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LAWYER ADVERTISING: PERMISSIBILITY OF INDICATING THE NATURE OF LEGAL PRACTICE IN ADVERTISEMENTS

Canon 27 of the ABA Canons of Professional Ethics, adopted by the American Bar Association in 1908, provided that it was "unprofessional" for lawyers to advertise or solicit professional employment.¹ This prohibition made sense in a time when most lawyers were general practitioners and communities were small, so that a lawyer's reputation was well known.² However, the increasing size and complexity of both society and the law have made it necessary for lawyers to select certain areas of law in which to practice³ in order to develop the expertise necessary to deal with today's complex legal issues. A corresponding need has developed to inform the public about the detail and variety of legal services that are available.⁴

In 1977, the United States Supreme Court declared that absolute prohibitions on lawyer advertising are violative of the first amendment.⁵ In January, 1982, the Supreme Court again dealt with lawyer advertising in *In re R.M.J.*⁶ The purpose of this comment is to examine the constitutional validity of the various approaches used by the states to regulate the areas of law practiced in light of the Supreme Court's decision in *In re R.M.J.* Specifically, the constitutionality of restrictions upon the three primary methods of advertising areas of legal practice will be examined. These methods are: (1) advertising a legal speciality; (2) advertising that one's practice is limited or restricted to certain areas of the law; and (3) listing the areas of law in which one practices in an advertisement.

1. Canon 27 was the original predecessor to the advertising provisions of MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981). Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RESEARCH J. 967, 968.

2. A 1908 canon of ethics stated: "The most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust." *Id.*

3. The day of the predominance of the general practitioner is, in many respects, virtually gone: "In a national poll, 65 percent of the young lawyers surveyed considered themselves specialists and 73 percent said they spent more than 40 percent of their time practicing in a single area." Andrews, *The Model Rules and Advertising*, 68 A.B.A.J. 808, 810 (1982) [hereinafter cited as *Rules and Advertising*].

4. According to a national survey published in 1977 by the American Bar Foundation, 83 percent of the public agreed with the statement that "people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems." Andrews, *supra* note 1, at 968 (citing B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 228 (American Bar Foundation 1977)).

5. *Bates v. State Bar*, 433 U.S. 350 (1977).

6. *In re R.M.J.*, ___ U.S. ___, 102 S. Ct. 929 (1982).

I. ANALYTICAL FRAMEWORK OF *IN RE R.M.J.*A. *Background*

In a series of commercial speech cases over the last decade,⁷ the United States Supreme Court has developed an analytical framework to be used to determine the constitutional validity of restrictions on professional advertising. Because these cases have dealt primarily with absolute prohibitions of certain forms of speech or communication which the Court generally rejected as violative of the first amendment, these cases afford little guidance regarding the constitutional validity of regulations which allow some but not all types of promotional communications.⁸ *In re R.M.J.* represents an attempt by the Court to provide some much needed guidance in evaluating the constitutionality of such regulations in the context of lawyer advertising.

In *In re R.M.J.*, the Court articulated the analytical framework that has been developed in the key cases regarding commercial speech generally and lawyer advertising specifically. Citing *Bates v. State Bar*,⁹ the Court stated that lawyer advertising is a form of commercial speech that is protected by the first amendment so that advertising by attorneys may not be subjected to blanket suppression.¹⁰ The Court emphasized that its decision in *Bates* was a narrow one and that advertising by lawyers could be regulated in appropriate circumstances.¹¹

B. *The In Re R.M.J. Analysis*

In summarizing the development of the commercial speech doctrine as it applies to professional advertising, the Court articulated its analytical framework as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive.¹²

7. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

8. *Andrews*, *supra* note 1, at 971.

9. *Bates v. State Bar*, 433 U.S. 350, 383 (1977).

10. *In re R.M.J.*, 102 S. Ct. 929, 935 (1982).

11. *Id.*

12. *Id.* at 937.

The Court further stated that "even when the communication is not misleading, the state retains some authority to regulate it."¹³ To be constitutional, such regulations must conform with the three-part test formulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, requiring that (1) a substantial governmental interest be asserted as justification for the regulation; (2) the regulation directly advance the governmental interest asserted; and (3) the regulation be not more extensive than necessary to serve that interest.¹⁴

C. *Application to the Facts in In re R.M.J.*

In re R.M.J. involved the Missouri Supreme Court rule which specified how areas of practice could be listed in an advertisement. The rule specified that a lawyer could use one or more terms from a specified list of twenty-three areas of practice but could not deviate from the precise wording stated in the rule in describing these areas.¹⁵ The advertisement at issue included a listing of areas of practice which did deviate from the language of the rule.¹⁶ In the disbarment proceedings that resulted, the Supreme Court of Missouri upheld the constitutionality of the rule.¹⁷

The United States Supreme Court noted that the state did not assert that the appellant's listing was misleading. Nor upon its own examination did the Court find the listing to be misleading.¹⁸ The Court concluded that "because the listing published by the appellant has not been shown to be misleading, and because the [State Bar] Advisory Committee suggests no substantial interest promoted by the restriction, . . . this portion of Rule 4 is an invalid restriction upon speech as applied to appellant's advertisements."¹⁹

It should be emphasized that the actual result in this case is less signifi-

13. *Id.* at 937 n.15 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980)).

14. 447 U.S. at 566.

15. Mo. SUP. CT. R. 4, addendum III (Vernon 1977), cited in *In re R.M.J.*, 102 S. Ct. 929, 931, 933 & n.6 (1982).

16. A typical version of the appellant's advertisements which was published in August, 1978, included a listing of 23 areas of practice. Four of the areas conformed to the language prescribed in the rule. Eleven of the areas deviated from the precise language of the rule, e.g., "tax" instead of "taxation law," and "real estate" instead of "property law." Eight other areas listed in the advertisement were not listed in any manner in the rule, e.g., "contracts" and "securities-bonds." 102 S. Ct. at 934 n.8.

