

# **The Coming of the Courthouse Cannibals\***

## **A summary of the views of the United States Supreme Court on the solicitation of clients by lawyers**

**Offered at the 1992 WVTLA Midwinter Seminar  
by Barry Hill, WVTLA past president**

### **The competing forces:**

Balancing the free flow of information to the public guaranteed by the First Amendment against the states' power to regulate the practice of law for the protection of the public.

### **Where do we stand:**

If you don't do it in person, misrepresent or mislead, or try to present the trivial as being important, you can probably do it; as long as you don't use a trade name.

## **The Cases**

***Bates v. State Bar of Arizona*  
433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)**

The State Bar of Arizona brought disciplinary proceedings, alleging that advertising as a "legal clinic" with "very reasonable prices" violated Arizona's ban on lawyer advertising. The court held that, although Arizona's power to regulate its bar was not subject to attack under the Sherman Act, its ban on lawyer advertising nonetheless failed under Constitutional scrutiny. Information about a law practice that is not misleading and which may be useful to the public is commercial speech and entitled to protection as such by the First Amendment.

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\* The title of this presentation implicates lawyers, not the United States Supreme Court. Please see the commentary at the end of this snippet of prose.

***Ohralik v. Ohio State Bar***  
**436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978)**

Disciplinary proceedings were brought on the basis of in-person solicitations of accident victims for the purpose of representing them on a contingent fee basis. The court held that 1) a state's power to regulate commercial activity is not lost because of the speech component of such activity, and 2) that in-person solicitation by its nature poses risks of misrepresentation that are sufficiently greater than other forms of communication to allow it to be prohibited.

***Friedman v. Rogers***  
**400 U.S. 1, 99 S.Ct. 887, 59 L.Ed.2d 100 (1979)**

This decision does not implicate the legal profession directly, but it may have precedential worth with respect to the enforceability of a state ban of lawyers practicing under a trade name.

A Texas statute that forbade optometrists from practicing under a trade name was challenged as being offensive to the First Amendment. The court held that because there was a demonstrated danger that use of a trade name by optometrists could be misleading and deceptive, the statute presented a reasonable restriction on commercial speech. The court also noted that a state's limited power to regulate the time, place, and manner of commercial speech cannot stand as justification for a restriction, unless it contains no reference to the content of the speech.

***Supreme Court of Virginia v. Consumer Union of the United States***  
**446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980)**

This suit was brought to have Virginia's ban on lawyer advertising, promulgated by the Virginia Supreme Court, declared unconstitutional. The court upheld the decision of a three judge panel holding the ban unconstitutional, relying on *Bates v. Arizona, supra*. However, an

award of attorney fees in favor of the plaintiff was reversed on the ground that the Virginia Supreme Court, in promulgating its rules of professional conduct, was acting in a legislative capacity, and in such capacity it enjoys absolute immunity from suits for money damages, including attorney fees.

***Consolidated Edison Co. of N.Y. v. Public Service Commission of N.Y.***  
**447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed. 319 (1980)**

This decision is perhaps worth noting in context despite not dealing directly with lawyers.

Con Ed, a power company, challenged a New York P.S.C.'s ruling requiring Con Ed to stop placing inserts that discussed controversial issues of public policy, *e.g.*, nuclear power, with its monthly billing statements. The court held that New York could not rely on its power to regulate the time, place, and manner of presenting commercial speech, because the state did not ban all inserts, only those dealing with controversial subjects of public policy. Time, place, and manner restrictions must be on all speech, irrespective of subject matter, to be enforceable. The government cannot choose the permissible subject of debate. See *Friedman v. Rogers, supra.*, and *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 106 S.Ct 903, 89 L.Ed.2d 1 (1986), in which this premise was also articulated.

