Excerpt from *Materials and Cases on Law Practice Management*
Third Edition (Thomsen Reuters, 2007)
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Chapter 6
Marketing Legal Services

A. Background

Marketing is a term used to describe the process by which businesses, including law firms, seek and obtain clients or customers. Lawyers have always engaged in marketing, insofar as they sought to attract new clients and offer new services to existing clients, even though advertising of legal services was prohibited by the Canons of Ethics and later the Code of Professional Responsibility from 1908 until1977. The ban covered direct advertising, in-person solicitation, and many indirect forms of marketing. Lawyers were expected to develop a reputation over an extended period of time, and to obtain new business through referrals from former (satisfied) clients. Any organized campaign by an attorney to attract clients or suggest that known or unknown persons needed legal services violated the ethical rules.

The pervasiveness of these regulations produced a chilling effect on the active marketing of legal services. In 1977, the U.S. Supreme Court in *Bates and O'Steen v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810, held that advertising of routine legal services by lawyers was constitutionally protected commercial speech. The Arizona Bar, unsuccessfully argued that the ban on advertising was an appropriate exercise of regulatory power, notwithstanding the interest in fostering the free exercise of commercial speech, for a number of reasons: 1) the adverse effect on professionalism; 2) the inherently misleading nature of attorney advertising; 3) the adverse effect on the administration of justice; 4) the undesirable economic effects of advertising; 5) the adverse effect of advertising on the quality of service; and 6) the difficulties of enforcement. *Bates* recognized the right of the Bar Association to impose reasonable regulations on advertising, but refused to permit a complete ban on truthful advertising by lawyers.

In the three decades since *Bates,* lawyers have slowly emerged from their restrictive cocoons to test their wings in an environment far different from the one they had experienced previously. One of the earliest observers of this emergence was Lori B. Andrews, a research lawyer for the American Bar Foundation. Her 1980 book *Legal Advertising: The Birth of a Salesman* pointed out that *Bates* not only opened the door to newspaper ads for legal services, but a whole different attitude toward seeking new clients. The term "law firm marketing" described by Andrews, soon became a buzzword for a plethora of activities much broader than contemplated by the Court in *Bates.*

Since Andrews' observations in 1980, additional court cases, amendments to the ethical rules, and extensive experimentation have continued to push the limits of legal marketing, reflecting wide differences among lawyers concerning the limits of this fledgling industry.

Although media advertising by law firms has not become as prevalent as some observers predicted in the years immediately following *Bates*, marketing has had an impact on virtually every law firm in the United States. It is hard to imagine a law firm that does not apply marketing principles and practices to client development. Some firms retain full-time marketing directors; others utilize public relations firms on retainer; many firms have hired consultants to help them develop marketing plans. Although lawyers are novices at marketing compared to those engaged in many other business fields, they are catching up fast.

The underlying ideas are simple: an organization must determine what services it intends to deliver; who will buy the services; who will compete with the organization; and how it will communicate with potential buyers to convince them to retain the organization. The implementation of these principles is much more complicated. Not only must law firms spend considerable time developing and carrying out marketing plans, but planning activities also can encroach upon the ongoing legal work of the firm. Furthermore, a marketing study may upset long-held assumptions about clientele, services, profitability, and the roles of individuals in the firm. The uncertainties of the regulatory framework, coupled with the relative lack of sophistication among lawyers about marketing, lead many firms either to ignore the need to deal with marketing or to hire outside professional services.

A new law firm really has no choice but to develop a marketing plan before committing financing to the business. A firm that starts out with a plan can more easily review and revise the plan, than an existing firm without a plan can create one from scratch.

Before considering the issue of marketing, it may be useful to look at the legal background of advertising and solicitation. It becomes apparent in the cases since *Bates* that bar associations continue to cast their nets as broadly as possible in order to prohibit the greatest amount of advertising. At the same time, individual lawyers have continued to challenge restrictions that interfere with their efforts to attract clients. Conceptually, these efforts can be viewed as a continuum from word-of-mouth advertising to hard-sell face-to-face solicitation. The former approach was permissible before *Bates*; the latter is still prohibited. Ironically, the more direct the communication, the more effective the results are likely to be. Any salesman will tell you that their best shot is a face-to-face meeting with a motivated buyer. The more practical problem for a lawyer or law firm is deciding whether to risk professional discipline to engage in an arguably acceptable but technically impermissible method of securing clients.

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Over the years, court cases significantly expanded the scope of permissible advertising by lawyers in situations that did not involve face-to-face solicitation.

