advertisement were violative of his constitutional rights.[5]

One year later, the Complaint Tribunal issued its findings of fact and ruling. The Tribunal found that McLellan's advertisement violated the Disciplinary Rules of the State Bar Association and that the rules did not impinge on McLellan's constitutional rights.[6] The Tribunal's final determination was that McLellan should be publicly reprimanded by way of a sanction.[7] McLellan appealed as a matter of right to the Mississippi Supreme Court.[8]

Although the *McLellan* case is one of first impression in Mississippi, the issue of professional advertising and the commercial speech protections afforded by the United States Constitution has undergone extensive review in other jurisdictions. The recent case law has sharpened the law in this area to the point that the court had only one logical way to decide the case, that being in favor of the appellant, William E. McLellan, III.

COMMERCIAL SPEECH - INTRODUCTION

The historical explanation for the development of the ban on lawyer advertising is not clear. Henry S. Drinker contends that young affluent men in England came to the Inns of Court to eat dinner and study to become barristers.[9] Drinker states that these young men regarded the study and practice of law to hold as much honor and dignity as a seat in Parliament.[10] They believed the profession did not need nor want solicitation because of the fraternal characteristics it maintained and exhibited.[11]

The profession and its brethrenly protocol began its spread to the United States when young men from Boston, New York, Philadelphia, and the South went to study at the Inns of Court.[12]

Failure to perform an advertised service at the advertised fee for a person responding to the advertisement shall be misleading advertising and deceptive practice.

4. Abstract of Record at 2, Brief of the Appellant at 10, McLellan v. Mississippi State Bar Ass'n, 413 So. 2d 705 (Miss. 1982).

5. 413 So. 2d at 706.

6. Brief of the Appellant at 4, McLellan v. Mississippi State Bar Ass'n, 413 So. 2d 705 (Miss. 1982).

7. Abstract of Record at 2, McLellan v. Mississippi State Bar Ass'n, 413 So. 2d 705 (Miss. 1982).

8. MISS. CODE ANN. § 73-3-319(b) (1972).

9. H. DRINKER, LEGAL ETHICS 201 (1953).

10. *Id.*

11. *Id.* at 212.

12. *Id.* at 5.

Upon return these men became the leaders of the American Bar, adhering to the traditions of honor and dignity that surrounded the practice of law in England[13] and which prohibited advertising.

In the past century in our country this tradition weakened. A mounting force emerged from a long series of cases dealing with the authority of the States to control certain forms of advertising and the constitutional application of the first amendment to commercial speech. The primary attacks on the tradition came under the first amendment and free speech[14] while the secondary attacks came via the fourteenth amendment[15] and its equal protection clause. These attacks on professional advertising controls and commercial speech limitations subsequently led to the landmark case of *Bates v. State Bar of Arizona*[16] where the established ban on lawyer advertising was broken against what had been almost a century of constitutional onslaught. The true effects of the *Bates* decision remain to be seen.

PRE-*Bates*

As was noted above, historically, lawyer advertising has been shunned and prohibited. There were, however, no express prohibitions against lawyer advertising until 1908, when the American Bar Association adopted its Canons of Professional Ethics.[17] Canon 27 of this first code of ethics included the following practices as unprofessional: "the solicitation of employment by circulars, advertisements, 'touters,' unwarranted personal communications, the inspiring of favorable newspaper comments, publication of photographs or any form of self-laudation."[18]

One of the chief purposes of Canon 27's prohibition of advertising involved the preservation of professional standards in the practice of law. The primary fear was that advertising would erode dignity traditionally associated with the profession.[19] While *Bates* dispelled this longstanding belief,[20] the early case law relied upon

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13. *Id.*

14. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

15. *See, e.g.*, Sherman v. State Bd. of Dental Examiners, 116 S.W. 2d 843 (1938).

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

17. H. DRINKER, *supra* note 9, at 215.

18. *Id.*

19. *Bates*, 433 U.S. at 368. *See also*, People v. MacCabe, 18 Colo. 186, 187, 32 P. 280 (1893). There the court said "[t]he ethics of the legal profession forbid that an attorney advertise his talents or skills as a shopkeeper advertises his wares." *Id.*

20. 433 U.S. at 368. "But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar." *Id.*

this belief to prohibit lawyer advertising as well as other professional and commercial advertising against constitutional challenges.

