ATTORNEYS' RIGHTS UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY: FREE SPEECH, RIGHT TO KNOW, AND FREEDOM OF ASSOCIATION

CONTENTS

I. INTRODUCTION

For many years professionals have organized associations to regulate themselves and maintain the integrity of their profession. Although some regulations adopted by these associations may violate their members' civil rights, courts have been reluctant to intervene in disputes between professional associations and their members.[1] The conflict between a member's rights and duties is a distinct problem for the legal profession. State Supreme Courts regulate attorney conduct generally by adopting the American Bar Association's Code of Professional Responsibility (CPR)[2] which consists of ethical considerations (ECs) and disciplinary rules (DRs). While the ECs are merely aspirational, the DRs prescribe the minimum requirements with which an attorney must comply[3] and are enforced by reprimand,[4] suspension,[5] and revocation of license to practice.[6]

The Code arguably contains ambiguous language, inconsistent rules, and infringes attorneys' first amendment rights. Because severe sanctions are imposed for violations, it has been the subject of much litigation. Until recently, most courts have been reluctant to consider the Code's

1. *See* 58 GEO. L.J. 646 (1970).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975) (as amended 1977) [hereinafter cited as ABA CODE]. In quoting the ABA Code, this Note omits all footnotes contained therein.

The Code of Professional Responsibility (CPR) consists of rules promulgated by the American Bar Association to regulate attorney activity. The rules set forth uniform standards intended to develop and maintain public confidence in the legal profession and in the integrity of the trial process. Lawyers are held to a higher standard of conduct than laymen and the Code emphasizes an attorney's duty to the bar rather than a member's rights. Most state supreme courts have adopted the ABA Code with modifications. As of 1974, 47 states had adopted some part of the Code. State Bar v. Semaan, 508 S.W.2d 429, 432 (Tex. Ct. App. 1974).

3. ABA CODE, Preliminary Statement.

4. *See, e.g., In re* Raggio, 87 Nev. 369, 372, 487 P.2d 499, 501 (1971) (reprimanded for criticizing judicial decision); *In re* Porter, 268 Ore. 417, 425, 521 P.2d 345, 349, *cert. denied*, 419 U.S. 1056 (1974) (reprimanded for speaking out during pending trial in violation of gag rules).

5. *See, e.g.*, Ohio State Bar Ass'n v. Consoldane, 50 Ohio St. 2d 337, 364 N.E.2d 279 (1977) (lawyer suspended for obtaining funds from client for use in bribing a public official); *In re* Troy, 43 R.I. 279, 111 A. 723 (1920) (lawyer suspended for asserting seats on the state supreme court were bartered).

6. *See, e.g., In re* Moore, 110 Ariz. 312, 518 P.2d 562 (1974) (disbarment for commingling and conversion of estate's funds to personal use). *See generally* Nurick, *Pervasive Disciplinary Problems of the Bar—Pennsylvania's New Disciplinary System*, 79 DICK.L. REV. 549 (1975).

The ABA has no enforcement powers. Action can be undertaken only through state disciplinary committees.

conflict with a member's constitutional rights because they believed that, in return for their special status as members of a regulated profession, lawyers waived certain rights.[7] Some courts have disagreed, however, concluding that lawyers enjoy the same constitutional protections as other citizens.[8] They argued that abridgment of speech would discourage qualified people from practicing law[9] and deprive society of an articulate and intelligent critic of the administration of justice.[10] Recently, courts have been more receptive to attacks on ethical restrictions in the CPR.[11] This more favorable judicial attitude together with the compelling policy considerations suggest that both constitutional and nonconstitutional

7. We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold—conformity with those standards has proven essential to the administration of justice in our courts.

In re Raggio, 87 Nev. 369, 372, 487 P.2d 499, 500 (1971).

For other cases distinguishing attorneys from laymen, see, e.g., Cohen v. Hurley, 366 U.S. 117 (1961); *In re* Sawyer, 360 U.S. 622 (1959); Bradly v. Fischer, 80 U.S. (13 Wall.) 335 (1871); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976); State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); *In re* Woodward, 300 S.W.2d 385 (Mo. 1957) (en banc); State *ex rel.* Hunter v. Crocker, 132 Neb. 214, 271 N.W. 444 (1937); Justices of the Appellate Div. v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (Burke, J., dissenting); Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); *In re* Porter, 268 Ore. 417, 521 P.2d 345, *cert. denied*, 419 U.S. 1056 (1974); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956); *In re* Simmons, 65 Wash. 2d 88, 395 P.2d 1013 (1964), *cert. denied*, 381 U.S. 934 (1965).

8. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); Polk v. State Bar, 374 F. Supp. 784 (N.D. Tex. 1974); Jacoby v. State Bar, — Cal. 3d —, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Ct. App. 1974). *Cf.* Spevack v. Klein, 385 U.S. 511 (1967) (attorney may assert privilege against self incrimination in a bar proceeding). *See also* Pickering v. Board of Educ., 391 U.S. 563 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (public employment cases holding that one does not waive first amendment rights by agreeing to abide by a code of conduct).

9. Polk v. State Bar, 374 F. Supp. 784 (N.D. Tex. 1974).

10. *See* notes 9-12 *supra* and accompanying text.

Lawyers, who are more completely informed about the legal system, are in a peculiarly good position to discuss issues intelligently, act as a check on government by exposing abuses or urging action, and criticize the judicial process. It is "largely through public discussion that policy alternatives are articulated, and popular support is mobilized to stimulate governmental action." Comment, *Silence Orders—Preserving Political Expression by Defendants and Their Lawyers*, 6 HARV. C.R.-C.L. L. REV. 595, 601 (1971). *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 250 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922 (1974); ABA CODE, EC 8-1 ("[L]awyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein.").

11. *See, e.g.*, Bates v. State Bar, 97 S. Ct. 2691 (1977) (advertising); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (fee schedules); Chicago Council of Lawyers v.

challenges to the Code will increase.[12] Litigation will center upon possible ethical violations of the antitrust laws,[13] and an attorney's first amendment rights.

The Code defines attorneys' free speech rights inconsistently, rendering it difficult to determine the extent to which it restricts these rights. Several ethical considerations encourage speech: EC 8-1, for example, acknowledges that "lawyers are especially qualified to recognize deficiencies in the legal system"[14] and invites participation "in proposing and supporting legislation and programs to improve the system."[15] An attorney should attempt to change a rule of law if he believes it "causes or contributes to an unjust result."[16] The Code further encourages attorneys to educate the public to recognize legal problems,[17] and to "protest earnestly against the appointment or election of those who are unsuited for the bench."[18] Other ECs, however, discourage an attorney's freedom to speak out. An attorney "should be temperate and dignified"[19] because "even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession."[20] An attorney should "be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."[21] Disciplinary rules also discour-

Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (gag rules); Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977) (unauthorized practice of law); Consumers Union of United States v. ABA, 427 F. Supp. 506 (E.D. Va. 1976), *vacated & remanded in light of Bates sub nom.* Virginia State Bar v. Consumers Union of United States, Inc., 97 S. Ct. 2993 (1977) (advertising); Person v. Association of the Bar, 414 F. Supp. 144 (E.D.N.Y. 1976), *rev'd*, 554 F.2d 534 (2d Cir. 1977); Jacoby v. State Bar, — Cal. 3d —, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977) (solicitation and advertising).

12. *See generally* Bates v. State Bar, 97 S.Ct. 2691 (1977); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); Mid-Hudson Legal Servs., Inc. v. G & U., Inc., 437 F.Supp. 60 (S.D.N.Y. 1977); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976); Jacoby v. State Bar, — Cal. 3d —, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977); Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E. 1097 (1976), *prob. juris. noted*, 98 S.Ct. 49 (1977) (No. 76-1650). *See generally* Note, *supra* note 10.

13. *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977). *Contra*, Bates v. State Bar, 97 S. Ct. 2691 (1977) (antitrust challenge to advertising ban rejected).

14. ABA CODE, EC 8-1.

15. *Id.*

16. *Id.*, EC 8-2.

17. *Id.*, EC 8-3, 2-2, 2-3.

18. *Id.*, EC 8-6.

19. *Id.*, EC 1-5.

20. *Id.*

21. *Id.*, EC 8-6.

age attorney commentary on the judicial system. Thus, a lawyer may neither knowingly make false accusations against a judge or other adjudicatory officer,"[22] nor "[e]ngage in conduct that is prejudicial to the administration of justice."[23] Because of the inconsistencies in the CPR, lawyers are uncertain about the extent of their first amendment protections. This uncertainty has a chilling effect on the exercise of this right.

This Note considers various Code provisions that conflict with attorneys' first amendment protections—free speech, right to know, and freedom of association. It then reviews two attorney solicitation cases before the Supreme Court this Term and proposes several modifications in the solicitation rule which would effectively accommodate attorneys' first amendment rights with the public's and legal profession's need for protection.

II.

FREEDOM OF SPEECH AND THE CODE OF PROFESSIONAL RESPONSIBILITY

A. *Free Speech Protection in General*

The first amendment prohibits Congress from abridging free speech,[24] but fails to define speech.[25] Confronted with free speech challenges, therefore, the Supreme Court initially must determine whether the speech is within a category protected by the first amendment.[26] Although abstract political discussion is almost always protected,[27] libel,[28] obscenity,[29] false and misleading speech,[30] and "fighting words"[31] are generally

22. *Id.*, DR 8-102(B). *See also* Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977).

23. ABA CODE, DR 1-102(A)(5).

24. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The first amendment applies to the states through the fourteenth. *See* Malloy v. Hogan, 378 U.S. 1, 10 (1964); Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Schneider v. State, 303 U.S. 147, 160 (1939).

25. *See generally* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

26. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 28 (1975).

27. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1966); Bond v. Floyd, 385 U.S. 116 (1966); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

28. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952).

29. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

30. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); G.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956).

31. *See, e.g.*, Caplinsky v. New Hampshire, 315 U.S. 568 (1942); Village of Skokie v. National Socialist Party of America, 366 N.E.2d 347 (Ill. App. Ct. 1977).

not protected.[32] A state may regulate unprotected speech if the regulation is rationally related to a legitimate state interest.

If the speech is protected, however, courts balance the first amendment right against governmental interests in the regulation. In early cases, the Court required only that the state demonstrate that "the words used [were] used in such circumstances and [were] of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[33] Courts have recently required that the government demonstrate a "compelling,"[34] "substantial,"[35] "important or substantial,"[36] "significant"[37] or "overwhelming"[38] interest in the regulation.

The timing, clarity, and scope of a regulation infringing protected speech are also considered in the balancing analysis. Regulations that prohibit expression before it occurs—prior restraints—are presumptively invalid[39] because a flat ban on first amendment rights chills free speech more than subsequent prosecutions do. Vague regulations affecting the first amendment also chill the exercise of protected first amendment rights because uncertainty about the precise boundaries of the prohibition causes people to be cautious in their speech.[40] Finally, courts require

32. For an illustration of the categorization process, see the evolution of commercial speech cases. The Court initially held that commercial advertising was not protected by the first amendment in Valentine v. Chrestensen, 316 U.S. 52 (1942). The concept was eroded in Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) and Bigelow v. Virginia, 421 U.S. 809 (1975) and finally abandoned in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). The Court reaffirmed protection for commercial speech in Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977), followed by Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) and Bates v. State Bar, 97 S. Ct. 2691 (1977).

33. Schenck v. United States, 249 U.S. 47, 52 (1919). *See also* Wood v. Georgia, 370 U.S. 375 (1962).

34. NAACP v. Button, 371 U.S. 415, 438 (1963). *See also* Spevack v. Klein, 385 U.S. 511 (1967); Konigsberg v. State Bar, 353 U.S. 252 (1957).

35. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964).

36. United States v. O'Brien, 391 U.S. 367 (1968).

37. Polk v. State Bar, 374 F. Supp. 784, 787 (N.D. Tex. 1974).

38. Hiett v. United States, 415 F.2d 664, 672 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).

39. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Near v. Minnesota, 283 U.S. 697 (1931); Rodgers v. United States Steel Corp., 536 F.2d 1001 (3d Cir. 1976).

