Attorney Direct Mailings as Impermissible Solicitation or Permissible Advertising

"Dear Sir:

This is to advise you that our office handles all aspects of legal work concerning real estate transactions. Our fees are as follows:

Opinion of title:	50.00
Deed preparation:	15.00
Mortgage preparation:	15.00

We guarantee that every Opinion of Title from our office is researched by an approved attorney who is a member of the _____ Bar Association. We also guarantee that if there are no objections to title or encumbrances which must be resolved as to the title, that our opinion will be delivered to the lending institution within 48 hours of the date of your order.

We thank you for your time and consideration in the matter.

Sincerely yours,"[1]

The above letter was actually printed and mailed to potential clients by two attorneys. Was this action permissible attorney advertising within the standards of *Bates v. State Bar of Arizona*,[2] the foundation case of the modern era of allowable attorney advertising? Or was this correspondence a form of impermissible attorney solicitation of clients for pecuniary gain?[3]

Although the basic criteria have been set out in several recent United States Supreme Court decisions,[4] various state court opinions have demonstrated that the line between permissible advertising and impermissible solicitation through direct mail campaigns by attorneys is very fine and difficult to pinpoint.[5]

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1. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978).

2. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

3. The Kentucky Court found that in this particular case the letter was a form of advertisement within the Bates criteria and not "in-person solicitation." Kentucky Bar Ass'n, 568 S.W.2d at 934.

4. *See, e.g.*, Bates v. State Bar of Arizona, 433 U.S. 350 (1977); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); and *In re* R.M.J., 455 U.S. 191 (1982).

5. *See, e.g.*, Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978); *In re* Madsen, 68 Ill. 2d 472, 370 N.E.2d 199 (1977); Allison v. Louisiana State Bar, 362 So. 2d 489 (La. 1978); Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416,

The grandfather of all modern-day attorney advertising practices is *Bates*.[6] In the 1977 opinion written by Justice Blackmun, the Court held that a blanket suppression of attorney advertising was an undue infringement upon attorneys' First Amendment rights.[7] The Court narrowed its opinion by saying that a lawyer may constitutionally advertise "the *prices* at which certain *routine* services will be performed."[8]

The Court further restricted its opinion by holding that a state could always prohibit advertising that was deceptive and misleading,[9] and, furthermore, could place reasonable time, place, and manner restrictions upon such advertising.[10]

The definition of routine services and the forms of media that could be used for such advertising are just a few of the many questions left to the individual state courts to answer.

In lifting the ban on attorney advertising, the Court focused on the beneficial nature of such commercial speech in "assuring informed and reliable decisionmaking."[11] By carefully lifting the curtain, the Court felt that society would be better served through the education of laypersons so that they might be less fearful of seeking out legal advice[12] and more aware of the availability of such advice and the terms at which such advice would be rendered.[13]

In fact, advertising should do for the legal profession what it has already done for all other advertised goods and services; that is, "to

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393 A.2d 1175 (1978); Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-218, 58 MICH. B.J. 564 (1979); N.Y. Comm. on Professional Ethics, Op. 507, 51 N.Y. ST. B.J. 343 (1979); N.Y. Comm. on Professional Ethics, Op. 508, 51 NEW YORK STATE B.J. 343 (1979); Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980); *In re* Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980); Bishop v. Comm. on Professional Ethics, 521 F. Supp. 1219 (S.D. Iowa 1981); Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1981); In the Matter of Appert, 315 N.W.2d 204 (Minn. 1981); State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982) and *In re* Utah State Bar Petition, 697 P.2d 991 (Ken. 1982).

6. In *Bates*, the appellants were two Arizona attorneys who advertised in a newspaper the prices they would charge for some kinds of general legal services such as uncontested divorces, adoptions, bankruptcies and name changes. *Bates*, 433 U.S. at 354.

7. *Id.* at 383.

8. *Id.* at 367.

9. *Id.* at 383.

10. *Id.* at 384.

11. *Id.* at 364.

12. *Id.* at 370.