In *In re Cohen*,[21] the lawyer, purporting to be a specialist in marital problems, advertised free legal advice in several Boston newspapers.[22] The court, in response to Cohen's arguments which relied upon first amendment freedoms, said "[w]hatever may be his constitutional rights, a member of the bar must conduct himself as an officer of the court in such manner as not to offend against reasonable rules of propriety established by the court for the general welfare."[23]

Similarly, in *Semler v. Oregon State Board of Dental Examiners*,[24] a state prohibition against certain types of advertising and solicitation by dentists withstood constitutional challenge. Semler, a practicing dentist in Portland, Oregon, brought an action to enjoin the enforcement of the Oregon legislation calling for the revocation of his license to practice for unprofessional conduct.[25] Semler alleged the statute was violative of the due process and equal protection clauses of the fourteenth amendment[26] as "an arbitrary interference with liberty and property... ."[27] The statute was upheld in the Supreme Court of Oregon[28] and the case was then appealed to the United States Supreme Court. The Court affirmed the Oregon court's decision stating that the state has an interest in the protection of the public[29] against "unwarranted and misleading claims... even though in particular instances there might be no actual deception or misstatement."[30]

Among other things, what *Semler* has shown is that a challenge to a state advertising statute resting on the equal protection clause is generally not strong enough to override the state's policy for the legislative enactment. Initially, the courts give greater weight to the enactment by presuming it to be within constitutional limitations.[31] Additionally, "[a statute] will not be set

21. 159 N.E. 495 (1928).
22. *Id.* at 496.
23. *Id.* at 497.
24. 294 U.S. 608 (1935).
25. The unprofessional conduct amounting to grounds for revocation of license in this case included "[a]dvertising professional superiority or the performance of professional services in a superior manner [and] advertising prices for professional service... ." *Semler*, 294 U.S. at 609.
26. 294 U.S. at 609.
27. *Id.* at 611.
28. 148 Or. 50, 34 P.2d 311.
29. 294 U.S. at 612.
30. *Id.* at 613.
31. Oregon v. Mitchell, 400 U.S. 112, 247 (1970) (Brennan, White, and Marshall, JJ., dissenting in part, concurring in part).

aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it."[32] Thus, this method or strategy for challenging state advertising and solicitation statutes became futile and a new basis of attack arose: the first amendment.

The first amendment of the Constitution of the United States prohibits legislative interference in the right to freedom of speech.[33] While in theory this right seems unquestionable,[34] in practice the judiciary has found many instances to determine that the first amendment right is not absolute.[35]

In *Valentine v. Chrestensen*,[36] the U.S. Supreme Court was called upon to determine whether advertising should be afforded protection under the first amendment. The Court upheld a municipal ordinance which prohibited the distribution of "any handbill, circular... or other advertising matter whatsoever in or upon any street or public place... ."[37] In reaching its conclusion the Court also enunciated what has since been labeled the "commercial speech doctrine":

> 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.*[38]

In other words, commercial speech is outside the protection of the first amendment. The approach which denied commercial speech protection was never echoed[39] following the decision in *Breard v. Alexandria*,[40] where the Court further supported the com-

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32. Metropolitan Casualty Insurance Co. v. Brownell, 294 U.S. 580, 584 (1934).

33. "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. Amend. I.

The first amendment of the Constitution of the United States has been found applicable to the several states through the fourteenth amendment. Gitlow v. New York, 268 U.S. 652 (1925).

34. *See, e.g.*, Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

35. *See, e.g.*, Saia v. New York, 334 U.S. 558, 561 (1948); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Murdock v. Pennsylvania, 319 U.S. 105, 109-10 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

36. 316 U.S. 52 (1942).

37. *Id.* at 53 n.1.

38. *Id.* at 54 (emphasis added).

39. *Virginia State Bd. of Pharmacy*, 425 U.S. at 759.

