GRIEVANCE ADMINISTRATOR
v
ROBERT J. BUK,
Respondent

File No. 35947-A

Decided: December 12, 1979

OPINION OF THE BOARD

Respondent asked the Board to review an Order of Discipline issued by the Attorney Disciple Board Wayne County Hearing Panel No. 9. He asserts that DR 2-103(A)[1] is vague and overbroad and, as applied to him, is unconstitutional under Bates v. State Bar of Arizona, 433 US 350, 97 S Ct 2691, 53 L Ed 2d 810 (1977). We affirm the finding of misconduct, but reduce discipline to a reprimand.

I. FACTS

Respondent was admitted to the Michigan Bar in 1969. He has, but for fourteen months, continuously handled workers' compensation claims as part of his practice. Such claims composed 20-30% of his practice at the time of misconduct.

Soon after Bates was decided, Respondent telephoned the State Bar for an oral clarification. He understood the spokesman to imply that letters to prospective clients would be permissible.[2] In December, 1977, Respondent collected the names of about fifty heart attack victims from Macomb County death records and mailed what he termed "form letters" to their widows, including Complainants Jesse and Ruggirello.[3] The letters suggested addressees might recover benefits from their late husbands' employers and that additional information could be obtained without cost by calling Respondent.

In August, 1978, the Grievance Administrator filed a Formal Complaint charging Respondent with two counts of solicitation in violation of DR 2-103(A). Respondent seeks review of the Hearing Panel decision on the ground that the letters constitute a permissible form of advertisement. We consider the conduct in question to be impermissible solicitation. professional advertising. In the instant case, even if Respondent's letters are construed to be advertisements, they are distinguishable from those in Bates. The Bates advertisements were not designed to promote or encourage litigation, but were intended to inform members of the public as to the availability of generalized and routine services; those taking notice of that advertisement were persons likely to have a pre-existing intention to seek the particular legal services advertised.

Across the spectrum from Bates is Ohralik v Ohio State Bar Association, 436 US 447, 98 S Ct 912, 56 L Ed Id 444 (1978), in which the Court held valid a state interest in restricting personal solicitation. The appellant-attorney had visited an accident victim in the hospital and induced her to sign a contingent fee agreement. Appellant insisted he was giving the victim information about

the availability and terms of his legal services. The Court found he had conducted an in-person solicitation because he made specific statements to a specific client about a specific cause of action. The state, said the Court, may prohibit this person-to-person communication as a preventive measure. The appellant conceded, and the Court agreed, that states also have a legitimate and compelling interest in preventing aspects of solicitation which actually, or potentially, involve fraud, undue influence, intimidation, overreaching,[5] and other kinds of "vexatious conduct."[6] The Court distinguished speech proposing a purely commercial transaction from other types of expression subject to greater constitutional protection. Personal solicitation by a lawyer for pecuniary gain is a business transaction, subject to a low level of protection. It only skirts the edge of the first amendment and may be regulated to promote important state interests. 435 US at 459.

A contrasting case, In re Primus, 436 US 412, 98 S Ct 1893, 56 L Ed 2d 417 (1978), Invoked solicitation of prospective litigants by a non-profit organization.[7] The Court held this to be constitutionally protected because litigation pursued by such organizations is a form of political expression or association. Primus is distinguishable from the situation before us, since Respondent's letters admittedly were sent in the hope of financial gain. Panel Record at 70-71. Primus nevertheless reinforces the right of a state, acting through its bar, to forbid solicitation of prospective clients through the mails for pecuniary gain. The Court noted that "invasion of privacy" was also a potential harm which states have a proper interest in preventing. 436 US at 432.

Personal solicitation does not necessarily mean face-to-face contact. A specifically drafted letter may provide a quasi-personal link. State Bar Formal Ethics Opinion C-218 (August 1979) permits Michigan attorneys to advertise legal services by mail, but such notices must be generalized and not directed to potential clients with "an identified present need for legal services." They may, for example, be addressed to "occupant" and distributed throughout a geographical area.[8] They may not extend an invitation to contact the sender, nor unduly prompt a response. Letters are not, then, forbidden per se, but their content must not be tailored. "Communications directed to targeted potential clients with an identified need for particular legal service, framed to elicit a direct response to the attorney-sender, constitute improper solicitation." Formal Opinion C-218.