13. *Id.* at 376.

inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[14] The *Bates* court indicated that the allowance of some carefully regulated advertising would be both healthy to the legal profession and serve the important societal function of supplying the public with much needed information.[15]

Bates and other Supreme Court opinions[16] provide us with a skeleton upon which we can begin to formulate the body of law concerning attorney advertising by direct mail. *In re Primus*,[17] decided on May 30, 1978, was chronologically the next major framework case. *Primus* involved an attorney with strong associational ties to the American Civil Liberties Union who sent a letter to a woman who had been sterilized as a condition to receiving public medical help.[18] The letter informed the woman of the availability of free legal assistance sponsored by the ACLU.[19] The court found that a South Carolina disciplinary rule which served to prohibit such an expression of political and ideological conduct violated the lawyer's First Amendment right of speech and Fourteenth Amendment associational rights.[20] The court focused on the fact that the attorney was not motivated by pecuniary gain having received no compensation from the ACLU.[21] The court distinguished the degree of regulation a state may assert over attorney solicitation for pecuniary gain and that which may be asserted over the same type of activities motivated by political and associational interests.[22]

In *Ohralik v. Ohio State Bar Ass'n*,[23] another foundation case decided on the same day as *Primus*, the court had the opportunity to develop the solicitation issue to a much fuller extent. The appellant

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14. *Id.* at 364.
15. *Id.*
16. *See, e.g., In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); and *In re* R.M.J., 455 U.S. 191 (1982).
17. 436 U.S. 412 (1978).
18. *Id.* at 415.
19. *Id.* at 416.
20. *Id.* at 439.
21. *Id.* at 415.
22. "Under certain circumstances that approach [prophylactic regulation of all solicitation] is appropriate in the case of speech that simply 'propose[s] a commercial transaction' . . . In the context of expression and association, however, a State must regulate with significantly greater precision." *Id.* at 437-38.
23. 436 U.S. 447 (1978).

was severely disciplined[24] by the Ohio State Bar and the Supreme Court of Ohio for violation of the Ohio Code of Professional Responsibility, DR 2-104(A)[25] and DR 2-103(A)[26] which prohibited attorney solicitation for pecuniary gain. The appellant had approached two young accident victims[27] to discuss the possibility of representing them on a contingent fee basis. One of the victims was still in the hospital in traction when visited by the attorney. He visited the other victim at home on the day she had left the hospital.[28] The attorney even went so far as to conceal a tape recorder on him during one of the visits, allegedly so he would have evidence of the girl's oral agreement to hire him.[29] The Supreme Court found his actions to be impermissible attorney solicitation and affirmed the indefinite suspension levied on him by the lower court.[30]

The court carefully and painstakingly distinguished *Bates* and its approval of attorney advertising concerning "the availability and terms of routine legal services"[31] from the situation in *Ohralik* involving in-person client solicitation. "But in-person solicitation of professional employment by a lawyer does not stand on a par with truthful advertising about the availability and terms of routine legal services, let alone with forms of speech more traditionally within the concern of the First Amendment."[32] The court noted significant differences between advertising and solicitation. Advertising provides relevant information to the recipient, leaving it up to him to evaluate the information and make any choice he feels is appropriate while solicitation invites an immediate

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24. Albert Ohralik was indefinitely suspended from the practice of law. *Id.* at 454.

25. DR 2-104 (A) provides that:

> 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:
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> (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id. at 453 n.9 (citing Ohio Code of Professional Responsibility (1970)).

26. DR 2-103(A) provides that: "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." *Id.* (citing Ohio Code of Professional Responsibility (1970)).

27. Both victims were only 18 years of age. *Id.* at 449, 451.

28. *Id.* at 450.

29. *Id.* at 451.

30. *Id.* at 468.

31. *Id.* at 454.

32. *Id.* at 455.

response, putting pressure on the decision-maker to act first and think later.[33] Advertising can be easily regulated by the Bar to prevent misrepresentation and undue influence. Solicitation cannot be.[34]

While agreeing that lawyer conduct in seeking employment deserves some First Amendment protection, the *Ohralik* court held that this freedom was subject to regulation by states in furtherance of important state interests.[35] The court identified these interests as the protection of consumers, the regulation of commercial transactions, and the maintenance of professional standards of attorneys.[36] Within the interest of consumer protection, a state seeks to prevent certain evils generally associated with attorney solicitation. These include the prevention of attorney behavior that is "overreaching, overcharging, underrepresentat[ive],"[37] fraudulent, unduly influential, intimidating, an invasion of privacy, and other conduct that is "vexatious."[38] After identifying the important state interests sought to be protected by a state's ban on solicitation, the court found that the facts of this case aptly demonstrated the need for "prophylactic regulation."[39]

Although the *Ohralik* court said that its focus was on the conduct of the attorney,[40] it seemed to place a great deal of emphasis on the mental and physical condition of the recipient in determining whether or not such conduct contained the evils sought to be prevented.[41] This is important because many of the later state court cases seem to use the condition and occupation of the letter recipients as one basis for determining whether the conduct is advertising or solicitation.

