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Constitutional Law - Commercial Speech - Professional Responsibility - Lawyer Advertising. Disciplinary Proceeding Against Marcus and Tepper, 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

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CONSTITUTIONAL LAW—Commercial Speech—Professional Responsibility—Lawyer Advertising: *Disciplinary Proceeding Against Marcus & Tepper*, 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

In *Bates v. State Bar of Arizona*¹ the United States Supreme Court held that blanket suppression of lawyer advertising is unconstitutional.² Subsequently, every state revised its disciplinary rules to allow at least some advertising by attorneys. In a 1977 Supreme Court Order,³ the Wisconsin Supreme Court lifted all advertising bans, stating that only false, misleading or deceptive advertising was prohibited. *Disciplinary Proceeding Against Marcus & Tepper*,⁴ a case of first impression in Wisconsin, interprets Wisconsin's liberal rule.

Marcus and Tepper, two Milwaukee attorneys, advertised their firm in local newspapers by comparing their low costs for routine legal services with those of other firms which, they said, had high overhead, low case loads and traditionally charged by the hour.⁵ A complaint was filed by the Attorneys Board of Professional Responsibility alleging the ads were false, misleading and deceptive. The supreme court dismissed the complaint against Marcus and Tepper

1. 433 U.S. 350 (1977).

2. *Id.* at 383.

3. 82 Wis. 2d xxvii (1977). The court's order provided that:

1. For a one year period beginning January 1, 1978, a lawyer may advertise the lawyer's availability to provide legal services. It is professional misconduct for a lawyer to use any advertisement which is false, misleading, or deceptive.

2. Any provision of the Code of Professional Responsibility to the extent that it conflicts with this order is suspended.

3. Section 256.295 [the barratry statute] is not suspended by this order and a violation of that section is professional misconduct.

4. 107 Wis. 2d 560, 320 N.W.2d 806 (1982). One advertisement bore a photograph of a taxi meter and the caption "How to hire a lawyer without getting taken for a ride." The other contained a photograph of two hands bound around the wrists with rope and headlined "When it comes to lowering their prices, most lawyers hands are tied."

The theme of the advertisements was that the fees of other lawyers were excessive due to high overhead. In contrast, Marcus and Tepper claimed they opted for a low overhead, high volume practice. Therefore, they claimed, their fees would be lower.

5. *Id.* at 564-67, 320 N.W.2d at 809-10.

on the merits.⁶ This note will discuss the development of lawyer advertising, present the *Marcus & Tepper* opinion and analyze the impact of *Marcus & Tepper* on future advertising by Wisconsin attorneys.

I. BACKGROUND

The formal prohibition on advertising by attorneys dates back to 1908, when the American Bar Association adopted its first canons of ethics.⁷ In 1969 the Canons of Professional Ethics were replaced with the American Bar Association's Code of Professional Responsibility⁸ which continued the absolute prohibition against advertising and solicitation. Another portion of the code, however, provided that every lawyer "should assist the legal profession in fulfilling its duty to make legal counsel available."⁹ This responsibility to make information concerning legal services available to the public collided with the traditional prohibition against advertising and solicitation.¹⁰ In 1976, in the interest of serving the public, the American Bar Association began to relax the prohibition on advertising.¹¹ The Disciplinary Rules were amended to allow lawyers to advertise a limited amount of information in both the classified advertising section of the telephone directory and in law directories.¹²

6. *Id.* at 580, 320 N.W.2d at 816.

7. See Canons of Professional Ethics, Canon 27 (1908). The informal ban on advertising goes back much further; it has been traced to the English Inns of Court and existed in nineteenth century America. For a discussion of the history and development of the ban on lawyer advertising, see generally H. DRINKER, *LEGAL ETHICS* 210-15 (1953).

8. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as MODEL CODE]. The Model Code was adopted in Wisconsin on Dec. 16, 1969. Wis. Sup. Ct. Order, 43 Wis. 2d lxxv (1969). It includes both Ethical Considerations and Disciplinary Rules. The Ethical Considerations are goals to which lawyers should aspire; the Disciplinary Rules are mandatory.

9. MODEL CODE, *supra* note 8, Canon 2.

10. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 552 (1982).

11. Comment, *The Wisconsin Experience With Advertising Legal Services*, 1979 WIS. L. REV. 1251, 1254. The comment includes a survey of advertising by attorneys in the first ten months during which it was allowed.

12. The American Bar Association's Model Code, Disciplinary Rules 2-101 and 2-102 read in part:

DR 2-101

These rules were in effect when two Arizona attorneys, John Bates and Van O'Steen, began to advertise their "legal clinic" in a Phoenix newspaper.¹³ The Arizona Bar Association initiated disciplinary proceedings and reprimanded Bates and O'Steen. On appeal, the Arizona Supreme Court rejected the claims of Bates and O'Steen that the disciplinary rule infringed upon their first amendment rights,¹⁴ and, because it tended to limit competition, violated the Sherman Act.¹⁵

The United States Supreme Court, in *Bates v. State Bar of Arizona*,¹⁶ reversed the Arizona Supreme Court and held

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

(B) 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 advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf

DR 2-102

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

. . . .