40. *See generally* Note, *The Void-for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Vagueness is a due process problem because vague statutes fail to give notice. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First

limitations on protected speech to "be no greater than is necessary or essential to protection of the particular government interest involved."[41]

B. *Judicial Interpretations of Free Speech Under the CPR*

Judicial interpretations of the CPR and constitutional challenges to it have been inconsistent. Initially, courts ignored the constitutional attack[42] or held that an attorney could not invoke his free speech right against the state's right to discipline.[43] Courts frequently cited the layman-attorney distinction and noted that although laymen were protected by the first amendment, attorneys were not.[44] Other courts have upheld attorney free speech rights,[45] but the scope of protection afforded has varied according to the strength of the countervailing state interest required by the court to justify the regulation. If the standard is lenient, the regulation will probably suffer from overbreadth.[46]

In *Bates v. State Bar*,[47] the Supreme Court last Term struck down a restriction on attorney advertising of "routine legal services,"[48] upholding the consumer's right to receive information.[49] Its practical effect was to recognize free speech rights of attorneys to advertise.[50]

Amendment freedoms,' it 'operates to inhibit exercise of [those] freedoms.' " Grayned v. City of Rockford, 408 U.S. 104, 109 (1972). A vague statute is always overbroad; if it is unclear, it may be applied to protected speech.

41. Note, *Professional Responsibility—Trial Publicity—Speech Restrictions Must be Narrowly Drawn*, 54 TEX. L. REV. 1158, 1165 (1976).

42. *See* cases cited in Note, *supra* note 10, at 925 nn.24 & 25 (1974). Courts still often avoid constitutional grounds when deciding ethical issues. *See, e.g.*, Klein v. Edelstein, 407 F. Supp. 570 (S.D.N.Y.), *aff'd mem.*, 551 F.2d 300 (2d Cir. 1976), *cert. denied*, 98 S.Ct. 57 (1977); Hagopian v. Justices of Mass. Supreme Judicial Court, 429 F. Supp. 367 (D. Mass. 1977), *aff'd*, 98 S.Ct. 34 (1977); *In re* Mead, — Mass. —, 361 N.E.2d 403 (1977); *cert. denied*, 98 S.Ct. 182 (1977); Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 98 S.Ct. 49 (1977) (No. 76-1650); *In re* Smith, — S.C.—, 233 S.E.2d 301 (1977), *prob. juris. noted*, 98 S.Ct. 49 (1977) (No. 77-56).

43. *See, e.g.*, State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); *In re* Porter, 268 Or. 417, 521 P.2d 345, *cert. denied*, 419 U.S. 1056 (1974).

44. *See* note 7 *supra*.

45. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); Hirschkop v. Virginia State Bar, 421 F. Supp. 1127 (E.D. Va. 1976); Polk v. State Bar, 374 F. Supp. 784 (N.D. Tex. 1974); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Ct. App. 1974).

46. *See, e.g.*, ABA CODE, DR 1-102(A)(5).

47. 97 S. Ct. 2691 (1977). *See* notes 154-79 *infra*.

48. *Id.* at 2709.

49. *Id.* at 2694, 2699, 2704.

50. *See* notes 154-79 *infra* and accompanying text.

C. *Areas of Conflict between Free Speech and the CPR*

1. *Gag Rules*

Courts have been more receptive to constitutional attacks on the Code's gag rules, which limit extrajudicial comment by counsel during litigation, than on other CPR provisions. The present bar rules limit an attorney's speech which is "reasonably likely to interfere with the administration of justice"[51] from the time a criminal case is filed until the defendant is sentenced.[52] Similar proscriptions apply to civil actions[53] and administrative hearings.[54]

States assert their interest in preserving a fair trial justifies the imposition of gag rules. The rules are designed to avoid the dissemination of any news or comments that tend to prevent the judge or jury from exercising impartial judgment.[55] States also urge that gag rules are necessary to preserve the integrity of the judicial process and maintain respect for the courts.[56] Attorneys argue, however, that they can play a singular role in presenting the crucial issues of a case when public interest and awareness are focused on it.[57] Furthermore, they claim that

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51. ABA CODE, DR 7-107(D), (E).

52. *Id.*, DR 7-107(A)-(E).

53. *Id.*, DR 7-107(G).

54. *Id.*, DR 7-107(H).

55. *Id.*, EC 7-33:

> A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news of comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipted or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

Note the extremely broad standards EC 7-33 sets for prevention of such speech: "tend to influence," "may . . . interfere," or "may prevent."

56. *See In re* Sawyer, 360 U.S. 622, 624-26 (1959); Bridges v. California, 314 U.S. 252, 270 (1941) (gag rules on press); Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1150 (E.D. Va. 1976); Comment, *supra* note 10.

57. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). *See also* Comment, *supra* note 10; Note, *supra* note 41.

Courts may develop different standards based on the type of trial involved: criminal, civil, or "political." Strictest fair trial protections are afforded in criminal cases. One commentator argues that the "fair trial" rationale does not apply to criminal "political" trials. Comment, *supra* note 10, at 598. Political trials have been defined as encompassing civil disobedience cases and conspiracy indictments. Such cases generally require more public discussion since part of their motivation is to enlighten the public about an existing problem. *E.g., In re* Sawyer, 360 U.S. 622 (1959) (conspiracy trial); King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970), *rev'd*, 450 F.2d 478 (6th Cir. 1971), *vacated & remanded with*

they are entitled to the same first amendment rights afforded laymen.[58]

Courts recognize that gag rules regulating attorney speech must comply with the first amendment and employ a balancing analysis to resolve the conflict.[59] They differ, however, over the extent of the interest a state must demonstrate to justify the regulation. Thus, the courts in *In re Porter*[60] and *In re Sawyer*[61] held gag rules permissible when the speech tended to prevent a fair trial.[62] This overly broad and ambiguous standard chills attorney free speech. The 1970 CPR held that gag rules were necessary whenever the communication was "reasonably likely" to interfere with a fair trial.[63] At least one court embraced this test,[64]

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instructions to dispose of case as moot, 405 U.S. 911 (1972) (trial concerning Kent State victims). The commentator contends that lawyers and defendants are the "best source of relevant knowledge" in such a case. Comment, *supra* note 10, at 601. Thus, restrictions must be narrowly drawn to further a limited legitimate governmental interest.

58. *See* Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); See note 8 *supra.*

59. *See generally* ABA PROJECT ON THE STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (REARDON REPORT), *reprinted in* Hirschkop v. Virginia State Bar, 421 F.Supp. 1137, 1157 (E.D. Va. 1976).

60. 268 Or. 417, 521 P.2d 345, *cert. denied*, 419 U.S. 1056 (1974).

61. 360 U.S. 622 (1959).

62. In *In re* Porter, the court refused to protect an attorney's statements concerning anticipated litigation. The attorney represented a widower whose wife died from hypothermia. The attorney's statements to the media disclosed the testimony of a deposed witness, the basis for the suit, the fact that the opposing party had sequestered a witness, and plans for settling the case. 268 Or. at 419, 521 P.2d at 346-47. The attorney sought a stricter standard of proof than the court required.—*i.e.*, that the attorney had actual knowledge of the DR and intended to violate it. *Id.* at 421-22, 521 P.2d at 348. In *In re* Sawyer, the Supreme Court upheld an attorney's criticism of conspiracy trials while she was representing a client on such a charge.

This standard is also consistent with the position that attorneys should be treated differently from other citizens under the first amendment. The concurring and dissenting opinions in *In re* Sawyer emphasized the difference between an attorney who belongs to a profession with "inherited standards of propriety and honor" and a lay citizen. 360 U.S. at 646. Justice Stewart argued that a lawyer could not "invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *Id.* The court in *In re* Porter held to the theory that "[w]hen one is admitted to the bar he embraces certain ethical considerations and restrictions not required or expected of laymen which experience has indicated will be of benefit to the public if lawyers are required to obey them." 268 Or. 417, 425, 521 P.2d 345, 349, *cert. denied*, 419 U.S. 1056 (1974).

63. ABA CODE, DR 7-107(D), 7-107(G)(5).

64. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137 (E.D. Va. 1976). The court views the rule as a reasonable regulation of the time, place, and manner of speech. *Id.* at 1143. *See also* Markfield v. Association of the Bar, 49 App. Div. 2d 516, 370 N.Y.S.2d 82 (1975).

> Indeed, only where the words used present a clear and present danger, can it be said that there is a likelihood of interference with a fair trial. In so interpreting

holding that it effectively balanced free speech rights against the fair trial guarantee: "Can an attorney who considers himself competent enough to try a case claim ignorance as to what comments are reasonably likely to prejudice that case? . . . [A] lawyer knows what reasonable means just as a priest knows what faith means."[65]

The Court of Appeals for the Seventh Circuit has rejected the CPR standard.[66] In *Chase v. Robson*,[67] the court held that speech cannot be restricted unless it creates either a " 'clear and present danger' . . . of a serious and imminent threat to the administration of justice"[68] or a " 'reasonable likelihood' . . . of a serious and imminent threat to the administration of justice."[69] A year later, the same court concluded that such a prohibition must be limited to situations " 'where there is a reasonable likelihood that such dissemination will . . . prejudice the due administration of justice.' "[70]

In *Chicago Council of Lawyers v. Bauer*,[71] the Seventh Circuit declared the 1970 CPR standard unconstitutional and introduced a stricter standard to protect attorneys' free speech rights.[72] Attorney's speech may not be restricted unless it poses a " 'serious and imminent threat' of interference with the fair administration of justice."[73] The court reasoned that the goals of the CPR rule—to promote free speech yet retain the

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subdivision (D) of DR 7-107, it is accorded its full purpose, for the attorney is given notice of the conduct that will be punished . . .; his right to free expression is not unreasonably limited, and the judicial process is fully protected.

Id. at 517, 370 N.Y.S.2d at 85 (citation omitted).

65. Hirschkop v. Virginia State Bar, 421 F. Supp. 1137, 1148 (E.D. Va. 1976).

66. *See, e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970).

67. 435 F.2d 1059 (7th Cir. 1970).

68. *Id.* at 1061 (quoting Wood v. Georgia, 370 U.S. 375 (1962)).

69. *Id.* (quoting United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969)).

70. *In re* Oliver, 452 F.2d 111, 114 (7th Cir. 1971) (quoting 45 F.R.D. 391, 404 (1969)). The court was there presented with a blanket prohibition against all comment which did not consider whether such comment is or even could be prejudicial to the fair administration of justice.

71. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The court there faced the question of enforcement of a local criminal rule of the district court and the ABA disciplinary rule proscribing extrajudicial comment by attorneys during both civil and criminal litigation.

72. 522 F.2d at 249. The court noted that restrictions for many years are quite possible: "the broad time span of this rule relating to civil matters is an influential factor weighing against its constitutionality." *Id.* at 258.

73. *Id.* at 24 (quoting Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970)). For application of the "serious and imminent threat" standard to the press and witnesses in the trial context, see Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

integrity of the judicial process—could be accomplished by its clearer, more precise, and more narrowly drawn standard. The court noted the similarities between gag orders and prior restraints on free speech. Like prior restraints, these gag rules subjected attorneys to the possibility of contempt proceedings and prevented speech before its expression.[74]

The Supreme Court, in *Nebraska Press Association v. Stuart*,[75] balanced the state's sixth amendment interest in fair trials against the press' first amendment right to report trials accurately.[76] In invalidating the press restrictions, the Court emphasized the preferred status of the first amendment within our constitutional framework.[77] Although this analysis should be employed in attorney gag rule cases,[78] the Court stated, in dicta, that gag rules imposed on defendants and their counsel during trial were the least restrictive alternatives available.[79] Although the Court's "unsupported and conclusory"[80] dicta is inconsistent with the rest of the opinion,[81] the Court subsequently refused to consider a case that presented the issue of attorney gag rules in the fair trial context,[82] and thus implicitly allowed attorney gag rules to stand.

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74. 522 F.2d at 248-49; *see* Note, *supra* note 41, at 1160-61. *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) (describing gag rules as "an immediate and irreversible sanction").

75. 427 U.S. 539, 561 (1976).

76. *Id.* at 556.