Even with these guidelines, there has still been considerable confusion as to what actually constitutes solicitation and/or advertising. Justice Marshall in a concurring opinion to both *Ohralik* and *Primus* noted the problems that were likely to stem from those opinions.[42] Mar-

33. *Id.* at 457.
34. *Id.* at 457-58.
35. *Id.* at 460.
36. *Id.* at 461.
37. *Id.*
38. *Id.* at 462.
39. *Id.* at 468.
40. *Id.* at 463.
41. [The] very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. *Id.* at 465-66
42. *Id.* at 469.

shall discussed the wide gap between a state's ability to regulate the legal profession to prevent "fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy"[43] and a situation which involves "honest, unpressured 'commercial' solicitation."[44] Marshall suggested that there should be no distinction made between the standards for advertising and those for solicitation. He offered his own version of a disciplinary rule for this area: "to permit all solicitation and advertising except the kinds that are false, misleading, undignified, or champertous."[45] Marshall also said that the *Primus* and *Ohralik* cases represented "opposite poles"[46] and that it would be up to individual Bars and courts to draft regulations that deal with the "intermediate situations."[47] The state court and bar opinions that will be discussed later in this article are the recent attempts to fill in these vague gaps.

The final skeletal case is *In re R.M.J.*,[48] a case out of Missouri. The appellant, in addition to newspaper advertising, mailed announcement cards to "persons other than lawyers, clients, former clients, personal friends, and relatives in violation of DR 2-102(A)."[49] The appellant was issued a private reprimand by the Missouri Supreme Court which he subsequently appealed to the U.S. Supreme Court on the grounds that the sanction violated his First and Fourteenth Amendment rights.[50] The Court found for the appellant, holding that misleading advertising could be entirely prohibited,[51] but such restrictions "may be no broader than reasonably necessary to prevent the deception."[52] Even non-misleading communications may be regulated by a state, but only where it serves to further some substantial state interest and under circumstances where the particular method used is "inherently misleading" or "subject to abuse."[53]

With respect to the issue of mailing announcement cards, the court concluded that a blanket prohibition was too restrictive and there was

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43. *Id.* at 476.
44. *Id.*
45. *Id.*
46. *Id.* at 471.
47. *Id.* at 473.
48. 455 U.S. 191 (1982).
49. *Id.* at 198.
50. *Id.*
51. *Id.* at 203.
52. *Id.*
53. *Id.*

at least one less restrictive method for the regulation of such conduct.[54] The less restrictive method suggested by the Court was to require the filing of a copy of the materials mailed with the Advisory Committee.[55] In effect, the *R.M.J.* court held that when regulating commercial speech by an attorney that is not misleading, the state must do so in the least restrictive manner that will adequately serve the interest sought to be protected.[56]

One of the first major state court cases dealing with attorney direct mailings that followed *Bates* was *In re Madsen*[57] decided in October of 1977 by the Illinois Supreme Court. The attorney in the case mailed certain materials to approximately 2,000 clients.[58] One enclosure was a bulletin entitled "Tips from your Lawyer for 1973."[59] This communication contained information about various aspects of the law, including how to avoid probate and the advantages of business incorporation.[60] The bulletin also contained specific information for particular clients informing them when they had last reviewed their wills and suggesting that it should be done every couple of years.[61] This bulletin also described the firm as being engaged in a "'wide general practice'"[62] and that it had processed 1,149 files in 12 areas of general practice.[63] The second communication was a pamphlet entitled "Wills, Their Importance and Why You Should Have One" which was published by the Illinois Bar Association.[64] The attorney was charged with improper business solicitation.