17. *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1981), *rev'd* 102 S. Ct. 929 (1982). The Missouri Supreme Court, shortly after the United States Supreme Court's decision in *In re R.M.J.*, vacated the rules governing lawyer advertising, pending a study to develop new rules. The court indicated that the rules would not be enforced until new ones were formulated. *Lawyer Ad Decision Raising More Questions*, 68 A.B.A.J. 407, 407 (1982).

18. "The use of the words 'real estate' instead of 'property' could scarcely mislead the public." 102 S. Ct. at 938.

19. *Id.*

cant than the analytical framework articulated in the opinion. The opinion itself stresses that the holding is limited to the facts of the case²⁰ and that the analysis articulated is to be applied on a case by case basis.²¹ Furthermore, because of the particular facts of the case, the Court was not required to apply the full analysis to arrive at its decision.²² Consequently, questions remain as to the application of this analytical framework to other forms of regulating the advertising of areas of law practiced.

II. CONSIDERATIONS IN APPLYING THE *In Re R.M.J.* ANALYSIS

A. *What is Misleading?*

In *In re R.M.J.* the state did not assert that the attorney's deviation from the prescribed list of areas of practice made his advertisement misleading or deceptive. Thus, the facts of the case did not lend themselves to a sophisticated analysis of what constitutes a deceptive or misleading advertisement, and so the opinion provides little new guidance as to what is misleading.²³ However, the opinion does indicate that there may be particular advertisements which, although not inherently misleading, have been shown by experience to be misleading to the public.²⁴ There is also authority for the proposition that in determining whether an advertisement is misleading, a court must consider not only the context of the advertisement itself, but also the legal sophistication of the audience that it is intended to reach.²⁵

20. The opinion does not even go so far as to deem the Missouri rule unconstitutional as enacted, but holds merely that the rule's requirement of conforming to the list of 23 area descriptions is "an invalid restriction upon speech as applied to appellant's advertisements." *Id.* (emphasis added). The Court reiterated: "[The] restrictions in the Rule upon appellant's First Amendment rights can [not] be sustained in the circumstances of this case." *Id.* at 939 (emphasis added).

21. *Id.* at 938 n.16.

22. In applying the analysis, the Court never got past the second part of the *Central Hudson* test, since the state asserted no governmental interest in support of the restriction. *Id.* at 939. See *supra* text accompanying note 14.

23. In determining the constitutional protection afforded a lawyer's advertisement, one court has considered applying the strict standard used by the Federal Trade Commission in determining whether advertisements are misleading or deceptive. See *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980). The FTC standard involves determining whether an advertisement "could" deceive members of the public. In making its determination, the FTC may take into account the fact that certain members of the audience may be unlearned and gullible. The district court pointed out that this test was at odds with the concept that restrictions on constitutionally protected speech must be narrowly drawn. *Id.* at 220. The court justified its consideration of the FTC standard by observing that the United States Supreme Court had relied on and cited FTC precedent in *Bates v. State Bar*. 498 F. Supp. at 220 (citing *Bates v. State Bar*, 433 U.S. 350 (1977)).

24. See *In re R.M.J.*, 102 S. Ct. 929, 936 n.11 (1982).

25. *Bates v. State Bar*, 433 U.S. 350, 383 n.37 (1977); *In re Bloomfield*, 16 Bankr. 220, 222 (Bankr. D.D.C. 1981).

For these reasons, few generalizations can be made as to what constitutes misleading lawyer advertising since actual experience with advertising and audience sophistication may vary from case to case.²⁶

B. *Substantial State Interest*

In order to sustain a restriction on advertising, the *Central Hudson* three-part test, as part of the *In re R.M.J.* analysis, requires that the state show a substantial interest which will be served by the regulation.²⁷ It is well established with regard to lawyer advertising, as with all advertising and commercial speech, that the state has a substantial interest in preventing the public from being deceived or misled by false, deceptive, or misleading advertising.²⁸ However, *Central Hudson* and *In re R.M.J.* suggest that there may be other substantial state interests which could justify restrictions even when the advertising is not false or misleading.²⁹ Precisely what these other governmental interests are and what makes these interests substantial for purposes of regulating lawyer advertising remain unclear. Although other interests have been identified as substantial in various advertising cases,³⁰ *In re R.M.J.* provides little guidance regarding lawyer advertising because the state asserted no governmental interest.³¹

26. There seems to be general agreement only that lawyer advertising, on the whole, is not inherently misleading. *In re R.M.J.*, 102 S. Ct. 929, 935 (1982); *Bates v. State Bar*, 433 U.S. 350, 372 (1977); *Consumer Union v. American Bar Ass'n*, 427 F. Supp. 506, 521 (E.D. Va. 1976), *vacated and remanded*, 433 U.S. 917 (1977), *original judgment reinstated on remand*, 470 F. Supp. 1055 (E.D. Va. 1979). However, there is much less certainty concerning more specific questions. *See, e.g., In re Appert*, 315 N.W.2d 204, 215 (Minn. 1981) ("Claims of special expertise in an advertisement may be found to be material representations giving rise to a warranty of competence or information that is false, deceptive, or misleading.").

27. *In re R.M.J.*, 102 S. Ct. 929, 936 (1982).

28. *See generally supra* note 7.

29. *See supra* note 13 and accompanying text.

30. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 568-69 (1980) (State interests in energy conservation and fair and efficient utility rates are clear and substantial governmental interests justify ban on promotional utility advertising); *Virginia State Bd. of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 766 (1976) (While the state "indisputably, . . . has a strong interest in maintaining [a high degree of] professionalism," this interest does not justify the suppression of price advertising of prescription drugs.).

