1985

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Available at: http://lawecommons.luc.edu/luclj/vol16/iss3/16
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INTRODUCTION

Regulating the use of direct mailings from attorneys to potential clients has been a problem for both the bar and the courts. The difficulty is due in large part to confusion over whether direct mailings should be classified as advertising or as solicitation. Generally, to advertise is to announce, to inform, or to call to the public attention. To solicit is to awake or excite to action, usually implying a personal petition to a particular individual to do some particular thing. Direct mailings contain elements of both. Like advertisements, direct mailings can be used to inform the recipient of the attorney's services and to explain the fees. Direct mailings are also like solicitations, however, because they are private communications between the attorney and the recipient, urging the latter to take some kind of action.

In the days when both advertising and solicitation by attorneys were banned, the problem of correctly classifying direct mailings had little significance. As the freedom of speech protections of the first amendment began to be applied to commercial speech, restrictions on attorney advertising were gradually eased. Solicitation, however, continued to be prohibited. As a result, a continuum emerged. At one end of this continuum truthful advertisements are readily permissible and at the other extreme, private solicita-

1. See infra notes 122-24 and the accompanying text.
2. If the mailings are classified as advertisements, they can be regulated but not proscribed. See infra notes 50-53 and accompanying text. If mailings are classified as solicitations, they can be more strictly regulated or even prohibited. See infra notes 53, 58-68 and accompanying text.
4. Id. at 1249. There is some degree of overlap between the two extremes of advertising and solicitation. For example, advertising of any type involves some aspect of solicitation. In re Koffler, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980), cert. denied, 450 U.S. 1026 (1981), and solicitation can be viewed as a means of getting an advertising message across. L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING & SOLICITATION 61 (1980).
5. See infra notes 48-49 and accompanying text.
6. See infra notes 62-63 and accompanying text.
7. See infra notes 15-30 and accompanying text.
8. See infra notes 44-50 and accompanying text.
9. See infra notes 64-68 and accompanying text.
tion can be clearly proscribed. Direct mailings fall somewhere in the middle, and it has been up to the individual states to determine the manner in which the issue should be resolved.

Illinois has attempted to define the position that direct mailings occupy on this continuum in the recently amended Rule 2-103 of the Illinois Code of Professional Responsibility ("Illinois Code"). This rule allows an attorney to initiate contact with a prospective client by means of a written communication distributed generally to persons who might find the attorney's services useful. The question remains, however, whether the new Illinois Code Rule 2-103 ("Rule 2-103" or "the Rule") adequately and constitutionally deals with the practice of direct mailings.

This note will examine the historical justifications for the prohibition on attorney advertising and solicitation. It will then trace the breakdown of the prohibitions against advertising from the United States Supreme Court cases to the corresponding modifications of the Illinois and other jurisdictions' codes of professional responsibility. Next, this note will compare the two basic approaches used by the states to regulate direct mailings. Particular attention will be given to the newly amended Illinois Rule 2-103 and to the recent challenge that has been waged against it. Finally, this note will examine the competing concerns underlying the use of direct mailings to determine whether the Illinois rule balances these concerns fairly, intelligently, and constitutionally.

scribe truthful newspaper advertising concerning routine legal services). See infra notes 43-53 and accompanying text for a discussion of Bates.

11. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (a state can prohibit solicitation by attorneys in circumstances likely to pose certain dangers to the public). See infra note 68 and accompanying text. Other forms of commercial speech that can be prohibited include advertising that is "false, deceptive, or misleading," Bates, 433 U.S. at 383, and advertising that relates to illegal activity, id. at 384. See infra notes 52-53 and accompanying text.

12. See infra notes 124-27 and accompanying text.


14. Illinois Code Rule 2-103(b) (amended 1984). The rule provides in pertinent part that a lawyer may initiate contact with prospective clients by written communication distributed generally to persons not known in a specific matter to require such legal services as the lawyer offers to provide but who in general might find such services to be useful and providing that such letters . . . and the envelopes containing them are plainly labeled as advertising material.

Id.
HISTORICAL JUSTIFICATIONS FOR PROHIBITING ATTORNEY ADVERTISING

During the early days of the bar, attorneys were prohibited from both soliciting and advertising for clients. At that time, the prohibition was more a matter of professional etiquette than one of ethics. There were two basic reasons for prohibiting advertising and solicitation. First, the members of the profession were from well-to-do families who considered the law as a form of public service rather than as a means of making a living. Advertising or soliciting for clients was seen as characteristic of a mere trade, and therefore was thought to lessen the traditional dignity of the profession. Second, the prohibition was deemed necessary to protect the public from such abuses as barratry, champerty and maintenance.

The American bar continued the tradition of absolutely prohibiting advertising and solicitation. The first formal prohibition ap-
peared in 1908, and similar rules were in existence, in various forms, until as late as 1976. The primary justification cited for the total ban on advertising by attorneys was the need to protect the public interest. The American Bar Association Model Code of Professional Responsibility ("Model Code") stated that the ban

21. This was the year in which the first Canons of Professional Ethics were adopted by the American Bar Association ("ABA"). AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL RESPONSIBILITY ("ABA CANONS"). The ABA Canons were adopted in an attempt to reverse the deteriorating standards of the American bar. This decline in standards was the result of a widespread belief, in the later part of the 19th century, "that professions were undemocratic and un-American." The control of the organized bar was weakened by this attitude, and before the end of the century, the practice of law had been reduced to the status of an ordinary trade. See Note, In Re R.M.J: Reassessing the Extension of First Amendment Protections to Attorney Advertising, 32 CATH. U.L. REV. 729, 733-34 (1983).

Canon 27 provided in part: "The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom . . . is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional." ABA CANONS No. 27 (1908), cited in DRINKER, supra note 16, at 215.

22. The ABA Canons were revised several times, but the ban on individual attorney advertising and solicitation remained in force. The most notable revision of the ABA Canons regarding advertising was the 1937 amendment permitting publication of professional cards in approved law lists. Later exceptions allowed recognized legal aid organizations the freedom to promote their services. See Note, supra note 21, at 734 for a general discussion of the evolution of the ABA Canons regarding advertising and solicitation.

In 1969, the ABA Canons were redrafted into the American Bar Association Model Code of Professional Responsibility ("MODEL CODE"). The Model Code is comprised of three interrelated parts: Canons, Ethical Considerations (EC's), and Disciplinary Rules (DR's). The Canons are statements of general concepts of professional conduct. The EC's are aspirational objectives toward which the profession should strive. The DR's are mandatory rules stating the minimum level of conduct which lawyers must meet. MODEL CODE Preamble and Preliminary Statement (1980). The rules governing the use of advertising and solicitation are found in Canon 2 which states "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." Id.

23. The rules prohibiting advertising appeared in Model Code DR 2-101. Until 1976, DR 2-101(B) provided in part that:

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

MODEL CODE DR 2-101(B) (1976).

The rules prohibiting solicitation appear in Model Code DR 2-103 and DR 2-104. DR 2-103 provides that: "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a lay person who has not sought his advice regarding employment of a lawyer." MODEL CODE DR 2-103(A) (1980). DR 2-104 generally prohibits an attorney from accepting employment resulting from his unsolicited legal advice. MODEL CODE DR 2-104(A) (1980). The Model Code was adopted into law by every state. See Note, supra note 21, at 729.

24. Regulating communication by lawyers was an attempt to prevent certain social evils. For example, advertising of divorce services was prohibited because it was believed
was necessary to protect the public from potentially deceptive advertisements and to prevent public confidence in the legal system from being undermined by commercialization of the profession.

Another justification for prohibiting advertising was the belief that it would stir up litigation and thereby adversely affect the administration of justice. Similarly, the prohibition of attorney solicitation was justified on three broad grounds: reducing the likelihood of overreaching and undue influence on lay persons, protecting the privacy of individuals, and avoiding situations where the lawyer's judgment was clouded by his own pecuniary interest. The legitimacy of these justifications regarding advertising began to be challenged in the mid-1970's.

that such advertisements would encourage dissolution of marriage and the breakdown of the family. Andrews, supra note 4, at 1.


26. Model Code EC 2-9 also stated that "[competitive advertising] would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services." Model Code EC 2-9 (1976) (amended 1980).