Respondent's letters are of this prohibited nature. They bare his letterhead, announcing that he is an attorney, the location of his office and his professional telephone numbers. The introductory paragraph explains that Respondent has practiced law since 1969, that his practice is primarily general, though much of it involves workers' compensation. No other areas of practice are explicitly mentioned.[9] One could conclude Respondent specializes in worker's compensation law. The body of the letter notes that addressee has recently lost her husband [10] and she "could benefit from the following information." It then relates that a surviving spouse can maintain a claim If a worker's death was heart-related. Respondent assures the widow "that your late husband would have desired you, as his surviving spouse, to benefit economically in the event that his employment may have been a factor In bringing about the condition ... that took his life." He concludes by mentioning that such claims are usually resolved in nine months, with a 15% contingent fee. Finally, there is an invitation to contact Respondent, "[i]f you are interested in obtaining further information at no charge [emphasis in the original] to you, please call me for additional particulars."

The Board feels such personalized contact through the mails is impermissible. It is not condoned in Bates, which permits only the advertisement of the existence of, and prices for, "standardized" and "routine" services, directed at no individual or class, but at the public.

Respondent's letters constitute solicitation. The fairest reading leads one to conclude they are personalized. They were also an egregious invasion of privacy and an attempted exploitation of the widows' grief and sorrow. There is perhaps at no other time a greater need for privacy than after the loss of one's spouse; serious concern for such intrusion via the mails was recently strongly expressed by the New York courts.[11]

Respondent contends the letters are "junk mail," as permitted by Kentucky Bar Association v Stuart, 568 SU2d 933 (Ky. 1978). There, an attorney mailed a price list for routine real estate services to brokers. The list was broad, general, and impersonal. In upholding such advertising, the court noted that the letters, in effect, were nothing more than newspaper notices mailed to a business. None of the harms associated with personal solicitation were present. The case is distinguishable. Respondent's letters were specifically crafted and designed over a number of weeks for the solicitation of a small class of individuals. Panel Record at 70.[12] The single legal service they seek to supply was not of the routine, standard of "minimal fee" type offered in Stuart. The prosecution of a workers' compensation action based on an employment-related heart condition Is difficult, complicated, and hardly routine. Board Record at 17, 19. In further contrast to Stuart, Respondent's letters served more than simply an educational function. They outlined the possibility of a definite cause of action, even to the expected length of time to settlement and fee, suggesting the addressees avail themselves of such services offered by the sender. His letter go beyond concerns of accessibility and affordability. Instead of fostering healthy competition among lawyers for pre-existing legal business, they attempt to cultivate a potential claim. This encouragement of contention is at the core of the unprofessional nature of personal solicitation which the state is authorized to prevent. It is "overreaching."[13]

We agree the public should be informed of its rights and remedies. We distinguish, however, the informational function of promoting public awareness from the marketing function of inducing individuals to seek a particular lawyer for a specific service.

The Supreme Court of Michigan recently decided a personal solicitation case under the Ohralik guidelines. State Bar Grievance Administrator v Jaques, 407 Mich 26, 281 NW2d 469 (1979). Attorney Jaques approached a union official after a tunnel explosion in Port Huron. Jaques asked the official to recommend him to members of the union who might have claims arising from the accident. The Michigan Supreme Court found this to be impermissible solicitation, but on appeal, the U. 5. Supreme Court vacated the Judgment and remanded for consideration in light of Ohralik, which had been decided in the interim. The Michigan court then reversed Its earlier holding, deciding that Jaques' actions were protected by the first amendment.

However, in contrast to the present circumstances, attorney Jaques did not directly contact a prospective client. His contact was with an intermediary, a union agent who ostensibly represented the interest of union members with potential claims. The agent possessed the expertise to make a detached and informed evaluation of Jaques' qualifications before recommending him.[14] In the

instant case, no intermediary was used. The complainants were directly contacted in writing. There is no evidence they had the expertise to make a proper evaluation of Respondent's qualifications. The union agent in Jaques served as a buffer between the attorney and prospective clients, minimizing the potential for "overreaching" and undue influence. In the instant case, there was no buffer.

