ATTORNEY DIRECT MAIL COMMUNICATION: THE KOFFLER COMMERCIAL SPEECH APPROACH

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COMMENT

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I. INTRODUCTION

In February 1976 two attorneys in Phoenix, Arizona decided that advertising was a critical element for the economic survival of their law office.¹ The office was dedicated to providing routine legal services at moderate fees for middle income persons who did not qualify for government legal services.² The attorneys placed an advertisement in a daily newspaper of general circulation.³ Their advertisement offered legal services at reasonable rates and listed the services available with accompanying fees.⁴ The attorneys’ use of newspaper advertising was a clear violation of the Arizona rules of professional conduct.⁵ Citing these rules, the state bar association filed a disciplinary complaint against the attorneys.⁶ The case reached the United States Supreme Court as Bates v. State Bar of Arizona.⁷ The Court recognized attorney advertising as a form of constitutionally protected commercial speech⁸ and held that a state cannot proscribe attorney newspaper advertising that is truthful and concerns the terms and availability of routine legal services.⁹

² Id.
³ Id.
⁴ Id.
⁵ Id. at 355. As part of its regulation of the professional conduct of the Arizona bar, the Arizona Supreme Court imposed and enforced a disciplinary rule restricting advertising by attorneys: Id. at 353.
⁶ Id. at 356.
⁸ Id. at 380-82.
Bates was the first in a line of four Supreme Court cases in the general area of unsolicited attorney communication for the purpose of generating business. Two, Ohralik v. Ohio State Bar Association\textsuperscript{10} and In re Primus,\textsuperscript{11} dealt with solicitation,\textsuperscript{12} an area of attorney communication with prospective clients that is closely related to advertising.\textsuperscript{13} The fourth, In re R.M.J.,\textsuperscript{14} dealt with the specific question of "whether certain aspects of the revised ethical rules of the Supreme Court of Missouri regulating lawyer advertising conform to the requirements of Bates."\textsuperscript{15} R.M.J. also provided some generalizations on commercial speech doctrine in the context of professional services.

\textsuperscript{10} 436 U.S. 447 (1978). An attorney solicited automobile accident victims in person for the purpose of representing them in claims against the insurance company under the uninsured motorist clause in one victim's automobile insurance policy. \textit{Id}. at 449-52. The Court held that the state or the state bar association, acting with state authorization, constitutionally may discipline a lawyer for soliciting clients in person for pecuniary gain under circumstances that pose dangers of attorney overreaching, overcharging, underrepresentation, or misrepresentation, all of which the state has a right to prevent. \textit{Id}. at 449, 462.


\textsuperscript{12} Solicitation is defined as a movement to action—an endeavor to obtain by asking—and implies personal petition to a particular individual to do a particular thing. \textit{In re Koffler}, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980), cert. denied, 450 U.S. 1026 (1981); see Black's Law Dictionary 1248-49 (5th ed. 1979) [hereinafter cited as Black's].

\textsuperscript{13} Advertising is defined as a calling to the public attention by any means whatsoever. Black's, supra note 12, at 50. These means can include print and broadcast media, billboards, or direct mail. Examination of the two definitions reveals a semantic difference between solicitation and advertising. This difference will be referred to as the "solicitation-advertising dichotomy." This distinction, however, is not without paradox. The two activities overlap. All advertising, either directly or indirectly, involves solicitation. \textit{In re Koffler}, 51 N.Y.2d 140, 146, 412 N.E.2d 927, 931, 432 N.Y.S.2d 872, 875 (1980), cert. denied, 450 U.S. 1026 (1981). This overlap is illustrative of the fallacy in using the term "advertising-solicitation dichotomy" as an analytical tool in judicial analysis.

\textsuperscript{14} 102 S. Ct. 929 (1982).

\textsuperscript{15} \textit{Id}. at 932.
None of these decisions, however, provides a concise analytical approach for dealing with situations which arguably can be categorized as both solicitation and advertising. The most striking example of such a situation is attorney direct mail communication with prospective clients for pecuniary gain. The absence of a Supreme Court decision providing specific guidelines in the area of attorney direct mail communication with real estate brokers who seek closing referrals. See notes 90-91 infra and accompanying text.