77. *Id.* at 561. The Court emphasized that "barriers to prior restraint remain high and the presumption against its use continues intact." *Id.* at 570.

78. The Supreme Court emphasized that it did not have the issue of attorney speech before it. *Id.* at 564.

79. *Id.* at 553-54; *id.* at 601 n.27 (Brennan, J., concurring).

80. This aspect of the opinion is discussed in Freedman & Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607 (1976).

81. The irony of *Nebraska Press Association* is that the opinions recognize so clearly the infirmities of prior restraints against the press but suggest as a possible "less restrictive alternative" that trial courts might impose prior restraints upon defendants and their attorneys. Perhaps because the issue was not argued or because the problem of prior restraints traditionally has been framed in terms of the press rather than individuals, the Court overlooked the ready applicability of its arguments against prior restraints to situations involving the first amendment rights of defendants. For whatever reason, the Court appears to have adopted Justice Stewart's distinction between the first amendment rights of individuals and those of the press, an argument it apparently rejected in *Pell v. Procunier*. Yet the adoption, if such it was, came too easily, in marked contrast to the careful consideration given the other issues in *Nebraska Press Association*.

Id. at 618-19 (footnotes omitted).

82. Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976). The Court had also earlier refused to hear this issue. *See In re* Porter, 268 Or. 417, 521 P.2d 345, *cert. denied*, 419 U.S. 1056 (1974).

2. *Attorney Criticism of the Administration of Justice*

Although many attorneys desire to discuss, criticize, and thereby improve the judicial system, several rules in the Code restrict this activity. DR 1-102(a)(5) provides that "[a] lawyer shall not engage in conduct that is prejudicial to the administration of justice,"[83] and DR 8-102(B)[84] and EC 8-6[85] proscribe attorney criticism of a judge or other adjudicatory officer.[86] States claim these rules are necessary to maintain respect for the judicial system.

Traditionally, courts have held that an attorney cannot invoke his free speech rights against the right to discipline.[87] Although courts occasionally upheld attorney speech rights, they often based their decisions on non-speech grounds.[88] In *In re Sawyer*,[89] defense counsel's harsh criticism of conspiracy trials was found to be general, and not improperly directed at judge or prosecutor.[90] In *State v. Nelson*,[91] an attorney was not punished for stating that courts are "commonly prejudiced," police are "headbeaters," and that he had little respect for either. The court

83. ABA CODE, DR 1-102(A)(5). The rule is both vague, because it fails to give notice, and overbroad, because it encompasses protected speech as well as speech legitimately subject to regulation.

EC 1-5 encourages lawyers to be "temperate and dignified . . . . Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession." This statement within the same canon seems to require a conservative interpretation of DR 1-102(A)(5).

84. *Id.*, DR 8-102(B) provides: "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

85. *Id.*, EC 8-6 provides: "While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."

86. Other ethical considerations within Canon 8 seem to encourage free speech. Nevertheless, they are often overlooked and are rarely relied on by courts in resolving difficult factual issues. *Id.*, EC 8-1 (lawyers "should participate in proposing and supporting legislation and programs to improve the system"); EC 8-2 (lawyers should seek change in the law when it causes an unjust result); EC 8-3 (aid public to recognize legal problems); EC 8-6 (lawyer should protest earnestly against those unsuited for the bench).

87. A lawyer cannot "invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct." *In re* Sawyer, 360 U.S. 622, 646 (1959) (Stewart, J., concurring). *See* State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972); *In re* Troy, 43 R.I. 279, 111 A. 723 (1920) (two year suspension ordered because attorney said in an election speech that Supreme Court seats were bartered); Annot., 12 A.L.R.3d 1408 (1967).

88. *See, e.g., In re* Sawyer, 360 U.S. 622 (1959); State v. Nelson, 210 Kan. 637, 504 P.2d 211 (1972).

89. 360 U.S. 622 (1959).

90. *Id.* at 628 (plurality opinion).

91. 210 Kan. 637, 504 P.2d 211 (1972).

held that "since the case was terminated, respondent's statements [could] not serve as harassment or intimidation for the purpose of influencing a decision in the case involved."[92]

In other cases, courts have applied the attorney-layman distinction to justify disciplining attorney statements. In *In re Raggio*,[93] an attorney who publicly criticized an opinion of the state supreme court (the same court hearing his case) was reprimanded. The court concluded that it had become "the center of controversy" and "[e]ssential public confidence in our system of administering justice may have been eroded."[94] The court distinguished between laymen and attorneys, noting that laymen may criticize the performance of judges without sanction. Attorneys, however, as members of a regulated profession, are bound by higher standards of conduct which have "proven essential to the administration of justice."[95]

In *Justices of the Appellate Division, First Department v. Erdmann*,[96] an attorney was quoted extensively in a Life magazine article entitled, *I Have Nothing To Do with Justice*.[97] He criticized trial judges for failing to leave questions of guilt or innocence to juries. In addition, Erdmann described appellate division judges as "whores who became madams"[98] and claimed that they obtained their positions through political patronage or money.[99] The court refused to find such isolated instances of disrespect for the law subject to professional discipline. In a dissenting opinion, Judge Burke held that no protected speech was involved, and, relying on EC 8-6, concluded that an attorney's contentions must have merit and must be made in appropriate language.[100]

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92. *Id.* at 641, 504 P.2d at 215. The court also relied on DR 8-102(B). The same court rejected the claim that DR 1-102(A)(5) is unconstitutionally vague and has an impermissible chilling effect on first amendment freedoms. *Id.* at 639-40, 504 P.2d at 214. The provision was upheld again against a constitutional attack in State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974).

93. 87 Nev. 369, 487 P.2d 499 (1971).

94. *Id.* at 371, 487 P.2d at 500.

95. *Id.* at 372, 487 P.2d at 500-501.

96. 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973).

97. *Id.* at 560, 301 N.E.2d at 427, 347 N.Y.S.2d at 441.

98. *Id.*, 301 N.E.2d at 427, 347 N.Y.S.2d at 442.

99. *Id.*, 301 N.E.2d at 437, 347 N.Y.S.2d at 442.

100. *Id.* at 566, 301 N.E.2d at 431, 347 N.Y.S.2d at 445. *See also In re* Shimek, 284 So. 2d 686 (Fla. 1973) (attorney disciplined for criticizing a judge when there was *likely* impairment of the administration of justice). Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977) indicates the greater tolerance courts have for layman criticism. In that case, Judge Rinaldi was described as one of the "10 worst judges in New York," "incompetent," and "probably corrupt." The court held that a "[p]laintiff may not recover from defendants for simply expressing their opinion of

In two recent cases, the courts rejected the attorney-layman distinction, and squarely protected an attorney's free speech rights. In *Polk v. State Bar*,[101] the court held that the attorney's speech could be restricted only when it "undermines the legitimacy of the judicial process"—e.g., when jury bribery, subornation of perjury, misrepresentation to court, or inability to represent clients competently is shown.[102] In *State Bar v. Semaan*,[103] the court held that an attorney's newspaper editorial criticizing a judge's knowledge of law and ability was protected unless the "statement [was] made with knowledge that it [was] false or with reckless disregard to whether it is false."[104]

As the CPR and judicial rules are presently written, an attorney may not criticize the judiciary if such conduct would be "prejudicial to the fair administration of justice."[105] Because this standard is vague, an attorney cannot predict whether his speech will be protected, and will naturally limit his remarks to ensure conformity with the rules. As a result, attorneys will less vigorously debate needed reforms in our judicial system. The ABA and the judiciary must remedy this situation by developing rules that state narrowly and precisely the state interest justifying infringement of attorney free speech.

3. *Bar Admissions*

Although the CPR allows states to establish their own bar admissions procedures, DR 1-101 declares that attorneys may be disciplined for failure to disclose a material fact on their bar exam.[106] Some state procedures arguably infringe free speech rights. In at least twenty-four states and the District of Columbia,[107] the bar requires a candidate statement authorizing the committee on admissions to obtain informa-

his judicial performance, no matter how unreasonable, extreme or erroneous these opinions might be." *Id.* at —, 366 N.E.2d at 1306, 397 N.Y.S.2d at 950.

101. 374 F. Supp. 784 (N.D. Tex. 1974).

102. *Id.* at 788.

103. 508 S.W.2d 429 (Tex. Ct. App. 1974).

104. *Id.* at 432. *See also In re* Johnson, 467 Pa. 552, 359 A.2d 739 (1976); State v. Kirby, 36 S.D. 189, 154 N.W. 284 (1915).

105. ABA CODE, DR 1-102(A)(5).

106. *Id.*, DR 1-101(A) provides: "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar."

107. Arizona, California, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Missouri, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Virginia. Forms were not received from seven states—Alaska, Colorado, Florida, Georgia, Maine, New Jersey, and Utah. The other seventeen states do not ask applicants this question.

tion regarding his moral character and fitness for the practice of law. Fourteen states and the District of Columbia[108] have comprehensive

108. Delaware, District of Columbia, Iowa, Illinois, Indiana, Kentucky, Nevada, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia. The following is a typical form:

AUTHORIZATION AND RELEASE

I, _____ (Name), born at _____ (City) _____ (State) on _____ (Date), having filed an application for admission to the bar of Ohio, consent to have an investigation made as to my moral character, professional reputation and fitness for the practice of law and such information as may be received reported to the admitting authority. I agree to give any further information which may be required in reference to my past record.

I also authorize and request, every person, firm, company, corporation, governmental agency, court, association or institution having control of any documents, records and other information pertaining to me, to furnish to The Supreme Court of Ohio any such information, including documents, records, bar association files regarding charges or complaints filed against me, formal or informal, pending or closed, or any other pertinent data, and to permit The Supreme Court of Ohio or any of its agents or representatives to inspect and make copies of such documents, records, and other information.

I specifically authorize The Supreme Court of Ohio to obtain any information from my official record on file with Local Board Number_____ of the Selective Service System, located in the City of_____, State of_____; and hereby consent to and authorize the release of such information by the Selective Service System.

I hereby request and authorize the Department of the_____ (Army, Navy, Air Force) to furnish to The Supreme Court of Ohio, the record of each period of my service therein, and to furnish the character of service rendered for each period. My serial number was _____.

I hereby release, discharge, and exonerate The Supreme Court of Ohio, its agents and representatives, bar associations and the committees thereof and their agents and representatives, The Board of Commissioners on Character and Fitness and their agents and representatives, and any person so furnishing information from any and all liability of every nature and kind arising out of the furnishing or inspection of such documents, records, and other information or the investigations made by or on behalf of The Supreme Court of Ohio, bar associations and the committees thereof and the Board of Commissioners on Character and Fitness.

I have read the foregoing document and have answered all questions fully and frankly. The answers are complete and true of my own knowledge.

State of _____
ss.
County of _____

_____
Signature of Applicant

Subscribed and sworn to before me
this _____ day of_____A.D., 19___

_____
Notary Public

This copy to be returned to the Office of the Clerk of The Supreme Court for use by the local committees on Admissions to the Bar

release forms, authorizing every "person, firm, company, corporation, governmental agency, court, association or institution"[109] to release information concerning the applicant. In those states, the committee on admissions is "release[d] and exonerate[d] from *any and all liability of every nature and kind*" resulting from investigation of released materials.[110] Some states even specify that an applicant is "not entitled to a copy of the report or to know its contents."[111]

Since many of these forms allow access to every file kept on an applicant, an aspiring attorney may restrict his conduct and speech for years before he applies for bar admission to prevent the presence of any questionable data in his file.[112] Although an applicant "consents" to bar committee access to this information, the consent is hardly voluntary[113] because a person may not be admitted to the bar unless his application is complete[114] and it is incomplete without consent to the form.[115]

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109. The forms generally waive all traditional privileges (e.g. attorney-client, husband-wife, physician-patient, etc.). A few states have a special provision authorizing waiver of the physician-patient privilege. Nevada waives it with regard to treatment in any hospital; Arizona, which does not have one of the comprehensive authorization and release forms, waives it regarding "physical, mental or emotional health."

110. *Id.* This provision means that although the bar committee might rely on erroneous information, the applicant could not bring a cause of action because of the waiver.