The Illinois Supreme Court held that Madsen's conduct did not amount to improper solicitation. The court concluded that the letter contained "information of value and did not under the circumstances, constitute an improper effort to solicit business."[65]

The next case to be discussed was the source of the letter that began this article. This is the case of *Kentucky Bar Association v.*

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54. *Id.* at 206.
55. *Id.*
56. *Id.* at 203.
57. 68 Ill. 2d 472, 370 N.E.2d 199 (1977).
58. *Id.* at _____, 370 N.E.2d at 200.
59. *Id.*
60. *Id.* at _____, 370 N.E.2d at 201.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at _____, 370 N.E.2d at 200.
65. *Id.* at _____, 370 N.E.2d at 202.

Stuart.[66] The Kentucky Supreme Court found that the letter mailed by the attorneys to certain real estate agencies[67] was a proper form of advertising. The court said the letter only provided information as to "prices charged for routine legal services;" qualifications of the senders, and the "time period in which the services would be rendered" and did not constitute "in-person" solicitation.[68] The letter was found to be merely a form of advertising[69] and it had not been shown that an advertisement in the form of a letter was a source of increased problems due to overreaching, deceptive practices[70] and difficulty of ethical enforcement.[71]

Allison v. Louisiana State Bar[72] is a case which was decided a few years after *Bates* and just a few months after *Primus* and *Ohralik*. An attorney and his partner had formulated a plan where they would provide prepaid legal services to business employers for their employees. The employers who joined the plan would deduct $10 from each employee's salary and use this to pay the attorneys for the service.[73] In order to inform the businesses about the plan, the attorneys sent them letters.[74] The Louisiana Committee on Professional Responsibility charged the attorneys with solicitation in violation of Louisiana disciplinary rules.[75] The Louisiana Supreme Court found that the petitioners' conduct was in fact "direct solicitation for pecuniary gain" and not an exercise of their right of association.[76] The court distinguished the standard for associational conduct and solicitation for pecuniary gain in much the same way as *Primus*.[77] The court found that the state's

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66. 568 S.W.2d 933 (Ky. 1978).
67. *Id.* at 933.
68. *Id.* at 934.
69. *Id.*
70. *Id.*
71. *Id.* at 934. The court further stated:
[t]he written form provides a record of what was stated as protection against such abusive conduct . . . Ample protection may be assured the public by promulgation of a rule which requires the attorney to mail a copy of such advertisements to the Association simultaneously with the mailing of one or more of them to members of the public.
72. 362 So. 2d 489 (La. 1978).
73. *Id.* at 490.
74. *Id.* at 489.
75. *Id.* at 490.
76. *Id.* at 496.
77. The *Allison* court said:
[i]n cases involving the substantial rights to associate for the advancement

important interests in regulating solicitation motivated by pecuniary gain outweighed the right to free commercial speech by lawyers.[78]

In a concurring opinion, Justice Tate pointed out that the service offered by the petitioners was "socially desirable," especially for "middle income employees."[79] Therefore, he felt that the conduct of the petitioners in informing employers of their plan through "restrained and dignified . . . mail solicitation . . . rather than advertising in public journals" would not be objectionable under *Ohralik*.[80]

In *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, a partnership of lawyers sought an injunction against former members of their firm who had left to form their own partnership.[81] The new firm sent letters to their clients advising them that they could continue with the old firm or dismiss the old firm and retain the new one.[82] The letter contained another letter that could be mailed to the old firm dismissing them and a contingent fee agreement form to be used to retain the new firm.[83]

The Supreme Court of Pennsylvania reinstated the injunction issued by a lower court which had been dissolved by an appellate court.[84] The court held that the new firm had gone beyond the point of permissible advertising[85] in violation of the rule against "self-recommendation."[86] The court said that the conduct of the appellees under these circumstances was too one-sided and therefore frustrated "'informed and reliable decision-making.'"[87] The court stated, "Thus, appellees were actively attempting to induce the clients to change

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> of a common purpose, the state's interest in regulating the 'solicitation' attending that association will generally be deemed insufficient to sustain the abridgement of First Amendment rights. On the other hand, because of the substantial dangers associated with direct, in-person solicitation for pecuniary gain, the state's interest in 'prophylactic' regulation justifies the limitation upon the lawyer's activities.