16. *Id.* at 937. *R.M.J.* outlined three policy generalizations regarding proscriptive regulation of professional services advertising. First, states may impose appropriate restrictions on advertising that is inherently misleading or subject to abuse. Second, restrictions on professional services advertising may be no broader than is reasonably necessary to prevent deception. Finally, the state may regulate, through narrowly drawn restrictions, only to the extent that the restriction furthers the state's asserted substantial interest in regulation. *Id.* at 937-38.

17. Another example is attorney direct mail communication with real estate brokers who seek closing referrals. See notes 90-91 infra and accompanying text.

18. Direct mail is defined as printed matter designed to solicit trade through the mails. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 641 (1976). In the case of attorney direct mail communication, printed matter would provide information on legal services and fees. The problem with attempting to dispose cleanly of attorney direct mail communication with prospective clients for pecuniary gain under any case in the *Bates* line is twofold. First, there is the semantic problem of whether the communication is advertising or solicitation. See note 13 supra. Second, even if it were possible to achieve an acceptable classification, the cases are not clearly dispositive. If one classifies attorney direct mail communication with prospective clients for pecuniary gain as advertising, one finds that the *Bates* holding, restricted to "whether the state may prevent the publication in a newspaper of . . . [a] truthful advertisement concerning the availability and terms of routine legal services," 433 U.S. at 384, is not clearly applicable. Rather, an argument by analogy is necessary to bring attorney direct mail communication within *Bates*. On the other hand, classification as solicitation finds the *Primus* holding, addressed to solicitation not for pecuniary gain, 436 U.S. at 439, clearly inapplicable. The *Ohradik* holding, prohibiting solicitation for pecuniary gain that involves potential for overreaching, overcharging, and undue influence, 436 U.S. at 449, may be applicable only if the possibility of those dangers is demonstrable. Such a demonstration is extremely difficult to generate in a prospective manner. See Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).

19. *R.M.J.* inferred that the absolute prohibition of attorney mailing of announcements to an audience of other than lawyers, friends and relatives, and present and former clients only could be supported by a demonstration of the state's inability to supervise such mailings or in the absence of a less restrictive alternative. 102 S. Ct. at 939. *R.M.J.* also proposed filing of general mailing copy with the bar association as a possible means of supervision, *id.*, and labelling of general mailing envelopes "This is an Advertisement" as a less restrictive alternative. *Id.* at n.20. *R.M.J.*, however, clearly restricted its analysis to the facts of the particular case. *Id.* at 939.

has thrust resolution of this issue upon the states.\textsuperscript{21}

This comment will highlight the recent New York Court of Appeals decision, \textit{In re Koffler},\textsuperscript{22} against the background of attorney advertising and solicitation. \textit{Koffler} held that the state may regulate, but may not constitutionally proscribe, attorney direct mail communication with prospective clients for pecuniary gain.\textsuperscript{23} The signifi-

\textsuperscript{932.} See notes 14-17, 19 \textit{supra}. One of the questions presented on appeal involved the state’s discipline of an attorney for mailing announcements of an office opening to persons with whom he was not yet acquainted. \textit{Id.} at 939. At least one commentator felt that the disposition of the \textit{R.M.J.} appeal would resolve the direct mail issue. Note, \textit{High Court to Rule on Lawyer Ad Controls}, 67 A.B.A. J. 1108, 1108 (1981).

