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## **Law Firm Marketing, Part 1: Theory**

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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 market 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 column, we’ll look at “theory” and then follow in the next with “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. Similarly, Canon 28 prohibited direct solicitation “except in rare cases” involving “ties of blood, relationship or trust.” Washington adopted the ABA Canons under former Remington’s Compiled Statutes Section 139-15 and lawyers were disciplined over the years for violating the advertising and solicitation rules.<sup>1</sup> When the ABA moved from the Canons to its Model Code of Professional Responsibility in 1969, the advertising ban continued. Again, Washington followed in 1972 when we moved

to the CPRs.<sup>2</sup> Until the mid-1970s and the then-emerging doctrine of commercial free speech,<sup>3</sup> 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 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 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 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 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 from 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. The Supreme Court also did not 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 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 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 U.S. at 455. The Supreme Court then concluded that the state’s legitimate interest in protecting the public justified continued regulation of in-person solicitation.<sup>4</sup>

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 involving potentially coercive circumstances and closely related situations.

On the former, the Supreme Court in *In re R.M.J.*, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 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 U.S. 626, 106 S.Ct. 2265, 85 L.Ed.2d 652 (1985), and *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988). In *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 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 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 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 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (involving in-person solicitation by a CPA), and *Tennessee Secondary Athletic Association v. Brentwood Academy*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2489, 2493-95, 168 L.Ed.2d 166 (2007) (involving in-person high school athletic recruiting) emphasized that *Ohralik* was limited generally to circumstances that inherently lend themselves to potential coercion and 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 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 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.

The Washington Supreme Court cited both *Bates* and *Ohralik* in *Hahn v. Boeing Company*, 95 Wn.2d 28, 35-36, 621 P.2d 1263 (1980). Although its discussion was comparatively brief, the Washington Supreme Court noted the

same twin threads first articulated in *Bates* and *Ohralik*. As both the ABA (in 1983 and 2002) and Washington (in 1985 and 2006) moved to and then updated the Rules of Professional Conduct, *Bates*, *Ohralik* and the cases that followed continued to shape the regulatory structure we have today even as marketing itself increasingly moved from the older print forms to electronic media. We'll look at that in my next column.

#### **ABOUT THE AUTHOR**

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<sup>1</sup> See, e.g., *In re Winthrop*, 135 Wn. 135, 237 P. 3 (1925); *In re Steinberg*, 44 Wn.2d 707, 269 P.2d 970 (1954).

<sup>2</sup> See *Lightfoot v. MacDonald*, 86 Wn.2d 331, 336, 544 P.2d 88 (1976) (noting the continued ban on lawyer advertising).

<sup>3</sup> See, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (allowing prescription drug price advertising by licensed pharmacists).

<sup>4</sup> The Supreme Court in *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), drew a distinction where solicitation is through an organization in furtherance of political rights and accorded political rights in this context much greater protection than “commercial” rights.