78. *Id.*
79. *Id.* at 497.
80. *Id.*
81. 482 Pa. 416, 393 A.2d 1175 (1978).
82. *Id.* at _____ , 393 A.2d at 1178.
83. *Id.*
84. *Id.*
85. *Id.* at _____, 393 A.2d at 1186.
86. The court further said "Appellees could inform the general public, including clients of Adler, Barish, of the availability of their legal services, and thus the 'free flow of commercial information' to the public is unimpaired." *Id.* at ____, 393 A.2d at 1179.
87. *Id.*

law firms in the middle of their active cases . . . In this atmosphere, appellee's contacts posed too great a risk that clients would not have the opportunity to make a careful, informed decision."[88]

The Committee on Professional and Judicial Ethics of the Michigan Bar has been the source of at least one recent ethics opinion involving attorney advertising by mail.[89] The Committee held: "An attorney may properly advertise his or her legal services by mail. Such advertising will not constitute impermissible solicitation if it is general in nature and is not directed to or intended for potential clients with an *identified present need for legal services.*"[90] The Committee evaluated four specific situations in order to reach their general resolution.

The first situation involved a proposal by a lawyer to send out a general letter and brochure as an "occupant" type of mailing to a specific area which would inform the recipient of the kind of work the firm did and the prices charged.[91] The second situation involved a firm that sent out letters to about 500 non-lawyers informing them of the experience of the firm in labor arbitration and the fees charged for such services.[92] The letter also contained a paragraph inviting inquiry if a labor arbitrator should be needed.[93] Focusing on the nature of the recipients and the content of these letters, the Committee found both to be acceptable means of attorney advertising.[94] However, they did feel that the second letter should be modified by removing the invitation to inquire so that it would no longer invite a "specific response."[95]

The third and fourth proposals were found to constitute "improper solicitation."[96] In the third proposal, a firm heavily involved in labor law wanted to send out a brochure to specific companies with labor

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88. *Id.* at _____, 303 A.2d at 1181.

89. Mich. Comm. on Professional and Judicial Ethics, Formal Op. C-218, 58 MICH. B.J. 564 (1979).

90. *Id.* at 564 (emphasis added).

91. *Id.*

92. *Id.*

93. *Id.*

94. The Committee said: "Note that both of the above proposals are general in nature and do not pinpoint present identified needed service. They make known to the recipient available services provided by the sender, either general in nature or through the limitation of practice." *Id.*

95. *Id.*

96. *Id.* at 565.

problems.[97] The brochure would describe the firm and give information about the qualifications of its members.[98] The fourth proposal was one in which an attorney wishes to send out information on wills to a particular area.[99] Along with an informative brochure, the attorney wanted to enclose a letter inviting the recipient to have questions answered by him and a card that could be returned by the recipient to the lawyer in order to set up an " 'appointment to discuss wills.' "[100]

The Committee found the line between the proper and improper proposals to be content-based.[101] They said it would be permissible for an attorney to send out letters containing general information that "do not unduly prompt a response,"[102] but letters sent to a particular clientele with an "identified need for particular legal services" was a form of improper attorney solicitation.[103]

New York has been the source of several recent opinions on the subject of attorney advertising/solicitation. In 1979, the New York Committee on Professional Ethics issued an opinion on direct mailings by lawyers.[104] The Committee felt that as long as the other disciplinary rules were not violated, it "does not become an improper solicitation merely because it is placed in the recipient's mailbox by a postman rather than a newsboy."[105] In the opinion of the Committee, a lawyer may advertise, as long as the other rules were satisfied, by mail sent to "non-lawyers with whom the lawyer maintains no special relationship."[106]

In another opinion,[107] the same committee recognized that direct mail has long been used as a cheap, but effective form of advertising.[108] The committee said that when sent to parties familiar with this type of communication medium, "a direct mail promotion piece is not qualitatively or functionally different from either broadcast or print advertising."[109]

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97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. N.Y. Comm. on Professional Ethics, Op. 507, 51 N. Y. St. B.J. 343 (1979).
105. *Id.* at 343.
106. *Id.*
107. N.Y. Comm. on Professional Ethics, Op. 508, 51 N Y. St. B.J. 343 (1979).
108. *Id.* at 345.
109. *Id.*