111. Delaware, Iowa, Kentucky, Nevada, New Mexico, North Carolina, Rhode Island, South Carolina, Tennessee, Vermont, and West Virginia. Illinois' form specifies that "if there is an adverse determination by a Character and Fitness Committee, the contents of the report will be disclosed to me, otherwise, I will not be entitled to disclosure of such contents and the same will be privileged." Delaware's form provides that "the contents of any such report are privileged . . . however, [the applicant] will not be denied admission to the Delaware bar based on a character investigation unless and until [he receives] a hearing before the Board."

112. The forms require potential attorneys to waive privacy rights such as those granted in the Buckley amendment. They also waive access to official files granted by any state's "Sunshine Acts."

113. Contract principles of unconscionability are a possible basis for challenging these forms. Clearly there is unequal bargaining power between the bar committee and the applicant. The applicant is also deprived of any meaningful choice.

114. *See* note 200 *infra*.

115. Of the ten other states that have authorization forms, three have less comprehensive authorization and release forms. They are Oregon, Michigan, and South Carolina. *See, e.g.*, Oregon:

> I, the undersigned, being first duly sworn, on oath depose and say that I am the applicant named in the foregoing application; that I fully realize that the determination as to whether I am admitted to practice law in Oregon depends on the truth and completeness of my answers; that I will give any further information which may be required concerning my past record; that the answers which I have given are true and complete; that I hereby *authorize* the Supreme Court of the State of Oregon and the Oregon State Bar, or any agent or authorized representative thereof, to make a complete investigation of my character, financial responsibili-

ty and general fitness to practice law in Oregon and of the completeness and truthfulness of my answers, and I hereby release and *exonerate those so authorized*, and any person or organization supplying requested information, from liability of any kind resulting from the investigation or from furnishing information; that I have read the Rules of the Supreme Court of the State of Oregon relating to admission to practice law in Oregon; and that, if admitted, I intend to reside in the State of Oregon on and after the date of my admission to practice law therein.

Oregon's form also includes express authorizations of credit information, driving and motor vehicle license records, and school records. A fourth state, Virginia, limits its exoneration clause to releases "reasonably needed by such official, body or agency in response to his or its inquiry relating to [his/her] moral character and/or fitness to engage in the practice of law."

The Idaho provision exonerates "said colleges and law schools from any and all liability in connection with the contents of said files as might follow from their disclosure." The other six states variously provide for authorization from specified institutions. *See, e.g.*, the South Dakota and Missouri forms:

South Dakota

THE PERSON NAMED AS THE APPLICANT IN THE FOREGOING APPLICATION AND QUESTIONNAIRE SAYS:

I am the applicant for admission to practice referred to; I have carefully read the questions in the foregoing questionnaire and have answered them truthfully, fully and completely, without mental reservation of any kind. I fully understand that failure to make a full disclosure of any fact or information called for may result in the denial of my application.

I hereby authorize educational or other institutions, my references, employers (past and present), business and professional associates (past and present) and all governmental agencies and instrumentalities (local, state, federal or foreign) to release to the Board of Bar Examiners any information, files or records requested by the Board in connection with the processing of this application.

I further authorize the Board of Bar Examiners to release to the organizations, individuals and groups listed above any information furnished by me or received by the Board and material to my application.

I hereby declare under penalty of perjury that the foregoing answers and statements are true and correct.

(Signature of Declarant)

Executed on

(Date)

Missouri

I understand and agree that the Supreme Court of *Missouri*, its appointees and agents of its appointees may use all information contained herein for investigation as to my qualification to register as a law student with the Supreme Court of Missouri and obtain information from *any public or private file or record pertaining to me for such purpose*. I understand that all such information shall be kept confidential and used solely for purposes of determining my fitness to practice law in Missouri or in any other jurisdiction.

California's form recognizes the traditional privileges—i.e. attorney-client, marital, physician-patient, psychotherapist or clergyman. At least sixteen states attempt to limit their inquiry to the questions asked on their forms. Alabama, Arkansas, Connecticut, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New York, North Dakota, Wisconsin, Wyoming.

The potential attorney has an interest in protecting the right to speak out uninhibited by fear of any professionally deleterious effects. The bar, as a self-regulating body, has a legitimate interest in establishing membership criteria. To accommodate these competing interests, states should require narrow, precise consent forms that limit access to relevant information for specified purposes.[116]

4. *Other Provisions Vulnerable to Free Speech Attack*

a. *Criticism of Another Attorney*

Similar considerations of protecting attorney free speech and preserving the fair administration of justice are involved when an attorney criticizes another attorney, yet the court standards in this area suffer from the same problems of imprecision and vagueness. The court in *State Bar v. Semaan*[117] employed the following test for the regulation of such conduct:

> We recognize that such actions, where conducted in a public forum of any nature, would usually be in poor taste, as well as unprofessional, and in extreme situations could even be prejudicial to the administration of justice. However, it cannot be said that isolated incidents . . . raise a fact issue of professional misconduct . . . .[118]

Courts have also recognized that DR 1-102(a)(5)[119] could be used to regulate criticism of fellow attorneys.[120]

b. *Communication with a Party Opponent*

An attorney may not, under DR 7-104, communicate with a party he

116. The petitioners in Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) suggest a possible alternative to such close scrutiny of bar applicants. The Court discusses the petitioners' view:

> [W]hatever the facial validity of the various details of a screening system such as New York's, there inheres in such a system so constant a threat to applicants that Constitutional deprivations will be inevitable. The implication of this argument is that no screening would be constitutionally permissible beyond academic examination and extremely minimal checking for serious, concrete character deficiencies. The principal means of policing the Bar would then be the deterrent and punitive effects of such post-admission sanctions as contempt, disbarment, malpractice suits and criminal prosecutions.

Id. at 167.

117. 508 S.W.2d 429 (Tex. Ct. App. 1974).

118. *Id.* at 433.

119. ABA CODE, DR 1-102(A): "A lawyer shall not: . . . (5) Engage in conduct that is prejudicial to the administration of justice."

120. *See also* Bernstein v. Alameda-Contra Costa Medical Ass'n, 139 Cal.2d 241, 293 P.2d 862 (1956) (doctor disciplined for criticizing another doctor's decision to change from regular labor to a Caesarian section within hearing distance of the patient); Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breach of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95.

"knows to be represented by a lawyer."[121] Although this rule is designed to prevent attorneys from unduly interfering with opposing parties,[122] it may occasionally interfere with attorney free speech rights. An attorney may know that an opposing party is receiving inferior representation, but in the absence of proof of incompetence[123] or consent from the opposing attorney he may not communicate this fact to the party. Additionally, if an attorney proposes a settlement that opposing counsel does not communicate to his client, the attorney may not, under the rule, communicate this information because it may impair his ability to represent his own client with zeal.[124]

c. *The Confidentiality Rule*

Absent specified exceptions, an attorney must preserve his client's secrets and confidences.[125] The rule has not been challenged on first amendment grounds.[126] The profession is apparently convinced that the confidentiality rule facilitates the adversary system's proper operation. Without the rule, clients might refuse to discuss their cases fully[127] or forego counsel entirely.[128] Indeed, if the rule were challenged on constitutional grounds, a court might find the state's interest in ensuring public confidence in the legal profession sufficiently compelling to justify the regulation.

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121. ABA CODE, DR 7-104 Communicating With One of Adverse Interest.

122. *See* United States v. Springer, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972).

123. *See* ABA CODE, DR 6-101(A).

124. *Id.*, Canon 7; *see id.*, DR 7-101.

125. *See id.*, DR 4-101 Preservation of Confidences and Secrets of a Client.

126. In rejecting a free speech challenge to gag rules during a pending trial, Justice Stewart in *In re* Sawyer, 360 U.S. 622 (1959) (Stewart, J., concurring), said: "I doubt that a physician who broadcast [*sic*] the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline." *Id.* at 647.

127. ABA CODE, EC 4-1 provides: "A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed in order for his client to obtain the full advantage of our legal system."

128. The rule "not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance." *Id.* *Cf.* Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965) (patient may sue insurance company for requiring doctor to divulge information in violation of the doctor-patient privilege). There are, however, internal conflicts within the Code which are difficult to reconcile with the confidentiality rule. *See, e.g.*, DR 7-102(A)(2) and DR 1-102(A)(5). (Zealous representation based on confidential information may be prejudicial to the administration of justice.)

III. RIGHT TO KNOW

A. *Right to Know in General*

Courts recently have recognized that the first amendment guarantees a "right to know"—a right to receive information communicated by another.[129] The right assumes that society will benefit from informed and reliable decisionmaking[130] and that "people will perceive their own best interest if only they are well enough informed."[131]

Although it is not as fully accepted as free speech, the Supreme Court has continued to expand the right to know by striking down restrictions

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129. Emerson sees the concept as embodying two notions: 1) the "right to read, to listen, to see and to otherwise receive communications" and 2) the "right to obtain information as a basis for transmitting ideas or facts to others." Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2. For a general discussion of the theory, see Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975) [hereinafter cited as *Right to Receive*]; Comment, *Freedom to Hear: A Political Justification for the First Amendment*, 46 WASH. L. REV. 311 (1971).

For cases that have recognized the right to know, *see, e.g.*, Procunier v. Martinez, 416 U.S. 396, 408-09 (1973) (right to receive mail from prisoners); Kleindienst v. Mandel, 408 U.S. 753, 762, 765 (1972) (recognized public's right to know as part of first amendment, but right defeated by federal government's right to regulate admission of aliens into country); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971) (right to peaceful distribution of informational literature is protected); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (fairness doctrine protects right of viewers to obtain information); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (person can read or see obscene material in his possession at home); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("State may not . . . contract the spectrum of available knowledge"); Lamont v. Postmaster General, 381 U.S. 301 (1965) (addressee can receive "communist political propaganda" from abroad); Martin v. City of Struthers, 319 U.S. 141 (1943) (right to receive religious information); Hiett v. United States, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (addressee can receive foreign divorce information in the mails).

The Court has also recognized a conflicting right to be left alone. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) ("captive" audience has right not to be exposed to political advertisements on city's rapid transit vehicles); Rowan v. Post Office Dep't, 397 U.S. 728 (1970) (right not to receive unwanted mail); Breard v. Alexandria, 341 U.S. 622 (1951) (door to door solicitation for commerical purposes prohibited); Kovacs v. Cooper, 336 U.S. 77 (1949) (statute prohibiting street use of sound trucks emitting loud and raucous noises upheld); Packer Corp. v. Utah, 285 U.S. 105 (1932) (state statute prohibiting tobacco advertisements in public places upheld); Close v. Lederle, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970) (right not to view paintings). *See also* Note, *The Constitutional Status of Commerical Expression*, 3 HASTINGS CONST. L.Q. 761, 772-75 (1976).

130. The right to receive fits within the theories of self government and a responsive electorate espoused by the framers. *See generally Right to Receive, supra* note 129, at 777.

131. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

on commercial speech.[132] When consumers have been granted the right to know in cases involving legal affairs,[133] attorneys' first amendment protections have been enlarged by the implicit grant of power to convey information to consumers.

In analyzing a restriction on the right to know, the Supreme Court balances the first amendment interest against the governmental interest in the restriction. It has become increasingly difficult to justify an infringement of this first amendment right. Thus, although the Court in *Bigelow v. Virginia*[134] thought a "reasonable regulation that serves a legitimate public interest"[135] was sufficient to defeat the recipient's right to know, it required a stronger state interest when presented with a prohibition on pharmaceutical price advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[136] In *Linmark*

132. *See* Bates v. State Bar, 97 S. Ct. 2691 (1977) (advertising legal services); Carey v. Population Servs. Int'l., 431 U.S. 678 (1977) (distribution of nonprescription contraceptives); Linmark Assocs. v. Township of Willingsboro, 431 U.S. 85 (1977) (for-sale signs); Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc., 425 U.S. 748 (1976) (prescription drug advertising). For lower court cases expanding the right to know doctrine in the commerical context, *see, e.g.*, Consumers Union of United States, Inc. v. ABA, 427 F. Supp. 506 (E.D. Va. 1976), *vacated & remanded in light of Bates sub nom.* Virginia State Bar v. Consumers Union of United States, Inc., 97 S. Ct. 2993 (1977) (consumers have right to gather, publish, and receive non-fee information about practicing lawyers); Health Sys. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976) (public has right to gather, publish, and receive factual information about practicing physicians); Terminal-Hudson Elecs., Inc. v. Department of Consumer Affairs, 407 F. Supp. 1075 (C.D. Cal. 1976), *vacated for further consideration in light of Virginia Pharmacy*, 426 U.S. 916 (1976) (state law prohibiting opticians and optometrists from advertising prices for eyeglass frames restricts consumers right to receive information); Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 426 U.S. 913 (1976) (statute prohibiting prescription drug advertising violates first amendment); *Right to Receive*, *supra* note 129, at 789-94 & nn.94-118. *See generally* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Note, *supra* note 129; Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U. CHI. L. REV. 205 (1976).