(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices . . . but the listing in the alphabetical section may give only the name of the lawyer or law firm, the fact that he is a lawyer, addresses, and telephone numbers

(6) A listing in a reputable law list, a legal directory, a directory published by the state, county, or local bar association, or the classified section of the telephone company directories giving brief biographical and other informative data

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 & -102 (1976).

13. The advertisement was entitled "Do You Need a Lawyer? Legal Services at Very Reasonable Fees," and listed a series of "routine services" provided, such as divorce or legal separation, adoption, bankruptcy, and change of name, and the fee charged for each. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 385 (1977).

14. *In re Bates*, 113 Ariz. 394, ___, 555 P.2d 640, 642 (1976).

15. *Id.* at ___, 555 P.2d at 642.

16. 433 U.S. 350 (1977). The *Bates* Court relied on its decision in *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), in which it declared unconstitutional a Virginia statute which held a pharmacist guilty of "unprofessional conduct" if he advertised prescription drug prices. The Court stated that commercial speech of this kind was entitled to first amendment protection and found that "the

that blanket suppression of advertising by attorneys violates the free speech clause of the first amendment. The Court rejected the Bar's arguments that such advertising would have an adverse effect on professionalism,¹⁷ would be inherently misleading,¹⁸ would have an adverse effect on the administration of justice,¹⁹ would produce undesirable economic effects²⁰ and would have an adverse effect on the quality of legal services.²¹ It also rejected the contention that a rule permitting limited advertising would be difficult to enforce.²² The rationale behind the *Bates* decision was not so much the right of attorneys to advertise as it was the right of the public to have access to this type of commercial information.

Bates galvanized bar associations across the country to amend their disciplinary rules on advertising. Because the decision was limited to the specific facts of the case,²³ many states rewrote their rules narrowly, preserving as much of the old tradition as could be rationalized constitutionally.²⁴ The Wisconsin Bar Association also proposed a very narrow and specific set of rules which prohibited any form of advertising not addressed by the *Bates* court.²⁵ However, the Wisconsin Supreme Court rejected the Bar proposal, adopting instead a very brief order which simply prohibited the use of any ad-

State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Id.* at 769. Commercial speech informs the public of the availability, nature and price of products and services and thereby serves individual and societal interests in assuring informed and reliable decision making. *Id.* at 761-65. In its decision, the Court specifically reserved judgment as to advertising by other professionals such as physicians and lawyers. *Id.* at 773 n.25.

17. *Bates*, 433 U.S. at 368-72.

18. *Id.* at 372-75.

19. *Id.* at 375-77.

20. *Id.* at 377-78.

21. *Id.* at 378-79.

22. *Id.* at 379.

23. The Court held only that a state may not prevent the publication in a newspaper of truthful advertisements concerning the availability and terms of routine legal services. *Id.* at 384. The Court declined to address claims as to the quality of legal services or the special problems of advertising on the electronic broadcast media. The Court also added that because the public lacks sophistication concerning legal services, reasonable regulations would still be permissible. *Id.* at 383-84.

24. Boden, *supra* note 10, at 555.

25. *Id.* at 555-56.

vertisement which is false, misleading or deceptive.²⁶ The Wisconsin rule on lawyer advertising represented the most liberal view in the country since it treated advertising by lawyers no differently than advertising generally.²⁷

The 1982 United States Supreme Court decision of *In re R.M.J.*²⁸ affirmed the Wisconsin position. This decision sounded the death knell for restrictive regulations by flatly declaring that absolute prohibitions on speech are unconstitutional.²⁹ In *R.M.J.* a Missouri attorney had been reprimanded for violating the advertising rules of the Missouri Supreme Court.³⁰ His advertisement listed areas of practice in language other than those specified by the rule³¹ and listed the courts in which he was licensed to practice, something not specifically permitted by the rule. He also violated the rule by sending announcement cards to persons other than other lawyers, clients, former clients and relatives. On ap-

26. See *supra* note 3. The one year period provided in the Supreme Court Order was subsequently extended from December 31, 1978 to April 30, 1979. On April 30, 1979, the following Rule and Comment were adopted:

Rule:

A lawyer may advertise the lawyer's availability to provide legal services, provided that the use of any advertisement which is false, misleading, deceptive or unfair shall constitute professional misconduct.

Comment:

Lawyers are officers of the court system, and their advertising should merit the public's confidence in and respect for the administration of justice. The rule permits the dissemination of objective, relevant information on which a person may base an informed selection of competent counsel. Because there presently is no state regulated plan to insure the existence of a lawyer's specialized competence, it is misleading or deceptive to advertise that a lawyer is a specialist in a particular field of practice other than the historically recognized special fields of patent, trademark and admiralty law. It is permissible for a lawyer to advertise that he or she practices or does not practice in specialized fields. The use of the word "specialization" or a synonym that connotes certified expertise is misleading or deceptive.

88 Wis. 2d xxix (1979). The rule differs from the temporary one by adding a prohibition against "unfair" advertising. *Id.*

27. Boden, *supra* note 10, at 562.

28. 455 U.S. 191 (1982). Although the holding in *Bates* was a five-four split, the decision in this case was unanimous.

29. Boden, *supra* note 10, at 562.

30. *R.M.J.*, 455 U.S. at 198.