31. In lawyer advertising cases there have been few state interests, other than the prevention of public deception, that have had any significance. *See, e.g., Bates v. State Bar*, 433 U.S. 350 (1977). However, in 1982 the Utah Supreme Court, in approving changes to the Utah disciplinary rules on lawyer advertising, held that maintaining high standards of dignity and professionalism among Utah attorneys is a substantial state interest for purposes of the *In re R.M.J.* analysis. The court used this argument to justify approval of a rule that would permit attorneys to advertise in newspapers or the electronic media while prohibiting advertising by billboards, direct mail, circulars, and the use of promotional items like matchbooks and inscribed pencils and pens. In what appeared to be stretching, the court

C. Does Regulation Directly Advance State Interest?

The second part of the *Central Hudson* test requires that the restriction on advertising directly advance the governmental interest asserted.³² In *In re R.M.J.*, since the advertisement in question was found to be not misleading and since no other substantial governmental interest was asserted, the Court was not required to address the issue. However, some guidance is to be found in pre-*Central Hudson* cases.³³ Some of these cases involved interests which the Court found simply were not served by the advertising restriction.³⁴ Others involved advertising regulations which were found to be unnecessary because there were other existing provisions that adequately served to further or protect the governmental interest asserted.³⁵

attempted to harmonize *Bates*, *Ohrlik*, and *In re R.M.J.* in an effort to support its "dignity" position. Two dissenting justices argued that maintaining the dignity of the profession was vague and subjective and did not constitute a "substantial state interest" as was intended by the United States Supreme Court in *In re R.M.J.* *In re Utah State Bar Petition*, 647 P.2d 991 (Utah 1982).

32. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

33. The Court in *In re R.M.J.* cited *Virginia State Bd. of Pharmacy* and *Bates* as examples of cases involving restrictions which failed to comply with the second part of the *Central Hudson* test. 102 S. Ct. 929, 937 (1982). See *infra* note 34. See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980).

34. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 375-78 (1977). In *Bates*, the state expressed many concerns regarding the lifting of the ban on lawyer advertising. The state claimed that the lawyer advertising would have an adverse effect on the administration of justice by stirring up additional litigation and fraudulent claims. The Court responded that limiting advertising would not prevent dishonesty and fraudulent acts. The state also asserted that lawyer advertising would have an adverse effect on the quality of legal services provided to the public. The Court rejected this contention on the ground that restraints on advertising were not an effective way to deter shoddy work. *Id.*

35. See, e.g., *Consumer Union v. American Bar Ass'n*, 427 F. Supp. 506, 518-19 (E.D. Va. 1976), *vacated and remanded*, 433 U.S. 917 (1977), *original judgment reinstated on remand*, 470 F. Supp. 1055 (E.D. Va. 1979). The district court held that the lawyer advertising ban was unnecessary in that other provisions of Virginia law would prevent deceptive or misleading lawyer advertising. The court offered as examples section 18.2-216 of the Virginia Code, which provides that it is unlawful to advertise services containing any representation which is untrue, deceptive, or misleading, and VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4)(1976), reprinted in VA. SUP. CT. R. 6:II, 216 Va. 1064, 1066 (1976), which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. See also *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (state's interest in preventing public deception and harassment not sufficiently compelling to justify ban on direct mail advertising because alternative regulation requiring submission and review of advertising materials would adequately serve the state's interest and would be less restrictive on the first amendment rights involved). *But see In re Mountain Bell Directory Advertising*, ___ Mont. ___, 604 P.2d 760, 764 (1970) (rejecting argument that action for malpractice would adequately protect public from false implication of special expertise arising from published directory listing lawyers by areas of practice).

D. *Is Regulation More Extensive than is Necessary?*

The third part of the *Central Hudson* test requires that the regulation be no more extensive than is necessary to serve the asserted governmental interest.³⁶ This requirement caused the regulation at issue in *Central Hudson* to be declared unconstitutional and appears to be the most rigorous of the requirements that the first amendment imposes upon restrictions on lawyer advertising.³⁷

Although the facts in *In re R.M.J.* did not squarely raise an issue regarding the third requirement, precedent has been developed in other cases regarding the application of this requirement to restrictions on lawyer advertising. These cases reflect two approaches to this application. Some courts have held that even if a restriction directly serves a governmental interest, such as preventing public deception, it is unconstitutionally overbroad if it also prohibits certain nonmisleading, nondeceptive advertising.³⁸ Other courts have held restrictions unconstitutionally overbroad where the court finds that the governmental interest could be served by a less restrictive regulation that is less offensive to the first amendment rights involved.³⁹

E. *Advertising Content versus Advertising Format*

The *In re R.M.J.* opinion raises a significant new question regarding the application of the Supreme Court's commercial speech analysis to restrictions on advertising areas of practice. Prior to *In re R.M.J.*, the Court's approach to the protection of commercial speech provided that the *content* of the communication was more highly protected than the *time, place, or manner* of such communication.⁴⁰ Restrictions on advertising content are permissible only to the extent they prohibit false, decep-

36. See *supra* text accompanying note 14.

37. In *Central Hudson* the Court stated: "To the extent that the [Public Service] Commission's order suppresses [certain] speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1980). The Court also put the burden on the state to demonstrate "that its interest in conservation cannot be protected adequately by more limited regulation. . . ." *Id.* With respect to lawyer advertising and the state's interest in preventing public deception, this standard would appear to impose a very difficult burden for any state restriction which regulates anything but false or misleading speech. *But see* *Foley v. Alabama State Bar*, 481 F. Supp. 1308 (N.D. Ala. 1979), *rev'd in part*, 648 F.2d 355 (5th Cir. 1981) (Alabama disciplinary rule which merely required submission of copy of advertisement after it had been published constituted reasonable restriction of the manner of advertising, designed to enable the State Bar to determine which advertisements were false and misleading).