133. *See, e.g.*, Bates v. State Bar, 97 S. Ct. 2691 (1977); Consumers Union of United States, Inc. v. ABA, 427 F. Supp. 506 (E.D. Va. 1976), *vacated & remanded in light of Bates sub nom.* Virginia State Bar v. Consumers Union of United States, Inc., 97 S. Ct. 2993 (1977); Jacoby v. State Bar, — Cal. 3d —, 562 P.2d 1236, 138 Cal. Rptr. 77 (1977).

134. 421 U.S. 809 (1975).

135. *Id.* at 826.

136. 425 U.S. 748 (1976). The Court upheld first amendment interests of consumers in obtaining price information against the state interest in maintaining a high degree of professionalism among licensed pharmacists. The Court held the state's interest could not be achieved "by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering." *Id.* at 770.

Associates v. Township of Willingboro[137] and *Bates v. State Bar*,[138] the Court this Term further expanded the consumer's right to obtain information; under *Linmark*, only an emergency can justify repression of the first amendment interest.[139]

B. *Areas of Conflict Between the Right to Know and the CPR*

1. *Advertising*

Several rules in the CPR limit an attorney's right to advertise[140] and thereby infringe the public's right to receive adequate information about the availability of legal services. The justification for the prohibition on attorney advertising in newspapers, magazines, telephone directories, on radio, and television[141] was that such action would not only stir up litigation, but also encourage overreaching, underrepresentation, and misrepresentation.[142] This, in turn, would reduce an attorney's self-image and status, making compliance with the ethical requirements of the profession increasingly difficult.[143]

Courts have traditionally upheld regulations prohibiting advertising[144]

137. 431 U.S. 85 (1977). The Court noted that the choice between the danger of suppressing information and the danger arising from its free flow was precisely the choice that the first amendment makes for us. *Id.* at 97 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976)).

138. 97 S.Ct. 2691 (1977). The Court emphasized that "we view as dubious any justification that is based on the benefits of public ignorance." *Id.* at 2704. The importance of consumer information for intelligent decisionmaking was also emphasized at 2699, 2703.

139. Linmark Assocs. v. Township of Willingboro, 431 U.S. 85, 97 (1977).

140. The original 1969 ABA Code rule on advertising is contained in DR 2-101 Publicity in General and DR 1-102 Professional Notices, Letterheads, Offices, and Law Lists. For the earlier rule regarding advertising *see* ABA CANONS OF PROFESSIONAL ETHICS No. 27 (1908) Advertising, Direct or Indirect.

141. ABA CODE, DR 2-101.

142. *See* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1184 (1972). *See also The Effect of Legal Fees on the Adequacy of Representation: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 144 (1973) [hereinafter cited as *Hearings*].

143. Note, *supra* note 142, at 1184. *See also* Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. C.R.-C.L. L. REV. 301, 334 (1970).

144. *See* Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Barsky v. Board of Regents, 347 U.S. 442 (1954); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935); Barkin v. Board of Optometry, 269 Cal. App. 2d 714, 75 Cal. Rptr. 337 (1969); Winberry v. Hallihan, 361 Ill. 121, 197 N.E. 552 (1935); State v. Rones, 223 La. 839, 67 So.2d 99 (1953); Davis v. State, 183 Md. 385, 37 A.2d 880 (1944); *In re* Cohen, 261 Mass. 484, 159 N.E. 495 (1928); Abelson's Inc. v. New Jersey State Bd. of Optometrists, 5 N.J. 412, 75 A.2d 867 (1950); Levine v. State Bd. of Registration & Examination in Dentistry, 121 N.J. L. 193, 1

against attacks based on the due process and equal protection clauses.[145] Concluding that no fundamental interest was involved, courts have applied a mere rationality test, inquiring whether "any state of facts reasonably may be conceived to justify" the challenged legislation.[146] Regulation of the legal profession's right to disseminate information has consistently been upheld as a valid exercise of the state's police power,[147] necessary to maintain the profession's integrity[148] and the distinction between the profession of law and a trade.[149]

In response to antitrust attacks on the advertising rule,[150] the American Bar Association (ABA), in its February 1976 meeting, revised its rule: attorneys could list themselves in a "reputable law list, legal directory, a directory published by a . . . bar association or the classified section of telephone company directories."[151]

The prohibition on attorney advertising, however, infringed the public's right to know in several ways. It prevented people from being informed so that they could recognize legal problems. Even if an individual were aware of a problem, the advertising ban would prevent him from intelligently choosing a lawyer who could meet his needs.[152] Nevertheless, a right to know challenge of the advertising ban became possible only after the Supreme Court struck down a similar ban on pharmacists, emphasizing the serious constitutional infirmity of rules inhibiting communication.[153]

A.2d 876 (1938); Ullom v. Boehm, 392 Pa. 643, 142 A.2d 19 (1958); Modern Sys. Dentists, Inc. v. State Bd. of Dental Examiners, 216 Wis. 190, 256 N.W. 922 (1934).

145. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935).

146. McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See* note 144 *supra*.

147. *See, e.g.*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); State v. Rones, 223 La. 839, 67 So. 2d 99 (1953); Davis v. State, 183 Md. 385, 37 A.2d 880 (1944); Levine v. State Bd. of Registration & Examination in Dentistry, 121 N.J. L. 193, 1 A.2d 876 (1938).

148. *See, e.g.*, Mayer v. State Bar, 2 Cal. 2d 71, 74, 39 P.2d 206, 208 (1934).

149. *See, e.g.*, *In re* Cohen, 261 Mass. 484, 488, 159 N.E. 495, 497 (1928). *But see* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

150. *See, e.g.*, *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A.J. 979 (1976).

151. ABA CODE, DR 2-102(A)(6) (Feb. 1976 amendments).

152. *Hearings, supra* note 142, at 144 (statement of John M. Ferren); Morrison, *Institute on Advertising Within the Legal Profession*, 29 OKLA. L. REV. 609, 610 (1976). *See* Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust*, 1968 WIS. L. REV. 1237, 1255. *See also* ABA CODE, EC 2-1, 2-2, 8-3 which encourage attorneys to educate the public regarding their legal rights.

153. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). For other cases striking down prohibitions on drug prices, see Florida Bd.

The Supreme Court confronted the issue of attorney advertising last Term in *Bates v. State Bar*.[154] In violation of ethical restrictions,[155] plaintiffs advertised their legal clinic in a newspaper and listed a variety of legal services for "'very reasonable fees'"—i.e., uncontested divorces, uncontested adoptions, simple personal bankruptcies, and name changes.[156] The Court invalidated the bar rule, stating:

> The constitutional issue in this case is only whether the state may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.[157]

Emphasizing the importance of consumer information for informed decisionmaking, the Court rejected the traditional rationales for the attorney advertising ban.[158] It did not consider regulation of the quality of legal

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of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971).

154. 97 S.Ct. 2691 (1977).

155. 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 the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

ARIZ. SUP. CT. R. 29(a), DR 2-101(B).

156. The advertisement is reproduced in the Court's opinion, *see* 97 S.Ct. at 2710.

157. *Id.* at 2709 (1977).

158. The Court discussed each of the traditional rationales for the rule and found them inapplicable.

1) The Adverse Effect on Professionalism—The traditional argument was that an attorney's sense of dignity and self-worth would be undermined by advertising. The Court refuted this argument by noting that "[i]f the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office." *Id.* at 2701. The Court also stated that habit and tradition are insufficient to sustain a constitutional challenge and rejected the characterization of lawyers as "above" trade.

2) The Inherently Misleading Nature of Attorney Advertising—The Court countered this argument by limiting its holding to routine legal services. The Court rejected the argument's assumption that the public is not intelligent enough to understand the limits of advertising.

3) The Adverse Effect on Administration of Justice—In refuting this argument, the Court referred to the bar's obligation to aid consumers in intelligently selecting attorneys.

4) The Undesirable Economic Effects of Advertising—The Court found that the possibilities of increased overhead and entry barriers to younger attorneys neither distinguished lawyers from others or had any relevance to a first amendment inquiry. The Court

services[159] or in-person client solicitation,[160] however, and acknowledged the possibility of reasonable time, place, and manner restrictions on advertising.[161] It specifically excluded false, deceptive, and misleading advertisements from first amendment protection.[162]

The *Bates* decision resulted from the development of the right to know doctrine.[163] In the past, equal protection and free speech attacks on the advertising ban had focused on the professional rather than the consumer.[164] The equal protection challenge was easily overcome by the states' claim that the advertising restriction was a valid exercise of state police power and the free speech attack was summarily dismissed.[165] By focusing on the public's right to know and receive information, the Court succeeded in rejecting the advertising ban while implicitly granting attorneys' free speech rights. The Court, however, was able to avoid discussion of the difficult issue of free speech rights and the traditional distinction drawn between attorneys and laymen.

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also noted that prices are often lower when a competitive marketplace is allowed to operate.

5) Adverse Effect of Advertising on the Quality of Service—The Court found an advertising ban does not deter poor quality work, arguing that an attorney who wishes to do such work will do so regardless of the status of the rule on advertising

6) Difficulties of Enforcement—The Court noted that "It is at least somewhat incongrous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort."
Id. at 2707.

159. *Id.* at 2700, 2709.

160. *Id.* at 2700.

161. *Id.* at 2709.

162. *Id.* at 2708.

163. Other courts have also struck down legal advertising bans on the basis of the right to know doctrine. In Consumers Union of United States, Inc. v. ABA, 427 F. Supp. 506 (E.D. Va. 1976), *vacated & remanded in light of Bates sub nom.* Virginia State Bar Ass'n v. Consumers Union of United States, Inc., 97 S.Ct 2993 (1977), the rights of consumers to receive and gather information for a directory of attorneys was found to be protected activity under the first amendment. The attorney's right to submit information to such a directory was implicitly given protection. The Court found the ethical ban overly broad and declared it unconstitutional.

In Jacoby v. State Bar,—Cal. 3d—, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977), two attorneys cooperated with reporters who published news articles and broadcasts about their legal clinic. The California Supreme Court found that the state bar must be furthering a compelling state interest before it may suppress society's right to hear those views. *Id.* at—, 562 P.2d at 1338, 138 Cal. Rptr. at 89. No such interest was found by the Court.

164. *See* notes 144-48 *supra* and accompanying text.

165. First amendment issues were sometimes raised but never fully considered by courts. *See, e.g.*, Head v. New Mexico Bd. of Examiners in Optometry, 374 U.S. 424 (1963); Barkin v. Board of Optometry, 269 Cal. App. 2d 714, 75 Cal. Rptr. 337 (1969); *In re* Cohen, 261 Mass. 484, 159 N.E. 495 (1928); Ullom v. Boehm, 392 Pa. 643, 142 A.2d 19 (1958).

a. *The Effect of* Bates *on Attorney Advertising*

Following *Bates*, the ABA, at its annual August meeting, developed two proposals for regulating attorney advertising which were distributed to state bar associations. The ABA itself adopted a regulatory approach to attorney advertising, modeled after those of the Food and Drug Administration and the Securities and Exchange Commission.[166] This proposal specifically outlines the permissible scope of an advertisement.[167] It seeks to "channel commercial announcements but would rely on 'after the fact' enforcement"[168] for violations of the rule. The second proposal is "directive;"[169] rather than specify the content of advertisements, it permits publication of all information that is not "false, fraudulent, misleading or deceptive."[170] Although both proposals suggest

166. 46 U.S.L.W. 2 (Statutes Aug. 23, 1977).