31. MO. ANN. RULES, Rule 4, DR 2-101(A) (Vernon 1981) listed 23 fields of law which could be named in an advertisement. *R.M.J.* deviated from the list, using, for example, "Personal Injury" instead of "Tort Law" and "Real Estate" instead of "Property Law." *R.M.J.*, 455 U.S. at 197.

peal, the United States Supreme Court held that states may not place an absolute prohibition on certain types of potentially misleading information if the information may also be presented in a way that is not deceptive.³² Nor may the states impose an absolute prohibition on mailings and handbills since other less restrictive means are available which would insure against abuse or misleading information being conveyed.³³

In *R.M.J.* the Court applied the *Central Hudson Gas Co. v. Public Service Commission*³⁴ test, which provides that commercial speech which is not misleading and is not related to unlawful activity is constitutionally protected. Under this test, commercial speech may not be restricted by the state unless there is a substantial government interest to be protected, the regulation directly advances that interest and there is no less restrictive alternative available to protect the interest in question.³⁵ The effect of so stringent a test is that only misleading lawyer advertising may be absolutely prohibited; the Wisconsin Supreme Court wisely avoided restrictive regulations in setting forth its simple rule.³⁶

II. FACTS AND OPINION

Marcus and Tepper established their law firm in 1978. They intended to develop a volume practice of middle income clients through the use of advertising and fixed fees for "routine" legal services such as adoption, bankruptcy, divorce, real estate closings, will preparation and traffic offenses. From August to October, 1978, they placed advertisements in *The Milwaukee Journal* and *The Milwaukee Sentinel*.³⁷ Several attorneys complained orally and in

32. *R.M.J.*, 455 U.S. at 203.

33. *Id.* at 206.

34. 447 U.S. 557 (1980).

35. *Id.* at 564.

36. Young, *Lawyer Advertising May Not Be Restricted Unless "Misleading,"* 68 A.B.A. J. 342 (1982). "The Court's unanimous holding on January 24 that advertising by lawyers may be prohibited only when it is misleading appears to have invalidated many state revisions of the Code of Professional Responsibility that attempted to steer a course between prohibition of any ads by lawyers and unlimited professional advertising." *Id.* at 342.

37. Disciplinary Proceeding Against Marcus & Tepper, 107 Wis. 2d 560, 564-67, 320 N.W.2d 806, 809-10 (1982).

writing to persons associated with the Board of Attorneys Professional Responsibility.³⁸ The Board filed a complaint with the supreme court alleging that the ads were false, misleading and deceptive. The court appointed a referee, and a hearing was held on May 26 and 27, 1981.

At the hearing, the Board introduced the ads, the firm's fee schedule, excerpts from answers to interrogatories and a deposition of Mr. Marcus, and testimony of Mr. Tepper. The evidence revealed that Mr. Marcus and an advertising executive had created the ads, that the content was based on Mr. Marcus' law and business experience, as well as conversations with other attorneys, and that Mr. Tepper had reviewed and approved the ads. The Board presented no other evidence.³⁹

Two witnesses testified on behalf of Marcus and Tepper. Professor Gerald Thain,⁴⁰ of the University of Wisconsin Law School, stated that "to a reasonable degree of advertising probability, the ads were not false, misleading or deceptive."⁴¹ Attorney James Brown, president of the Wisconsin Consumers League, also testified that based upon his experience as a Milwaukee attorney and a consumer advocate, the ads were not false, misleading or deceptive.⁴²

The referee, the Honorable William C. Sachtjen, Reserve Judge, issued a twenty-eight page report ordering that the

38. Wisconsin's Board of Attorneys Professional Responsibility is charged with the enforcement of the Model Code and the protection of the public from professional misconduct by attorneys. The Board was established in 1978 and consists of both attorneys and lay persons. It is completely separate from the state bar. It has several disciplinary options and procedure is streamlined. When a complaint is filed, a referee, named by the chief justice, conducts a hearing on the matter. His findings are filed with the clerk of the supreme court. Either the Board or the attorney may appeal the matter to the supreme court. See *In re Regulation of the Bar of Wisconsin*, 74 Wis. 2d ix (1976).

39. *Marcus & Tepper*, 107 Wis. 2d at 568, 320 N.W.2d at 811.

40. Professor Thain had been an attorney with the Federal Trade Commission; his responsibilities included reviewing of advertising by national advertisers and making an initial determination as to whether the advertising was unfair or otherwise contrary to trade regulations. *Id.*

Professor Thain is also the author of Thain, *The Basics of Lawyer Advertising from a Regulatory Perspective*, 53 Wis. B. BULL., May 1980, at 30.

41. *Marcus & Tepper*, 107 Wis. 2d at 568, 320 N.W.2d at 811.

42. *Id.* at 569, 320 N.W.2d at 811.

complaint be dismissed on its merits. The Board appealed to the Wisconsin Supreme Court.

The court first addressed the issue of which party bore the burden of proof. The Board argued that the attorneys should have the burden of proving the veracity of statements in their advertisements. The court rejected this argument, noting that generally in a disciplinary proceeding, the state has the burden of showing a violation of the Code of Professional Responsibility by clear and satisfactory evidence.⁴³ The court also relied on language in *Bates* and *R.M.J.* which did not expressly allocate the burden, but implied it was the state's duty to proceed. Therefore, the court decided, the party seeking to impose discipline bears the burden of proving by clear and satisfactory evidence that the advertisement violates the rule.⁴⁴

The court then addressed the issue of whether the ads were false, misleading and deceptive. The court held that the ads were not misleading on their face. The court reasoned that the "argument as to whether fixed fees or time charges best serve the public interest is a matter about which reasonable minds may differ."⁴⁵ The court also found the ads were in fact not misleading because the Board offered no proof that any client or member of the public had been deceived by the ads.⁴⁶ Therefore, the court ordered the com-

43. *Id.* at 570, 320 N.W.2d at 811.