***In re R.M.J.***  
**455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982)**

Disbarment proceedings, which resulted in a private reprimand, were brought against a lawyer for violating Missouri Supreme Court rules that prohibited lawyers from mailing business cards announcing the opening of a new office to other than lawyers, clients, former clients, personal friends, and relatives; and from listing on professional stationery and cards a lawyer's

areas of practice and jurisdictions in which admitted to practice. The court held that there was no showing that anything the lawyer had done was misleading and no showing that mailings or handbills could not be adequately supervised. Thus the lawyer's activities were within the ambit of protected commercial speech. The court recognized that the potential for deception and confusion is particularly real in advertising professional services, and therefore that a state can impose restrictions on the advertising of professional services; but that such restrictions can be no broader than are necessary to prevent deception.

***Zauderer v. Office of Disciplinary  
Counsel of the State of Ohio***  
**471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985)**

Attorney Zauderer placed newspaper ads, advertising women of potential Dalkon Shield claims, and containing a picture of the offending I.U.D. The court found that the ban on in-person solicitation does not extend to newspaper ads addressing a subject in which members of the public may have a substantial interest. An advertisement can be directed to specific persons with specific legal problems, and a state cannot punish a lawyer for presenting truthful, nondeceptive information and advice regarding legal rights. However, offering to accept a case on a contingent fee basis, where the intended arrangement is for the client to bear the costs of litigation irrespective of outcome, is deceptive if the ad does not distinguish between attorney fees and litigation expenses.

***Shapiro v. Kentucky Bar Association***  
**486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)**

The court decided that a categorical prohibition against using direct mail to solicit clients is overly broad and hence contravenes the First Amendment. A lawyer may write to people

known to face particular legal problems in a truthful, nondeceptive fashion to solicit them as clients, as long as the mailing is identified as being an advertisement. Here, although there were subjective projections of client satisfaction and various words in underscored upper case letters, the state failed to show that the mailing was false or misleading, that it unduly emphasized trivial matters, that it offered overblown assurances of satisfaction; or that the state could not by means less restrictive than prohibition, *e.g.* requiring the filing of such letters with a state agency, adequately protect the public from unacceptable mailing practices. One can note that the vote in this decision was close and mixed, and that the court's composition has significantly changed since.

***Peel v. Attorney Registration & Disciplinary Commission of Illinois***  
**\_\_\_ U.S. \_\_\_, 110 S.Ct. 2281, 110 L.Ed2d 83 (1990)**

The court held that a lawyer may advertise the lawyers' Trial Specialist certification by the National Board of Trial Advocacy, at least in a state with no certification program of its own and where there is no implication that the certification is from the state. ATLA filed an *amicus* brief in this case, and the result was considered by most trial lawyers as being beneficial to the public.

### **Commentary**

Lawyer advertising, indeed mass advertising, is a reality. As much as many of us regret it, it's with us, and it isn't going to go away. Young lawyers perceive the blabbering cries of the purveyors of tackiness as the *way it is*. They don't know the *way it was*; and it will never be that way again.

We are all cheapened by the sleaziness of most of the advertising done by many personal injury lawyers, and I see a long-term effect that will take personal injury practice somewhere I hate to see it go.

If the public perceives the personal injury practice as being just another commercial activity, is it not reasonable to conclude that the public will almost necessarily also perceive jury trials as being little more than a marketplace for the wares of pinstripe peddlers? Are jurors, who see themselves as but a cog in a grinder, likely to allow themselves to empathize with the injured paraded before them? I think not. We cannot publicly strip the dignity from one end of the process and expect it to remain in tact on the other.

The United States Supreme Court has given us the freedom to destroy ourselves. Will we? I certainly can't claim to know. Frankly, my concern is not so much for myself or my contemporaries. We'll probably be gone from the picture before trial by jury corrodes to the point of dysfunction. But what of those who are following and will follow us? More importantly, what of their clients? Will they not be the ones who ultimately pay the price of the mindless greed of the cannibals among us?

Advertising by lawyers is *conceptually* neither inherently bad nor inherently good. However, as *executed*, it usually offers all of the beauty and none of the usefulness of a slaughterhouse. If the promulgators of tripe continue to harangue the populace with their maladroitness and prattle, resulting institutional damage is inevitable and inestimable.

*Quo vadis?*