167. ABA CODE, DR 2-101 (Aug. 1977 amendment, Proposal A), 46 U.S.L.W. 5 (Statutes Aug. 23, 1977) (adopted by the House of Delegates at the 1977 ABA Convention). A lawyer is permitted to list name, address, telephone number, any legal specialties, age, public positions held, date and place of admission to the bars of state and federal courts, educational background and honors, publications, military service, legal teaching positions, associational memberships, foreign language ability, bank references, and names of clients (with their consent). Information concerning fees for an initial consultation, hourly rates, and the range of fees for specific services are permitted subject to the general prohibition against fraudulent and misleading information. *Id.* at DR 2-101(B). An attorney may not advertise additional information unless granted permission by state bar officials. *Id.* at DR-2-101(C).

168. 46 U.S.L.W. 2 (Statutes Aug. 23, 1977).

169. *Id.*

170. ABA CODE, DR 2-101 Publicity and Advertising (Aug. 1977 amendment, Proposal B), 46 U.S.L.W. 10-11 (Statutes Aug. 23, 1977). It sets forth the elements of fraud in great detail:

> DR-2-101 Publicity and Advertising.
>
> (A) A lawyer shall not on behalf of himself, his partner, or associate, or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, or deceptive statement or claim.
>
> (B) Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
>
> (1) Contains a material misrepresentation of fact;
>
> (2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;
>
> (3) Is intended or is likely to create an unjustified expectation;
>
> (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;
>
> (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
>
> (6) Relates to legal fees other than:
>
> (a) A statement of the fee for an initial consultation;
>
> (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

consumer education programs,[171] neither allows in-person solicitation.[172] In addition, both prohibit television advertisements unless a state bar association finds them necessary "to provide adequate information to consumers of legal services."[173]

Following *Bates*, lower courts have considered and carefully limited the scope of the right to know. In *Talsky v. Department of Registration & Education*,[174] the Illinois Supreme Court upheld an advertising restriction that prevented a chiropractor from advertising "free chicken

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(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;
(e) The availability of credit arrangements; and
(f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive;
or
(7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

171. *Id.*, EC 2-2 (Aug. 1977 amendment, Proposals A & B), 46 U.S.L.W. 3, 9 (Statutes Aug. 23, 1977).

172. *Id.*, DR 2-104(A) (Aug. 1977 amendment, Proposal A), 46 U.S.L.W. 7 (Statutes Aug. 23, 1977); *id.*, DR 2-103(A) (Aug. 1977 amendment, Proposal B), 46 U.S.L.W. 11 (Statutes Aug. 23, 1977).

173. 46 U.S.L.W. 2 (Statutes Aug. 23, 1977). Some state supreme courts have taken an even more restrictive view of the requirements of *Bates*. In Missouri, rules unanimously approved by the state supreme court would ban radio advertisements, "information on military service, legal publications, teaching positions and memberships in legal associations." *State Supreme Court Approves Stiffer Rules on Lawyers' Ads Than Bar Suggested*, St. Louis Post-Dispatch, Oct. 19, 1977, at 3A. The Maine Bar Association also prohibits radio and television advertising under the rationale that it is "harder to monitor . . . for compliance." *Legal Huckstering: Lawyers' Advertising Expected to Pick Up as State Sets Rules*, Wall Street J., Sept. 9, 1977, at 1, 23.

There is still a large philosophical split within the profession on the utility of advertising. *Compare* Morrison, *Institute on Advertising Within the Legal Profession—Pro*, 29 OKLA. L. REV. 609 (1976) (in support of lawyer advertising), *with* Jeffers, *Institute on Advertising Within the Legal Profession—Con*, 29 OKLA. L. REV. 620 (1976) (opposed to lawyer advertising). Many fear a fee war that could force lowering of rates. *See Legal Huckstering: Lawyers' Advertising Expected to Pick Up as State Sets Rules*, *supra* at 1. Although some attorneys are waiting for their states to enact new guidelines before placing their ads, others, particularly new members of the profession seeking increased business, have already begun advertising. Of these attorneys, some report negative reactions from their peers.

174. —Ill. 2d —, 370 N.E.2d 173 (1977).

and refreshments," and "free spinal X-rays" in newspapers and on city traffic-light poles.[175] The court concluded that this was not an advertisement of routine services nor did it provide information helpful to the public in making an informed decision regarding the use of professional services.

b. Bates *and the Ban Against Solicitation*

Although *Bates* clearly held that the public has a right to receive information in the form of advertisements about legal services, it did not consider whether that right extends to invalidate the CPR rules that prohibit solicitation. Whereas an attorney informs the public through advertising that he is competent to deal with certain problems, he actively encourages specific people with particular problems to come to him through solicitation. Confronted with the solicitation problem, courts have interpreted the scope of permissible attorney advertising broadly and have narrowly limited the no-solicitation ban.[176]

The ABA proposals on advertising also suggest changes in the solicitation rules. Whereas the regulatory approach would make only minor changes in the language of DR 2-103,[177] the directive proposal substantially changes both DR 2-103 and 104. Under the proposed rules, an attorney cannot accept employment resulting from false information or "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct."[178] The constitutional status of the solicitation rule

175. The chiropractor's advertisements assure the reader that "health is in reach through chiropractic." It further states: "Chiropractic eliminates the need for drugs which treat symptoms by eliminating the true cause of most chronic health problems—displacement of spinal vertebrae." Some advertisements offer free chicken and refreshments and free spinal x-rays in connection with the chiropractor's "open house" and picture a man on his knees praying and asking, "Why didn't someone tell me about chiropractic care sooner?"
46 U.S.L.W. 2219 (Nov. 1, 1977).

176. The California Supreme Court in Jacoby v. State Bar, — Cal. 3d —, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977), held information communicated was "not 'primarily directed' toward solicitation unless, viewed in its entirety, it serves no discernible purpose other than the attraction of clients." *Id.* at —, 562 P.2d at 1334, 138 Cal. Rptr. at 85.

The Illinois Supreme Court similarly decided that a "tip sheet" giving legal advice and asking clients to advise the attorneys of any changes of address was not improper solicitation through advertising. *In re* Masden, — Ill. 2d —, 370 N.E. 2d 199 (1977).

177. ABA CODE, DR 2-104 (Aug. 1977 amendment, Proposal A), 46 U.S.L.W. 7 (Statutes Aug. 23, 1977).

178. *Id.*, DR 2-104(A)(2) (Aug. 1977 amendment, Proposal B), 46 U.S.L.W. 12 (Statutes Aug. 23, 1977).

awaits a definitive Supreme Court ruling scheduled this Term.[179]

2. *The Right to Know's Effect on Gag Rules*

Gag orders that limit attorney speech during litigation[180] infringe the public's right to know when its interest in the information is greatest. Attorneys most familiar with the particular case before the court are prohibited from communicating their information to the public.

The theory of *Bates*[181] and *Nebraska Press Association v. Stuart*[182] requires recognition of the right to know in gag rules. In *Nebraska Press*, the Court invalidated judicial restrictions on the press during trial on the basis of the public's right to know. Justice Brennan emphasized that "secrecy of judicial action can only breed ignorance and distrust of courts and judges."[183] The increased exposure of the criminal justice system through active debate, criticism, and reporting can improve the quality of the system, as well as educate the public concerning its operation.[184] Because the public's need for information from interested attorneys is at least as great as from the press, the rationale of *Nebraska Press* should apply to attorneys as well.

The Seventh Circuit in *Chicago Council of Lawyers v. Bauer*[185] acknowledged the importance of the public's right to be informed.[186] The court found gag rules in civil litigation particularly offensive because such cases frequently continued for several years and concerned important social issues.[187] Since nonlawyers may adequately comment on the government side, lawyers may be the "only articulate voice for [the other] side of the case."[188] The court concluded that it "should be

179. Ohio State Bar Ass'n v. Ohralik, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976), *prob. juris. noted*, 98 S.Ct. 49 (1977) (No. 76-1650); *In re* Smith, — S.C. —, 233 S.E.2d 301 (1977), *prob. juris. noted*, 98 S.Ct. 49 (1977) (No. 77-56).

180. ABA CODE, DR 7-107(A)-(H). *See* notes 51-82 *supra* and accompanying text.

181. Bates v. State Bar, 97 S. Ct. 2691 (1977).

182. 427 U.S. 539 (1976).

183. *Id.* at 587 (Brennan, Stewart, Marshall, J.J., concurring). *See also* King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970), *rev'd on other grounds*, 450 F.2d 478 (6th Cir. 1971), *vacated & remanded with instructions to dismiss as moot*, 405 U.S. 911 (1972) (injunction restraining grand jury witnesses from speaking out about comments of special grand jury prevented debate in public forum of social, political, and moral questions raised by the grand jury report).

184. 427 U.S. at 587.

185. 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

186. *Id.* at 250. *See* Note, *supra* note 41.

187. 522 F.2d at 258. The District of Columbia Circuit has adopted a less restrictive rule for civil litigation. For a discussion disputing the view that a looser standard should apply for civil trials, see 29 STAN. L. REV. 1607 (1977).

188. 522 F.2d at 258. *See also* Bridges v. California, 314 U.S. 252 (1941).

extremely skeptical about any rule that silences that voice."[189]

IV. FREEDOM OF ASSOCIATION

A. *Freedom of Association in General*

Although the constitution nowhere explicitly recognized the freedom of association, its protection is implied in the whole constitutional framework.[190] The Supreme Court only recently acknowledged the doctrine by upholding the right to associate for the advancement of political ideas in *NAACP v. Alabama ex rel. Patterson*.[191] Courts now generally regard this nebulous right as entitled to first amendment protection.[192] An individual's associational rights are infringed when the government inhibits his ability to join together by requiring membership disclosure,[193] compelling association,[194] regulating the organization,[195] or penalizing an individual because of his associations.[196] To resolve these issues, courts balance the virtue of the organization, the legality of its activities and goals, and the type and scope of restriction imposed.[197]

B. *Areas of Conflict Between Freedom of Association and the CPR*

1. *Bar Admissions*

Applicants for bar admission are frequently required to answer questions concerning political affiliations and beliefs.[198] Although an-

189. 522 F.2d at 258.

190. For a discussion of the theory, see Emerson, *Freedom of Association and Freedom of Expression*, 74 YALE L.J. 1 (1964); Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977); 1970 DUKE L.J. 1181.

191. 357 U.S. 449 (1958). The right of freedom of association is generally protected only in the context of traditional first amendment rights, although courts and commentators have sometimes encouraged its recognition as an independent right.

192. *See* Buckley v. Valeo, 424 U.S. 1 (1976); Healy v. James, 408 U.S. 169 (1972); United Transp. Union v. State Bar, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. City of Little Rock, 361 U.S. 516 (1960). *But see* Lathrop v. Donohue, 367 U.S. 820 (1961).

193. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); *See In re* Stolar, 401 U.S. 23 (1971); Shelton v. Tucker, 364 U.S. 479 (1960).

194. *See* Lathrop v. Donohue, 367 U.S. 820 (1961).

195. United Transp. Union v. State Bar, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

196. Healy v. James, 408 U.S. 169 (1972); Baird v. Arizona, 401 U.S. 1 (1971).

197. 1970 DUKE L.J. 1181, 1200.

198. The only Code provision that deals with bar admissions is DR 1-101(A): "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar."

swers to such questions may indicate good moral character with which a state may legitimately be concerned, it is an impermissible infringement on an applicant's freedom of association to accept or reject him on the basis of his response. Courts have provided inconsistent protection for this right in the bar admissions context, reflecting the general uncertainty about the scope of associational freedom. Early cases held a state that denied an individual admission to the bar because of his affiliation with the Communist Party or refusal to answer questions about political associations violated due process.[199] Later, however, courts have held that bar admission could be denied if an applicant refused to answer questions respecting Communist Party affiliation because such political activity was not protected by the first amendment.[200] More recently, the Supreme Court, in *Law Student Civil Rights Research Council v. Wadmond*,[201] upheld the constitutionality of bar admissions' questions concerning knowing membership in the Communist Party, specific intent to further aims of the organization, and a loyalty oath. Nevertheless, in *Baird v. Arizona*[202] the Court held that a state could not deny an individual admission to the bar merely because he was a member of an organization.[203]

Twelve states presently require applicants to sign a loyalty oath[204] and at least five use the form approved in *LSCRRC*.[205] Fifteen states inquire about membership in organizations that seek to overthrow the government by illegal or unconstitutional methods;[206] four of those question an

199. Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 234 (1957).