In a very forceful opinion written by Judge Meyer, the New York Court of Appeals in *Koffler v. Joint Bar Association*[110] soundly distinguished solicitation from advertising.[111] Here, attorneys Koffler and Harrison mailed out over 7000 letters to real estate owners informing them of the availability of their services should they decide to sell their property.[112] The attorneys also sent letters to real estate brokers asking that they refer clients to them.[113] While avoiding the issue of the mailing of the letters to the brokers, the court concluded that direct mail advertising could not be constitutionally prohibited.[114]

The court defined "solicit" as a "means to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing."[115] On the other hand, "advertising" "is the calling of information to the attention of the public, by whatever means."[116]

The court also discounted the problems of invasion of privacy and deception.[117] In discussing invasion of privacy, the court said that the recipient may "escape exposure to objectionable material simply by transferring . . . [it] from envelope to wastebasket."[118] Although it recognized the possibility that deception would be greater because direct mail goes to only one person at a time, the court felt that this could be adequately policed by requiring the filing of the letter with a regulatory association.[119] Therefore, these potential problems would not justify a complete ban on direct mail advertising[120] and less restrictive

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110. 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980).
111. *Id.* at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.
112. *Id.* at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 874.
113. *Id.*
114. *Id.* at 144, 412 N.E.2d at 930, 432 N.Y.S.2d at 874.
115. *Id.* at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.
116. The court went on to say that:

> [t]o outlaw the use of letters, the content of which does not violate DR 2-101, addressed to those most likely to be in need of legal services, because in addition to 'advertising' the nature of the service and its price the letters implicitly or explicitly suggest employment of the writer to perform those services, ignores the strong societal and individual interest in the free dissemination of truthful price information as a means of assuring informed and reliable decision making in our free enterprise system.

Id. at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.
117. *Id.* at 148, 412 N.E.2d at 932, 432 N.Y.S.2d at 877 (quoting Consolidated Edison Co. v. Public Serv. Comm., 447 U.S. 530, 542 (1980).
118. *Id.* at 149, 412 N.E.2d at 933, 432 N.Y.S.2d at 877-78.
119. *Id.* at 150, 412 N.E.2d at 933, 432 N.Y.S.2d at 878.
120. *Id.*

means of regulation were available.[121]

In the final New York opinion to be discussed, *In re Greene*,[122] the Court of Appeals finally dealt with the issue avoided in *Koffler* which involved the mailing of letters[123] to real estate brokers by an attorney for the purpose of persuading the brokers to recommend the attorney's services to the brokers' clients.[124] Simply put, the court found that such communication was an "indirect solicitation of clients"[125] that was fraught with potential conflicts of interest[126] and therefore impermissible solicitation.[127]

> The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale are examples of the conflict potential to be protected against.[128]

The court also stated that a mere filing requirement would not sufficiently protect against this problem.[129]

In *Eaton v. Supreme Court of Arkansas*,[130] two attorneys were

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121. *Id.* at 151, 412 N.E.2d at 934, 432 N.Y.S.2d at 878.
122. 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981).
123. The letter read:

> ALAN I. GREENE offers your client full legal representation on any and all property transactions for just $335. Legal coverage begins with contract and continues through to closing. With 18 years experience, the office of ALAN I. GREENE is fully prepared to expedite all closings and offer competent advice to the buyer and/or seller. Your real estate office will be afforded our full cooperation. With just two hours notice, a contract and all legal documents can be prepared.
>
> By recommending the services of ALAN I. GREENE, you, the relator, will save your client time and money-one of the main reasons they called on you!

Id. at 121, 429 N.E.2d at 391, 444 N.Y.S.2d at 884.
124. *Id.*
125. *Id.* at 125, 429 N.E.2d at 393, 444 N.Y.S.2d at 886.
126. *Id.* at 126, 429 N.E.2d at 394, 444 N.Y.S.2d at 887.
127. *Id.*
128. *Id.* at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889.
129. *Id.*
130. 270 Ark. 573, 607 S.W.2d 55 (1980), *cert denied*, 450 U.S. 966.

involved in a mail campaign in which they included their advertisement in a packet of coupons[131] mailed out to 10,000 households.[132] The court held that this was improper advertising.[133] The court said that the advertisement failed to provide enough information on fees and services so that an informed comparison could be facilitated.[134] Furthermore, under the circumstances, a recipient could easily believe that the advertisement was a solicitation of services by the use of a "discount offer."[135] The court found that the "combination of the content and the manner of dissemination in this case constitute a violation of our rules."[136]