40. 341 U.S. 622 (1951).

mercial speech exception to first amendment protection. The commercial speech doctrine enunciated by the Court in *Valentine* was not well taken by subsequent decisions of the Court[41] and was essentially avoided in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations.*[42]

The Pittsburgh Press Co., in violation of an ordinance, printed in a newspaper sexually discriminatory "help-wanted" advertisements.[43] The newspaper company listed employment advertisements in sex-designated columns according to the employer-advertiser's wishes. The newspaper contended that the ordinance was violative of first amendment rights.[44] The Court upheld the statute on the grounds that discriminatory advertising was illegal commercial activity,[45] not on the basis that commercial speech is unprotected, as under *Valentine.*[46]

The commercial speech doctrine was finally put to rest in *Bigelow v. Virginia.*[47] Bigelow, managing editor of a weekly newspaper in Charlottesville, Virginia allowed an advertisement for an abortion referral service in New York City to be published. Bigelow was convicted of advertising abortions.[48] The Supreme Court of Virginia affirmed the conviction,[49] rejecting Bigelow's first amendment claim on the ground that the advertisement was a "commercial advertisement" and thus could be subjected to government regulation.[50] The U.S. Supreme Court reversed the state court's holding[51] stating "[o]ur cases... clearly established that speech is not stripped of First Amendment protection merely because it appears in that form."[52]

With the commercial speech doctrine on the shelf and the court

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41. The ruling in *Valentine* has been labeled "casual, almost offhand." Cammarano v. United States, 358 U.S. 498, 514 (1958) (Douglas, J., concurring). *See also,* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974), where four dissenting Justices expressed doubts as to the validity of the *Valentine* decision.

42. 413 U.S. 376 (1973).

43. *Id.* at 379.

44. *Id.* at 381.

45. *Id.* at 388.

46. *Id.* at 389. Mr. Justice Powell intimates at the notion that some advertising could override a governmental interest. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal... ."*Id.* at 389.

47. 421 U.S. 809 (1975).

48. *Id.* at 811.

49. Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1962).

50. *Id.* at 195, 191 S.E.2d at 176.

51. 421 U.S. at 818. "The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements." *Id.* at 818.

52. *Id.*

now applying a balancing test between first amendment rights and the public interests sought to be protected by the challenged statute, the Court opened the door to a new breed of challenges: whether the "professional" may advertise.[53]

One year after *Bigelow* the Supreme Court was faced precisely with that issue in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[54] This case came to the Court on grounds somewhat different from the statutory challenges previously discussed. In the previous cases the action was either brought against or brought by the "advertiser" who had communicated the advertisement. Conversely, in this case it was the consumer, the recipient of the advertisement, who commenced the suit.[55]

The prescription drug consumers brought suit to enjoin the Virginia State Board of Pharmacy and the individual members of that Board from enforcing a statute[56] which provided that pharmacists licensed in Virginia were guilty of unprofessional conduct if they advertised prescription drug prices.[57] The consumers contended that the first amendment entitled them "to receive information that pharmacists wish[ed] to communicate to them through advertising... concerning the prices of [prescription] drugs."[58] The State Board on the other hand argued that the statute provided a means of maintaining the professional image of the pharmacist, a legitimate state interest,[59] and that commercial speech is unprotected by the first amendment.[60]

The Court reviewed the cases that had developed and those that had eventually eroded the commercial speech doctrine and found that "speech does not lose its First Amendment protection because money is spent to project it .... If there is a kind of com-

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53. The balancing test can be gleaned from the dictum of United States v. O'Brien, 391 U.S. 367, 377 (1968) and United States v. Jackson, 390 U.S. 570, 582-83 (1968).

54. 425 U.S. 748 (1976).

55. *Id.* at 753. As a matter of right the Court stated that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising... ." *Id.* at 757.

56. *Id.* at 748.

57. Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in anyway whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription. VA. CODE ANN. § 54-524.35 (1974).

58. 425 U.S. at 754. *See also*, note 55 *supra.*

59. *Id.* at 766-67.

60. *Id.* at 758.

mercial speech that lacks all First Amendment protection... it must be distinguished by its content... [not] simply be speech on a commercial subject."[61]

In addition, the Court reasoned that the consumers' right to know prevailed over a state's interest in maintenance of professional standards.[62] The majority, realizing the possible implications this decision might have on other professional advertising, explicitly distinguished physicians and lawyers as not within the scope of the opinion[63] and reserved decision[64] on those professions for future determination.