\textsuperscript{21.} In the wake of \textit{Bates}, many states and the District of Columbia have amended their attorney advertising rules. See Andrews \& Brosnahan, \textit{Regulation of Lawyer Advertising: In the Public Interest?}, 46 \textit{Brooklyn L. Rev.} 423, 426 n.19 (1980) for a partial listing of those jurisdictions that have amended their advertising rules. There is no clear majority position on the use of direct mail as a method of attorney communication with prospective clients. Maine specifically includes direct mail as a permissible means of “public communication” available for attorney use. Me. Bar R. 3.9(a). Massachusetts, on the other hand, explicitly proscribes attorney direct mail communication with prospective clients. Mass. DR 2-103. Other jurisdictions have adopted less clear positions. The actions of the state courts in the areas of attorney advertising, solicitation, and direct mail after \textit{Bates} have shown no clear trend. \textit{In re Carroll}, 124 Ariz. 80, 602 P.2d 461, 466 (1979) (radio advertisement offering victims of a train explosion free transportation to an attorney’s office for consultation not prohibited in light of the absence of advertising standards after \textit{Bates}); Eaton v. Supreme Court, 270 Ark. 573, 580, 607 S.W.2d 55, 59 (1980), \textit{cert. denied}, 450 U.S. 966 (1981) (advertising that lists a $10 consultation fee and a series of questions on need for legal services in broad areas without distinguishing fees for various legal services and distributed through discount coupon mailing is potentially deceptive and insufficient to provide information to facilitate an informed selection of a lawyer and therefore properly subject to proscription); \textit{In re Amendments to the Code of Professional Responsibility and Canons of Judicial Ethics}, 267 Ark. 1181, 1185, 590 S.W.2d 2, 4-5 (1979) (plan disapproved which proposed allowing attorney advertising of specialization after state certification); The Florida Bar re Amendment to the Florida Bar Code of Professional Responsibility, 380 So.2d 435, 438 (Fla. 1980) (Florida adopts the American Bar Association model rules on advertising); Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978) (direct mail advertising by attorneys is constitutionally protected unless the state or the state bar association can justify a prohibition by demonstrating a state interest which outweighs individual and societal interests in commercial speech); Allison v. Louisiana State Bar Ass'n, 362 So.2d 489, 496 (La. 1978) (letters to employee groups concerning prepaid legal plans constitute direct solicitation which state may prohibit in its regulation of the practice of law); Woll v. Kelley, 409 Mich. 500, 510-13, 549-51, 297 N.W.2d 578, 581-82, 600 (1980) (charges dismissed against attorneys who invited, by letter, retired union members to meetings on the pursuit of workmen’s compensation claims on the grounds that the antisolicitation statute was inapplicable to attorney truthful advertising); \textit{In re Petition for Rule of Court}, 564 S.W.2d 638, 643-44 (Tenn. 1978) (attorney advertising approved except for use of handbills, circulars, billboards, or any other means, not including established and regularly circulated or broadcast media).

\textsuperscript{22.} \textit{Id.} at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.
cance of *Koffler* \(^{24}\) lies in the court's rationale, which provided a detailed, analytical approach \(^{25}\) blending prior Supreme Court decisions with current New York Court of Appeals logic. This analytical approach can resolve those cases in the area of attorney communication with prospective clients that fall beyond the scope of the *Bates* line. In order to fully comprehend the importance of *Koffler*, preliminary discussion of several background topics is necessary: The attitude of the practicing bar toward attorney advertising, and the constitutional history of commercial speech, attorney advertising and solicitation.

II. **Background**

A. **Attitude of the Practicing Bar Toward Advertising**

Despite the *Bates* approval of attorney advertising and the states' acceptance of attorney advertising in their rules of court, \(^{26}\) the practicing bar has exhibited an indifferent attitude toward advertising. \(^{27}\) There are two reasons cited for this indifferent attitude. First, attorneys have maintained a traditional and ingrained reluctance to advertise because they perceive the practice of advertising as being beneath the standards and dignity of the profession. \(^{28}\) The *Bates* Court refuted the reasoning behind the traditional reluctance to advertise; \(^{29}\) yet recent surveys indicate that the practicing bar does not


\(^{25}\) See notes 133-46 *supra* and accompanying text.

\(^{26}\) See note 21 *supra*.

\(^{27}\) A pre-*Bates* survey indicated that 69% of the attorneys surveyed were against the advertising of attorney fees while 46% were against attorney use of electronic media advertising. Victor, *Commentary on Legal Advertising*, 66 WOMEN LAW. J. 6, 9 (1980). One post-*Bates* survey indicated that only 3% of the attorneys surveyed had ever advertised. 89% of those same attorneys indicated that they never would advertise. Id. at 6 (emphasis added). Another post-*Bates* survey indicated that only 49.7% of those attorneys surveyed favored some sort of advertising. Meyers & Smith, *Attorney Advertising, Bates and a Beginning*, 20 ARIZ. L. REV. 427, 470 (1978). Furthermore, a significantly smaller group, only 26.4%, felt direct mail should be allowed. Id. at 474. For a more expansive discussion of attorney attitudes toward advertising, see Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, A.B.F. RES. J. 179, 181-82 (1979); Meyers & Smith, *supra*, at 431-32; Walker, *Advertising By Lawyers: Some Pros and Cons*, 55 CHI.-KENT L. REV. 407 (1979).

\(^{28}\) H. DRINKER, LEGAL ETHICS 212 (1953).