44. *Id.* at 576, 320 N.W.2d at 815. In its analysis, the court did not define "misleading." Thain, *supra* note 40, at 30 states four basic propositions concerning legal deception in advertising by FTC standards:

a. Intent is irrelevant. If a representation has the tendency or capacity to deceive, that is sufficient to constitute deception.

b. It is the overall impression which is significant, not the specific words used, which determine whether something is deceptive.

c. It is not necessary that the advertisement deceive all its readers. It is only necessary that a not insubstantial number of the potential consumers might be deceived.

d. Failure to disclose material facts is deceptive, even in the absence of any affirmative misstatements.

As these propositions indicate, what is most vital in determining if an advertisement is deceptive is the nature and response of its audience — the potential consumers of the advertised goods or services. *Id.* at 31 (citations omitted).

45. *Marcus & Tepper*, 107 Wis. 2d at 577, 320 N.W.2d at 815.

46. *Id.* at 579, 320 N.W.2d at 816.

plaint against Marcus and Tepper dismissed on the merits.⁴⁷

III. ANALYSIS

A. Comparison With Other Jurisdictions

Before *In re R.M.J.*,⁴⁸ a minority of courts upheld the constitutionality of restrictive advertising regulations.⁴⁹ The most stringent restrictions absolutely prohibited any "promotional content" in attorney advertising.⁵⁰ The majority of courts, however, relaxed restrictive advertising rules, partic-

47. Chief Justice Beilfuss, in a concurring opinion, stated that "these ads were degrading and lack the sense of professionalism we should expect of lawyers. However, those characterizations are not sufficient to prohibit them." *Id.* at 581, 320 N.W.2d at 817 (Beilfuss, C.J., concurring).

48. 455 U.S. 191 (1982).

49. In *Lovett & Lindner, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981), a Rhode Island law firm was disciplined for placing an ad in the front cover of the telephone directory, rather than in the alphabetical listing under "lawyers," and for listing areas of practice in its ads. The court struck down the rule restricting advertising to the yellow pages, stating it was difficult to justify the rule as serving a significant governmental interest, but upheld the prohibition against listing areas of practice. The court found that the listing was misleading since readers would conclude that the attorney was especially qualified in the areas of law mentioned. The court added that a disclaimer (stating that the listing implied no such specialization) was even more pernicious in that it deliberately states an untruth, namely, lack of expertise. *Id.* at 911. Wisconsin specifically allows such listings. See *supra* note 26 and accompanying text for text of Rule and Comment.

The Arkansas Supreme Court, in *Eaton v. Supreme Court of Ark.*, 270 Ark. 573, 607 S.W.2d 55 (1980), held that an advertisement which listed a fee of ten dollars for an initial consultation was in violation of the state's disciplinary rules. The court found that the ad did not meet the stated purpose of advertising legal services in that there was no indication to the consumer how these attorneys were competitive in price, other than for their initial consultation fee. *Id.* at ___, 607 S.W.2d at 60. The court also felt the method of dissemination was impermissible. The ad was included in a packet of advertising materials mailed to households; the packet included coupons for free french fries and discounts on dry cleaning, auto repair and health spa memberships.

50. See, e.g., *Bishop v. Committee of Professional Ethics*, 521 F. Supp. 1219 (S.D. Iowa 1981). Iowa's disciplinary rules prohibited advertising that appealed to the emotions, prejudices, likes or dislikes of its potential audience. Attorney Bishop wanted to use restrained claims of quality in his advertising, such as "competent" and "trustworthy," to characterize his fees as "reasonable," to advertise by nonpermitted methods, such as direct mail, flyers, leaflets, billboards and telephone book covers, and to participate in his own television ads, which were to include such backgrounds as typewriters, sirens and file cabinet drawers closing. Bishop was allowed to characterize his fees as "reasonable" since the ad in *Bates* had done so and to use direct mail, but his other requests were denied.

ularly where "routine" legal services were involved.⁵¹ In *In re Discipline of Appert*,⁵² however, the Minnesota Supreme Court allowed direct mail advertising regarding complex and specialized product liability litigation. An attorney sent letters and brochures to women who had been injured by the Dalkon Shield intrauterine device, advising them of their legal rights and offering to represent them. The court stated that the information in the letter and brochure made several injured parties aware of their legal position, and absent access to these materials, some of those individuals would not have been aware of their rights.⁵³ The court, applying the *Central Hudson Gas Co. v. Public Service Commission*⁵⁴ test, held that the attorney's right to free speech and the public's right to receive commercial information outweighed the state interest being served by the advertising prohibition.⁵⁵ Therefore, the state's interest was not sufficiently compelling to justify a restriction of first amendment rights.⁵⁶

Two decisions after *R.M.J.* continued this trend. In *McLellan v. Mississippi State Bar Association*⁵⁷ the Mississippi Supreme Court held unconstitutional a regulation prohibiting all yellow page ads except those which contain no information beyond the attorney's name, firm name, address and