At the very least, the potential for grave overreaching and undue influence was present in the case before us.[15] We believe the state has a legitimate interesting in preventing even possible instances of these harms. As the supreme court stated in Jaques, an appropriate Inquiry Is whether the conduct of an attorney Is likely to result In the harms which a state has an Interest In preventing. 407 Mich at 37. When asked If the conduct attributed to Respondent rises to the level of undue influence, intimidation, overreaching or other forms of vexatious conduct which the disciplinary rules may properly seek to prevent, we must answer In the affirmative.

The state, acting through its highest Judicial body, has a particularly strong interest In regulating solicitation by attorneys. Members of the legal profession are central to the proper administration of Justice, and, as officers of the court, have historically been held to a higher standard of conduct and ethical awareness than other Individuals in the marketplace of services and goods. The supreme court has the power and duty to prevent substantive evils Inherent in unregulated solicitation. Were it to deny that it possesses broad powers to regulate the practice of law, or seek to avoid enforcement of those powers, then the legal profession In Michigan would be a virtually unregulated body over which little meaningful authority can or will be exercised. We cannot envision the court abdicating its authority or responsibility In this regard.

The New York courts have recently proscribed similar activities. The respondents In re Koffler, No. 2738 (NY Sup Ct App Div Oct. 1, 1979), after placing an advertisement In the real estate section of a newspaper, mailed approximately eight thousand letters to homeowners and real estate brokers. The letters included a copy of the newspaper advertisement, and said the firm could handle the closing of title for a price lower than that listed in Its own newspaper notice. When the New York Bar Association took action, the attorneys answered they had relied in good faith upon the ruling in Bates. After Investigation, a referee found the conduct violated the Code of Professional Responsibility, not because mailings had been used, but because the content of the letters indicated a seeking out of particular individuals believed interested In a certain transaction,[16] and urging that the addressors be retained. The court found an attempt to establish a "personal and private relationship which is peculiarly geared to a particular legal transaction." The letters were "insulated from the commercial marketplace of competitive advertising, [going] far beyond the allowable type of restrained advertising aimed at giving public notice of the availability of legal services which was approved of in Bates." Slip op. at 25.

The court listed the prerequisites for regulation of solicitation. First, it must be considered whether there are sufficient alternate methods of communication of the information. Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, 425 US 748 (1976).[17] The solicitation should involve vexatious conduct or invasion of privacy, or the likelihood of such. Ohralik and Primus. It should also be considered whether the solicitation "unduly commercializes the legal profession or unduly erodes true professionalism contrary to the 'State's interest in maintaining high

standards among licensed professionals'"[18] Slip op. at 25. In confirming the report of the referee, the court concluded,

> Law is a profession. Thus, In this realm of the law commercial speech has its boundaries and limits as well as Its horizons. As a member of a most honorable profession, a member of the Bar must never forget that he is a lawyer first and only then, If proper, an entrepreneur. Slip op. at 25.

In the instant case, we find all the prerequisites for the regulation of solicitation to be present. We do Dot find Respondent's actions have any Identifiable protected interests under the first amendment.

III. VAGUENESS

Respondent protests enforcement of DR 2-103 against him because the rule provides quasi-criminal sanctions and applications of it remain only partially tested by the courts, resulting, he claims, in ambiguity and lack of notice in violation of due process. In Michigan, it has been acknowledged that attorney discipline proceedings are quasi-criminal in character. State Bar v Woll, 387 Mich 154, 194 NW2d 835 (1972). Disciplinary actions, however, are governed by court rules applicable to non-Jury civil trials, GCR 964.1, and need not be cloaked by the law of criminals trial "at every turn." State Bar v Jaques, 401 Mich 516, 529, 258 NW2d 433 (1977), vacated 436 US 952 (1978), rev'd on remand, 407 Mich 26, 281 NW2d 469 (1979).