27. Bates v. State Bar of Ariz., 433 U.S. 350, 375-77 (1977). Other justifications supporting a total ban on attorney advertising were advanced in Bates, including the inherently misleading nature of attorney advertising, id. at 372-75; undesirable economic effects, id. at 377-78; the adverse effect on quality of service, id. at 378; and the difficulties of enforcement, id. at 379. The Court held, however, that none of these provided an acceptable reason to prohibit all truthful advertising by attorneys. Id. See infra notes 46-50 and accompanying text.

28. These dangers are due to the inherently private nature of solicitation which involves direct contact between the attorney and the lay person. See supra note 4 and accompanying text. The effect is usually to give a one-sided presentation and to urge a quick decision without providing an opportunity for third-parties to intervene. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1977). See infra notes 55-68 and accompanying text for further discussion of Ohralik.

29. "[T]he overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy." Ohralik, 436 U.S. at 465.

30. "A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income." Id. at 461 n.19.

31. On June 25, 1976, the Department of Justice initiated an antitrust suit against the ABA alleging conspiracy to prohibit advertising. Andrews, supra note 4, at 3. Joe Sims, then special assistant to the Justice Department, pointed out: "The consumers of legal services are just as entitled to the benefits of competition as are the consumers of other services." Id. at 11. The suit was dropped in 1978 following major amendments to the Model Code permitting advertising. Id. at 6; see also Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 18 Yale L.J. 1181 (1972).
Breaking Down the Barriers

One major source of the challenge against the ban on advertising was the concern that information pertaining to legal services should be made available to the public.\textsuperscript{32} Studies indicated that 83\% of the population believed that public ignorance as to which lawyers would be able to handle particular problems kept many people from contacting any lawyer at all.\textsuperscript{33} It was also believed that the public should be more informed about the law itself.\textsuperscript{34} Given the ever increasing amount of legal regulation over aspects of daily life, many people did not always realize that they even had a legal problem.\textsuperscript{35} Advertising by attorneys was one way to get this much needed information to the public.

The other major reason that total prohibitions of attorney advertising were breaking down was that advertising bans began to be challenged as unconstitutional.\textsuperscript{36} The notion that commercial speech was not entitled to first amendment protection\textsuperscript{37} was gradually being eroded.\textsuperscript{38} In 1976, the United States Supreme Court set-

\textsuperscript{32} "A wide gap separates the need for legal services and its satisfaction, as numerous studies reveal. . . . [One] set of reasons is ignorance of the need for and the value of legal services, and ignorance of where to find a dependable lawyer." Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar, 12 U.C.L.A. L. Rev. 438, 438 (1965).


\textsuperscript{34} ANDREWS, supra note 4, at 43-44.

\textsuperscript{35} Studies have shown that many people took no action when confronted with potential legal problems. Thirty percent of those who had been seriously injured through the fault of another took no action; 32\% took no action against repossessions; 42\% took no action against civil infringements; 44\% took no action against child injuries; 54\% took no action against evictions; and 71\% took no action against job discrimination. ANDREWS, supra note 4, at 44.

\textsuperscript{36} See infra notes 39-50 and accompanying text.

\textsuperscript{37} In Valentine v. Christensen, 316 U.S. 52 (1942), the Supreme Court held that commercial speech was not entitled to the protection of the first amendment. Id. at 54. In Valentine, the Court upheld a city ordinance which prohibited hand bill distribution, stating that "The Constitution imposes no . . . restraint on government as respects purely commercial advertising." Id. at 54. Commercial speech has been defined as "[an] expression related solely to the economic interest of the speaker and its audience." Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).

The first amendment provides: "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.

\textsuperscript{38} After Valentine, 316 U.S. 52 (1942), the Supreme Court extended first amendment protection to messages that were commercial in nature by characterizing them as not purely commercial. See, e.g., Ginzberg v. United States, 383 U.S. 463 (1966); New
tled the issue when it extended first amendment protection to product advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*

In *Virginia State Board of Pharmacy,* the Court stated that although the state retained the power to regulate commercial speech, it could not completely suppress the dissemination of concededly truthful information about activity that was entirely lawful. The Court, however, reserved the question as to whether advertising by attorneys who render a variety of services rather than dispense standardized products would also be covered by this first amendment protection. That question was directly con-

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The decision in *Bigelow v. Virginia,* 421 U.S. 809 (1975), holding that a state statute prohibiting the advertisement of abortions violated the first amendment, further damaged the *Valentine* doctrine. In *Bigelow,* the Court held that any advertisement which conveyed information of potential value and interest to the public should be entitled to first amendment protection. *Id.* at 822. For a detailed discussion of the development of the commercial speech doctrine, see Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment,* 65 VAND. L. REV. 1 (1979); Comment, *Attorney Direct Mail Communication: The Koffler Commercial Speech Approach,* 4 W. NEW ENG. L. REV. 397, 403-06 (1982).

39. 425 U.S. 748 (1976). In *Virginia Bd. of Pharmacy,* a consumer group challenged a Virginia statute prohibiting pharmacists from advertising prescription price information. *Id.* at 749-50. The consumers claimed they would benefit if the prohibition were lifted and advertising were freely allowed. *Id.* at 753.

40. *Id.* at 770. The Court held that commercial speech may still be subject to regulations as to time, place, and manner as long as these regulations leave open “ample alternative channels for communication of information.” *Id.* at 771. Further, the Court stated that commercial speech that is untruthful or promotes illegal activity is not protected. *Id.* at 771-72.

41. *Id.* at 773. The Court pointed out three justifications, based on the first amendment, for permitting advertising of prescription drug prices. First, the Court stated that a “purely economic” interest does not disqualify an advertiser from first amendment protection. *Id.* at 762. Second, the Court noted that consumers have a key interest in the free flow of commercial information in order to make informed decisions. *Id.* at 763. Finally, the Court stressed the role of advertising in the free enterprise system as a means of promoting competition. *Id.* at 765.

42. “[T]he distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example . . . render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” (emphasis in original) *Id.* at 773 n.25.
fronted one year later in *Bates v. State Bar of Arizona.*

The issue presented to the Supreme Court in *Bates* was whether lawyers must be permitted to advertise the fees charged for "routine" legal services. The appellants had been charged with violating Rule 2-101(B) of the Arizona Code of Professional Responsibility because they had placed an advertisement for their legal clinic in a newspaper. The Court examined the state interests advanced by the respondents in support of the restriction, such as preventing adverse effects on professionalism and the administration of justice and protecting the public from the inherently misleading nature of attorney advertising, and concluded that none were sufficient to justify a blanket suppression of all attorney advertising. In reaching this conclusion, the Court focused on the overwhelming public need for information concerning the nature and availability of legal services. The Court viewed legal advertising as a way of getting this information to the public. Thus, the Court held that a state cannot proscribe truthful attorney newspaper advertising concerning the terms and availability of routine legal services.

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44. *Id.* at 354. The services to which the appellant's advertisement applied were uncontested divorces, uncontested adoptions, simple personal bankruptcies, and name changes. *Id.*
45. *Id.* at 354-55. The rule provided in pertinent part that "a lawyer shall not publicize himself . . . as a lawyer through newspaper or magazine advertisements, radio or television announcements . . . or other means of commercial publicity." ARIZONA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), incorporated in ARIZ. CT. R. 29(a), 17A ARIZ. REV. STAT. ANN. § 26 (Supp. 1984).
46. *Bates,* 433 U.S. at 368-77. Other state interests advanced by the respondents included preventing undesirable economic effects, preventing adverse effects on the quality of service, and the difficulties of enforcement. *Id.* at 377-79. See *supra* notes 24-27 and accompanying text.
47. *Bates,* 433 U.S. at 379. Much of the Court's reasoning in reaching this conclusion was taken from *Virginia Bd. of Pharmacy,* 425 U.S. 748 (1976), see *supra* note 40 and accompanying text. The Court in *Bates* acknowledged this, stating: "We have set out this detailed summary of the Pharmacy opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow a fortiori from it." *Bates,* 433 U.S. at 365.
48. *Bates,* 433 U.S. at 370-77. The Court cited surveys indicating that legal services were underutilized by the middle 70% of the population due to a fear of the cost and an inability to locate a suitable lawyer. *Id.* at 370 nn. 22-23, 376 n.33. See *supra* notes 33-35 and accompanying text.
49. "[C]ommercial speech serves to 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." *Bates,* 433 U.S. at 364.
50. *Id.* at 364. For a detailed analysis of the Court's decision, see The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 198-208 (1977); Comment, Lawyer Advertising: The Practical Effects of Bates, 1 W. NEW ENG. L. REV. 349 (1978).
The Bates Court, however, did not eliminate all restrictions on attorney advertising. The states were still permitted to regulate advertising by lawyers in an effort to assure accuracy and reliability. One of the recommendations made by the Court was the continued prohibition of advertising that is false, deceptive, or misleading, and of in-person solicitation.