In *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), appellant, an Ohio lawyer, contacted the parents of one of the drivers injured in an automobile accident after hearing about the accident from another source, and learned that the 18–year-old daughter was hospitalized. He then approached the daughter at the hospital and offered to represent her. After another visit with her parents, he again visited the accident victim in her hospital room, where she signed a contingent fee agreement. In the meantime, appellant approached the driver's 18–year-old female passenger—who also had been injured—at her home

on the day she was released from the hospital; she agreed orally to a contingent fee arrangement. Eventually, both young women discharged appellant as their lawyer, but he succeeded in obtaining a share of the driver's insurance recovery in settlement of his lawsuit against her for breach of contract. As a result of complaints filed against appellant by the two young women with a bar grievance committee, the Ohio Bar Association filed a formal complaint with the Disciplinary Board of the Ohio Supreme Court. The Board found that Ohralik solicited clients in violation of the Disciplinary Rules and rejected his defense that his conduct was protected by the First and Fourteenth Amendments. The Ohio Supreme Court adopted the Board's findings and increased the Board's recommended sanction of a public reprimand to indefinite suspension. In an opinion written by Justice Powell, the Court held that the Bar, acting with state authorization, constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.

In contrast, the Court found for the defendant in *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982). In this case, the Court responded to a challenge to the post-*Bates* revisions to the Code of Professional Responsibility. Missouri, like most states developed a "laundry list" approach to regulation, banning everything that was not permitted (rather than permitting everything that was not prohibited). In this case the attorney committed such heinous acts as stating that he engaged in "personal injury" and "real estate" law rather than "tort law" and "property law" as set forth in DR 2–101 of the Missouri Code. In striking down the rules, the Supreme Court articulated a test for determining the validity of such restrictions on commercial speech:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.
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> Even when a communication is not misleading, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served. *Central Hudson Gas Co. v. Public Service Comm'n,* 447 U.S., at 563–564. Restrictions must be narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), involved a lawyer who placed newspaper ads targeted to women who may have been injured by an intrauterine device called a Dalkon Shield. The ad contained a picture of a Dalkon

Shield in violation of Ohio disciplinary rules against graphic representation. In another ad Zauderer promised that there would be no fee to contingent-fee clients if there was no recovery. He was disciplined by the Bar, and the discipline was upheld by the Ohio Supreme Court. The U.S Supreme Court held that the illustrations were constitutionally protected, but that his contingent fee ads were misleading because they did not make it clear that clients remained responsible for the costs of litigation even if they lost the case.

Restrictions on the communication of specialties were disallowed in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 495 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). Interestingly, Chief Justice Rehnquist and Justice O'Connor, now joined by Justice Scalia, questioned the wisdom of the Court's advertising decisions. The Chief Justice favored a review of the entire line of commercial speech cases, while Justice O'Connor seemed to suggest that protection of professionalism is a substantial state interest like the interest in preventing untruthful advertising. She would permit considerably more latitude to the bar in controlling "sleazy" but truthful practices than would the current majority.

Targeted direct mail campaigns were permitted in *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). Justice O'Connor, dissenting, argued that professionalism represented a substantial state interest that was an appropriate basis for regulation under the *Central Hudson Gas* test. Seven years later, her view represented the majority, when lawyer advertising came before the court again in a challenge to Florida's thirty-day waiting period before lawyers were allowed to contact accident victims. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). Changes in the makeup of the Supreme Court since the *Went For It* decision raise questions about how future cases will be analyzed, but it is unlikely that the Court will retreat to a pre-*Bates* prohibition of all advertising.

In 2002, the ABA amended the Model Rules of Professional Conduct to reflect current constitutional limitations in the rules governing advertising. ... Despite this effort, a number of areas remain untested. For example, the ABA's Model Rules of Professional Conduct, in Rule 7.3 include real time Internet and live telephone contact in the category of solicitation, although an argument can be made that both are more like the targeted direct mail in *Shapero* than the overreaching face-to-face contact in *Ohralik*, but neither provision has been challenged in court. Perhaps soon, some brave lawyer will do so, but most lawyers do not want to put their licenses on the line to test the rules, and elect instead to limit their communications to permissible and tested approaches.

Since 2002, individual states have reviewed the ABA's recommended changes, and some have adopted them. Other jurisdictions, including Florida, Texas and New York, have enacted revisions to state rules of professional conduct that are more stringent than the ABA standards. Whether these rules will be challenged, and if so overturned by the courts remains to be seen. One thing is certain: state variations of the adverting rules differ markedly, so, at the very least, law firms should consider the ethical rules of the jurisdiction(s) where they practice before engaging in creative or untested marketing activities.