\(^{29}\) 433 U.S. at 368-82. The Court discussed each of the following rationales for
accept the Bates refutation.30 Second, the practicing bar has not viewed advertising as a cost effective means of attorney communication with prospective clients.31 Available statistics, however, do not lend support to this view of cost effectiveness.32

The noted statistics demonstrate that direct mail communication is the most cost effective means of generating legal business.33 The statistics also indicate that direct mail may be the answer to the practicing bar's concern with the cost effectiveness of advertising.34 Despite the possibility of direct mail communication as a solution to the cost effectiveness problem, neither the Supreme Court decisions35 nor the divergent amendments to state attorney advertising rules36 give significant guidance to state courts with respect to analytical approaches for determining the constitutionality of legislative proscription against attorney direct mail communication with prospective

proscription of attorney advertising and found each one singularly unpersuasive: Adverse effect on professionalism; inherently misleading nature of attorney advertising; adverse effect on the administration of justice; undesirable economic effects of advertising; adverse effect of advertising on the quality of service; and difficulties of enforcement of advertising standards. Id.

30. See note 27 supra.

31. One commentator has argued that the perception of inadequate cost effectiveness has been fueled by the wide-spread publicity given law firms that have experienced financial difficulty as a result of large advertising expenditures. Victor, supra note 27, at 7. The most striking example of financial difficulty is the bankruptcy of a Massachusetts firm which had relied on advertising to attract clients and had launched an unsuccessful $200,000 advertising campaign. Id.

32. These statistics are drawn from two sources. First, a 1980 marketing survey found that the most cost effective permissible form of attorney advertising surveyed was the yellow pages of the telephone book. Winter, Lawyer Ads Yield $8 Per Every Dollar Spent: Survey, 66 A.B.A. J. 705 (1980). On the average, every dollar spent on any form of advertising generated eight dollars in legal fees; the minimum return was two dollars in fees for every dollar spent on advertising. The survey did not include direct mail communications. Id.

Second, the law firm involved in Koffler, Koffler & Harrison of Islip, New York, experienced a twenty-five dollar return in legal fees for every one dollar spent in a direct mail campaign. The firm expended $3,750 during a direct mail campaign, lasting slightly over eight months, which generated $100,000 in real estate closing fees over the next several years. Telephone interview with Alfred S. Koffler, Koffler & Harrison (Mar. 12, 1981) (updating the figures Attorney Koffler had quoted during disciplinary proceedings. See notes 89-91 infra and accompanying text).

33. At the present time the cited statistics are the only ones available. Although it is possible that the statistics may be biased in some manner, it is worth noting that researchers have not reported any statistics to the contrary.

34. State legislatures and judiciary have not yet established a clear trend on the status of attorney direct mail communication with prospective clients for pecuniary gain. See note 21 supra.

35. See note 18 supra.

36. See note 21 supra.
clients for pecuniary gain. In order to understand fully the constitutional ramifications of a proscription of attorney direct mail communication, it is necessary to briefly survey the constitutional history of commercial speech and attorney advertising.

B. Constitutional History of Commercial Speech and Attorney Advertising

The Supreme Court recently has defined commercial speech as "an expression related solely to the economic interest of the speaker and its audience." Originally commercial speech was not entitled to first amendment protection under Valentine v. Chrestensen. In Valentine, petitioner owned a submarine that he exhibited for profit and advertised through the distribution of handbills. The Supreme Court denied petitioner’s request to have a New York City Police Commissioner enjoined on constitutional grounds from enforcing a city ordinance prohibiting handbill distribution. The Court held that commercial advertising is not entitled to first amendment protection because the Constitution imposes no restraint on the government with regard to the regulation of commercial advertising.

The Court subsequently eroded the Valentine doctrine in a line of decisions beginning with Cammarano v. United States. Justice Douglas penned a concurring opinion, characterizing Valentine as "casual, almost offhand . . . [i]t has not survived reflection." In Ginzburg v. United States, the Court further eroded the doctrine by stating that "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." The erosion continued in Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations. The Pittsburgh Press Court upheld an ordinance prohibiting newspapers from advertising

37. See id.
40. Id. at 53-54.
41. Id. at 54.
43. 358 U.S. at 513-14.
45. Id. at 474.
employment opportunities in sex-designated columns, but suggested that speech could not be denied first amendment protection merely because it concerned commercial matters. In dicta, the Court stated that even an “ordinary commercial proposal” might merit first amendment protection if its informational value outweighed the government regulatory interest. The case for abandonment of the Valentine doctrine was given additional support two years after Pittsburgh Press, later in Bigelow v. Virginia.