One year after Bates, the Supreme Court confronted the issue of individual attorney solicitation in Ohralik v. Ohio State Bar Association, a case that highlights the differences between advertising and solicitation. In this case, the appellant, after learning that two

51. Bates, 433 U.S. at 383. "[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability." Id.
52. Id. at 383. The Court also suggested prohibiting claims as to quality of service and improper advertising. The Court also noted that advertising by electronic broadcast media needed special consideration. Id. at 383-84.
53. Id. at 384. As one author pointed out, "It is not clear whether the Court considered direct-mail communications as a form of advertising or solicitation, if indeed the issue was contemplated at all." Note, Direct Mail Solicitation By Attorneys: Bates to R.M.J., 33 SYRACUSE L. REV. 1041, 1048 n.47 (1982). The Court also recommended the use of warnings or disclaimers. Bates, 433 U.S. at 384. Additionally, the Court stated that reasonable restrictions upon the time, place, and manner of advertising could be imposed. Id.

54. Earlier cases concerning attorney solicitation all involved group solicitation. In these cases, the solicitation was afforded constitutional protection because of the collective activity involved. The major group solicitation cases are United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) (collective activity by the union, including recommendation of attorneys undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment); UMW, Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) (in view of first amendment rights, a union cannot be prohibited from employing an attorney on salary to pursue Workman's compensation claims); Brotherhood of R.R. Trainmen v. Virginia ex rel Va. State Bar, 377 U.S. 1 (1964) (union members have first amendment right to receive a recommendation from union legal department on selection of an attorney, and those attorneys who accept such work are exercising constitutional rights which the state may not abridge); NAACP v. Button, 371 U.S. 415 (1963) (state statute prohibiting solicitation as applied to the NAACP unconstitutionally inhibited freedom of speech and association). See Comment, supra note 38, at 406-09 for a discussion of the constitutional history of solicitation.
55. 436 U.S. 447 (1978). The Court decided another case involving individual attorney solicitation on the same day, In re Primus, 436 U.S. 412 (1978). These two cases can be viewed as two extremes. The solicitation involved in Primus was for the purpose of engaging in litigation as a form of political expression and without motive for pecuniary gain. In Primus, mothers on welfare were solicited to engage in litigation seeking to enjoin a state policy of involuntary sterilization of women on public assistance. The Court held that this type of solicitation is afforded complete constitutional protection. Id. at 439. At the other extreme is the type of "ambulance chasing" that was present in
young women had been victims of an auto accident, actively pur- 
sued the two until he succeeded in obtaining both as clients on a 
contingent fee basis. They women later discharged him and filed a 
grievance charging him with solicitation in violation of the state 
code of ethics.

The Court held that this type of commercial speech was not enti- 
tled to the same constitutional protection as that seen in Bates. 
The Court acknowledged that both advertising and solicitation 
serve the function of providing information about legal services; however, the Court pointed out that there are significant differ- 
ces between the two. First, advertisements do not require the 
recipient to make an immediate decision. Solicitation, on the 
other hand, exerts pressure to make a speedy response before the 
recipient has had time to reflect. Second, unlike advertisements 
which are in the public view, solicitation does not allow for inter- 
vention by supervisory authorities.

Because of these differences between advertising and solicitation, 
the Court noted that the state interests in proscribing solicitation 
are stronger. The state interests referred to include protecting 
consumers and regulating commercial transactions; maintaining 
standards among members of licensed professions; and protecting 
the public from such dangers as overreaching and undue influence, 
invading of privacy, and the clouding of a lawyer's judgment by 
pecuniary self-interests. The Court held that the state could 
therefore constitutionally prohibit solicitation in circumstances 
likely to pose these dangers.

Ohralik, 436 U.S. 447 (1977). This kind of solicitation is completely proscribed. Id. at 449.
56. Ohralik, 436 U.S. at 450-51.
57. Id. at 453.
58. In-person solicitation by a lawyer of remunerative employment is a business 
transaction in which speech is an essential but subordinate component. While 
this does not remove the speech from the protection of the First Amendment, as 
was held in Bates and Virginia Pharmacy, it lowers the level of appropriate 
judicial scrutiny.
59. Id. at 457-58.
60. Id. at 457.
61. Id.
62. Id.
63. Id.
64. Id. at 455.
65. Id. at 460.
66. Id. The state has a great interest in regulating lawyers who serve as officers of the 
court and aid in the "primary governmental function" of administering justice. Id.
67. Id. at 461.
68. Id. at 449.
The decisions in *Bates* and *Ohralik* helped the states clarify the two ends of the spectrum concerning communications between attorneys and potential clients. 69 Truthful newspaper advertising regarding the terms and availability of routine legal services could no longer be prohibited. 70 In-person solicitation involving the potential for overreaching, however, could be absolutely proscribed. 71 In response to these pronouncements by the Supreme Court, the states began amending their codes of professional ethics to comply with these cases and to attempt to accommodate the many types of communications that fell between the two extremes. 72

**State Code Revisions After *Bates***

In enacting regulations relating to direct mailings, the states were guided by the two Draft Proposals, Proposals A and B, suggested by the American Bar Association ("ABA"). 73 Eighteen states 74 and the District of Columbia adopted Proposal B, which can be characterized as the directive approach. 75 This proposal permits lawyers to advertise any information that is not false, fraudulent, misleading, or deceptive. 76 The majority of the states,

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69. See supra notes 12-13 and accompanying text.
70. *Bates*, 433 U.S. at 384; see supra notes 46-50 and accompanying text.
71. *Ohralik*, 436 U.S. at 449; see supra notes 46-50 and accompanying text.
72. Forty-eight states and the District of Columbia amended their advertising rules following the decision in *Bates*. The two states that did not do so are Hawaii and Montana. Texas merely suspended it rules to the extent they conflict with *Bates*. ANDREWS, supra note 4, at 43, 138, 141, and 146.
73. The Draft Proposals were the product of the ABA Task Force on Lawyer Advertising. The Task Force was established on June 7, 1977, shortly before the decision was handed down in *Bates*. ANDREWS, supra note 4, at 91. Both Proposals are reprinted at 97-134.
74. These states include California, Florida, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, South Dakota, Virginia, and Wisconsin. ANDREWS, supra note 4, Appendix III, at 135-45. The reference to Illinois here is to the Code of the Illinois State Bar Association. This is not the official code for Illinois. See infra note 85 and accompanying text.
75. See ANDREWS, supra note 4, at 93 (quoting from the Report to the Board of Governors of the Task Force on Lawyer Advertising).
76. Id. This directive approach is also in the MODEL RULES OF PROFESSIONAL CONDUCT (1983) ("MODEL RULES"). The newer Model Rules offer a less restrictive approach to advertising than does the older Model Code, Andrews, *The Model Rules and Advertising*, 68 A.B.A. J. 808, 808 (1982). The Model Rules take the directive approach to lawyer advertising. Generally this means that lawyers may include any information in their advertisements as long as it is not false or misleading. This approach differs from that taken in the Model Code which provides a limited list of the items of information that may be included in an advertisement. See infra note 78. Rule 7.1 of the Model Rules contains the general guideline that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services." MODEL RULES Rule 7.1
and the ABA itself,\textsuperscript{77} adopted Proposal A, known as the regulatory approach.