The majority's realization of the implications of the *Virginia State Board of Pharmacy* decision became an actual determination in *Bates*,[65] where two lawyers, John R. Bates and Van O'Steen, advertised[66] in a newspaper in violation of DR 2-101(B).[67]

Bates

Bates and O'Steen sought review in the Supreme Court of Arizona following a recommendation by the Board of Governors of the State Bar that both be suspended for one week. They contended that the disciplinary rule violated sections 1 and 2 of the Sherman Act because it limited competition and that the rule was violative of first amendment rights.[68] The Arizona court rejected both contentions.

On appeal to the Supreme Court of the United States, Bates and O'Steen sought review of the same issues heard in the court below. The Court in the first half of the opinion affirmed the antitrust section of the lower court's decision.[69] The second half of the opinion, dealing with the first amendment issue, or more specifically "whether lawyers ... may constitutionally advertise

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61. *Id.* at 761.
62. *Id.* at 763-70.
63. *Id.* at 773 n.25.
64. *Id.* at 773.
65. 433 U.S. 350 (1977).
66. A copy of the advertisement can be found in Appendix II of this Note.
67. ARIZ. REV. STAT. SUP. CT. R. 29(a), DR 2-101(B) (Supp. 1977) provided:
A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements 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.
68. 433 U.S. at 356.
69. *Id.* at 352. The Court relied on Parker v. Brown, 317 U.S. 341 (1943), which held that the Sherman Act does not prohibit rules imposing restraint which are imposed by the state acting in a sovereign capacity. Similarly, in *Bates* it is Arizona, in its sovereign capacity, imposing the restraint; thus the *Parker* exemption applies and bars the Sherman Act contention. *Id.* at 359.

the prices [of] certain routine services...,"[70] was structured according to the six proffered justifications for restricting such advertising.

First, the Arizona Bar feared that price advertising would have an adverse effect on the pride, dignity and self-worth of the legal profession and the public image thereof.[71] The Court rejected this argument taking a realist's attitude on how the public really views the profession. Moreover, after reviewing studies on the legal profession, the Court suggested that advertising might expel some of the cynicism that failure to advertise could have created.[73]

Second, it was argued that advertising of legal services would be misleading. It was contended that because legal services are so individualized the consumer would not be able to determine the legal services he requires on the basis of an advertisement. The Court's response was that since only routine services under familiar topic headings such as uncontested divorces, simple adoptions, uncontested personal bankruptcy and change of names would be advertised, that there could be no misinterpretation.[74] Also the Court considered this contention to underestimate the public's knowledge. As in *Virginia State Board of Pharmacy*[75] the Court viewed "as dubious any justification that is based on the benefits of public ignorance."[76]

Third, the Bar feared that advertising would stir up litigation. The Court recognized this fear as probable but took notice of a possible benefit in advertising by attorneys, since recent studies showed an underutilization of the legal profession. Advertising might prompt the person wronged to seek compensation by legal action where he would have been silent without it.

Fourth, the Court dismissed the claim that advertising would increase the profession's overhead costs and that such costs would be ultimately passed on to the consumer.[77] The Court pointed to "revealing evidence" which actually found just the opposite; where

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70. 433 U.S. at 367-68.

71. *Id.* at 368. *See also*, notes 19 & 20 *supra* and accompanying text.

72. 433 U.S. at 370-71 nn. 22-23. The Court cited from the A.B.A.'s Revised Handbook on Prepaid Legal Services (1972) which stated on page 26: "We are persuaded that the actual or feared price of such services coupled with a sense of unequal bargaining status is a significant barrier to wider utilization of legal services." The Court was also influenced by a report which suggested that people do not seek legal assistance because they have no way to know which lawyer is competent to handle their problem. *See ABA, Legal Services & the Public*, 3 ALTERNATIVES 15 (Jan. 1976).

73. 433 U.S. at 371-72.

74. *Id.* at 372-73.

75. *See* 425 U.S. at 769-70.

76. 433 U.S. at 375.