The Bigelow Court, holding that a state statute prohibiting the advertisement of abortions violated the first amendment, balanced state interests with first amendment interests. The Court considered both the advertiser’s rights and the right of the general public to obtain information. Bigelow held that any advertisement conveying “information of potential interest and value” to the public should be entitled to first amendment protection.

In 1976, the Supreme Court extended first amendment protection to product advertising in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council. The Virginia Pharmacy Court held that the state could not constitutionally proscribe advertising that was truthful and concerned lawful activity. The question of attorney advertising was resolved by Bates.

In Bates, decided one year after Virginia Pharmacy, the Court held that the state may not constitutionally proscribe attorney newspaper advertising that is truthful and concerns the terms and availa-

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47. Id. at 389. The crux of the decision was the illegal nature of the content of the advertisements, furthering sex discrimination in employment. Id. at 388-89.

48. Id. at 389.


50. Id. at 826-27.

51. Id. at 828-29.

52. Id. at 822.


54. Id. at 773. The rationale underlying Virginia Pharmacy rested upon a combination of three notions. First was the premise, from the first amendment, that regulation of an activity is impermissible on the ground that ignorance is preferable to knowledge. Second, was the idea that the values of free speech under the first amendment are not limited to political dialogue but, rather, extend to any exchange of ideas or information that will generate a more knowledgeable basis for individual choice of alternatives. Finally, commercial information is indispensable not only for the proper allocation of resources in a free enterprise system, but also for the formation of intelligent opinions on how to regulate or alter that system. L. Tribe, supra note 20, § 12-15, at 654-55. A key section of Virginia Pharmacy was the Court’s proposal of a three-part test for the constitutionality of restrictions on the manner of professional advertising. See notes 124-28 infra and accompanying text. The Court, however, reserved opinion on the permissibility of the regulation of other professional advertising, including that of attorneys. 425 U.S. at 773 n.25.
bility of routine legal services. Several questions remained open as a result of the narrow holding in *Bates*.

From a constitutional perspective, the most important of these questions was the appropriate standard of review for regulation of advertising.

*Friedman v. Rogers*, involving a challenge to the Texas statute prohibiting optometry practice under a trade name, exemplified the Court's developing willingness to afford first amendment protection to commercial speech. The afforded protection, however, was of a lesser degree than that given to political speech and associational freedoms. Without articulating a standard of review, the Court emphasized that some forms of commercial speech regulation are constitutionally permissible. Examples noted by the Court included regulation of time, place, and manner of dissemination and false, deceptive, and misleading content.

In 1980, the Court resolved the standard of review problem in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. In *Central Hudson*, a utility company, on first amendment grounds, contested a statute that purported to advance energy conservation by barring advertising to promote the use of electricity. The *Central Hudson* Court used a level of scrutiny that required a substantial government interest, directly advanced by the regulation, for the regulation to pass first amendment muster.

The standard of review previously associated with first amendment cases was strict scrutiny. Under a strict scrutiny level of re-

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55. 433 U.S. at 383.
56. See notes 1-9 supra and accompanying text.
59. Id. at 3.
61. 440 U.S. at 9.
63. Id. at 559.
64. This standard appears to be analogous to the Court's equal protection intermediate scrutiny standard. The intermediate equal protection standard was developed during the 1971 term, Gunther, *The Supreme Court, 1971 Term—Forward In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17 (1972), and is a method of judicial intervention into legislation without strict scrutiny. Id. at 18. The old system was two-tiered: Scrutiny was either strict in theory and fatal in fact, or minimal in theory and permissive in fact. Id. at 8. The intermediate standard allows the courts to "assure rationality of means, without unduly impinging on legislative prerogatives regarding ends." Id. at 23.
65. 447 U.S. at 566.
66. Buckley v. Valeo, 424 U.S. 1, 64 (1976) (significant encroachments on the first amendment must be justified by a government interest that "survives exacting scrutiny");
view, a regulation restricting first amendment rights must further a "compelling state interest"\textsuperscript{67} to be constitutionally valid. The \textit{Central Hudson} promulgation of an intermediate standard for commercial speech cases resulted in first amendment protection that is quantitatively less than that accorded to political speech and associational freedoms under a strict scrutiny standard.\textsuperscript{68}

In summary, constitutional progress in the area of commercial speech and advertising has been substantial but remains open for development. The focus of this development will be the application of intermediate scrutiny to a variety of commercial speech cases. For example, the Court has not yet ruled specifically on attorney direct mail communication with prospective clients.\textsuperscript{69} The incomplete progress in commercial speech is further exemplified by the constitutional history in the area of solicitation.