Under the regulatory approach, permissible advertising is restricted to certain categories of information or to certain specified language.\textsuperscript{78} The states differ as to the kind of information that can be disclosed\textsuperscript{79} and as to the form of media that can be used.\textsuperscript{80}

\textsuperscript{(1983).} Rule 7.2 lists the media through which lawyers may advertise. This rule states that "subject to the requirements of rule 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor, radio or television, or through written communication not involving solicitation as defined in rule 7.3." \textit{Model Rules} Rule 7.2 (1983). Rule 7.3 governs the practice of direct contact with prospective clients. Rule 7.3 provides:

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

\textit{Model Rules} Rule 7.3.


Of the states that adopted Proposal B, nine seem to permit the use of direct mailings. These are California, District of Columbia, Maine, Maryland, Michigan, Minnesota, Oregon, Pennsylvania, Virginia, and Wisconsin. Andrews, \textit{supra} note 4, Appendix III at 135-45. The various state rules regarding direct mailings are not always clear, however. The numbers used here "reflect the bias of giving . . . terms in the state advertising rules the broadest interpretation possible." \textit{Id.} at 135.


\textsuperscript{78.} Andrews, \textit{supra} note 4, at 92. The categories of information include basic biographical information and limited fee information. The Model Code, for example, listed 25 categories of permissible information in DR 2-101(B). This rule permitted a lawyer to publish or broadcast the following information: name, address, and telephone number; field of law practice; date and place of birth; date and place of admission to bar; schools attended; public offices; military service; legal authorships; legal teaching positions; bar association membership; membership in legal fraternity or society; technical and professional licenses; membership in scientific, technical, or professional associations; foreign language ability; bank references; names of regularly represented clients; prepaid or group legal services programs; credit plans; office hours; initial consultation fee; availability of written fee schedule; contingent fee rates; range of fees for services; hourly rate; and fixed fee for specific legal services. \textit{Model Code} DR 2-101(B) (1980).

\textsuperscript{79.} For example, Rhode Island does not permit a lawyer to include biographical information and Connecticut does not permit advertising of hourly rates. Andrews, \textit{supra} note 76, at 809.
Under the version of Proposal A adopted by the ABA, general mailings are prohibited, but professional announcement cards can be mailed to lawyers, clients, friends, and relatives. An attorney is further prohibited from recommending employment of himself to a lay person, or from accepting employment resulting from his in-person, unsolicited advice. In addition, the rules prohibit an attorney from holding himself out publicly as a specialist.

Illinois modeled its Code of Professional Responsibility after the Model Code and thus generally followed the regulatory approach. As originally adopted, the Illinois Code was ambiguous in its treatment of direct mailings. While mailings were neither

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80. Various jurisdictions restrict the use of direct mailings, television advertisements, handbills, and billboards. For a chart pointing out the various approaches, see Andrews, supra note 4, at 135-46.

81. "A brief professional announcement card stating new or changed association or addresses . . . may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer. . . ." MODEL CODE DR 2-102(A)(2) (1980); see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 301 (1961) (mailing announcements to person with whom the attorney had no professional relations or dealings is prohibited).

82. "A lawyer shall not . . . recommend employment as a private practitioner, of himself . . . to a layperson who has not sought his advice regarding employment of a lawyer." MODEL CODE DR 2-103(A) (1980); see also ABA Comm. on Professional Ethics and Grievances, Formal Op. 307 (1962) (lawyer may not seek from persons not his clients the opportunity to perform a legal checkup).

83. "A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice. . . ." MODEL CODE DR 2-104(A) (1980).

84. "A lawyer shall not hold himself out publicly as a specialist. . . ." MODEL CODE DR 2-105(A) (1980). Exceptions to this rule are designations of "Patent Attorney" or other exceptions authorized by the states. Id.

85. The Illinois Supreme Court did not adopt an official code of ethical rules until June 3, 1980. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY Preface (1980). Prior to this, it had been established by case law that the Code of the Illinois State Bar Association was to be used as a guideline. In re Taylor, 66 Ill. 2d 567, 571, 363 N.E.2d 845, 847 (1977).

86. The Committee on Professional Responsibility also considered the codes of the Illinois State and Chicago Bar Associations in developing the new Illinois Code. TRANSMITTAL REPORT OF THE ILLINOIS SUPREME COURT COMMITTEE ON PROFESSIONAL RESPONSIBILITY 3 (1978).

87. The categories of information listed in the Illinois Code are more generalized than those of the Model Code. They are the name of the lawyer; the address and phone number; educational or other background; basis on which fees are determined and available credit; description of types of legal matters which will be accepted; foreign language ability; names of references and regularly represented clients. ILLINOIS CODE Rule 2-101(a) (1980). The Illinois Code also includes an open-ended provision that permits the inclusion of information about the lawyer which a reasonable person might find relevant in deciding whether to seek the lawyer's services. ILLINOIS CODE Rule 2-101(a)(8) (1980).

specifically permitted nor expressly prohibited, there were provisions of the code which could be interpreted either way. As a result, attorneys who wished to use mailings to advertise were understandably confused.

Under the earlier version of Rule 2-103, direct mailings seemed to be prohibited as a form of solicitation. In the provision, the Illinois Code stated that a lawyer could not recommend or solicit employment of himself by “private communications.” Private communications are defined in the Illinois Code as personal contact between a lawyer and an individual lay person directly, by telephone, or by “written communication.” Under Illinois Code Rule 2-101, however, mailings seemed to be allowed as a method of advertising. This rule permits a lawyer to advertise through any commercial publicity or “other form of communication.” Direct mailings were not specifically mentioned.

In evaluating whether Rule 2-103 or 2-101 applied to a particular mailing, the Illinois Ethics Committee generally focused on two issues: first, whether there were pecuniary goals motivating the mailings; and second, whether they were “private,” meaning targeted. If both of these questions were answered affirmatively, the mailings were generally prohibited. A mailing could, how-

89. The two conflicting provisions were Illinois Code Rule 2-101 (Publicity and Advertising) and Illinois Code Rule 2-103 (Private Communication Recommending or Soliciting Professional Employment). See infra notes 91-94.
90. See infra notes 97-102.
91. Illinois Code Rule 2-103(a) provided in part that “A lawyer shall not by private communication . . . recommend or solicit employment of himself . . . for pecuniary gain or other benefit and shall not for that purpose initiate contact with a prospective client.” ILLINOIS CODE Rule 2-103(a) (1980).
92. Id.
93. Illinois Code Rule 2-103(e) provides in pertinent part that “‘Private communication’ . . . shall include personal contact between a lawyer and an individual lay person, directly or by telephone, and may include other in-person and written communications.” ILLINOIS CODE Rule 2-103(e) (1980).
94. Illinois Code Rule 2-101 provides in part that “[a] lawyer may publicize himself as a lawyer through any commercial publicity or other form of public communication” provided that such communication meets all the conditions.” ILLINOIS CODE Rule 2-101 (1980).
95. Id.
96. Illinois Code Rule 2-101 provides that public communications include the following: “any newspaper, magazine, telephone directory, radio, television, or other advertising.” ILLINOIS CODE Rule 2-101 (1980).
97. See Illinois State Bar Association, Formal Op. 853 (Nov. 8, 1983), reprinted in ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT 801:3018 (1984) (letters mailed to targeted groups of consumers recommending that they file suit are prohibited). “The proposed communications are ones which solicit professional employment. Under Rule 2-103(a), such a communication is unethical if ‘private.’” Id.
ever, be targeted if there were no pecuniary motivations, or vice versa. Recognizing the ambiguity in this area, the Illinois State Bar Association Guidelines advised caution in the use of direct mailings. Thus, the revisions of the Illinois Code made in light of Bates left many questions unanswered. The next Supreme Court case on the issue of attorney advertising, In re R.M.J., provided some answers.

In Re R.M.J.

In In re R.M.J., the Supreme Court was called upon to examine the constitutionality of Missouri’s code revisions. The appellant in In re R.M.J., a Missouri attorney, wanted to announce the opening of his new law office. To do so, he mailed professional announcement cards to a selected list of addressees and placed several advertisements in local newspapers. As a result of these actions, he was charged with unprofessional conduct for violating the Missouri rules governing attorney advertising. The mailings had been sent to persons other than lawyers, clients, relatives, and friends, and the advertisements included information not specified.


100. "While direct mail is nowhere expressly banned in the Code, it remains a unique and potentially troublesome medium which should only be used with greatest care and reservation." Moenning, ISBA Special Committee Guidelines For Individual Lawyer Advertising, 71 Ill. B.J. 404, 408 (March 1983).