200. *In re* Anastaplo, 366 U.S. 82 (1961); Konigsberg v. State Bar (No. 2), 366 U.S. 36 (1961).

201. 401 U.S. 154 (1971).

202. 401 U.S. 1 (1971).

203. On the same day the court decided Baird v. Arizona and Law Students Civil Rights Research Council, Inc. v. Wadmond, it decided *In re* Stolar, 401 U.S. 23 (1971). The Court held that an applicant may not be required to disclose all memberships in organizations. In defiance of the Supreme Court ruling, Tennessee asks its applicants the following questions: "List below all fraternal, social, professional, civic, political, etc., clubs, associations, societies, or other organizations of which you are, or have at one time been, a member."

204. Alabama, Delaware, Idaho, Illinois, Kansas, Michigan, Mississippi, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming.

205. Alabama, Illinois, Kansas, Michigan, and Wyoming.

206. Alabama, Arkansas, California, Indiana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin. Whether these provisions can stand is dependent on how the states construe the language.

individual's specific intent to further the organization's aims.[207] Two states ask only about Communist Party affiliations.[208] Although the states' interest in asking these questions is to ensure that members of the legal profession will obey the law, less restrictive methods can achieve the same result.[209] If a state denies an individual admission to the bar merely because of his membership in certain organizations, it is acting unconstitutionally under *Baird v. Arizona*.[210]

2. *Prepaid Legal Services*

Prepaid legal service plans employ risk sharing and risk spreading principles to maintain low-priced services.[211] There are two plans: in an open panel plan, the client selects an attorney and is required to pay the attorney's usual fees;[212] in a closed plan, on the other hand, the consumer is provided services by designated attorneys at controlled prices.[213]

Bar associations have traditionally imposed ethical restrictions on these plans, claiming that they conflict with prohibitions against advertising and solicitation; allow third party control over the attorney-client relationship; aid the unauthorized practice of law; and stir up litigation.[214] The CPR currently allows attorneys to participate in prepaid legal

207. Oklahoma, South Carolina, Tennessee, and Texas.

208. Idaho and Nevada.

209. This is most persuasively illustrated by the fact that 19 states and the District of Columbia choose not to ask such questions: Arizona, Connecticut, Washington, D.C., Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

210. 401 U.S. 1 (1971). Other frequent questions not addressed by *Baird*, but which may abridge associational rights, concern commitments to mental institutions and treatment for narcotics and alcohol.

211. Note, *The Organized Bar and Prepaid Legal Services—An Antitrust Analysis*, 1975 WASH. U.L.Q. 1011, 1012.

212. The open panel plan, similar to prepaid medical insurance plans (e.g., Blue Cross), accepts members' contributions to the plan. For a study of one open panel plan, see Clifton, *The Shreveport Plan for Providing Legal Services*, 3 YALE REV. L. & SOC. ACT. 290 (1973). In that plan, all members contributed to the union and were offered a broad schedule of benefits with a liberal maximum annual benefit plus a small deductible amount.

213. The closed-panel plan pre-selects the lawyer for the member by referring him to a particular lawyer or, at most, giving him a short list to choose from. The organizing group, presumably having screened and approved the lawyer in advance, takes the worry and guesswork out of the selection process and provides the member with grounds for putting his faith in the chosen attorney.

Id. at 298. Clifton contrasts the closed panel to the "free choice" given in the open panel plan, which tends to "produce discouragement, confusion, and unsuccessful contacts." *Id.*

214. In the original formulation of the CPR, the bar opposed all prepaid plans. When

services if the plan is nonprofit (unless it is an open panel plan),[215] attorneys do not use the organization to solicit clients for private practice,[216] and clients have an opportunity to select their own attorneys.[217]

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court decisions guaranteed organizations the fundamental right to provide legal service plans for members, the ABA placed ethical restrictions on attorney participation in the plans. *See* Note, *supra* note 211, at 1015. In a series of amendments in 1974, the ABA adopted rules that approved some types of prepaid legal services. The rules clearly favored open panel plans, which are more lucrative for attorneys but more expensive for the consumer. Attorneys could participate in plans sponsored by bar associations, ABA CODE, DR 2-103(D)(1)(d), or in open panel plans sponsored by "an insurance company or other organization," DR 2-100(D)(1-4). Open panel plans could be operated for a profit and by an organization formed solely to provide legal services. DR 2-103(D)(5)(b). However, closed panel plans could not be organized for profit or primarily to render legal services. DR 2-103(D)(5)(a)(i). Under DR 2-104 solicitation was permitted for open panel but not closed panel plans. An opt out provision specifying that the member may choose any attorney to do his work was incorporated, defeating the ability of closed panel plans to control costs by setting ceilings on fees. These ABA rules were described as "so confusing, so filled with double negatives and multiple provisos and so broad in scope that there are real dangers of bar discipline for a lawyer who enters the group legal services area." Morrison, *Bar Ethics: Barrier to the Consumer*, TRIAL MAGAZINE 14 (March-April 1975).

The Justice Department thought the 1974 Houston amendments violated antitrust laws. Note, *supra* note 211, at 1020. Under pressure to reconsider the rules, the ABA drafted new amendments in 1975, which are currently in force.

215. ABA CODE, DR 2-103(D) provides:

> (D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exericise of independent professional judgment in behalf of his client:
>
> . . . .
>
> (4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries[78] provided the following conditions are satisfied:
>
> (a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

216. *Id.*, DR 2-103(D)(4)(b) & (c) provide:

> (b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.
>
> (c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

217. *Id.*, DR 2-103(D)(4)(e) provides:

> (e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or

This rule, which favors the open panel system, infringes an attorney's ability to associate freely. The closed panel system, with a limited number of staff attorneys, is most economical. When ethical rules require the plan to offer the option of nonstaff attorneys, however, costs increase, and the formation of these associations is discouraged.

The Supreme Court has recognized the right to associate for delivery of legal services in a series of cases that involved attempts by laymen groups to assist their members in vindicating their legal rights.[218] In *United Transportation Union v. State Bar*,[219] the Court held that laymen had a right to assert their legal claims as "effectively and as economically" as practicable; the right could be abridged only by a compelling state interest.[220] By recognizing that members have a right to engage in collective activity to obtain meaningful access to the courts,[221] the Court implicitly granted the right to attorneys who affiliate with these groups. However, the Court should explicitly extend the associational right to attorneys—and permit attorney-created groups the same opportunity to vindicate the rights of consumers "efficiently and effectively."

3. *The Rule Prohibiting Partnership with a Nonlawyer*

DR 3-103 prohibits an attorney from forming a partnership with a nonlawyer "if any of the activities of the partnership consist of the practice of law."[222] Yet, such a partnership in certain types of practice

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> beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

This proviso may require that members of a closed panel plan always have the right to seek outside counsel. A narrower reading would permit the plan to allow outside counsel only when the organization cannot provide contracted-for services. *See* Note, *supra* note 211, at 1021. Under Morgan's interpretation, the opt out provision allows outside counsel if there is improper or unethical representation. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 724 (1977).

218. United Transp. Union v. State Bar, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963).

219. 401 U.S. 576 (1971).

220. *Id.* at 580.

221. *Id.* at 585. In NAACP v. Button, 371 U.S. 415 (1963), the Court recognized that organizations have a fundamental right, protected by the first amendment freedom of speech, assembly, and petition, to provide legal services plans for members.

222. ABA CODE, DR 3-103.

might increase efficiency, reduce costs, and improve representation.[223] The rule has not been challenged on first amendment grounds.[224]

States and the CPR maintain that this associational prohibition serves several important interests. Lawyers, sworn to uphold certain ethical standards, are held to a different standard than laymen. A client dealing with a lawyer is assured that certain ethical conduct will be honored:[225] the attorney-client privilege, exercising independent judgment,[226] the no-solicitation rule, and acting in cases of divided loyalty. Partnerships in which profits are shared with non lawyers also would encourage the practice of law by laymen.[227]

Under a balancing analysis, this infringement on first amendment rights should be struck down. Although the rule purports to prevent incompetent legal services, it actually prohibits associations that could improve services. The goal of competent and zealous representation is best served by providing clients with the highest quality legal services available; in certain cases, this may only be possible with the assistance of a nonlawyer. Nonlawyers in a partnership would be bound by the attorney-client privilege under an agency theory. If it is determined that attorneys are unable to use their own independent judgment or operate within the scope of the CPR, the partnership could then be dissolved.

V. RULE AGAINST SOLICITATION INFRINGES FREE SPEECH, RIGHT TO KNOW, AND FREEDOM OF ASSOCIATION

States have traditionally prohibited attorneys from soliciting clients.[228]

223. For example, a lawyer specializing in family law might prefer a partnership with a social worker to provide the best client representation. An antitrust litigator might enhance the quality of his service by entering into a partnership with an economist. Similarly, a tax lawyer might want to enter into partnership with an accountant.

224. Previous cases have upheld various restrictions on professional partnerships. *See* Crawford v. State Bar, 54 Cal. 2d 659, 355 P.2d 490, 7 Cal. Rptr. 746 (1956) (sharing profits with nonlawyers encourages solicitation and practice of law by laymen—and lessens attorney's independence); State v. Willson, 20 Wis. 2d 519, 123 N.W.2d 452 (1963) (cannot share office facilities, clerical help, and other items and expenses except with another lawyer); *cf.* Rockmore v. Fein, 198 Misc. 2d 1060, 99 N.Y.S.2d 409 (Sup. Ct. 1950) (doctors may not be employees of laymen—doctors held to higher standard of conduct than prevails in other callings).

225. ABA CODE, EC 3-3.

226. *Id.* The court in Crawford v. State Bar, 54 Cal. 2d 659, 335 P.2d 490, 7 Cal. Rptr. 746 (1956), feared a partnership with a nonlawyer would lessen the "independence from the influence of a layman necessary for an attorney to carry out his responsibilities." *Id.* at 665, 335 P.2d at 493, 7 Cal. Rptr. at 750.

227. Crawford v. State Bar, 54 Cal. 2d 659, 335 P.2d 490, 7 Cal. Rptr. 746 (1956).

228. A lawyer may neither recommend nor accept employment from a nonlawyer who has not sought his advice. Exceptions have been drawn, however, for close friends,

Proponents of the rule claim that it avoids unnecessary litigation, misrepresentation or fraud, overreaching, overcharging, underrepresentation, detriment to the legal profession, and harm to the solicited client.[229] Opponents of the ban, on the other hand, argue that attorney solicitation will inform ignorant clients of their legal rights and encourage them to present their valid claims to the court. In addition, aggressive solicitation will increase competition and reduce the costs of legal services.

As a result of *Bates v. State Bar*,[230] the present status of the solicitation ban is unclear. *Bates* approved attorney advertising, but failed to establish a test by which advertising could be distinguished from solicitation. The proposed modifications of the ABA advertising rules following *Bates* disagreed over whether a new solicitation rule was required.[231] The Supreme Court will consider the constitutionality of the solicitation ban this Term in two quite different cases.

In *In re Smith*,[232] the appellant attorney met with three recently sterilized women,[233] identified herself as an attorney, answered questions about their legal rights, and explained their remedies against the physician.[234] After learning that a Mrs. Williams wanted to bring an action

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relatives, and former clients, if the advice concerns a matter similar to the previous employment ABA CODE, DR 2-104(A)(1). Futher exceptions have been made for lawyer referral services, legal services offices, and bona fide organizations that furnish, render or pay for legal services to its members or beneficiaries. *Id.* at DR 2-103(c).

229. For a further explanation of these rationales, *see* Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958); *See generally* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972).

230. 97 S. Ct. 2791 (1977).

231. *Compare* ABA CODE, 1977 amendments, Proposal A, *with* Proposal B, 46 U.S.L.W. 1 (Statutes Aug. 23, 1977).