C. \textit{Constitutional History of Solicitation}

The prohibition of attorney solicitation originated in the early days of the English bar, when young men who studied law predominately were from the wealthy class and looked upon the practice of law in the same light as a seat in Parliament: a form of public service for which compensation was merely incidental.\textsuperscript{70} Solicitation generally was proscribed on the basis that it was undignified, unprofessional, and fraught with such perils as commercialization, engenderment of litigation, possibility of undue influence, and overreaching.\textsuperscript{71}

The United States Supreme Court has dealt with attorney solicitation in a line of decisions, beginning with \textit{NAACP v. Button}\textsuperscript{72} and ending with \textit{Ohralik}. The first segment of this line of cases deals with group solicitation; the second deals with individual solicitation. 

\textit{Button} held a state statute prohibiting solicitation unconstitutional on the ground that the statute unduly inhibited freedom of speech and association. The NAACP, whose activities are not directed to the protection of pecuniary rights or liabilities, was the ob-

\textsuperscript{67} L. Tribe, \textit{supra} note 20, \S 12-8, at 602.
\textsuperscript{68} See notes 64-67 \textit{supra}.
\textsuperscript{69} See notes 10-21 \textit{supra}.
\textsuperscript{70} H. Drinker, \textit{Legal Ethics} 210 (1953).
\textsuperscript{71} \textit{Id.} at 212.
\textsuperscript{72} 371 U.S. 415 (1963).
ject of the application of the statute. 73 Button was the first of the group solicitation cases. 74 In the most recent, United Transportation Union v. State Bar of Michigan, 75 the Court noted that a common theme connected all of the cases: "[C]ollective activity, [including solicitation], undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment." 76 The collective activity theme clearly expresses the constitutional protection afforded an attorney's participation in group solicitation. The constitutional status of individual attorney solicitation, however, remains unclear. This constitutional status forms a rough spectrum, one extreme affording complete protection 77 and the other extreme completely proscribing activity. 78

The Court established the two extremes of the individual solicitation spectrum on the same day. 79 In Ohralik, an attorney had solicited several automobile accident victims for the purpose of representing them in personal injury claims against the uninsured mo-

73. Id. at 437.

74. The other major group solicitation cases are UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 225 (1967) (in view of first amendment rights, a union cannot be prohibited from employing an attorney on salary to pursue workmen's compensation claims) and Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 8 (1964) (union members have first amendment right to receive a recommendation from union legal department on selection of an attorney to pursue workmen's compensation claims, and those attorneys who accept work under the plan are exercising constitutional rights which the state may not abridge).

75. 401 U.S. 576 (1971). The state bar association had brought an action to enjoin the union from undertaking activities designed to protect union members from excessive legal fees at the hands of incompetent attorneys including recommendation of attorneys and pursuit of a 25% limit on contingent fees to those attorneys engaged. Id. at 577.

76. Id. at 585 (emphasis added).

77. Wholly protected activity includes attorney solicitation that is for the purpose of engaging in litigation as a form of political expression and association and undertaken without motive for pecuniary gain. An example of this kind of activity is the solicitation of welfare mothers to engage in litigation seeking to enjoin pursuit of a repugnant state policy. Under this policy, pregnant mothers on public assistance were being sterilized or threatened with sterilization as a condition for the continued receipt of medical assistance under the Medicaid program. See In re Primus, 436 U.S. 412, 416 (1978); notes 82-83 infra and accompanying text. An attorney, in cases of this kind, has an ethical obligation to see that legal aid is available. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 470 (1978) (Marshall, J., concurring).

78. Proscribed activity includes fraud, misrepresentation, undue influence, and other solicitation activity which represents assertion of fraudulent claims, invasion of privacy, and vexatious pecuniary self-interest which negates an attorney's unbiased judgment on a client's behalf. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 461-62. An example of this kind of activity is "[C]lassic . . . 'ambulance chasing,' fraught with obvious potential for misrepresentation and overreaching." Id. at 469 (Marshall, J., concurring).