103. In amending its rules on lawyer advertising, Missouri followed the regulatory approach. See supra notes 78-80 and accompanying text. Lawyer advertising was permitted in Missouri but was restricted to 10 categories of information, In re R.M.J., 455 U.S. at 194, and to certain specified language for listing areas of practice, id. at 195. General mailings were not allowed; only announcement cards could be mailed and only to lawyers, clients, friends, and relatives. Id. at 196.


105. Id. at 194-98.

106. Id. at 198; see supra note 104.
cally permitted by the state code. The appellant argued that Missouri's restrictions upon advertising were unconstitutional under the first amendment.

The Supreme Court began by summarizing the present status of commercial speech doctrine as applied to advertising by professionals. The Court stated that truthful advertising related to lawful activities was entitled to first amendment protection, but misleading advertising could be entirely prohibited. The Court also noted that the state retains some authority to regulate communications that are not misleading. In order to do so, however, the state must assert a substantial interest, and the regulation may be no more extensive than reasonably necessary to further those interests. In applying this doctrine to lawyer advertising specifically, the Court expanded the narrow holding of Bates and put forth a workable standard for evaluating the regulation of attorney advertising.

Applying this standard to the facts in In re R.M.J., the Court

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108. _In re R.M.J._, 455 U.S. at 198.
109. _Id._
110. _Id._ at 203-04.
111. _Id._ at 203.
112. _Id._
113. _Id._ This language is essentially that of _Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n_, 447 U.S. 557 (1980). In _Central Hudson_, the Court held that a statute purporting to advance energy conservation by banning advertising to promote the use of electricity violated the first amendment. In reaching this result, the Court applied a four-part analysis:

At the outset, we must determine whether the expression is protected by the First Amendment. . . . [T]o come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

_Id._ at 566.

The standard employed in this analysis appears to be analogous to the Court's equal protection intermediate scrutiny standard. The prior standard associated with first amendment cases was strict scrutiny. Applying an intermediate standard to commercial speech cases results in "first amendment protection that is quantitatively less than that accorded to political speech and associational freedoms under a strict scrutiny standards." Comment, _supra_ note 38, at 406.

114. See _supra_ notes 50-54 and the accompanying text.
115. This standard can be labeled as a substantial state interest standard whereby the state must demonstrate a substantial interest to support any proscription on commercial speech. For a discussion of this standard, see Whitman & Stoltenberg, _The Present Constitutional Status of Lawyer Advertising: Theoretical & Practical Implications_ of In Re R.M.J., 57 ST JOHN'S L. REV. 445, 469-71 (1983).
116. _Id._ at 467-71, 482-83.
examined Missouri's restrictions of the types of information that could be included in an advertisement.\textsuperscript{117} The Court held that since the information published in the appellant's advertisements was not misleading on its face and since the state had not suggested a substantial interest promoted by its restriction, the restriction was invalid.\textsuperscript{118} Further, the Court held that the absolute prohibition of mailings to the general public was too broad.\textsuperscript{119} Although the Court acknowledged that mailings may be more difficult to supervise than newspapers, it held that there were less restrictive ways to supervise such mailings short of an absolute prohibition.\textsuperscript{120} The Supreme Court thus opened the way for the practice of general direct mailings to persons other than lawyers, clients, relatives, and friends.\textsuperscript{121}

\textbf{STATE TREATMENT OF DIRECT MAIL SOLICITATION}

After the decision in \textit{In re R.M.J.}, it was clear that mailings to the general public could not be absolutely prohibited.\textsuperscript{122} The Court in \textit{In re R.M.J.} did not address, however, whether state interests exist which would justify more stringent regulations of direct mailings than those imposed on traditional advertising.\textsuperscript{123} Consequently, resolution of this issue was left to the states.\textsuperscript{124} The manner in which states have tried to resolve the issue of direct

\begin{footnotes}
\footnote{117. \textit{In re R.M.J.}, 455 U.S. at 204-05.}
\footnote{118. \textit{Id.} at 205.}
\footnote{119. \textit{Id.} at 206.}
\footnote{120. The Court suggested that reasonable supervision could be exercised by requiring a filing of a copy of all general mailings with a regulatory board. \textit{Id.} The Court also suggested that lawyers could be required to stamp "This is an Advertisement" on the envelope. \textit{Id.} at 206 n.20.}
\footnote{121. \textit{See generally} Whitman & Stoltenberg, supra note 115; \textit{Note, Attorney's Expanding Right to Advertise Under the First Amendment: In Re R.M.J.,} 26 How. L.J. 281 (1983).}
\footnote{122. \textit{See supra} note 119.}
\footnote{123. The Court merely stated that neither difficulties of supervision nor privacy interests were sufficient to justify an absolute prohibition on mailings. \textit{In re R.M.J.}, 455 U.S. at 206 n.20, 207. The Court has denied certiorari in three cases involving direct mail communication with prospective clients for pecuniary gain. Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), (advertising that mentions broad areas of legal services without distinguishing fees and which is distributed through a discount coupon mailing is potentially deceptive and therefore properly subject to proscription); \textit{cert. denied}, 450 U.S. 966 (1981); \textit{In re Koffler}, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980) (direct mail solicitation of potential real estate clients is protected commercial speech which may be regulated but not proscribed), \textit{cert. denied}, 450 U.S. 1026 (1981); Matter of Von Wiegen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984) (blanket prohibition of mail solicitation of accident victims violates first amendment), \textit{cert. denied}, 53 U.S.L.W. 3867 (U.S. June 10, 1985) (No. 84-1120).}
\footnote{124. \textit{See infra} notes 125-27.}
\end{footnotes}
mailings can be discussed and analyzed in terms of two broad approaches.

The first approach allows direct mail solicitation to be targeted to specific individuals who are considering legal action.125 The only restriction placed on such mailings is that they must not be deceptive.126 The second approach permits direct mailings to be targeted to individuals with a general interest in the lawyer's services, but not to those with identified legal needs.127 Illinois is among the states that have adopted the latter approach.128

The most recent case applying the first approach is Matter of Von Wiegen.129 This New York decision exemplifies the liberal treatment of direct mailings.130 In Von Wiegen, a personal injury attorney sent letters advertising his services to 250 persons injured in the 1981 collapse of a skywalk at the Hyatt Regency Hotel in

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126. See, e.g., Spencer, 579 F. Supp. at 889; Von Wiegen, 63 N.Y.2d at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.

127. See, e.g., California State Bar, Formal Op. 1980-54, (1980), reprinted in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:1601 (1984) (attorney may send unsolicited letters to potential business clients as long as no reference is made to any specific case or matter involving the recipient); Maryland State Bar, Formal Op. 81-21 (Feb. 16, 1981), reprinted in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:4307 (1984) (mailings to groups of persons whose characteristics suggest that they may be in need of legal services are permissible); Michigan State Bar, Formal Op. CI-573 (Oct. 13, 1980), reprinted in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:4812 (1984) (advertising legal services by mail is permissible only when it is generalized and not tailored to specific needs of individual recipients); Wisconsin State Bar, Op. E-84-13 (Sept. 1984), reprinted in ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 801:9113 (1985) (a lawyer may not target any mail advertising to potential clients with an identified need for legal services).


130. "[T]he ruling makes New York one of the nation's most permissive states in allowing contact between the bar and individuals who specifically may be considering legal action." Kaplan, N.Y. Court OKs Direct Mail to Possible Clients, Nat'l L.J., Nov. 5, 1984, at 8; see also N.Y. Lawyers May Solicit Accident Victims by Mail, 71 A.B.A. J. 117 (Feb. 1985).
Direct Mailings

Kansas City, Missouri. As a consequence of these mailings, he was charged with engaging in direct mail solicitation in violation of the New York Code of Professional Responsibility, and suspended from practice for six months. The attorney alleged that the prohibition of direct mail solicitation abridged his constitutional right to free speech.