77. *Id.* at 375-77.

there was price advertising the retail prices were lower than they would be without advertising.[78]

Fifth, the Bar claimed that advertising would lead to a standardization of the profession thereby lowering the quality of services performed by the attorney. The Court reasoned that advertising will not prevent inferior services because a lawyer "inclined to cut quality will do so regardless of the rule on advertising."[79]

As to the final claim that enforcement would be difficult, the Court said that most attorneys would be "honest and straightforward," and that it would be in their best interest to protect against those who were not.[80]

In conclusion, the majority held the Arizona Disciplinary Rule banning all advertising by attorneys violated the first amendment.[81] The Court clarified the limits of its holding by stating that this decision did not remove lawyer advertising from regulation and that false or misleading statements, claims of superior quality, and in-person solicitation were all subject to restraint as well as the time, place and manner of the advertising.[82] The cases that followed *Bates* dealt precisely with these issues.[83]

POST-*Bates*

Because of the *Bates* decision lawyers are now permitted to advertise subject to the particular restraints set out by their particular state bar association's Professional Code of Responsibility. The degree of permissiveness in lawyer advertising varies from state to state. On the other hand, all states still hold that misleading or false advertising, self-laudatory claims and in-person solicita-

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78. *See*, Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972). This study found the prices of eyeglasses to be substantially lower in states that allowed advertising compared to those states that prohibited advertising.

79. 433 U.S. at 378.

80. *Id.* at 379.

81. *Id.* at 384.

82. *Id.* at 383-84.

83. The *Bates* method of case analysis of commercial speech cases was expanded in Central Hudson Gas & Electric v. Public Service Comm'n of New York, 447 U.S. 557 (1979) against strong criticism from *Bates* majority opinion writer Justice Blackmun. The *Central Hudson Gas* decision provided a four-part analysis for commercial speech cases:

> [W]e must [first] 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 more extensive than is necessary to serve that interest.

Id. at 566. The *Central Hudson Gas* analysis was subsequently followed in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), a plurality opinion.

tion are unprofessional conduct. The latter of these prohibited forms of advertising, in-person solicitation, was the subject of debate in two Supreme Court cases handed down on the same day, *Ohralik v. Ohio State Bar Association*[84] and *In re Primus*.[85]

The *Ohralik* case presents the classic example of " 'ambulance chasing' fraught with obvious potential for misrepresentation and overreaching."[86] Shortly after an automobile accident Ohralik approached two hospitalized young women, both 18 years of age. Upon his second visit to the hospital room of one of the victims he obtained a signed contingent-fee arrangement. Shortly thereafter, he obtained an oral agreement to a contingent-fee arrangement with the second victim at her home on the day she was released from the hospital. Ohralik was never invited either to the hospital or to the home.

Both young women eventually discharged Ohralik but he succeeded in recovering a settlement on a breach of contract suit against them. The two women then filed a grievance against Ohralik with the county bar association. The Board found his conduct violative of DR 2-103(A) and DR 2-104 (A) of the Ohio Code of Professional Responsibility.[87] The Ohio Supreme Court found on appeal that his conduct was not constitutionally protected and the U.S. Supreme Court affirmed that judgment.[88]

In *Primus*, Edna Smith Primus, a cooperating lawyer with the American Civil Liberties Union (ACLU), was requested to address a group of women who had been sterilized as a condition to continued receipt of medical assistance under the medicaid program. Primus accepted and advised those who attended the meeting of their legal rights and suggested the possibility of a lawsuit. Shortly thereafter Primus was informed that one of the women who had attended the meeting wished to bring suit against the physician who had sterilized her. Primus then wrote this woman

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84. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

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

86. *Id.* at 469.

87. DR 2-103(A) of the Ohio Code (1970) 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.'

DR 2-104(A) (1970) provides in relevant 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, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.'

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 453 n.9 (1978).

88. *Id.* at 449-54.

a letter offering free legal advice. This letter was the subject of the litigation.

The Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina (Board) filed a formal complaint containing charges of unethical conduct in violation of DR 2-103(D)(5)(a) and (c)[89] and DR 2-104(A)(5).[90] The Board issued a private reprimand and the Supreme Court of South Carolina adopted the Board's findings.[91] The United States Supreme Court reversed, finding South Carolina's application of its disciplinary rules to Primus' letter violative of the first and fourteenth amendments.[92]

On first appearance both *Primus* and *Ohralik*, both involving solicitation issues, appear equivalent. But a closer look reveals the Court placed the weight of its decision on the substance of the solicitation, which is where the parity between the cases ends. The Court first distinguished *Ohralik* from *Primus* based upon the acts of solicitation.[93] Ohralik was reprimanded because he tried to attract business by in-person solicitation. The Court, in condemning such activities, said that because of the evils associated

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89. The relevant parts of South Carolina's DR 2-103(D) provide:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his service or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgement is exercised in behalf of his client without interference or control by any organization or other person: . . . .

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services....

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

S.C. SUP. CT. DR 2-103 (D), *quoted in* In re Primus, 436 U.S. 412, 418 n.10 (1978).

90. The relevant part of South Carolina's DR 2-104(A) provides:

(A) 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, except that: . . . .

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

S.C. SUP. CT. DR 2-104(A), *quoted in* In re Primus, 436 U.S. 412, 413 n.11 (1978).

91. In re Smith, 268 S.C. 259, 233 S.E.2d 301 (1977).

92. In re Primus, 436 U.S. at 439.

93. *Id.* at 422.

with in-person solicitation,[94] the state has a legitimate and compelling interest in preventing solicitation.[95]

In *Primus* the act of solicitation was a letter. In this instance the Court stated that the record failed to show any of the evils traditionally associated with in-person solicitation.[96] Additionally the Court distinguished the cases on the basis that in *Ohralik* the in-person solicitation was for pecuniary gain while in *Primus* the attorney's actions on the behalf of the ACLU were for a political tenet rather than a pecuniary interest.[97] While the Supreme Court was hearing and then deciding *Ohralik* and *Primus* another lawyer advertising issue, misleading advertising, had begun in the Midwest.

In 1978, R.M.J., a lawyer admitted to both Missouri and Illinois Bars, as a means of announcing his solo practice in St. Louis mailed out professional announcement cards and placed several advertisements in the local newspapers and the telephone directory.[98] Subsequently, the Advisory Committee[99] filed an information charging R.M.J. with unprofessional conduct in violation of Rule 4 of the Missouri Supreme Court[100] regulating advertising by lawyers.

The information charged that in several ways the language used in R.M.J.'s advertisements deviated from the prescribed areas of practice allowable in a published advertisement:[101] it listed the

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94. *See, e.g.*, Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 91 YALE L. J. 1181 (1972). "Advertising and solicitation, ... would encourage lawyers to engage in overreaching, overcharging, underrepresentation, and misrepresentation." *Id.* at 1184; Comment, *A Critical Analysis of Rules Against Solicitation by Laywers*, 25 U. CHI. L. REV. 674, 682-85 (Summer 1958).

95. *Ohralik*, 436 U.S. at 462.

96. *Id.* at 434-35.

97. *Id.* at 422.

98. In re R.M.J., 455 U.S. 191, 196 (1982). A copy of the advertisements in question in this case can be found in Appendix III of this Note.

99. The Advisory Committee has the authority to act on behalf of the Missouri State Bar to investigate, institute and prosecute suits for the unauthorized practice of law. MO. RULES OF COURT, RULE 5.05 (1982).

100. 455 U.S. at 196.

101. As of November 13, 1977 the Advisory Committee provided two methods of listing areas of practice in the advertisements. The rule provided in relevant part as follows:

> The following area for fields of law may be advertised by use of the specific language hereinafter set out:
>
> 1. General Civil Practice
> 2. General Criminal Practice
> 3. General Civil and Criminal Practice
>
> If a lawyer or law firm uses one of the above, no other area can be used . . . . If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:
>
> 1. Administrative Law
> 2. Anti-Trust Law

courts in which he was admitted to practice, although this was not within the ten prescribed categories of information authorized by Rule 4;[102] it failed to include a disclaimer of certification as required;[103] it violated DR 2-101(A)(2) for sending announcement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives." R.M.J. argued that each of these restrictions, with the exception of the disclaimer, was unconstitutional under the first and fourteenth amendments.[104] The Supreme Court of Missouri summarily upheld the constitutionality of Rule 4 of the same court and failed to discuss DR 2-102 dealing with announcement cards in its issuance of a private reprimand.[105]