51. In two similar decisions, *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978) and *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), cert. denied, 450 U.S. 1026 (1981), the Kentucky Supreme Court and the New York Court of Appeals struck down regulations which prohibited the mailing of promotional literature to persons other than clients and former clients, other lawyers, and personal friends. Both cases involved the mailing of letters by attorneys to real estate brokers, advising that the law firm handled all aspects of real estate transactions and noting their fees. The courts recognized that such advertising was more difficult to police than that placed in the print or broadcast media, but that an absolute prohibition was more restrictive than was necessary. The rules could be amended, for example, to require an attorney desiring to use direct mail to file a copy of the letter or leaflet with the state. *Stuart*, 568 S.W.2d at 934. This was the same conclusion subsequently reached in *R.M.J.*, which noted that Rule 7.2(b) of the proposed Model Rules of Professional Conduct requires that a "copy or recording of an advertisement or written communication shall be kept for one year after its dissemination." *R.M.J.*, 455 U.S. at 206 n.19.

52. 315 N.W.2d 204 (Minn. 1981).

53. *Id.* at 210.

54. 447 U.S. 557 (1980).

55. *Appert*, 315 N.W.2d at 212.

56. *Id.*

57. 413 So. 2d 705 (Miss. 1982).

phone number.⁵⁸ In *State ex rel. Oklahoma Bar Association v. Schaeffer*,⁵⁹ the Oklahoma Bar brought disciplinary proceedings against an attorney on the basis of two advertisements with an "emotional" content.⁶⁰ The Oklahoma Supreme Court dismissed the disciplinary proceeding against attorney Schaeffer because the ads were not misleading and the state had shown no substantial interest being served by restricting such advertisements.⁶¹

The mandate from the United States Supreme Court is clear: lawyer advertising, like other commercial speech, may not be prohibited unless it is misleading. Based on Wisconsin's obviously constitutional rule, the decision in *Marcus & Tepper* seems to conform with the trend in other jurisdictions, as well as with the Supreme Court position.

B. *Bates and R.M.J.*

As a result of *Bates v. State Bar of Arizona*⁶² and *In re R.M.J.*,⁶³ states retain the authority to regulate advertising that is inherently misleading or misleading in practice.⁶⁴ However, the first and fourteenth amendments require that

58. McLellan's ad included his office hours, a statement that the initial consultation was free, and a notation that he had been licensed since 1968. The court, citing *R.M.J.*, said the ad could not be prohibited since it was not misleading, and that there was no substantial state interest being promoted by the rule. "[A]dvertising by attorneys is constitutionally protected unless the [Bar] Association can justify prohibition of such speech by an interest which will outweigh individual and societal interests in the commercial speech . . ." *Id.* at 707 (quoting *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933, 934 (Ky. 1978)).

59. 648 P.2d 355 (Okla. 1982).

60. *Id.* at 358. The ads stated:

Advertisement #1:

adopt: to love and cherish as your very own. Perhaps you already love and cherish your step-child . . . Even so, he may be losing certain benefits. A legal adoption may give your step-child many of these benefits while telling your step-child you want him as your very own.

Advertisement #2:

Need a lawyer? 5 days — or free. Within 5 working days after you provide us with the information we need, we will file the necessary court documents, or if filing is not appropriate, begin providing legal services — or our services are free. Good for 30 days. DIVORCE NAME CHANGE WILLS INCORPORATION ADOPTION.

61. *Id.* at 359.

62. 433 U.S. 350 (1977).

63. 455 U.S. 191 (1982).

64. *R.M.J.*, 455 U.S. at 207.

they do so with care and in a manner no more restrictive than reasonably necessary.⁶⁵

In *Disciplinary Proceeding Against Marcus & Tepper*,⁶⁶ the Board hoped to prevail by establishing that the burden of proof in lawyer advertising cases should be placed on the advertising attorney. The Board's counsel argued that attorneys should be required to substantiate any claims made in their ads and that "all unverified and unsubstantiated ads must be viewed as having been made in reckless disregard of the truth."⁶⁷ Since Marcus and Tepper could not substantiate the claims in their ads, the Board insisted that no proof on their part was necessary.

The Board also argued that for policy reasons the court should place the burden of proof on advertising attorneys. The Board stated that "with thousands of lawyers practicing in Wisconsin, there is no way that this Court can insure the clean flow of advertising if the burden of preventing and remedying false, misleading, deceptive and unfair advertising is placed solely on the Board of Attorney's Professional Responsibility."⁶⁸ It acknowledged, however, that generally in disciplinary proceedings the state bears the burden of proof. The Board provided no legal authority to support a departure from this general principle.

The court rejected this argument stating that "[g]iven a choice of reasonable interpretations of a rule, this court should select a construction which renders the rule constitutional."⁶⁹ The court found language in *Bates* and *R.M.J.*

65. *Id.*

66. 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

67. Brief for Petitioner at 13, *Disciplinary Proceeding Against Marcus & Tepper*, 107 Wis. 2d 560, 320 N.W.2d 806 (1982) [hereinafter cited as Brief for Petitioner]. The Referee's response to this was that:

[S]uch a rule would clearly contravene *Bates* because it would be an unreasonable restriction upon the commercial free speech of lawyers, particularly when the lawyers are expressing economic opinions rather than engaging in specific comparison advertising. The power to require exact substantiation of all statements made in any lawyer advertising would simply be a means of preventing competitive types of advertising.