38. See *supra* note 37. See also *Durham v. Brock*, 498 F. Supp. 213, 224 (M.D. Tenn. 1980); *Consumer Union v. American Bar Ass'n*, 427 F. Supp. 506, 522 (E.D. Va. 1976).

39. See, e.g., *In re Appert*, 315 N.W.2d 204, 208 (Minn. 1981).

40. See *Andrews, supra* note 1, at 972-73.

tive, or misleading communications or communications concerning transactions that are themselves illegal.⁴¹ Restrictions on advertising format are permissible whenever they serve a significant governmental interest and leave open alternative channels for communication of information.⁴²

Although referring in a footnote to the "time, place, and manner" restrictions discussed in *Bates*, the Court's summary of the commercial speech doctrine in *In re R.M.J.* appears to make no distinction between restrictions on advertising content and restrictions on the method or format of advertising.⁴³ Whether the Court intended the level of first amendment protection given advertising content to be equivalent to that given advertising format is unclear. Taken literally, *In re R.M.J.* arguably indicates that restrictions on the content of lawyer advertising will be subjected to no stricter scrutiny than restrictions on time, place, or manner of advertising.

III. CONSTITUTIONAL EVALUATION OF STATE RULES ON LAWYER ADVERTISING

A. *State Approaches to Regulation*

In recognition of consumers' need for accurate information with which they can properly select a lawyer, all the states⁴⁴ and the District of Columbia have adopted rules against false, fraudulent, misleading, and deceptive communications by lawyers.⁴⁵ In response to *Bates*, all the states and the District of Columbia have adopted new ethics codes which are based on the American Bar Association's *Model Code of Professional Responsibility*⁴⁶ and which allow at least some promotional activity by lawyers.⁴⁷ However, the specific provisions of state rules vary so significantly that one commentator has described the current status of restrictions on lawyer advertising as "a crazy quilt of regulations, differing widely in approach."⁴⁸

41. See *Bates v. State Bar*, 433 U.S. 350, 383-84 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976).

42. *Andrews*, *supra* note 1, at 973. See also *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

43. *In re R.M.J.*, 102 S. Ct. 929, 936 (1982). The opinion states: "When the particular content or method of the advertising suggests that it is . . . misleading . . . the states may impose appropriate restrictions." *Id.* at 937 (emphasis added).

44. *E.g.*, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1979) reprinted in VA. SUP. CT. R. 6:II, 220 Va. 616, 626 (1979).

45. There is precedent for such provisions in Federal Trade Commission actions requiring truthful, nonmisleading product advertising. *Andrews*, *supra* note 1, at 985.

46. *Id.* at 986.

47. *Id.* at 969.

48. *Rules and Advertising*, *supra* note 3, at 809.

Thirty states base their codes on the ABA's Proposal A,⁴⁹ the version actually adopted by the ABA. This version is referred to as the "regulatory approach" and allows the lawyer to advertise only those items of information specifically provided for in the rule.⁵⁰ The Missouri rule involved in *In re R.M.J.* was this type of rule.⁵¹

Eighteen states and the District of Columbia have taken what is referred to as the "directive approach"⁵² based upon Proposal B of the ABA *Model Code*. These provisions generally permit all advertising that is not false, fraudulent, misleading, or deceptive, and in some states, self-laudatory or unfair.⁵³ They do not specifically provide what may be advertised, but rather set forth guidelines as to what may not be advertised.⁵⁴ Virginia's rule is an example of the directive approach.⁵⁵

In 1981, the ABA Commission on Evaluation of Professional Standards released its proposed final draft of the *Model Rules of Professional Conduct*,⁵⁶ which are to replace the current *Model Code*. Rule 7.1, the general advertising provision of the *Model Rules*, is similar to the directive approach of Proposal B of the *Model Code* in that it would permit any communication by a lawyer as long as the communication is not false or misleading about the lawyer or his services.⁵⁷

B. Rules Regarding Specialization

The advertising rules in virtually all states,⁵⁸ the *Model Code*,⁵⁹ and the new *Model Rules*⁶⁰ prohibit a lawyer from holding himself out as a specialist in a particular field of law unless he has been certified as a specialist by the state in which he practices.⁶¹ The language used to state this

49. *Id.*

50. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1981).

51. *In re R.M.J.*, 102 S. Ct. 929, 932-33 (1982).

52. *Rules and Advertising*, *supra* note 3, at 809.

53. Andrews, *supra* note 1, at 988.

54. Some jurisdictions (e.g., District of Columbia and New Hampshire) provide "definitions" as to what is deceptive or misleading. This may act to prohibit information that is not necessarily false or misleading on its face. *Id.* at 988 nn.97-98.

55. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1979), *reprinted in* VA. SUP. CT. R. 6:II, 220 Va. 616, 626 (1979).

56. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft 1981).

57. *Id.* Rule 7.1.

58. Andrews, *supra* note 1, at 998. See, e.g., VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(2)(1979), *reprinted in* VA. SUP. CT. R. 6:II, 220 Va. 616, 629 (1979).

59. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(3) (1981).

60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4(c) (Proposed Final Draft 1981).