The U.S. Supreme Court reversed the lower court's holding in a unanimous decision. The Court, citing the *Bates* decision, found that although the states retain the authority to regulate commercial speech, such as professional advertising, they may do so

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3. Appellate Practice
4. Bankruptcy
5. Commercial Law
6. Corporation Law and Business
7. Criminal Law
8. Eminent Domain Law
9. Environmental Law
10. Family Law
11. Financial Institution Law
12. Insurance Law
13. Labor Law
14. Local Government Law
15. Military Law
16. Probate and Trust Law
17. Property Law
18. Public Utility Law
19. Taxation Law
20. Tort Law
21. Trial Practice
22. Worker's Compensation Law

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

If one or more of these specific areas of practice are used in any advertisement, the following statement must be included . . . . Listing of the above areas of practice does not indicate any certification of expertise therein.

VERNON'S ANN. MO. RULES, Rule 4, Addendum III (Adv. Comm. No. 13), *quoted in* In re R.M.J., 455 U.S. 195, 196 n.6.

102. Part B of DR 2-101 of Rule 4 states that "a lawyer may publish . . . the following information in newspapers, periodicals and the yellow pages of telephone directories":

> Name, address, telephone number; areas or fields of practice; date and place of birth; schools attended, degrees received; foreign language ability; office hours; initial consultation fee; availability of a schedule of fees; credit arrangements for fees; and fixed fees charged for "specific routine legal services."

MO. RULES OF COURT, Rule 4, DR 2-101(B) (1982).

103. *See supra* note 101.

104. 455 U.S. at 198.

105. In re R.M.J., 609 S.W.2d 411, 412 (Mo. 1981).

only as far as is reasonably necessary to further substantial interests.[106] In addition, the Court held that R.M.J.'s deviations from the prescribed listed areas of practice were not misleading since, for example, using the words "real estate" instead of "property" could scarcely mislead the public. As to the listing of the jurisdictions in which he was licensed to practice, the Court found this information to be relevant in view of the geography of the region and not misleading in any way.[107] The Court did find that the listing by the attorney in large, boldface letters that he was a member of the bar of the Supreme Court of the United States was in "bad taste" but not misleading.[108] Finally, the Court held the announcement cards could not be absolutely prohibited simply because of the difficulty of supervision of this type of solicitation.[109]

THE *McLellan* DECISION

Following the *Bates* decision, the Mississippi State Bar (Bar) amended the Mississippi Code of Professional Responsibility to comply with that decision. While most states took a liberal, permissive view of lawyer advertising after *Bates*,[110] Mississippi adhered to a conservative, restrictive basis and permitted newspaper advertising only, subject to strict limitations.[111] This adherence can be attributed to a desire on the part of the Bar to maintain the dignity and honor traditionally associated with the legal profession.[112] However, where constancy becomes unwarranted constriction, the advertiser must prevail.

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106. In summarizing the present state of the commercial speech doctrine the Court made the following statement:

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

455 U.S. at 203.

107. *Id.* at 205.

108. *Id.*

109. *Id.* at 206. The Court offered a solution to the problem relating to the difficulty in supervising mailings and handbills. By requiring the advertising lawyer to file his mailing with the Advisory Committee the state would be able to exercise reasonable supervision over the mailings.

110. A state-by-state survey as of January 1, 1979 showed 35 states had adopted liberal, permissive advertising rules. *State by State—Rules on Lawyer Advertising*, NAT'L L.J. 14 (Oct. 15, 1979).

111. *See supra* note 3; *See also* Ethics Opinion No. 44.

112. The court in *McLellan* stated that "[we] recognize that advertising of any kind was/is repulsive to attorneys of the so-called 'old school.' " 413 So. 2d at 709 n.2.