Brief for Petitioner at Appendix, Referee's Report at 24-25, *Disciplinary Proceeding Against Marcus & Tepper*, 107 Wis. 2d 560, 320 N.W.2d 806 (1982) [hereinafter cited as Referee's Report].

68. Brief for Petitioner, *supra* note 67, at 9.

69. *Marcus & Tepper*, 107 Wis. 2d at 570, 320 N.W.2d at 812.

which indicated that the state should bear the burden of proof when attempting to restrict attorney advertising.⁷⁰ In order to be consistent with relevant United States Supreme Court decisions the court concluded that in a disciplinary action, the prosecuting party must bear the burden of proof.⁷¹ Therefore, the Board was required to show, by clear and satisfactory evidence, that the Marcus and Tepper ads were misleading.

Once the burden had been so allocated, the court could reach but one conclusion. Although the Board argued that based on the court's knowledge of legal practice it could find the ads inherently misleading,⁷² the court disagreed and stated that the ads were not on their face misleading. They express a belief that the fees charged by many attorneys are higher than necessary, and that this is at least in part due to high overhead, inefficiency, and the practice of charging by the hour.⁷³ The court noted that its conclusion was supported by the testimony of Professor Thain and Attorney Brown.⁷⁴

The Board also argued that several statements in the ads were in fact misleading, such as: Marcus and Tepper possess a high level of legal expertise,⁷⁵ their clients realized an aver-

70. In *Bates*, the court concluded that "it has not been demonstrated that the advertisements at issue could be suppressed." 433 U.S. at 382 (emphasis added). The opinion in *R.M.J.* contained several statements indicating the burden was on the state: "the listing published by the appellant has not been shown to be misleading," 455 U.S. at 205 (emphasis added); "[t]here is nothing in the record to indicate that the inclusion of this information was misleading," *id.* at 205-06; "[t]here is no finding that appellant's speech was misleading," *Id.* at 206.

71. *Marcus & Tepper*, 107 Wis. 2d at 576, 320 N.W.2d at 815.

72. "As the body which has supervisory control of the practice of law, this Court has knowledge of, and therefore needs no proof on, the nature or method of delivery of legal services by lawyers or on the reasonable value of services." Brief for Petitioner, *supra* note 67, at 17.

73. *Marcus & Tepper*, 107 Wis. 2d at 578, 320 N.W.2d at 815.

74. *Id.* at 579, 320 N.W.2d at 816. Professor Thain stated that this type of advertising should be encouraged rather than prosecuted. *Id.*

75. Brief for Petitioner, *supra* note 67, at 18-19. The allegation that the claim of a "high level of legal expertise" was misleading was made because although Mr. Tepper was an experienced attorney, Mr. Marcus, though licensed, had never practiced law. The other two members of the firm were recent law school graduates. Marcus and Tepper subsequently changed the wording in the ad to a "high level of professionalism."

age savings of one-half,⁷⁶ and the clients of other lawyers must pay for the idle time of their lawyers.⁷⁷ Although the Board alleged that these statements were misleading, no proof was provided.⁷⁸ The court concluded:

The Board did not offer any proof that any client had been charged more than the advertised fees, that clients did not realize an average savings of one half; that attorneys did not generally charge by the hour; or that the firm did not possess "a high level of legal expertise."

...

Furthermore, the Board presented no evidence whatsoever that any clients of the firm or members of the lay public were deceived by the ads or considered the allegations therein "false, mis-leading or deceptive."⁷⁹

In light of *R.M.J.*, the court could not find that the evidence introduced at the disciplinary hearing proved that the Marcus and Tepper ads were misleading. Therefore, the court dismissed the complaint.⁸⁰

C. Model Rules of Professional Conduct

The American Bar Association has now approved the Final Draft of the Model Rules of Professional Conduct.⁸¹ The five rules pertaining to advertising reflect the decisions in *Bates v. State Bar of Arizona*⁸² and *In re R.M.J.*⁸³ These revised rules remove the advertising prohibitions that were

76. *Id.* at 19. The Board argued that the firm's hourly rate for services not covered by a "fixed fee" of fifty dollars per hour and their contingent fee, thirty percent, did not represent a savings of one-half. Mr. Tepper testified that since the vast majority of the firm's work consisted of the routine services for which fixed fees had been set, he still believed that on the average the firm's clients realized a savings of one-half or more. *Marcus & Tepper*, 107 Wis. 2d at 578, 320 N.W.2d at 815-16.

77. Brief for Petitioner, *supra* note 67, at 19.

78. The Referee devoted five pages of his report to what the Board did not prove. Referee's Report, *supra* note 67, at 11-15.

79. *Marcus & Tepper*, 107 Wis. 2d at 579, 320 N.W.2d at 816.

80. *Id.* at 580, 320 N.W.2d at 816.

81. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft Nov. 1982). The Model Rules, prepared by the ABA Commission on Evaluation of Professional Standards, were submitted to the ABA's House of Delegates in August, 1982, at the Association's Annual Meeting. Consideration of the rules continued when the House of Delegates convened in New Orleans at the February, 1983, Midyear Meeting of the Association, and the Rules were finally approved in August, 1983.

82. 433 U.S. 350 (1977).