Whether vagueness is a complete defense to a disciplinary complaint, as It Is to a criminal charge, People v Dempster, 396 Mich 700, 242 NW2d 381 (1976), has not been addressed by the supreme court within the context of chapter 95 of its rules. We note, however, that Respondent himself initially questioned the propriety of sending the letters. Panel Record at 64-65. The rules governing attorney advertising will require additional Judicial elaboration which must come in time with analysis of Individual cases. Far less ambiguity exists in the area of solicitation. Respondent cannot avoid culpability because of some degree of uncertainty regarding advertisements.

We next consider Respondent's good faith. He would have us remove discipline because of his lack of knowledge of the boundaries of attorney advertising and solicitation. We consider this uncertainty a mitigating rather than an exculpatory factor. The circumstances of this matter make suspension Inappropriate as this Is a case of first impression for the Board. Respondent has practiced law since 1969 without previous misconduct, and although his actions plainly reflect an insensitivity to the widowed solicitees, he did make some attempt to obtain advice from the bar before his mailings. Accordingly, we reduce the discipline to a reprimand.

The reduction of discipline should not mislead the bar. Let the instant case stand for the proposition that letters of solicitation are proscribed. Having afforded this notice to the Michigan bar, should a similar case arise in the future, serious discipline may well be imposed upon a finding of misconduct.

IV. DECISION

The findings of fact of the hearing panel are affirmed. Respondent's discipline shall be reduced to a reprimand, with costs in addition to those Imposed by the panel, to be assessed in the Order of the Board.

FOOTNOTES

1. "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer."

2. We note that the State Bar has often sought to answer questions of a general and routine nature on this and other subjects. The Bar, however, is not the final determiner of proscribed and permitted conduct, and this Board necessarily looks to the courts for guidance. Neither do we suggest that the State Bar spokesman advised Respondent to engage in the specific behavior which has been determined misconduct. The record does not indicate this to be the case. Panel Record at 47-57, 62-65.

3. See appendix for copies of both letters.

4. Which reads in pertinent part: "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." The disciplinary rule in Michigan is identical to the Arizona rule in Bates.

5. A definition of overreaching is "aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the clients are in no condition to properly consider retention of a lawyer." Note Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181, 1184 n. 23 (1972). Quoted in State Bar Grievance Administrator v Jaques, 407 Mich 26, 43 n. 5, 281 NW2d 469 (1979) (Coleman, C.J., dissenting).

6. Variously defined "distressing, intended to harass," Webster's 7th New Collegiate Dictionary (1966-67), "without reasonable or probable cause or excuse," Black's Law Dictionary 1736 (rev. 4th ed. 1968).

7. In Primus the organization was the American Civil Liberties Union.

8. The Bar spokesman with whom Respondent spoke suggested that an attorney could properly send letters to everyone in Michigan. Panel Record at 64. However, no specific language in such a mailing was approved or even discussed in this phone conference.

9. Respondent testified "approximately 90 percent of my practice is Domestic Relations, Worker's Comp., real estate, traffic and criminal, and then 10 percent is just miscellaneous." Panel Record at 61.

10. It is not clear from the record exactly how long before the letters were not sent the men died. Respondent searched the death records in late December, 1977, Panel record at 65-66, complainants' letters dated February 11 and 16, 1978, appendix, and text of the letters says, "I am aware that you suffered the loss of your husband last year . . ." (Ruggirello letter), and "I am aware that you recently suffered the loss of your husband . . .", (Jesse letter). The widows did not testify at the panel hearing.

11. "A lawyer's letter commands immediate attention, if not fear. 'Junk mail' from others will often not even meet the respect of being opened; that will hardly ever happen to an envelope bearing indicia that it is from an attorney. It willy-nilly forces itself upon the attention of the recipient . . . It is as much an intrusion into the privacy of the recipient's home and into his right to be left alone, as would be a taped telephone call from a previously unknown attorney advising of his availability to perform stated legal services for stated prices, or an enforced personal solicitation by an attorney at his doorstep.

"Can there be any doubt that if mail solicitation is permitted, mailing lists will be purchased by some attorneys in order to minimize the percentage of non-responses? Anonymity will be lost and the right to be left alone will be vexatiously despoiled. People seeking advice from marriage counselors will receive letters from the matrimonial bar ... The obituary pages will result in a flood of mail to the mourning next of kin while yet the funeral baked meats remain unconsumed.