232. — S.C. —, 233 S.E.2d 301, *prop. juris. noted*, 98 S. Ct. 49 (1977) (No. 77-56).

233. Appellant states she was contacted by Mr. Gary Allen of the S. C. Council of Human Rights to investigate the matter and meet with the woman. Appellant's Jurisdictional Statement at 7.

Appellant's Jurisdictional Statement at 7 notes: "local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance."

Appellee states that appellant arranged the meeting by contacting Mr. Allen and requiring that he set it up. Appellee's Motion to Dismiss at 2,5. Appellee further claims that the meeting was with those "who had been sterilized, or had been advised by their physicians that they should undergo sterilization as a means of family planning." *Id.* at 2.

234. Appellant states that she simply answered questions asked by the woman. At that time, she did not know of the ACLU's interest in the matter, nor did she advise anyone to write to the ACLU. Appellant's Reply to Motion to Dismiss or Affirm at 5-6. Appellee states appellant advised the women that ACLU could bring money damages against her doctor and advised them to write to the ACLU. Appellee's Motion to Dismiss at 3.

against her doctor,[235] the attorney wrote a letter requesting that she be a client for ACLU litigation.[236] Mrs. Williams later declined.[237] The State Bar Committee voted to reprimand the attorney privately for violating DR 2-103(D) and 2-104(A); the South Carolina Supreme Court increased the punishment to public reprimand.

In *Ohio State Bar Association v. Ohralik*,[238] appellant attorney, after learning of the accident of an acquaintance,[239] obtained consent from her parents to visit her at the hospital eleven days after the accident.[240] The patient consented to his legal representation.[241] Shortly thereafter, the attorney also contacted the passenger in the car and advised her of her legal claims.[242] After appellant recovered the full statutory amount for the victim, the accident victim attempted to disengage the attorney.[243] In a

235. Appellant claims to have received "several telephone calls" and a letter from Mr. Allen indicating Mrs. Williams wanted to bring an action. She wrote to Mrs. Williams as a response to these requests. Appellant's Jurisdictional Statement at 7. Appellee claims appellant "was instructed by the ACLU" to get in touch with the women about the suit. Appellee's claim appellant wrote to Mrs. Williams without having been contracted by her in any way during the interim. Appellee's Motion to Dismiss at 3.

236. Appellant's Jurisdictional Statement at 25a.

237. Appellant's Jurisdictional Statement points out that "Mrs. Williams, shortly after receiving this letter, went to Dr. Pierce's office for treatment for her child. Dr. Pierce's attorney was present, read the letter, and questioned her about litigation against his client. Mrs. Williams disclaimed any interest in a lawsuit, and at the attorney's direction called appellant from Dr. Pierce's office to so inform her." *Id.* at 8. Appellee's Motion to Dismiss simply mentioned that Mrs. Williams informed appellant that she was no longer interested in the lawsuit. *Id.* at 4. A lawsuit was brought against Dr. Pierce in Doe v. Pierce, No. 74-475 (D.S.C. July 25, 1975) finding for the plaintiff (one other than Mrs. Williams). The Fourth Circuit reversed *sub nom.* Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977).

238. 48 Ohio St. 2d 217, 357 N.E.2d 1097, *prob. juris, noted*, 98 S.Ct. 49 (1977) (No. 76-1650).

239. The accident occurred on February 2. Appellee's assert that appellant learned of it on February 13 and immediately contacted her parents. Appellee's Motion to Dismiss at 5. Appellant asserts that he learned of the accident on February 4 or 5 but did not seek to contact any member of the family until February 13. Appellant's Jurisdictional Statement at 6-7.

240. Appellant's assert that the accident victim's mother asked him to come by because of fear of being sued by parents of the passenger. The hospital administration had also urged them to engage a certain law firm. Appellant's Jurisdictional Statement at 7.

241. There is no evidence that the client was in a mental state which would have impaired her ability to exercise reasonable judgment, or could not intelligently and thoughtfully consider future legal action.

242. The passenger agreed to representation. Appellee's Motion to Dismiss states she sought to disengage his services the next day. *Id.* at 7. Appellant states he was not notified of it until March 14 when she sent appellant a letter. Appellant's Jurisdictional Statement at 8.

243. On April 12, the accident victim discharged appellant as an attorney and asked him to submit his file to another attorney. Appellant's Jurisdictional Statement.

suit, the attorney won a settlement of one-third of the total recovery.[244] The disciplinary committee held that the attorney had violated DR 2-103(A) and 2-104(A) by soliciting personal injury cases and recommended a public reprimand; the Ohio Supreme Court suspended the attorney indefinitely.

The two cases present several first amendment problems. The solicitation ban at issue arguably infringes an attorney's free speech rights, interferes with the public's right to know, and inhibits the associational rights of attorneys. To resolve the first amendment claims in *Smith* and *Ohralik*, the Court must determine the amount of first amendment protection to which attorneys are entitled. If the Court concludes that the lawyers must be accorded the same protection as laymen,[245] it will balance the appellant's interest in speaking freely against the state's interest in protecting the public and the legal profession. Because the solicitation ban imposes a prior restraint on speech, the Court should strike it down absent a countervailing compelling state interest.

In *Smith*, the appellant's right to offer free legal assistance on behalf of an organization was infringed. Yet she engaged in no misrepresentation, fraud, or harassment, and respected the client's disclaimer of interest. The proffered ACLU services were free and competent. The client's interest would have been adequately represented and, if successful, she would have benefited from the suit. The solicitation here did not stir up unnecessary litigation. An important constitutional right may have been violated and the legal system, designed to redress grievances, was being used properly. Thus, the limitation on first amendment rights here was unnecessary to protect the public or the legal profession.[246]

In *Virginia Pharmacy*,[247] the Court disapproved of "completely suppress[ing] the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and recipients."[248] The solicitation ban inhibits attorneys and organizations from honestly advising consumers about their legal remedies because it prohibits them from accepting employment following such advice. Consequently, the consumers' access to the judicial

244. $4,166.66. The total recovery for the accident victim was $12,500.00.

245. *See* note 8 *supra* and accompanying text.

246. The attorney in *In re Smith* can also claim infirmity on the grounds of vagueness. Neither of the challenged provisions prohibit an attorney from offering services of an organization.

247. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

248. *Id.* at 773.

system and the attorneys' duty under Canon 2 of the CPR[249] to assist the legal profession in making counsel available are impeded. Absent a compelling state interest, therefore, the solicitation rule must be invalidated under *Virginia Pharmacy*. In *Smith* there is no such justification: the consumer voluntarily attended the informational meeting; without this information the welfare mother would have remained ignorant of her legal rights; there were no charges of fraud, misrepresentation, underrepresentation, or overcharging; and the client would have benefited from a successful lawsuit.

The solicitation ban further infringes the right of attorneys to associate freely. In *Smith*, the rule prohibits an attorney from cooperating with a nonprofit organization whose primary purpose is to provide legal services.[250] Appellant, an ACLU member, argues that under *NAACP v. Button*,[251] her organization has a right to assist lay persons to recognize their legal rights and that it need not "stand by while potential litigants forfeit through ignorance their Constitutional rights."[252] The opposing party notes, however, that *Button* concerned only litigation against the government in which no fees were involved. *Smith*, on the other hand, was private litigation in which "monetary stakes" were involved. Monetary stakes are viewed as increasing the likelihood of a conflict between the aims and interests of the organizations and the client litigants.[253]

If the Court balances the attorney's interest in freedom of association, the organization involved, its goals, and the prior restraint imposed by the rule, against the state's interest in protecting the public and the profession, it must conclude that the ban is unconstitutional.

The attorney's free speech and the public's right to know are also infringed in *Ohralik*. Appellant attorney contends that the first amend-

249. ABA CODE, Canon 2. See especially EC 2-1.

250. It is questionable whether appellant Smith even violated the existing rule. *Id.*, DR 2-103 (1)(C) prevents an attorney from cooperating with a nonprofit organization whose primary purposes include the rendition of legal services (ACLU counters that its purpose is to protect civil liberties, by any appropriate lawful means, just as the NAACP uses litigation to further equal rights); such organization does not derive benefit from the rendition of legal services by their lawyer (ACLU could have collected attorney's fees although appellant did not represent them in the suit); the client in the case is the beneficiary of the services and not the organization (the client would have received monetary damages with a successful lawsuit).

251. 371 U.S. 415 (1963).

252. There is no evidence that the client was in a mental state which would have impaired her ability to exercise reasonable judgment, or could not intelligently and thoughtfully consider future legal action.

253. Appellee's Reply Brief at 15.

ment protects his oral solicitation of legal services absent fraud, misrepresentation, or overreaching, and association with clients of his choosing.[254] Here, the attorney honestly advised his potential client of her legal rights and obtained a voluntary consent to legal representation. Yet the spectre of "ambulance chasing" is a potentiality. Appellant visited the client at the hospital only eleven days after an automobile accident during a period in which the patient may have been vulnerable. Overcharging, underrepresentation, and fraud are possible in such a situation; they were not present in this case, however. In a balancing analysis, the Court should recognize appellant's first amendment interest. The flat ban against solicitation is too harsh a rule to uphold for *potentially* harmful conduct. In fact, no harm against either the consumer or the profession occurred.

A more acceptable approach would prohibit solicitation only when consumers are "deceived or misled by over-zealous attorneys who approach them when they are particularly susceptible to duress or coercion."[255] This standard would create less certainty than a flat ban and would require a case by case analysis to determine whether an attorney had violated the standard. The Court may wish to adopt prophylactic rules to ensure that harm to the solicited party does not occur.[256]

In resolving *In re Smith* and *Ohralik*, the Supreme Court should reformulate the sweeping ban on attorney solicitation and more clearly delineate the first amendment rights of lawyers. Three alternatives are suggested here. First, the Supreme Court may prohibit attorneys from accepting employment that results from false information or "coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct."[257] This rule strikes a balance between providing the consumer with adequate information regarding his rights and available legal services and protecting him from overreaching attorneys when he is most vulnerable.

254. The *Ohralik* case raises an associational claim only in the sense of an individual attorney being unable to associate with a particular client. Controlling constitutional interpretations of the right to freedom of association weaken the argument and would most likely not prove successful ground for resolution of his constitutional claim.

255. Brief of Amici Curiae Public Citizen and The National Resource Center for Consumers of Legal Services at 4.

256. Such rules could require the attorney to specify the terms of his agreement and to receive a voluntary signed consent, perhaps in the presence of a witness.

257. ABA CODE, DR 2-104(A)(2), (Aug. 1977 amendments, Proposal B) 46 U.S.L.W. 12 (Statutes Aug. 23, 1977). The Court should clearly define the terms so that an attorney will know when he is engaging in unprotected solicitation. It may also wish to incorporate the standards developed from case law dealing with fraud and deception.

Secondly, the Court may prohibit or allow solicitation according to the substance of the claim involved.[258] Thus, solicitation of suits alleging constitutional violations might be encouraged, while solicitation of actions that might disrupt close personal relationships might be prohibited. Such a rule, requiring a determination of desirable activity by courts and bar associations, would be difficult to implement.

Finally, the Court may adopt the California Supreme Court's approach in *Jacoby v. State Bar*.[259] In *Jacoby*, only solicitation that, viewed in its entirety, serves no discernible purpose other than attraction of clients is prohibited. The court held that other solicitation was protected by the first amendment and could not be abridged absent a compelling state interest.

VI. CONCLUSION

There are compelling reasons to grant attorneys first amendment protections comparable to those accorded other citizens. Attorneys have the right to speak out honestly about legal services and the legal system; the right has often been slighted by ethical rules adopted by states. To ensure first amendment guarantees, the profession must revise its ethical standards so that the rules are clear, precise, and narrowly drawn. If the ABA or states fail to do so, judicial amendment of the CPR may be necessary to conform it to the first amendment. Overregulation in debatable areas will also decrease the authority of the bar as a self-policing organization.

Frances L. Pergericht

258. This approach is suggested in Comment, *supra* note 229, at 685.
259. — Cal. 3d —, 562 P.2d 1326, 138 Cal. Rptr. 77 (1977).