The court began by classifying the state restriction as content based, rather than one relating to the time, place, or manner of expression. As such, the court stated that the restriction had to be judged by a structured four-part analysis. First, the court found that direct mail solicitation of accident victims was entitled to constitutional protection because it did not relate to illegal activity nor was it inherently misleading. Second, the court examined the state interests sought to be protected and rejected the following: overcommercialization of the legal profession; invasion of privacy and risk of undue pressure; and stirring up litigation. The

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131. Von Wiegen, 63 N.Y.2d at 166, 470 N.E.2d at 839, 481 N.Y.S.2d at 41.
132. Id. at 167, 470 N.E.2d at 840, 481 N.Y.S.2d at 42. He was also charged with employing deception and misrepresentation in the letters, and in an unrelated incident, with using a prohibited tradename. Id.
133. Id. at 166, 470 N.E.2d at 839, 481 N.Y.S.2d at 41.
134. Id.
135. "[T]he state seeks to regulate respondent's letter, . . . because of the subject matter of the communication—the fact that respondent seeks to be retained to represent accident victims. . . . As such, the regulation is plainly content based." Id. at 172, 470 N.E.2d at 843, 481 N.Y.S.2d at 45.
136. To be a time, place, or manner restriction, the restriction can determine how, when or where speech is permitted, but it may only do so without reference to the subject matter or content of the speech. Id. at 171-72, 470 N.E.2d at 842, 481 N.Y.S.2d at 44. These types of restrictions are valid if reasonable and rationally related to legitimate state interests. Id.
137. Content restrictions are valid only if substantial state interests are involved and then the regulation may go no further than necessary to serve that interest. Id. For a more detailed discussion of the two types of restrictions and their constitutional consequences, see Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60 (1983); Consolidated Edison Co. v. Public Serv. Comm'n., 447 U.S. 530 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Cox v. Lou, 379 U.S. 536 (1965).
138. Von Wiegen, 63 N.Y.2d at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45; see also supra note 113.
139. The court correctly noted that there is no constitutional right to disseminate false or misleading information. Von Wiegen, 63 N.Y.2d at 173, 470 N.E.2d at 843, 481 N.Y.S.2d at 45. In spite of the fact that the court held the respondent's letters to be misleading in this case, id. at 176, 470 N.E.2d at 845, 481 N.Y.S.2d at 47, the court stated that this type of information could be presented in a non-deceptive way. Thus, absolute prohibition is unwarranted. Id. at 173-76, 470 N.E.2d at 843-45, 481 N.Y.S.2d at 45-47.
140. The court stated that overcommercialization is controlled by "advertising standards" contained in another provision of the New York code. Id. at 174-75, 470 N.E.2d at 844, 481 N.Y.S.2d at 46. Regarding invasion of privacy, the court stated that recipients could avoid the intrusion by throwing the letter away. Id. Finally, the court stated
only justification deemed sufficient to support a ban was the danger of deception. The court then combined the third part of the analysis, requiring that the regulation directly advance the interest, with the fourth part, requiring that the regulation be no more extensive than necessary to serve that interest, and found that the danger of deception could be obviated by a lesser restriction than a total ban. Accordingly, the court held that the blanket prohibition of mail solicitation of accident victims, people with identified legal needs, violates lawyers' rights of expression under the first and fourteenth amendments.

The Illinois Approach: Amended Rule 2-103

In contrast to the approach taken in New York, Illinois has amended Rule 2-103 to permit attorneys to target mailings to persons who might, in general, find the attorneys' services to be useful, but not to those known to require such services in a specific matter. This restriction is considered as necessary to distinguish the permitted mailings from solicitation by private communication, which remains prohibited. The requirement that the representations be general in character, as opposed to being tailored to a specific occurrence, is to make the mailings more closely resemble permissible advertising. In this way, the dangers of abuse associ-
ated with solicitation are avoided.\textsuperscript{148}

The rule imposes other requirements on the use of direct mailings that are designed to reduce the potential for abuse. First, the letters and the envelopes containing them must be plainly labeled as advertising material.\textsuperscript{149} Second, a copy of the mailing, along with a list of those to whom it was sent, must be filed with the Attorney Registration and Disciplinary Commission ("ARDC") within 30 days.\textsuperscript{150} Finally, and more generally, the mailings are subject to the same requirements as are public communications under Illinois Code Rule 2-101.\textsuperscript{151} As a result, their content is limited to the same generalized categories of information,\textsuperscript{152} they must be true, complete, and not misleading,\textsuperscript{153} and they must be made in a direct, dignified, and readily comprehensible manner.\textsuperscript{154} Although these safeguards appear to be consistent with the policy concerns surrounding direct mailings\textsuperscript{155} and the holding of the Supreme Court decision in \textit{In re R.M.J.},\textsuperscript{156} the propriety of the newly adopted Illinois Rule is currently being challenged in the federal district court in \textit{Adams v. Attorney Registration and Disci-

\begin{itemize}
\item[I.LLINOIS CODE Rule 2-103 committee comments (amended 1984).]
\item[148. \textit{Id.}]
\item[149. Illinois Code Rule 2-103(b)(2) provides that in order for an attorney to initiate contact with prospective clients via direct mailings, "such letters and circulars and the envelopes containing them [must be] plainly labeled as advertising material." ILLINOIS CODE Rule 2-103(b)(2) (amended 1984).
\item[150. "A copy of any written private communication recommending or soliciting professional employment, together with the name and address of each person to whom the communication is sent, shall be filed with the [ARDC] within thirty days after it is sent." \textit{Id.} See Chicago Bar Association, Op. 84-09 (May 29, 1984) (copies of the mailings need not be sent to the ARDC if they do not initiate contact, or if they are addressed to relatives, close friends, or others whom the lawyer may ethically solicit in person).
\item[151. This requirement appears in Illinois Code Rule 2-103(c)(4) which provides that "In no event may a lawyer initiate contact with a prospective client if . . . (4) the communication would be in violation of Rule 2-101 if it were a public communication." ILLINOIS CODE Rule 2-103(c)(4) (amended 1984). Other circumstances in which the lawyer is absolutely prohibited from initiating contact are where the lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment . . . ;" ILLINOIS CODE Rule 2-103(c)(1) (1980); where the person "has made known a desire not to receive" any communication, ILLINOIS CODE Rule 2-103(c)(2) (1980); and where the solicitation involves coercion, duress, or harassment, ILLINOIS CODE Rule 2-103(c)(3) (1980).
\item[152. ILLINOIS CODE Rule 2-101(a) (1980); see supra note 87.
\item[153. ILLINOIS CODE Rule 2-101(b) (1980). "Such communication shall contain all information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive." \textit{Id.}
\item[154. ILLINOIS CODE Rule 2-101(c) (1980).
\item[155. See infra notes 173-77 and accompanying text.
\item[156. \textit{In re RMJ}, 455 U.S. at 203; see supra text accompanying note 113.]
\end{itemize}
Adams v. Attorney Registration and Disciplinary Commission

The complaint in Adams was filed by several bankruptcy attorneys who challenged Rule 2-103 on the grounds that it violated their rights to freedom of speech, due process, and equal protection. The attorneys had been mailing brochures and letters to targeted groups with specific legal needs, such as people against whom foreclosure actions had recently been filed. The mailings urged the recipients to contact an attorney in order to be advised of their legal rights and options. They also contained recommendations that the recipients contact their office if they did not already have an attorney. The lawyers maintained that they had been making such mailings ever since the decision in In re R.M.J., relying on the Court's holding that direct mailings could not be absolutely prohibited. They further alleged that they had been able to make these mailings under the prior Illinois rule but would be prohibited from doing so under the new rule.

In their complaint, the plaintiffs sought a declaratory judgment that the new rule unconstitutionally violated their right to free speech. The plaintiffs relied on two decisions from other states, Koffler v. Joint Bar Association and Spencer v. Justices of the...
Pennsylvania Supreme Court, to support their position that mailings targeted to those with specific needs can be regulated with a lesser restriction than a total ban. The plaintiffs also sought to enjoin the ARDC from enforcing the amended rule against them and were successful in this request.