"That this is not a chimera nor a parade of imaginary horribles is shown by what occurred after the May 25, 1979, crash of the American Airlines DC-10 in Chicago." In re Koffler, supra, at 27-28, n. 4.

12. "I worked on that letter for approximately -- I think during the whole day, certainly until perhaps late January. I must have rewritten it 20 times." Panel Record at 70.

13. See Footnote 5 above.

14. The agent, in fact, did not recommend Jaques to anyone. 407 Mich at 38 n. 4.

15. Jaques was reversed because the court was convinced that the attorney's conduct did not rise to the level of ". . . undue influence overreaching, and other forms of `vexatious conduct.'" 407 Mich at 37. The Board believes that Respondent's behavior did reach such levels, at least of overreaching, invasion of privacy, perhaps undue influence, and overall vexatiousness. Even if we were convinced that his conduct did not reach this level, our decision would remain unchanged, since, under the circumstances, a very real potential for grave overreaching is posed by Respondent's personalized letters. Such a potential danger falls within the scope of state's regulatory interest.

16. The letters to the homeowners read, "We understand that you are selling your home," but the court could not find evidence in the record how they had obtained such information, or whether they actually possessed it at all. Slip op. at 3-4.

17. A survey by the ABA Journal found that within one year of Bates, 3% of attorneys had advertised in a newspaper, and 7% after two years. As a consequence, it cannot be reasonably argued that there are no other "sufficient alternate methods of communication" of information to potential clients, and that direct mailings are therefore necessary. Koffler, slip op. at 27 n. 4.

18. This language is from Ohralik v Ohio State Bar Ass'n, 436 US 447, at 461 (1978).

DISSENT

We respectfully dissent. When carried out, Respondent's actions, although perhaps in bad taste, did not constitute misconduct, and discipline should not be imposed. We base this conclusion on five points: (I) Respondent acted in good faith, and this is a case of first impression before the Board; (2) Respondent's motivation, in large part, was to disseminate information to a particular class of people whom he knew to be ignorant of their prospective legal rights; (3) The complaint was inadequate; (4) The record is poorly developed; and (5) Respondent's conduct was not shown to violate the precepts set forth by the U.S. Supreme Court in Ohralik v Ohio State Bar Ass'n, 436 US 447, 98 S Ct 912, 56 L Ed 2d 444 (1978), and followed by the Michigan Supreme Court in State Bar Grievance Administrator v Jaques, 407 Mich 26, 281 NW2d 469 (1979).

The majority considers Respondent's good faith, in having requested a clarification of Bates v State Bar of Arizona, 433 US 350, 97 S Ct 2691, 53 L Ed 2d 810 (1977), from the State Bar, as a "mitigating rather than an exculpatory factor." Opinion of the Board at 10. Coupled with the status of this case as one of first impression, the majority was persuaded to reduce Respondent's discipline to a reprimand. These factors, however, should operate to exculpate Respondent from his alleged misconduct.

The State Bar spokesman advised Respondent that mailings would be allowed after Bates. Panel Record at 65. Although the details of such letters were not discussed, neither were particular prohibitions. We agree the State Bar is not the 'final determiner of proscribed and permitted conduct," Opinion of the Board at 11, n.2, but Respondent's inquiry was a good faith effort to seek advice regarding appropriate conduct in light of Bates. Even the disciplinary agency operating at that time would have been unable to guide Respondent due the lack of case decisions and unclear application of related ethics rules. There was much confusion in the legal community about advertising following Bates. Respondent should not be disciplined because he chose a path which a divided Attorney Discipline Board now determines was improper.*

Respondent's motivation in sending his letters, although partly financial, was also to inform these widows that they might receive workers' compensation even if their husbands died of heart conditions, rather than on-the-job injuries. This was a fact the widows may not otherwise have discovered. The informational value of commercial speech was recognized by the Supreme Court in Bates, 433 US at 375; and in Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 US 748, 763-65, 96 S Ct 1817, 48 L Ed 2d 346 (1976).