61. The ABA *Model Code*, the *Model Rules* and all the states permit a lawyer to state that he practices before the United States Patent and Trademark Office if he has so admitted. Many jurisdictions and the *Model Rules* allow lawyers who are engaged in admiralty practice to state that they are so engaged. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)(1) (1981); MODEL RULES OF PROFESSIONAL CONDUCT RULE 7.4(a), (b) (Proposed

prohibition includes: holding oneself out as a specialist; holding oneself out as a recognized, designated, or certified specialist; or implying specialization.⁶² The rationale behind these prohibitions is that specialization labels imply a certain level of expertise in particular legal areas which may or may not be warranted in a given situation where the lawyer is not a certified specialist.⁶³ They may also imply that the lawyer is actually certified when in fact he is not or where certification is not even available.⁶⁴ In sum, the predominant view is that such communication will provide the public with no useful information with which to select a lawyer and will serve only to mislead the public until uniform procedures for certifying legal specialties or expertise have been adopted.⁶⁵

Assuming the public in fact would be misled by information regarding specialty or expertise,⁶⁶ restrictions upon advertising containing such information would be constitutional under the commercial speech analysis set forth in *In re R.M.J.* Under this analysis, communications that are

Final Draft 1981); VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(1) (1979), reprinted in VA. SUP. CT. R. 6:II, 220 Va. 616, 629 (1979).

62. Andrews, *supra* note 1, at 998.

63. *Consumer Union v. American Bar Ass'n*, 427 F. Supp. 506, 521 (E.D. Va. 1976).

64. The commentary to proposed *Model Rule 7.4* gives the following explanation:

Stating that the lawyer is a "specialist" or that the lawyer's practice "is limited to" or "concentrated in" particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.

MODEL RULES OF PROFESSIONAL CONDUCT RULE 7.4, comment (Proposed Final Draft 1981).

65. *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903, 912 (D.R.I. 1981).

66. According to Andrews, the assumption is

that people who hear the word specialist used with respect to lawyers understand it to mean certified by some official body in a particular field. Since this is the meaning the term generally has in the medical field, where consumers have heard it for years, this is an understandable assumption. So even in states without programs, lawyers can probably constitutionally be prohibited from saying they are specialists or recognized specialists.

Andrews, *supra* note 1, at 999 n.152.

However, another commentator has argued that the public would not be misled, that specialization is a fact of life today, and that lawyers should be allowed to practice specialties openly. He summarizes his argument as follows:

- (1) *de facto* specialization exists today, therefore, it should be formally recognized;
- (2) recognizing specialties will enhance the competence of lawyers in the particular field;
- (3) consumers will have access to more information by which to choose a particular lawyer;
- (4) specialization will lead to a reduction in legal service costs; and
- (5) failure to recognize specialties results in lawyers being held out as competent in all fields.

Scott, *Lawyer Advertising and Specialization in Montana: An Alternative Approach*, 43 MONT. L. REV. 131, 141 (1982).

false, fraudulent, or misleading may be prohibited entirely.⁶⁷

The Virginia State Bar contends, however, that the absolute prohibition of advertising lawyer specialization where there is no approved specialization or certification program is unconstitutional and unenforceable in light of *In re R.M.J.*⁶⁸ This position is apparently based on the premise that advertising a specialty in such a case is not inherently misleading, although it may be potentially misleading,⁶⁹ and thus it cannot be constitutionally prohibited under the *In re R.M.J.* analysis.

There appear to be no restrictions on lawyers' holding themselves out as specialists where in fact they have been certified as such in the state in which they practice. Several states have adopted various specialty certification plans for certain areas of law.⁷⁰

C. Rules Regarding Limiting or Restricting Practice

In most jurisdictions, holding oneself out as limiting or restricting one's practice to certain areas of the law is treated the same as holding oneself out as a specialist.⁷¹ In theory, the distinction between "practice limited to" and "specialist" is that the former does not imply that the lawyer possesses or has been certified as possessing particular expertise in the area, whereas the latter may be taken to signify particular expertise.⁷² However, the predominant view is that in practice the lay consumer will not make this distinction but rather will take both forms of wording to signify particular expertise.⁷³

Therefore, the rules in most states and those proposed by the ABA prohibit any indication that a lawyer limits or restricts his practice.⁷⁴ Under the commercial speech analysis articulated in *In re R.M.J.*, these prohibi-

67. *In re R.M.J.*, 102 S. Ct. 929, 937 (1982).

68. This is the position taken by the Bar in a petition pending before the Virginia Supreme Court seeking to amend the *Virginia Code of Professional Responsibility*. The proposed changes include deleting reference to a certified or recognized specialist in DR 2-101(A) and reserving DR 201-4(A)(2) pending adoption of a specialization plan for lawyers in Virginia. *In re* Petition of the Virginia State Bar to Amend the Rules of Court, Part Six, § II (Va. filed Mar. 15, 1982). See *infra* note 105.

69. The petition refers to "truthful advertising of specialization . . . [in] the absence of an approved specialization or certification program. . . ." *In re* Petition of the Virginia State Bar to Amend the Rules of Court, Part Six, § II, at 3-4 (Va. filed Mar. 15, 1982).

70. See generally *In re* Florida Bar Amendment, 399 So. 2d 1385 (Fla. 1981); *In re* Florida Bar, 319 So. 2d 1 (Fla. 1975); *In re* Petition for Rule of Court, 564 S.W.2d 638 (Tenn. 1978); *In re* Utah State Bar Petition, 647 P.2d 991 (Utah 1982); Scott, *supra* note 66, at 146-47; Note, *Regulation of Legal Specialization: Neglect by the Organized Bar*, 56 NOTRE DAME LAW. 293 (1980). But see *In re* Amendments, 267 Ark. 1181, 590 S.W.2d 2 (1979).