The only federal case to be discussed on the subject is that of *Bishop v. Committee on Professional Ethics*.[137] In the case, an Iowa lawyer sought a modification of various aspects of Iowa's disciplinary rules regulating lawyer advertising.[138] One of these involved the rule against direct mail advertising.[139] The court discussed in detail each of the interests sought to be protected by the ban on direct mail advertising—conflict of interest, overcommercialization, invasion of privacy, and deception[140]—and concluded that absolute prohibition of direct mail advertising was unconstitutional.[141]

The court could not identify how direct mail advertising posed a conflict of interest problem.[142] Therefore, a ban on this type of advertising would have no effect on this problem.[143] Although an interest in preventing overcommercialization was recognized by the court, they

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131. The coupon pack included:

> A coupon for french fries with the purchase of a hamburger, coupons for discounts on meals at local restaurants, a discount from a "Figure Salon and Health Spa" . . ., a discount on tune-ups and auto repairs, . . . a coupon offering a special on seamless guttering, . . . and an advertisement for a free home appraisal and a 'garage sale' sign from a real estate company.

Id. at , 607 S.W.2d at 59.

132. *Id.*
133. *Id.* at _____, 607 S.W.2d at 60.
134. *Id.* at _____, 607 S.W.2d at 59.
135. *Id.*
136. *Id.* at _____, 607 S.W.2d at 60.
137. 521 F. Supp. 1219 (S.D. Iowa 1981).
138. *Id.* at 1221.
139. *Id.* at 1230.
140. *Id.* at 1231.
141. *Id.* at 1232.
142. *Id.* at 1231.
143. *Id.*

found an absolute ban to be too restrictive—that content regulation would suffice.[144]

The court also found that the invasion of privacy that would result from direct mail advertising was not significant enough to impose an absolute ban.[145] It was suggested that one method to control any such invasion would be to require that the mailing be identified on the outside of the envelope as "Advertising Content."[146]

Recognizing that there is a greater possibility of deception with direct mail advertising because it is directed to individuals as individuals, the court still did not find this significant enough to sustain a total ban.[147] Just as the Kentucky Court decided in *Stuart*, a filing requirement should take care of this problem.[148]

In *Florida Bar v. Schreiber*,[149] the Florida Supreme Court found the use of direct mail campaigns to be improper[150] and stated that

> social benefits derived from this form of communication are negligible, and because we perceive certain harms to citizens such as undue influence, invasion of privacy, and distortion of an attorney's legal judgment, the state has a paramount interest in the prohibition of direct mail solicitation motivated solely by pecuniary gain.[151]

The attorney in the case had mailed a letter recommending his services in the area of immigration to a trade company.[152]

The court seemed to focus on the problem of a "captive

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144. *Id.*
145. *Id.*
146. *Id.* at 1232.
147. *Id.*
148. *Id.*
149. 407 So. 2d 595 (Fla. 1981).
150. *Id.* at 600.
151. *Id.* at 599-600.
152. The letter read:

> Gentlemen:
> It is noted that possibly your company, dealing in International Trade would at times find yourselves confronted with Immigration problems. Should such a problem occur and should you wish the services of reputable Immigration attorneys specializing in Immigration and Naturalization Law, please feel free to contact the undersigned. It would be our pleasure to be of service to you.
> Additionally, should you wish a copy of our outline on Immigration policy we will be pleased to send you a copy.

Id. at 596.

audience"[153] which in this case was a targeted company.[154] The problem arises because an "attorney's words carry a . . . sense of authority,"[155] and a "complete stranger"[156] would be "mentally or economically vulnerable."[157] The court emphasized the problem with projecting the letter toward a specific company or person.[158] The court also said that other equally adequate means of advertising by attorneys was available[159] and the "prohibition of direct mail solicitation [was] directly related to the state's obligation to uphold professional standards for the protection of its citizens."[160]

Justice Overton's concurring opinion, also recognized what most of the other courts that have dealt with this problem have recognized, but which the majority opinion seemingly failed to recognize: "that we can regulate this type of legal advertising, but we cannot constitutionally prohibit it under the existing law."[161]