Respondent's testimony before the Board illustrated the informative, and pecuniary, intent of the letters:

> " . . . from my experience in Workmen's Compensation I'm well aware that unless a person works for probably a big-3 organization where they have a lot of contact with union lawyers end so forth many, many people are very misinformed regarding their Workmen's Compensation rights . . . "
>
> " . . . I found that many people, for example, believe that Workmen's Compensation only relates to an injury that occurs on the job . . ."
>
> " . . I had many situations where a widow had come in She'd heard about Workmen's Compensation.
>
> Unfortunately, you'd have to tell her that: 'Well, your husband died seven years ago, and it's a little bit too late, and I can't advocate doing anything about it.'"
>
> "This happened many, many times, and this was part of my formulating my feelings that-people were just not informed, particularly widows . . ."
>
> "Q. Well, Mr. Buk, you did expect that you might get some business from this, didn't you?"
>
> "A. Oh sure. Obviously, if one advertises one might expect to get some business."
>
> "Q. But if you did not were you still willing to give the information?"
>
> "A. Absolutely . . ."
>
> "Q. Did you have a desire in addition to getting business also to inform these people?"
>
> "A. Well, obviously. I mean, nobody would have their hands tied behind their back. Obviously I find that if people are informed at least they can make an intelligent decision regarding something . . ."
>
> "You know, my father ... was a factory worker, and I saw in my life growing up, many, many inequities that have occurred, not to him so much, but to other people, also, and I just felt that: 'Hey. This is

> opening up an area. Bates is opening up an area where we can indicate information.'"
>
> "Q. . . . your motive was: you did have a desire to inform, true?"
>
> "A. Obviously. In other words, my feeling is that if advertising is perfectly permissible ..., and I felt I was in the ambits of Bates, then, this is permissible, and this is what my intention was." Panel Record at 68-73.

Within his letters, Respondent also indicated his informational motive. " . . . feel that you could benefit from the following information." With the exception of the first paragraph and last sentence, the letters can be seen as purely informational. Respondent's intent, then, was in large part to educate this class of people whom he knew had often been deprived of legal benefits because of ignorance. This type of commercial speech, even if viewed as a quasi-personal contact bordering on solicitation, is protected.

To be found impermissible, direct mail or other contact must constitute fraud, undue influence, intimidation, overreaching or other forms of "vexatious conduct."Ohralik, supra, et p 462. The Formal Complaint alleged only that Respondent "prepared, executed and mailed" unsolicited letters to complainants, and that this is misconduct. The Board would discipline Respondent, ultimately, on the sole basis that his behavior potentially, or actually, constituted some form of "vexatious conduct." Opinion of the Board at 3, 9. Even if his conduct did reach the level of "vexatious," and we do not think it did, this criterion of misconduct was absent from the complaint. This raises questions of notice and due process. See State Bar v Crane, 400 Mich 484, 255 NW2d 624 (1977). Without legally sufficient allegation and proofs in support thereof, the complaint against Mr. Buk should be dismissed.

In Ohralik, which focuses on in-person solicitation remunerative employment by a lawyer, the Court isolated the reasons for subjecting solicitation, which still comprises protected speech, to a lower level of judicial scrutiny than cases defined as involving advertising. The U.S. Supreme Court observed that,

> "[U]nlike the reader of an advertisement, who can 'effectively avoid further bombardment of [his] sensibility simply by averting [his] eyes' . . ., the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning." Ohralik, supra, at fn. 25 p 465 [citations omitted].

The recipients of Mr. Buk's letters were free to avoid the "bombardment of [their] sensibilities" by simply discarding the letters. Clearly, then, the direct mail solicitation which is the subject matter of the case at bar does not fall within the impermissible strictures set forth in Ohralik and followed by the Michigan Supreme Court in Jaques, supra.

The record in this case is underdeveloped. None of the complainants testified before the Panel. No testimony was heard concerning the "vexatious" effect the letters had, if any, or opportunities complainants may have had to counter-balance the letters with outside advice. The Board's "rush to judgment" on an inadequately developed record makes this case a poor precedent, and an unfair instance in which to impose discipline.