71. Andrews, *supra* note 1, at 998.

72. Scott, *supra* note 66, at 140.

73. See *supra* note 64.

74. See *supra* notes 59, 60.

tions would be constitutional if the use of "limited to" or "restricted to" is inherently misleading or if experience has shown that this wording is in fact misleading.⁷⁵ However, whether such language is misleading is a determination about which the states vary.⁷⁶ A few jurisdictions do not consider the limitation or restriction of a practice to be inherently misleading.⁷⁷ The Virginia rule, for example, specifically permits a lawyer to hold himself out as limiting his practice to a particular area or field of law.⁷⁸ This would appear to be a reasonable approach. If in fact the attorney does restrict his practice to certain areas, then this fact, combined with other information in the advertisement, would be relevant and valuable to the consumer in selecting a lawyer to handle a particular legal problem.⁷⁹ The government's interest in preventing any potential deception or confusion could be served by requiring some form of disclaimer indicating that the lawyer is not a certified specialist and does not claim any special expertise in the areas listed.⁸⁰ Where the state is unable to show that indications of limitation and restriction of practice are inherently misleading or proven by experience to be misleading, an outright prohibition of such indications should be unconstitutional under the commercial speech analysis articulated in *In re R.M.J.* The communication would be afforded first amendment protection since the information is not false or misleading. Although the governmental interest in preventing any potential deception is substantial and the prohibition of indications of limitation or restriction of practice would directly advance that interest, a disclaimer requirement is available as an alternative which would adequately serve the governmental interest and be less restrictive to the first amendment rights involved. Accordingly, an outright prohibition should be deemed more extensive than is necessary to serve the government's interest and therefore invalid.

D. Rules Regarding Listing Areas of Practice

An issue not easily distinguishable from the limitation of one's practice is the listing of areas of practice in advertising, without any indication of limitation, restriction, or specialty. However, such listing is allowed by almost all jurisdictions, subject to varying degrees of regulation.

75. See *supra* notes 58-68 and accompanying text.

76. See *supra* note 25 and accompanying text.

77. Andrews, *supra* note 1, at 1001 n.158.

78. See *infra* note 105. Such communications must be in accordance with the standards of DR 2-101 (must not be false, fraudulent, misleading or deceptive), DR 2-102 (relating to professional notices, letterheads, offices and law lists), and DR 2-103 (pertaining to recommendation of professional employment). VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(B) (1979), reprinted in VA. S. Ct. R. 6:II, 220 Va. 616, 629 (1979).

79. See *supra* note 11.

80. See *infra* notes 99-101 and accompanying text.

1. Regulatory Approach and Absolute Prohibition

At least one state, Oklahoma, prohibits lawyers from advertising the areas of law in which they practice, concluding that the inclusion of such information is, like indicating a specialty, inherently misleading.⁸¹

Sixteen states follow a regulatory type approach to listing areas of practice based on DR 2-105(A)(2) of the ABA *Model Code of Professional Responsibility*.⁸² These rules require lawyers to describe their practice according to officially sanctioned designations which are specified in the rules. The actual designations specified vary from state to state. The Missouri rule in *In re R.M.J.* is an example of such a regulatory type approach.⁸³ The major justification offered for these regulations is that a

81. See Andrews, *supra* note 1, at 996 n.134.

82. *Id.* at 998 n.148; *Rules and Advertising*, *supra* note 3, at 810.

83. The relevant part of the rule reads as follows:

"[T]he following areas for fields of law may be advertised by use of the specific language hereinafter set out:

1. 'General Civil Practice'
2. 'General Criminal Practice'
3. 'General Civil and Criminal Practice.'

"If a lawyer or law firm uses one of the above, no other area can be used If one of the above is *not* used, then a lawyer or law firm can use one or more of the following:

1. 'Administrative Law'
2. 'Anti-Trust Law'
3. 'Appellate Practice'
4. 'Bankruptcy'
5. 'Commercial Law'
6. 'Corporation Law and Business Organizations'
7. 'Criminal Law'
8. 'Eminent Domain Law'
9. 'Environmental Law'
10. 'Family Law'
11. 'Financial Institution Law'
12. 'Insurance Law'
14. 'Labor Law'
15. 'Local Government Law'
16. 'Military Law'
17. 'Probate and Trust Law'
18. 'Property Law'
19. 'Public Utility Law'
20. 'Taxation Law'
21. 'Tort Law'
22. 'Trial Practice'
23. 'Workers Compensation Law.'

"No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

"If one or more of these specific areas of practice are used in any advertisement, the following statement must be included . . . : 'Listing of the above areas of practice does not indicate any certification of expertise therein.'"

In re R.M.J., 102 S. Ct. 929, 933 n.6 (1982) (quoting Mo. Sup. Ct. R. 4, addendum III

listing of an area of practice implies specialization in that area and thus is misleading to the public.⁸⁴

In applying the commercial speech analysis articulated in *In re R.M.J.* to an outright prohibition such as Oklahoma's, the prohibition would be valid only if the state could show either that the listing of a lawyer's areas of practice is inherently misleading or that experience has proven that such listings are misleading and subject to abuse.⁸⁵ Although this determination may vary among states, the fact that the vast majority of states have not made such a determination makes it unlikely that a state could succeed in showing that such communications are misleading.⁸⁶ Accordingly, an outright prohibition of the listing of a lawyer's areas of practice should be invalid as being more restrictive than is necessary to prevent any potential deception.⁸⁷

Regarding regulatory type rules such as Missouri's, the Court in *In re R.M.J.* held that the designations used by the lawyer that differed from the State's list were not misleading and therefore could not be prohibited.⁸⁸ Even if there were a concern that the list would imply specialization (and thus mislead the public), a rule prescribing the precise language of the designations to be used in lawyer advertising does not directly meet that concern or further the government's interest in preventing it.⁸⁹ Additionally, it appears that any deception could be prevented by requiring the use of a disclaimer in the advertisement indicating that the lawyer is not a specialist and claims no special expertise.⁹⁰ In such a case, the regulatory type rules would fail the *In re R.M.J.* analysis in that they are more restrictive than is necessary to serve the state interest.⁹¹

Although no other state interest was put forward in *In re R.M.J.*, an "ostensible state interest" in prescribing the precise language to be used in advertising is the establishment of a common set of terms to aid the

(Vernon 1977) (item 13 omitted in quoted passage)).