Soon after this action was commenced, the ARDC filed a complaint for declaratory relief in the Supreme Court of Illinois seeking a ruling that Rule 2-103 is a constitutional regulation of commercial speech by attorneys. Thereafter, the plaintiffs in the original action filed a petition for removal of this state action to the federal court. The ARDC sought to remand the action to the state court but was not successful. Currently, these actions are still pending, and thus, the question of whether Illinois attorneys

167. 579 F. Supp. 880 (E.D. Pa. 1984). The plaintiff, a Pennsylvania attorney, wanted to send information about his credentials in aviation and computer law to targeted groups of the population (aircraft owners, pilots, and computer owners). The Pennsylvania Code of Professional Responsibility provided that direct mailings could be used if they constituted advertising but not if they constituted solicitation. No definitions of these terms were provided. Thus, the court held those provisions to be unconstitutionally vague. Id. at 888-89. The court stated that direct mail solicitation could be regulated in a less restrictive manner than a total ban. Id. at 890; see infra notes 214-20 and accompanying text.


The district court granted the plaintiff's emergency motion for a temporary restraining order on April 26, 1984. Under the restraining order, enforcement of the old but not the new rule against the named plaintiffs was allowed. See ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT Currents Reports 623-24 (1985).


170. ARDC v. Adams, No. 84-5711 (N.D. Ill., filed July 3, 1984). On the same day, two similar cases that had subsequently been filed against the ARDC were consolidated with the original complaint filed by Adams. These two cases were Zalutsky v. ARDC, No. 84-4771 (N.D. Ill., filed June 6, 1984), and Kaplan v. ARDC, No. 84-1579 (N.D. Ill., filed June 19, 1984).

171. On December 4, 1984, Judge Moran ruled that the action was properly removed to the district court, which already was considering Adams' challenge to the rule's constitutionality, and therefore, the action could not be remanded. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT Current Reports 623 (1985).

172. In the interim, the United States Supreme Court has recently decided a case
will be able to send direct mailings to targeted groups known to require the attorney's services has yet to be resolved.

**ANALYSIS**

Formulating a rule governing the use of direct mailings involves the balancing of two competing interests that are central to the debate over advertising by attorneys. On the one hand is the very important interest of making information about legal services known to the public.\(^\text{174}\) Direct mailings, in their capacity as advertisements, can be used to perform this needed service.\(^\text{175}\) On the other hand, there is the equally important interest of protecting the public from such abuses as deception and undue influence, invasion of privacy, and the clouding of a lawyer's judgment by pecuniary self-interest.\(^\text{176}\) Direct mailings, in their capacity as private solicitation, possess the potential for these abuses.\(^\text{177}\)

Those states that permit mailings to be targeted to individuals with an identified need for legal services in a particular matter\(^\text{178}\)

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\(^{174}\) See supra notes 32-35 and accompanying text. See also McDaniel, Lawyer Ads, 71 A.B.A. J. 35 (Jan. 1985). This article sets forth the findings of a recent Federal Trade Commission study which concluded that attorneys should be able to advertise for legal services in any medium of communication. This conclusion is based upon a finding that legal fees are lowest in states that allow the greatest flexibility in advertising. Id.

\(^{175}\) See supra text accompanying note 5.

\(^{176}\) See supra notes 67-68 and accompanying text.

\(^{177}\) See supra text accompanying note 6.

clearly emphasize the first interest over the second. Although providing adequate information about legal services is a legitimate concern, exclusive focus upon this interest may result in greater abuses in the use of direct mailings. Persons with an identified legal problem who may need information about legal services are most susceptible to succumbing to undue influence.\textsuperscript{179} These individuals are extremely vulnerable to suggestions of employment that may or may not be in their best interest.\textsuperscript{180} The potential invasion of privacy is also much greater when the recipient has a potential legal need,\textsuperscript{181} as illustrated in the cases of letters directed to accident victims and their families.\textsuperscript{182}

The situation is aggravated by the confidential nature of direct mailings.\textsuperscript{183} There is no third party scrutiny of letters between the

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\textsuperscript{179} See supra notes 125-26 and accompanying text.

\textsuperscript{180} See, e.g., State v. Moses, 231 Kan. 243, 642 P.2d 1004 (1982). The Moses court held that an attorney could not target mailings to people who were in the process of trying to sell their homes because of the potential for overreaching. The court stated that this type of mailing could be regulated because it is directed to persons who “under present economic conditions, are extremely vulnerable to a suggestion of employment that may or may not be advantageous.” 231 Kan. at 246, 642 P.2d at 1007. Accord Ohralik, 436 U.S. at 461 n.19. See supra note 30.

\textsuperscript{181} See Ohralik, 436 U.S. at 465 (the overtures of an uninvited lawyer may distress the recipient due to their “obtrusiveness and the invasion of the individual’s privacy”). Accord Bishop v. Commission on Prof. Ethics and Conduet of the Iowa State Bar Ass’n, 521 F. Supp. 1219, 1231-32 (S.D. Iowa 1981).

\textsuperscript{182} Mailings of this type are akin to the “classic... ‘ambulance chasing’” seen in Ohralik, 436 U.S. at 469 (Marshall, J., concurring). Solicitation of accident victims in any form usually results in producing a negative image of attorneys in the public perception. A recent example can be seen in the attacks by news organizations on lawyers who rushed to Bhopal, India, after a toxic gas leak that killed 2500 people. Lawyers were referred to as “vultures” by the media. See Frank, Bhopal Blowup: Are Some Lawyers Vultures? 71 A.B.A. J. 17 (March 1985).

\textsuperscript{183} “Direct, private communications from a lawyer to a prospective client are not subject to such third-party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.” Model Rules Rule 7.3 comment par. 4 (1983). See supra text accompanying note 63.
attorney and thus no effective mechanism to reduce the danger of deception. The court in *Von Wiegen*\(^1\) stated that this danger could be controlled by a filing requirement,\(^2\) but this would only result in after-the-fact review. Given the highly vulnerable position of the recipients, the damage may very well be already done.\(^3\) It is interesting to note that the *Von Wiegen* court held that the very letters at issue in that case were deceptive.\(^4\) Putting the letters on file would not have made them any less so. This amply demonstrates that the interest of informing the public may be advanced at the expense of reducing the protection against abuse.

In contrast to the liberal approach, the Illinois approach attempts to balance the competing concerns in a fair and equitable manner. First, Rule 2-103 satisfies the goal of making legal services known to the public by permitting the use of direct mailings to persons who, in general, might find such services to be useful.\(^5\) Direct mailings in these circumstances function as advertisements, and, therefore, are allowable.\(^6\) Moreover, the rule acknowledges that additional safeguards\(^7\) are required due to the confidential nature of this medium.\(^8\)

The first safeguard provided is the requirement that the mailings be stamped as advertising material.\(^9\) This requirement helps to prevent overreaching and undue influence because the recipient is

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\(^1\) *Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984); see supra notes 129-43 and accompanying text.

\(^2\) *Von Weigen*, 63 N.Y.2d at 165, 470 N.E.2d at 845, 481 N.Y.S.2d at 47; see supra note 142 and accompanying text.

\(^3\) This was one of the primary reasons that Model Rule 7.3 found that effective regulation of mailings targeted to persons with known legal needs could not be accomplished by the filing requirement. The comments following the Model Rule state “[s]uch review would be after the fact, potentially too late to avert the undesirable consequence of disseminating false and misleading material.” MODEL RULES Rule 7.3 comment par. 5 (1983).

\(^4\) *Von Wiegen*, 63 N.Y.2d at 176, 470 N.E.2d at 845, 481 N.Y.S.2d at 47. The court found two deceptive statements in the attorney’s letters. The first was that a litigation coordinating committee had been formed to assist the victims. In fact, the attorney and his secretary were the sole members of the committee, and it did not exist as an entity independent of the attorney as the statement implied. The second statement was that many victims had contacted him requesting representation. In fact, only a few had contacted the attorney, and none had requested representation. *Id.*


\(^6\) “Rule 2-103(b)(2) permits general advertising mailings which are not directed to persons known to require legal services with respect to a specific matter or problem.” *ILLINOIS CODE* Rule 2-103(b)(2) committee comments (amended 1984).

\(^7\) See supra notes 147-54 and accompanying text.

\(^8\) See supra note 183.

\(^9\) *ILLINOIS CODE* Rule 2-103(b)(2) (amended 1984); see supra note 149 and accompanying text.
immediately advised of the nature of the contents and will be better able to evaluate any unsubstantiated claims. The requirement also helps to reduce the invasion of the recipient's privacy. Although a letter from the office of an attorney may compel the recipient to open it, requiring that it be stamped as an advertisement, however, lets the recipient know at once that it is not a vital communication.