83. 455 U.S. 191 (1982).

present in the 1969 code. The general rule prohibiting false or misleading advertising by an attorney is stated in Rule 7.1.⁸⁴ Rule 7.2 states a lawyer may advertise through public media, written or broadcast, or through written communication not involving personal contact.⁸⁵ The situations in which a lawyer may personally solicit professional employment are described in Rule 7.3.⁸⁶ Rule 7.4 authorizes attor-

84. Rule 7.1 provides:

A lawyer shall not make false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material representation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or
- (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (Proposed Final Draft Nov. 1982) [hereinafter cited as MODEL RULES].

85. Rule 7.2 provides:

(a) Subject to the requirements of Rules 7.1 and 7.3(b), a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, or through written communication not involving personal contact.

(b) A copy or recording of an advertisement or written communication shall be kept for [one year] after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

MODEL RULES, *supra* note 84, Rule 7.2.

86. Rule 7.3 provides:

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment only in the following circumstances and subject to the requirements of paragraph (b):

- (1) if the prospective client is a close friend, relative, former client or one whom the lawyer reasonably believes to be a client;
- (2) under the auspices of a public or charitable legal services organization; or
- (3) under the auspices of a bona fide political, social, civic, fraternal, employee or trade organization whose purposes include but are not limited to providing or recommending legal services, if the legal services are related to the principal purposes of the organization.

(b) A lawyer shall not contact, or send a written communication to a prospective client for the purpose of obtaining professional employment if:

neys to list fields of practice in advertisements.⁸⁷ Also, the use of misleading firm names or letterheads is prohibited by Rule 7.5.⁸⁸

Had the Model Rules been in effect in Wisconsin when Marcus and Tepper ran their ads, the case may have been decided differently. Rule 7.1(c) of the Model Rules provides that the use of an advertisement that compares the lawyer's services with other lawyers' services is misleading, unless the comparison can be factually substantiated. Under this provision, the comments included in the Marcus and Tepper ads might have been adjudged to be misleading. One of the

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress, or harassment.

MODEL RULES, *supra* note 84, Rule 7.3 This rule also reflects recent Supreme Court decisions on solicitation. See *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978); *In re Primus*, 436 U.S. 412 (1978).

87. Rule 7.4 provides:

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(b) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation; and

(c) [provisions on designation of specialization of the particular state.].

MODEL RULES, *supra* note 84, Rule 7.4.

88. Rule 7.5 provides:

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

MODEL RULES, *supra* note 84, Rule 7.5.

ads included comments such as "lawyers traditionally charge by the hour," and "most lawyers are content to wait for unsolicited clients to come to them. So their clients have to pay for the time they spend waiting."⁸⁹ The other stated that most lawyers' rent is high, their volume is low and their overhead is almost out of sight. The ads asserted that "law firms traditionally charge by time and expenses."⁹⁰

Model Rule 7.1(c) places the burden of proof on the advertising attorney, not on the state. Therefore, under the Model Rules, Marcus and Tepper would have been required to substantiate their claims. This may not have been possible in light of the fact that Mr. Marcus could not recall the specific sources of his information.⁹¹ Under the provisions of the Model Rule, if Marcus and Tepper had been unable to substantiate their claims, the ads would have been found misleading.⁹²

D. Impact of the Decision

*Disciplinary Proceeding Against Marcus & Tepper*⁹³ represents the first test of Wisconsin's rule on attorney advertising. Prior to this decision, there was a great deal of uncertainty as to how it would be applied. The Board, cognizant of the potential problems involved in proving that advertising is misleading or deceptive, sought to place the burden of proving the veracity of lawyer advertising on the attorneys who placed the ads. The Wisconsin Supreme Court refused to adopt this rule in light of the constitutional protection afforded commercial speech.

Although a strong argument can be made that the Marcus and Tepper ads were misleading,⁹⁴ the Board presented

89. *Disciplinary Proceeding Against Marcus & Tepper*, 107 Wis. 2d 560, 565, 320 N.W.2d 806, 809 (1982).

90. *Id.* at 567, 320 N.W.2d at 810.

91. *Id.* at 568, 320 N.W.2d at 811.

92. Justice Steinmetz in dissent argued that the comparisons were misleading, stating "attorneys' fees are not 'mostly' set at an hourly rate." *Id.* at 587, 320 N.W.2d at 820 (Steinmetz, J., dissenting). He also found such claims as "the overhead of attorneys . . . being 'out of sight'" and "the volume of cases of 'most lawyers' is low" to be misleading and deceptive. *Id.* at 589, 320 N.W.2d at 820.

93. 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

94. *See id.* at 587-89, 320 N.W.2d at 820 (Steinmetz, J., dissenting). However, it was the Board's burden to establish the misleading nature of the ads by clear and

no evidence of this.⁹⁵ Had the Board presented clear and satisfactory evidence showing the statements in the ad were untrue, the result would have been different.