In re Appert[162] was a 1981 Minnesota case in which attorneys Appert and Pyle mailed letters and brochures to friends and clients, both present and former, informing them about problems with a certain brand of intrauterine contraceptive.[163] The court readily admitted that nothing in the letters was false or misleading.[164] Besides informing the recipients of problems that had arisen with the device, the attorneys informed them of their availability to represent people in litigation involving these devices and the terms of such representation.[165] Specifically, the letters said that the attorneys would accept such employment on a contingent fee basis.[166]

The Minnesota Supreme Court held that the attorneys' actions were constitutionally permissible.[167] The court seemed to focus on the

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153. *Id.* at 598.
154. *Id.* at 596.
155. *Id.* at 598.
156. *Id.*
157. *Id.*
158. *Id.* at 599.
159. *Id.*
160. *Id.*
161. *Id.* at 600.
162. 315 N.W.2d 204 (Minn. 1981).
163. *Id.* at 206.
164. *Id.* at 207.
165. *Id.* at 206.
166. *Id.* at 210.
167. *Id.* at 209.

public's right to be informed.[168] In an opinion similar to many that have previously been discussed, the court stated that a total ban on direct mail advertising was too restrictive.[169]

In the recent case of *State v. Moses*,[170] the Kansas Supreme Court held that a letter sent by an attorney to persons unknown to him who were trying to sell their homes[171] violated the Code of Professional Responsibility.[172] The letter was basically informative in nature, offering to do the work needed to sell a home for $300, but it also contained an invitation for the recipient to call the attorney's office to set up an appointment.[173]

The court found that this conduct was a form of solicitation subject to state regulation.[174] As in some of the cases previously discussed, the court noted the vulnerability of the recipients to the attorney's "suggestion of employment"[175] due to the economic circumstances involved.[176] According to the court, a ban on any direct solicitation is "reasonable and necessary for the protection of the public and the fair administration of justice."[177]

It is most fitting that we end our survey of cases with a recent opinion[178] in which the Utah Supreme Court decided to approve changes in the Utah disciplinary rules regarding attorney advertising as suggested by the Utah State Bar.[179] With respect to direct mail advertising, the court noted that the state had an interest in "maintaining high standards of dignity and professionalism in the manner in which at-

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168. The court went on to say that:

> The facts in this case demonstrate that important individual and public interests are present. The information supplied through respondent's distribution of the letter and brochure made several injured parties aware of their legal position and absent access to the letter and brochure, some of those individuals would not have been made aware of their rights.

Id. at 210.

169. They "could have as easily discarded them if they were not interested as they could have ignored a billboard or newspaper advertisement." *Id.* at 212.

170. 231 Kan. 243, 642 P.2d 1004 (1982).

171. *Id.* at _____, 642 P.2d at 1006.

172. *Id.* at _____, 642 P.2d at 1007.

173. *Id.* at _____, 642 P.2d at 1006.

174. *Id.* at _____, 642 P.2d at 1007.

175. *Id.*

176. *Id.*

177. *Id.*

178. *In re* Utah State Bar Petition, 647 P.2d 991 (Utah 1982).

179. *Id.* at 991.

torneys, who are officers of its courts, present themselves to the public . . ."[180] The court stated that an absolute ban on mediums such as "billboards, circulars, matchbooks, and inscribed pencils and pens"[181] for lawyer advertising is permissible because these are "undignified."[182]

The court did allow the use of direct mail for attorney advertising purposes to the extent of allowing "the circulation of *professional cards* and *announcements* to *prospective clients*."[183] This seemed to be as far as the court was willing to go.[184]

Conclusion

Even after an extensive review of the recent case law on the subject of attorney advertising or solictation by direct mail, there are still relatively few concrete guidelines that can be formulated. Each case must be decided on a case by case basis using *Bates*, *Primus*, *Ohralik*, and *R.M.J.* as frameworks. Generally, just as in many of the above cases, it seems that someone must first attempt a direct mail advertising campaign before a state without clear law will establish more concrete rules. This is risky business. Due to the case by case analysis employed by the courts, any attempt to draw precise conclusions would not be fruitful.

Philip Lisenby

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180. *Id.* at 993.
181. *Id.* at 995.
182. *Id.*
183. *Id.* at 996. (emphasis added).
184. *Id.*