The second safeguard is the requirement that a copy of the mailings be filed with the ARDC. Without this requirement, there would be no third-party scrutiny of the communication by a regulatory body. This requirement should encourage compliance with the provisions of Rule 2-103. Even though the review of these mailings will be after the fact, under the Illinois approach, the only recipients allowed to be targeted are those with a general need rather than those in a position of extreme vulnerability.

Unlike the liberal approach, Rule 2-103 meets the interest of protecting the public from the dangers of undue influence, deception, and invasion of privacy. This is accomplished by prohibiting mailings to "persons known in a specific matter to require such legal services as the lawyer offers to provide." The Illinois rule would regard mailings under these circumstances as solicitation and therefore prohibit them. This prohibition not only protects

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193. The recipients are also likely to be more skeptical since they are unlikely to be especially vulnerable at the time. Model Rules Rule 7.3 comment par. 6 (1983).
194. This requirement was suggested by the Court in In re RMJ, 455 U.S. at 206 n.20, and also by the court in Spencer, 579 F. Supp. at 890 n.13.
195. See Bishop, 521 F. Supp. at 1231; Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1982).
196. Illinois Code Rule 2-103(e) (amended 1984); see supra note 150 and accompanying text.
197. The committee comments point out that "although a review of such letter may well be after the fact, the filing requirement of the Rule and the circumstance that the lawyer's letter will be subject to the scrutiny of the Commission should be helpful in encouraging compliance with the provisions of Rule 2-103." Illinois Code Rule 2-103 committee comments (amended 1984).
198. See supra note 186 and accompanying text.
200. Illinois Code Rule 2-103 committee comments (amended 1984) set forth supra note 147. This is also the view taken by the drafters of Model Rule 7.3. Rule 7.3 prohibits mailings directed to specific recipients known to need legal services of the kind provided by the lawyer. Model Rules Rule 7.3 (1983). The accompanying comments state that, when the potential client has a known legal need, "The situation is . . . fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies its prohibition." Model Rules Rule 7.3 committee comments (1983).

Two states have adopted the Model Rules at the present time. Arizona adopted the Model Rules on September 7, 1984, to become effective in early 1985. ABA/BNA LAW-
recipients who are in a vulnerable position but also comports with
the Supreme Court's observation that "[t]he rules preventing solicitation are prophylactic measures whose objective is the prevention of harm before it occurs."\textsuperscript{201} Moreover, a lawyer is trained in the art of persuasion and often trusted as an expert by the lay person.\textsuperscript{202} Given this combination, the potential for overreaching is great.

\textit{The Constitutionality of Illinois Code Rule 2-103}

The amended rule meets the constitutional requirements enunciated in \textit{In re R.M.J.}.\textsuperscript{203} The Court in \textit{In re R.M.J.} stated that, in order to regulate commercial speech, the state must assert a substantial interest.\textsuperscript{204} The interests considered in promulgating Rule 2-103 of protecting the public from overreaching, deception, and other aspects of solicitation,\textsuperscript{205} are substantial and thus justify the restrictions on direct mailings. Next, the Court in \textit{In re R.M.J.} noted that the restriction must directly advance those interests.\textsuperscript{206} Under the Illinois approach, these interests are directly advanced by prohibiting the use of direct mailings in those situations where they pose a substantial danger of abuse, where the recipients are known to require legal services in a particular matter. Finally, \textit{In re R.M.J.} requires that the restrictions must be no more extensive than necessary to serve those interests.\textsuperscript{207} Here, direct mailings are prohibited only in those circumstances; in all other situations, the use of direct mailings is expressly allowed. Rule 2-103 thus meets the constitutional standard set out in \textit{In re R.M.J.}.

The amended rule also should withstand the constitutional challenges raised in \textit{Adams v. ARDC}.\textsuperscript{208} The cases relied upon by the plaintiffs in that case do not support a finding that Rule 2-103 is unconstitutional.\textsuperscript{209} The first, \textit{Koffler v. Joint Bar Association},\textsuperscript{210}


\textsuperscript{201} \textit{Ohralk}, 436 U.S. at 464.

\textsuperscript{202} This dangerous combination was stressed by the \textit{Ohralk} Court. "[T]he potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay pers-\textit{son.}" \textit{Id.} at 465.

\textsuperscript{203} \textit{See supra} note 113 and accompanying text.

\textsuperscript{204} \textit{In re R.M.J.}, 455 U.S. at 203.

\textsuperscript{205} \textit{See supra} notes 28-30 and accompanying text.

\textsuperscript{206} \textit{In re R.M.J.}, 455 U.S. at 203.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{See supra} notes 157-73 and accompanying text.

\textsuperscript{209} \textit{See supra} notes 166-67 and accompanying text.
held that an attorney specializing in real estate could not be pro-
hibited from mailing letters describing his services to individual
property owners.\textsuperscript{211} Similar mailings would be permitted under a
reasonable interpretation of Rule 2-103. Under this rule, a lawyer
may direct mailings to persons who in general might find his serv-
ices to be useful. Here, the recipients, as property owners, might
find the services of a real estate attorney to be useful. There is
some evidence in Koffler that a few of the recipients were in the
process of trying to sell their homes and thereby were in need of
legal services in a specific matter.\textsuperscript{212} These recipients are poten-
tially more vulnerable to suggestions of employment that may not
be in their best interests.\textsuperscript{213} Accordingly, Rule 2-103 would not
permit mailings to be specifically targeted to these individuals.
General mailings would, however, be permissible under the rule.
Thus, the restriction is no more extensive than necessary to serve
the interest of protecting the public.

The plaintiffs in Adams also rely on Spencer v. Justices of the
Pennsylvania Supreme Court.\textsuperscript{214} In Spencer, an attorney specializ-
ing in aviation and computer law wanted to send mailings to pilots,
plane owners, and computer owners in violation of Pennsylvania’s
blanket prohibition against targeted mailings.\textsuperscript{215} The court held
that this blanket prohibition could not withstand constitutional
analysis.\textsuperscript{216} Although the Spencer court stated that prohibiting at-
torneys from selecting as recipients “those who may be most in
need of a lawyer’s services” ignores the important role of these
mailings as a device to inform the public,\textsuperscript{217} the court did acknowl-
dge that there are circumstances under which a ban is appropri-
ate.\textsuperscript{218} To ban their use, the state must identify specific situations
where the mailings posed a danger of overreaching or undue influ-

\textsuperscript{210} 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), cert. denied, 450 U.S.

\textsuperscript{211} Id. at 151, 412 N.E.2d at 934, 432 N.Y.S.2d at 878-79.

\textsuperscript{212} See Comment, supra note 38, at 409, where the letters sent by the attorney in
Koffler are reproduced.

\textsuperscript{213} See supra note 180.


\textsuperscript{215} Id. at 888. The court stated that some of those whom the attorney sought to
mail to “may have a legal problem or may be in need of a lawyer.” Id. There is no
further explanation of the type of legal problem that is being referred to.

\textsuperscript{216} Id. at 888-91.

\textsuperscript{217} Id. at 891.

\textsuperscript{218} The court listed two situations: first, where “mail recipients [are] particularly
susceptible or vulnerable to the persuasive influence contained in a lawyer’s letter,” Id. at
890; and second, where direct mail solicitation may cause conflicts of interest. Id.
This is what the Illinois rule has done. The rule carves out a specific factual situation when the use of direct mailings poses a substantial risk of abuse, when the recipients require legal services in a specific matter, and has prohibited their use only in those instances. Consequently, *Spencer* would not support a holding that the Illinois rule is unconstitutional.

**CONCLUSION**

Before amending Rule 2-103, the Illinois Supreme Court had to consider what weight should be given to two competing concerns. The court recognized the important need to provide information about legal services to the public. In so doing, the court did not ignore the equally important need to protect vulnerable segments of the public from abuses, such as overreaching and undue influence. The rule as amended reflects a careful balance of these concerns to the benefit of both. If any one interest is subsequently to be given more weight, it will be at the expense of the other, and the balance will be destroyed. The rule should therefore be allowed to remain as it is.

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219. *Id.*
220. *See supra* text accompanying note 207.