It should also be noted that the complaints filed against Marcus and Tepper were filed not by consumers but by attorneys who felt the ads were disparaging to the legal profession.⁹⁶ The purpose of the rule adopted by the Wisconsin Supreme Court was to protect consumers regarding information on legal services. Experts testified that "opening up" the subject of fees may be beneficial to the public.⁹⁷

This is not to say that the *Marcus & Tepper* decision authorizes all types of advertising in Wisconsin. However, the decision does mandate that the party seeking to impose discipline for misleading advertisements substantiate that allegation. Clear and satisfactory evidence that consumers have been misled, or that an ad has a substantial potential to mislead, will result in disciplinary action being taken against the advertising attorney.

convincing evidence. They did not do so. The Referee's report, Findings of Fact and Conclusions of Law, enumerated a series of issues on which the Board offered no proof, such as: that the consumers of services that were advertised did not receive a savings of 50% or more (the Referee commented that the Board could have attempted to bring in witnesses familiar with prices to show the claim was untrue); that lawyers do not "traditionally" charge by the hour; that the firm did not have a sufficiently "high" level of legal expertise to practice law; or that the level of legal representation was inadequate. Referee's Report, *supra* note 67, at 11-15. The Referee concluded that there was a failure of proof to show the ads as a whole or any particular representations were false, misleading or deceptive. *Id.* at 20.

95. An argument that was not made as to the misleading nature of the ads is that Marcus and Tepper compared their firm to large downtown firms with "overstuffed chairs" and "fancy desks" who do extravagant client entertainment. Large downtown firms do not generally handle the "routine" legal services like divorces, real estate closings and will preparations that Marcus and Tepper advertised. Perhaps a comparison of their prices should have been made with those firms that provide comparable services.

96. *Marcus & Tepper*, 107 Wis. 2d at 568, 320 N.W.2d at 810-11. Chief Justice Beilfuss, in his concurring opinion, also found the ads degrading. *Id.* at 581, 320 N.W.2d at 817 (Beilfuss, C.J., concurring).

97. Referee's Report, *supra* note 67, at 16. Professor Thain and Attorney Brown testified that the ads were not "disparaging" to attorneys. *Id.* at 19. The Referee concluded that the ads were not disparaging of the legal profession, and that the criticism Marcus and Tepper leveled at the methods of charging by the hours does "not tend to undermine public confidence in the administration of justice . . . [S]uch public differing within the profession could be healthy for the profession and the public." *Id.* at 26-27.

IV. CONCLUSION

*Disciplinary Proceeding Against Marcus & Tepper*⁹⁸ is important in that it has drawn guidelines for the Board of Attorneys Professional Responsibility as well as for attorneys who choose to advertise. Adoption of the Model Rules would further facilitate this new area of American legal practice by providing additional guidelines.⁹⁹

The essence of *Bates v. State Bar of Arizona*¹⁰⁰ and the lifting of the ban on lawyer advertising is not so much a recognition of an attorney's right to advertise as it is of the public's right to information regarding legal services.¹⁰¹ Restrictions on the consumer's right to know should be limited to those communications which are misleading, because in those situations, the consumer is being deceived, not informed. Lawyer advertising has increased each year since *Bates*.¹⁰² Any evils which have arisen from advertising have been exceeded by the benefits accruing to lawyers and to the public.¹⁰³

*In re R.M.J.*¹⁰⁴ indicates that lawyer advertising is to be regulated no differently than other commercial advertising, a position held in Wisconsin since *Bates* and applied in *Mar-*

98. 107 Wis. 2d 560, 320 N.W.2d 806 (1982).

99. The Model Rules, although more detailed than Wisconsin's single rule, are in effect a general prohibition against false, misleading or deceptive advertising. The major distinction involves comparative advertising, in which the model rule shifts the burden of proof to the advertising attorney.

This rule concerning comparative advertising was not adopted as a protectionist measure but to follow FTC standards; the FTC would not allow, for example, pain reliever A to be compared favorably with pain reliever B unless the comparison can be verified. Thus, a lawyer could not claim to settle suits three times faster than a named competitor unless he could substantiate that claim.

100. 433 U.S. 350 (1977).

101. *Durham v. Brock*, 498 F. Supp. 213, 219 (M.D. Tenn. 1980).

102. "Since 1978 the incidence of lawyer advertising has continued to increase. Thirteen percent of 1983's respondents have advertised, compared to percentages of 10 in 1981, 7 in 1979, and 3 in 1978." *Big Firms Favor P.R.; Little Firms Like Ads*, 69 A.B.A. J. 892 (1983).

103. *Figa, Lawyer Solicitation Today and Under the Proposed Model Rules of Professional Conduct*, 52 U. COLO. L. REV. 393, 405 (1981). *Figa* cites a National Resource Center Study showing law firms receive an average of \$7.93 in fees for each dollar spent on advertising and an ABA study that concludes that lawyer advertising is reducing the cost of legal services to the consumer for routine legal matters because increased work resulting from advertising keeps down legal fees on a per client basis and increases comparative shopping for lawyers by the public. *Id.* at 393 n.3.

104. 455 U.S. 191 (1982).

cus & Tepper. In place of the narrow, sometimes arbitrary, restrictive regulations is a new standard: truthfulness. Most lawyers will not abuse the privilege;¹⁰⁵ for those who do mislead the public, there are sanctions available. The ultimate winner in this newly developed area will be consumers in need of legal services. "[P]eople will perceive their own best interest if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them" ¹⁰⁶

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105. By avoiding detailed regulations governing lawyer advertising, the Model Rules implicitly reflect trust in lawyers not to abuse the spirit of the advertising provisions. See Figa, *supra* note 103, at 404.

106. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770 (1976).