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Advertising, Part 1: Theory

**By Mark J. Fucile
Fucile & Reising LLP**

Law firm marketing regulation is a blend of theory and practice. The “theory” comes to us in the form of a series of United States Supreme Court decisions beginning in 1977 that paved the way for the broad ability to advertise that we have today. The “practice” comes to us in the form of the Rules of Professional Conduct regulating this area that reflect those same Supreme Court decisions. In this month’s column, we’ll look at “theory” and next month we’ll look at “practice.”

Given the pervasive nature of law firm marketing today, it is easy to forget the distance travelled in a relatively short time from an era where virtually no law firm marketing was permitted at all. The first set of national professional rules was the American Bar Association’s Canons of Professional Ethics adopted in 1908. Canon 27 prohibited advertising outright. When Oregon enacted the State Bar Act in 1935, we largely adopted the ABA Canons—including the ban on advertising. (For a discussion of Oregon’s adoption of the State Bar Act and the ABA Canons, see *In re Porter*, 320 Or 692, 701-02, 890 P2d 1377 (1995).) When the ABA moved from the Canons to its Model Code of Professional Responsibility in 1969, the advertising ban continued. Again, Oregon followed when we adopted our own variant of the ABA Model Code the next year. Until

the mid-1970s and the then-emerging doctrine of commercial free speech, the United States Supreme Court had upheld these severe restrictions on professional advertising in cases like *Semler v. Oregon State Board of Dental Examiners*, 294 US 608, 55 SCt 570, 79 LEd 1086 (1935).

In 1977 and 1978, however, the Supreme Court issued two decisions whose impact still resonates in all law firm marketing today.

The first, *Bates v. State Bar of Arizona*, 433 US 350, 97 SCt 2691, 53 LEd2d 810 (1977), addressed advertising. It arose on very prosaic facts. Two young former legal aid lawyers in Phoenix started a legal clinic focused on low cost consumer matters for clients who were just above the income ceiling for legal aid. They found that it was difficult to make themselves known to a consumer clientele in the absence of media advertising. Notwithstanding Arizona's ban on advertising that mirrored the ABA Canons and Model Code, they ran an ad in the city's largest newspaper outlining the scope of their services and their rates. The president of the State Bar of Arizona filed a complaint against them. An administrative panel of the Bar found them guilty and the Bar's Board of Governor's recommended suspension. The lawyers appealed to the Arizona Supreme Court, arguing that the advertising ban as it related to price was a violation of the Sherman Antitrust Act and that, more fundamentally, the ban on advertising was an unconstitutional infringement of their commercial free speech rights under the First Amendment. The Arizona Supreme Court rejected

both arguments. The United States Supreme Court granted review and affirmed on the Sherman Act issue, but reversed on the First Amendment argument. In doing so, the Supreme Court relied on then-recent commercial free speech cases in other fields to reject the outright ban on law firm advertising. At the same time, the Supreme Court noted that law firm advertising could be regulated to prohibit false and misleading advertising and that reasonable restrictions on the time, place and manner of advertising would also be permitted. Nor did it foreclose regulation on claims regarding the quality of service that are not susceptible to empirical measurement or the possible use of warnings or disclaimers. Nonetheless, *Bates* opened the door and law firm marketing was never the same.

The second, *Ohralik v. Ohio State Bar Ass'n*, 436 US 447, 98 SCt 1912, 56 LEd2d 444 (1978), dealt with in-person solicitation. In *Ohralik*, a lawyer had been disciplined for violating Ohio's ban on in-person solicitation (patterned on the then-current version of the ABA Model Code) by visiting a young automobile accident victim while she was in traction in a hospital and her equally young passenger as she recuperated at home in an effort to have them sign contingent fee agreements with him. After *Bates*, the lawyer sought review by the United State Supreme Court, arguing that the ban on in-person solicitation was also unconstitutional. The Supreme Court took review, but affirmed. The Supreme Court drew a sharp distinction between general media advertising of the kind

involved in *Bates* and the high-pressure, in-person solicitation involved in *Ohralik*: “The balance struck in *Bates* does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State’s countervailing interest in prohibition.” 436 US at 455. The Supreme Court then concluded that the state’s legitimate interest in protecting the public justified continued regulation of in-person solicitation.

The twin threads woven in *Bates* and *Ohralik* have continued to define the Supreme Court’s approach to law firm marketing: generally expanding Constitutional protection for media and written forms of advertising and generally continuing to sustain prohibitions and other regulation on in-person solicitation and closely related situations.

On the former, the Supreme Court in *In re R.M.J.*, 455 US 191, 102 SCt 929, 71 LEd2d 64 (1982), approved general direct mail advertising as long as it met *Bates*’ standard of being truthful. It did the same for targeted print and direct mail advertising in, respectively, *Zauderer v. Office of Disciplinary Counsel*, 471 US 626, 106 SCt 2265, 85 LEd2d 652 (1985), and *Shapero v. Kentucky Bar Ass’n*, 486 US 466, 108 SCt 1916, 100 LEd2d 475 (1988). In *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 US 91, 110 SCt 2281, 110 LEd2d 83 (1990), the Supreme Court found that a lawyer had a First Amendment right to advertise his certification as a trial specialist by the National Board of Trial

Advocates and in *Ibanez v. Florida Dep't of Bus. & Professional Regulation*, 512 US 136, 114 SCt 2084, 129 LEd2d 118 (1994), concluded that a lawyer could include her credentials as a certified public accountant and a certified financial planner in her advertising.

On the latter, the Supreme Court in *Edenfield v. Fane*, 507 US 761, 113 SCt 1792, 123 LEd2d 543 (1993) (involving in-person solicitation by a CPA), emphasized that *Ohralik* was limited generally to circumstances that inherently lend themselves to potential undue influence. Nonetheless, the Supreme Court continued to adhere to *Ohralik* and relied on it and *Edenfield* (among others) in *Florida Bar v. Went for It, Inc.*, 515 US 618, 115 SCt 2371, 132 LEd2d 541 (1995), upholding a Florida rule that prohibited personal injury lawyers from sending targeted direct mail solicitations to accident victims for 30 days following the accident involved. Although *Florida Bar* was a direct mail case, its analysis is framed in terms of the Supreme Court's approach to solicitation rather than advertising.

Both the ABA and Oregon rewrote their law firm marketing regulations several times in the past 30 years in the wake of *Bates*, *Ohralik* and the cases that followed to shape the regulatory structure we have today. We'll look at that next month.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.