84. See Andrews, *supra* note 1, at 1000. In Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 903, 906 (D.R.I. 1981), the district court quoted the Rhode Island Supreme Court regarding the listing of areas of practice: "The law firm was making a claim of expertise or specialization in those areas listed in the advertisement . . . Although the advertisement does not explicitly claim expertise, potential clients could reasonably infer that the law firm had expertise in those areas of law." *Id.* quoting Carter v. Lovett & Linder, Ltd., 425 A.2d 1244, 1246 (R.I. 1981) (different case involving same parties before district court).

85. *In re R.M.J.*, 102 S. Ct. 929, 937 (1982); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).

86. See *supra* text accompanying notes 11, 13, & 18 and note 18.

87. *In re R.M.J.*, 102 S. Ct. at 933, 937-39.

88. *Id.* at 939.

89. See Andrews, *supra* note 1, at 1000. For example, in "Missouri the permissible term, 'Negligence Law' does not convey any less a sense of expertise than does the impermissible 'Personal Injury Law.'" *Id.* See also *supra* text accompanying note 14.

90. See *infra* note 100 and accompanying text and text accompanying notes 100-102.

91. See *supra* text accompanying note 14.

public in comparing and selecting lawyers.⁹² However, this justification is constitutionally vulnerable even assuming that securing uniformity is a substantial state interest for purposes of the *In re R.M.J.* analysis.⁹³ Some states have apparently not yet promulgated a list of designations.⁹⁴ In those that have, many of the terms may not be comprehensible to the lay public and other important designations may have been omitted.⁹⁵ In these cases, the restrictions would not survive the *In re R.M.J.* analysis because they do not directly advance the asserted interest and are not the least restrictive approach.⁹⁶

The Court was careful to restrict its holding in *In re R.M.J.* to the facts of the case and declined to declare the Missouri rule unconstitutional on its face. It emphasized that the rule was invalid *as applied* to the lawyer's advertisement in question.⁹⁷ However, it is submitted that in the case of the Missouri rule and any of the regulatory type rules in other states there are infinite circumstances where, using the same analysis and reasoning, the Court would come up with the same result that it did in this case. Thus, the effect of the holding in *In re R.M.J.* is to make these regulatory type rules virtually unenforceable.⁹⁸

2. Disclaimer Requirement

Other state provisions allow lawyers to advertise areas of law in which they practice, but require that a disclaimer be included in the advertisement indicating that the lawyer is not a specialist.⁹⁹ Although there are varying opinions as to the effectiveness of such disclaimers,¹⁰⁰ several

92. See *Andrews, supra* note 1, at 999.

93. See *supra* text accompanying notes 27-33 and notes 30-33.

94. *Andrews* cites Nevada, West Virginia and Wyoming as examples. *Andrews, supra* note 1, at 999 n.153. In these cases, lawyers are effectively prevented from communicating their areas of practice at all. *Id.*

95. This was the case in *In re R.M.J.* Eight areas were listed in the advertisement that were not listed in any manner by the Advisory Committee's [Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri] addendum: "contract," "aviation," "securities-bonds," "pension & profit sharing plans," "zoning & land use," "entertainment/sports," "food, drug & cosmetic," and "communication." *Id.* at 937 n.8.

96. See *Andrews, supra* note 1, at 1000.

97. See *supra* note 20 and accompanying text.

98. As long as a lawyer could come up with a term to describe his area of practice which was not false or misleading, he could not constitutionally be prevented from using it in an advertisement. Any rule that did not include the designation would be deemed unconstitutional as it applied to that advertisement, as was the case in *In re R.M.J.*

99. *Andrews* offers the Pennsylvania and Tennessee rules as examples of rules that require lawyers who advertise that they limit their practice to include a disclaimer stating that the lawyer is not recognized or certified as a specialist. In addition, the Tennessee rule provides for the statement that the lawyer "neither assert[s] . . . [implies] or claim[s] any particular knowledge or expertise above that of other lawyers in this community." *Andrews, supra* note 1, at 997 n.138.

100. See *Durham v. Brock*, 498 F. Supp. 213, 225 (M.D. Tenn. 1980) (lawyer's advertise-

courts have approved this approach as a reasonable alternative to restricting or prohibiting the advertising of certain types of information.¹⁰¹ If effective, the disclaimer requirement would directly advance the governmental interest in preventing misleading or deceiving the public.¹⁰² Courts have acknowledged that such a requirement is no more extensive than is necessary to serve that interest.¹⁰³ Thus under the *In re R.M.J.* analysis, it appears that such disclaimer requirements would be found valid in terms of the first amendment rights involved.

3. Directive Approach

Finally, a small group of states,¹⁰⁴ including Virginia,¹⁰⁵ allows the pub-

ment stating his practice to be limited to domestic relations but including disclaimer that no particular expertise above that of the general legal community was asserted or implied would not mislead a consumer as to the quality of the legal services being offered). In *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903, 911 (D.R.I. 1981), however, the court found that listing areas of practice in an advertisement without any limiting explanation that these were merely areas of law in which the lawyer was interested and were not necessarily his specialty, was in fact listing the lawyer's specialties. The court added that it made no difference that the advertisement added that "we make no claim of expertise or specialization in these matters." *Id.* The court called this "even more pernicious in that it deliberately states an untruth." *Id.*

101. See, e.g., *Bates v. State Bar*, 433 U.S. 350, 384 (1971).

102. See *supra* text accompanying notes 14 & 36-39 and note 37.

103. See, e.g., *Durham*, 498 F. Supp. 213.

104. *Andrews* cites the rules in Hawaii, the District of Columbia, Massachusetts, and New Jersey as examples of the directive approach. *Andrews, supra* note 1, at 1001 n.158.

105. The Virginia Code of Professional Responsibility DR's 2-101(A) and 2-104 (1979), reprinted in VA. SUP. CT. R. 6:II, 220 Va. 616, 626, 629 (1979), provides:

DR 2-101 Publicity and Advertising.