In *McLellan*, the primary issue to be decided by the court sitting en banc was whether the tribunal's ruling totally suppressing all telephone directory advertising was constitutional in light of recent U.S. Supreme Court decisions. In discussing the *Bates* decision, the court dealt with the qualifying language which provided for restraint in those cases where the advertising was false, deceptive or misleading. Specifically, the court looked to footnote 26 of *Bates*, where it was stated: "If the information is not misleading when published in a telephone directory, it is difficult to see why it becomes misleading when published in a newspaper."[113] The court impliedly and quite logically turned the phrase to read, "if the information is not misleading when published in the newspaper, it is difficult to see why it becomes misleading when published in the telephone directory."

The court also used the *R.M.J.* decision to emphasize the states' ability to restrain this type of advertising while conceding that the boundaries of that authority only extend to a furtherance of substantial state interests and not to absolute prohibitions.[114] A collateral issue interposed by the Bar, and summarily dealt with by the court, involved the Bar's contention that allowing the advertisement that "the first conference is free" could lead to situations found unacceptable in *Ohralik*,[115] such as misrepresentation and overreaching.[116] The court addressed this issue by pointing to the facts and findings of the Complaints Tribunal which found that "[i]t is not contended or even suggested that the respondent [appellant McLellan] is guilty of any misconduct including misrepresentations, overreaching or asserting any undue influence upon clients or prospective clients."[117] The court also compared the *Bates* advertisement with McLellan's and found the *Bates* advertisement larger in size and more aggressive than McLellan's.[118]

In conclusion, the court found that since the advertisement was not inherently likely to deceive, and was far from self-laudatory when compared to the *Bates* advertisement, a blanket prohibition of all advertising in the Yellow Pages of the telephone directory was unconstitutional, as were the sections of the Code of Professional Responsibility dealing with this issue.[119]

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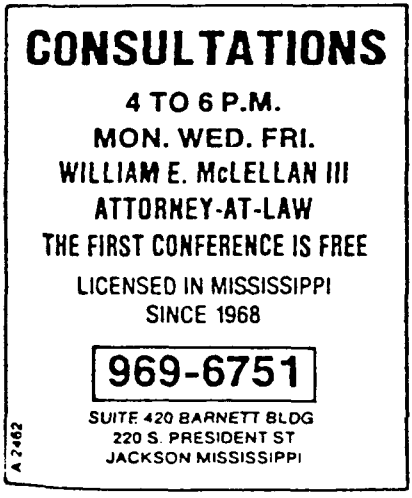
113. 433 U.S. at 372 n.26.
114. *See supra* notes 106 and 107 and accompanying text.
115. *See supra* note 94 and accompanying text.
116. Brief of Appellee at 5, 6, 413 So. 2d 705.
117. 413 So. 2d at 707.
118. *Compare* Appendix I *with* Appendix II, this Note.
119. 413 So. 2d at 708-09.

CONCLUSION

The *McLellan* decision was logically correct. The correctness stems from the long line of cases that whittled away at the fear of losing dignity, honor and tradition should lawyer advertising be allowed. The logic of the *McLellan* decision lies in the fact that if the U.S. Supreme Court in *Bates* allowed an advertisement much more aggressive and influential to appear in a newspaper where only telephone directory advertising was permitted, then *a fortiori* a simpler advertisement in a telephone directory where only newspaper advertising is permitted is likewise allowable. Therefore, the court in *McLellan* did not expand the advertising limits, but in essence, judicially confirmed a preexisting right implied but not written within the advertising rules.

Dennis J. Gruttadaro

Appendix I



Appendix II

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- **Divorce or legal separation--uncontested (both spouses sign papers)**

  $175 00 plus $20 00 court filing fee

- **Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

  $100 00

- **Adoption--uncontested severance proceeding**

  $225 00 plus approximately $10 00 publication cost

- **Bankruptcy--non-business, no contested proceedings**

  Individual
  $250 00 plus $55 00 court filing fee

  Wife and Husband
  $300 00 plus $110 00 court filing fee

- **Change of Name**

  $95.00 plus $20 00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-8888

Appendix III

LAW OFFICES

R M. J

CHROMALLOY PLAZA - SUITE 1404
120 SOUTH CENTRAL AVENUE
ST. LOUIS (CLAYTON), MISSOURI 63105
721-5321

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- Bankruptcy
- Personal Injury
- Divorce, Separation Custody, Adoption
- Workman's Compensation
- Contracts