Frankly, we would agree with the Grievance Administrator that Respondent's letter campaign was offensive, although not vexatious, and does nothing to advance the image of attorneys. However, offensiveness is not the criterion which has been adopted by either the United States or Michigan Supreme Courts for barring a particular attorneys contact with potential clients. If anything, one would think that such affronts to good taste would be counter-productive, and that an attorney following such a practice would find his or her potential clients remarkably unresponsive. If nothing else, the instant grievance, precipitated by a complaint from two outraged recipients of Respondent's mailings, supports this argument.

We think the best approach would be to regard such letters as but another form of advertising. The sole difference between this and more traditional advertising is that this form goes directly into the home of the recipient, devoid of editorial or programmatic surroundings. To the extent that any advertising is unsolicited, direct mailings are indistinguishable from other forms. Certainly, the problems connected with the regulation of such efforts by attorneys are more closely aligned with the regulation of advertising in the public press, as opposed to problems which result from face-to-face pressure.

Here, no immediate response was required. Here, there was a permanent record of what was said by the attorney. Here, an individual contacted could seek the advice of an independent third party. None of these conditions existed when the context is a one-on-one verbal confrontation. All these exist when the context is advertising. None of the evils of in-person solicitation in Ohralik exist in the instant case.

This case falls between the "ambulance chasing" of Ohralik and the constitutionally-protected expressional-speech of Primus. Because of the informational content of Respondent's letters, we think his case falls closer to Primus. We agree with our Brothers that the letters differ from those approved by the Kentucky court in Stuart. We disagree with our Brothers, however, that the critical difference is that the services offered by Respondent are not routine, standardized or minimal fee type legal matters. Certainly, both the Michigan and United States Supreme Courts have upheld advertising which does not fall within those strictures.

Rather, we focus on the analysis of the Supreme Court of Kentucky which noted,

> "[T]he fact that an advertisement is in the form of a letter does not increase the likelihood of evils occurring ... [T]he prosecution of this very case demonstrates that enforcement of ethical standards of attorney advertising will not be impossible or overly difficult because it is allowed to take the form of a letter." 568 SW2d at 934.

Indeed, the Kentucky Court suggested that the public be protected by adoption of a rule which requires the attorney to mail a copy of such advertisements to the Bar association simultaneously with the mailing of one or more of them to members of the public. The Bar, for example, might adopt such a program for all forms of advertising. We think it inappropriate to treat direct mail differently from television, radio, or print advertising.

We believe that we do not protect the public by unduly restricting its access to information about attorneys. This was one of the very real concerns of the U. S. Supreme Court when it decided Bates. In that revolutionary decision too, the Court responded to the sincere concern of our Brothers in the majority today who are anxious about a loss of professionalism. The argument was made before the Bates court that the hustle of the marketplace would adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his or her obligation to serve selflessly. 444 DS at 368. That argument was rejected. The Court's judgment that the posture of the attorney as a professional does not lean on as slim a reed as our Brothers fear is equally applicable to the instant case.

Imposing sanctions for practices the impropriety of which were not clear, does not increase confidence in our profession. Indeed, only increased sensitivity to public needs, and the maintenance of high standards of legal services, will accomplish that. The finding of misconduct should be reversed.

---

*Michigan State Bar Formal Ethics Opinion C-218, issued after Buk mailed his letters and cited by the majority at page 4 of their opinion is an effort to provide much-needed guidance to the Bar. However, while acknowledging that letters are not per se forbidden, the Ethics Opinion attempts establishment of a highly defined rule which would per se proscribe certain non-generalized mailings.

Not only is it legally improper to establish a "per se" rule which does not necessarily avoid the evils Ohralik seeks to prevent, but Ethics Opinion C-218 has fallacies of logic that would restrict smaller, less expensive mailings to specific groups, while permitting a broadside mailing to vast numbers of "occupants" necessarily including prospective clients who are unsophisticated and less knowledgeable regarding legal services and their need for same. Thus, bulk mailings affordable only by larger, wealthier lain firms would be acceptable, and mailings by less-capitalized practitioners regarding, for example, mortgage-law services, and sent to a group of specifically-addressed bankers knowledgeable about their need for services, would be forbidden.