(A) A lawyer may, on behalf of himself or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication unless such communication contains a false, fraudulent, misleading, or deceptive statement or claim. If a lawyer is a certified or recognized specialist or limits his practice as permitted by DR 2-104, a public communication which so states shall be deemed not false, fraudulent, misleading or deceptive.

DR 2-104 Specialists; Limitation of Practice.

(A) A Lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation Patents, Patent Attorney, or Patent Lawyer, or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation Trademarks, Trademark Attorney, or Trademark Lawyer, or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation Admiralty, Proctor Admiralty, or Admiralty Lawyer, or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who is certified as a specialist in a particular field of law or law practice as otherwise permitted by the Code of Professional Responsibility may hold himself out as such specialist in accordance with DR 2-101 [Publicity and Advertising], DR 2-102 [Professional Notices, Letterheads, offices and law lists] and DR 2-

lication of information regarding the nature of a lawyer's practice, provided that it is not false, fraudulent, or misleading.¹⁰⁶ Obviously, this approach is the least offensive to the first amendment.¹⁰⁷ Since false, fraudulent, and misleading speech is not protected by the first amendment,¹⁰⁸ these provisions are virtually immune from first amendment constitutional challenge.¹⁰⁹

The foregoing discussion is limited in that it presupposes individual lawyer advertising by way of some form of mass media, either print or electronic. The focus of the discussion has been the constitutionality of restrictions on the *content* of lawyer advertising, specifically information contained in the advertisement pertaining to a specialty or to the areas of law practiced.

As this area of law develops, a variety of fact situations will arise in which restrictions, as they apply to various advertisements, will be challenged. Although the basic content of these advertisements will probably be the same as that discussed here, the *method* of advertising or *format* of the advertisement will vary. For example, consideration has already been given in several courts to cases involving telephone or other directories which list lawyers by the areas of law in which they practice.¹¹⁰

It is beyond the scope of this comment to predict and analyze all the

103 [Recommendation of Professional Employment].

(B) A lawyer may state, announce or hold himself out as limiting his practice to a particular area or field of law so long as his communication of such limitation of practice is in accordance with the standards of DR 2-101 [Publicity and Advertising], DR 2-102 [Professional Notices, Letterheads, Offices and Law Lists], or DR 2-103 [Recommendation of Professional Employment] as appropriate.

106. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (Proposed Final Draft 1981).

107. The Virginia State Bar recognized that the 1979 amendment to Canon 2 of the *Virginia Code of Professional Responsibility* may be broader than required by *Bates*, but concluded that any attempt to restrict advertisements that are not false and misleading would cause unnecessary challenge and eventually fail to "stand the test of constitutional scrutiny." Comment, *Twenty-Fourth Annual Survey of Developments in Virginia Law, 1978-1979*, 66 VA. L. REV. 167, 214 (1980). The amendment was criticized at the time because it permitted considerable and costly advertising, unlike the amended *ABA Code of Professional Responsibility* which prevented "puffery," "advertising that encouraged frivolous suits," and "advertisements that harm the integrity of the legal profession." *Id.* at 215.

108. See *supra* text accompanying note 12.

109. But see *supra* text accompanying notes 68-69.

110. This is distinguishable from an individual lawyer's listing areas of his practice in an advertisement in that the directory listing, because of its format, affects all lawyers in the community. Some argue that this form of advertising effectively forces lawyers to designate areas of their practice when they might not otherwise do so, because unless they do, they will not be listed at all. See, e.g., *THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, GREATER RICHMOND YELLOW PAGES 418-27* (Sept. 15, 1982). See generally *Consumer Union v. American Bar Ass'n*, 427 F. Supp. 506 (E.D. Va. 1976); *In re Mountain Bell Directory Advertising*, — Mont. —, 604 P.2d 760 (1979); *Zimmerman v. Office of Grievance Comms.*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (1981).

various forms that advertising of legal specialties and the nature of a legal practice will take. However, the Court in *In re R.M.J.* indicated that its analytical framework is to be used to evaluate the constitutionality of regulations as they apply to those advertisements.¹¹¹ Although there are open questions as to the application of the *In re R.M.J.* analysis in cases involving the regulation of advertising format,¹¹² the basic analysis will be the same as discussed herein.

IV. CONCLUSION

The trend in recent years has been to allow lawyers to advertise a greater amount of information. State bar associations have increasingly recognized the need to provide the public with additional information regarding the availability of legal services and have recognized that some of the old justifications for restricting advertising are no longer valid.

In light of the analytical framework announced by the United States Supreme Court in *In re R.M.J.*, major changes in state rules restricting lawyer advertising appear likely. Since *In re R.M.J.* has made virtually unenforceable¹¹³ the regulatory type rules fashioned after DR 2-105(A)(2) of the ABA *Model Code of Professional Responsibility*, states with such rules are now faced with the need to revise them or the likelihood of unending constitutional challenges regarding the application of these rules to individual lawyer advertisements.

In revising their rules, these states would do well to follow the lead of the drafters of the ABA *Model Rules of Professional Conduct* and the state bars of those states which have directive type rules, such as Virginia.¹¹⁴ The drafters of these provisions have shown considerable foresight regarding the constitutional trend with respect to a lawyer's first amendment right to advertise.

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111. See *supra* text accompanying notes 40-43 and note 43.

112. *Id.* In addition, there is the question of *whether* the restriction regulates content or format. For example, in the telephone directory described in note 110, *supra*, the listing by practice (format) communicates the availability of various legal services (content). In such a case, a clear distinction between regulation of content and format does not exist.

113. See *supra* note 98 and accompanying text.

114. See *supra* text accompanying notes 104-06 and notes 104-05.