79. Id. at 469 (Marshall, J., concurring).
torist clause found in the automobile insurance policy of one victim. The Court held that the state may constitutionally discipline a lawyer for soliciting clients: In person; for pecuniary gain; and under circumstances likely to pose dangers that the state has an obligation to prevent. Primus represented the other extreme within the individual solicitation area. In Primus, an attorney who worked for a nonprofit organization, without compensation, used direct mail to contact potential plaintiffs for a civil action involving damages and an injunction against the involuntary sterilization of welfare mothers. The Court held that the state may regulate but not proscribe solicitation by an attorney when his primary purpose is not pecuniary gain.

Combining attorney advertising and solicitation into the general category of commercial speech raises two problems in constitutional analysis of state regulation of the activities. These problems are best illustrated by reference to the Bates line. First, from a factual standpoint, neither Ohraltik nor Primus satisfactorily resolved those cases in which there is not only attorney pecuniary motive but also an absence of fraud, overreaching, misrepresentation, or the possibility of any vexatious conduct. Direct mailing communication to prospective clients for the purpose of gaining legal employment, and direct mailing to real estate brokers in order to generate referrals for closings, provide two factual examples of circumstances not directly disposed of by Primus or Ohraltik. Second, from a doctrinal standpoint, the standard of constitutional review under Ohraltik and Primus is strict scrutiny. Bates, however, did not articulate a standard of

80. Id. at 449-52.
81. Id. at 449. The "dangers that the State has a right to prevent," id., are specifically identified as "those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious [attorney] conduct.'" Id. at 462 (quoting Brief for Appellant at 25).
82. 436 U.S. at 416 n.6.
83. Id. at 439. See sources cited notes 10-11 supra.
84. The Court noted that appellant Ohraltik had conceded a "compelling" state interest in the regulation of attorney conduct. By agreeing with Ohraltik, the Court adopted a standard of strict scrutiny. 436 U.S. at 462.
85. The Court characterized Attorney Primus' actions as participation in "'collective activity undertaken to obtain meaningful access to the courts ... [as] a fundamental right within the protection of the First Amendment.'" 436 U.S. at 426 (quoting United Transp. Union v. Michigan Bar, 401 U.S. 576, 585 (1971)). The Court also noted that the litigation undertaken by Attorney Primus was "'a form of political expression'" and "'political association'" and indicated that any suggestion of lowered constitutional scrutiny was inappropriate and impermissible. Id. at 428 (quoting NAACP v. Button, 371 U.S. 415, 429, 431 (1963)).
Thus the courts are in a quandary and must determine whether they should apply strict scrutiny under *Ohralik* or *Primus*, or intermediate scrutiny under *Central Hudson*.

The present state of the constitutional law in this area demonstrates the need for an analytical approach that is capable of dealing with the problems inherent in the *Bates* line. The New York Court of Appeals, in *Koffler*, proposed such an analytical approach.

II. *Koffler*

A. Facts

In August 1977, Attorney William H. Harrison placed an advertisement in *Newsday*, a Long Island, New York daily newspaper of large circulation. The advertisement posted a fee of $235 for residential real estate closings and provided the attorney’s telephone number. The response to the advertisement was negligible. It was obvious that the advertising needed a different approach. On August 24, 1977, Attorney Harrison and his partner, Attorney Alfred S. Koffler, began a direct mail campaign aimed at local homeowners and real estate brokers. The broker letter produced a minimal response.

The letter to the homeowners was headed by a reproduced copy of the advertisement. It then stated:

"Dear Homeowner [sic]:

"The advertisement shown above is being run by our office in 'Newsday's' real estate section.

"We understand that you are selling your home and we would like to take this opportunity to inform you that because we are now allowed to advertise our services you no longer need to pay $400.00 to $600.00 for legal representation when you close title.

"IN FACT, BECAUSE WE ARE ABLE TO CONTACT YOU BY DIRECT MAIL, WE ARE WILLING TO TRANSACT AND REPRESENT YOU AT THE SALE OF YOUR PROPERTY FOR $195.00.

"Feel free to contact us if you have any questions.

"If you wish, you may make an appointment with us prior to selling your house. This will enable us to draw your contracts quickly when you and a purchaser come to terms.

"Enclosed you will find our business card. We look forward to representing you."

The letter to the real estate brokers was also headed by a reproduced copy of the advertisement and stated: "Dear Broker:

"The advertisement shown above is being run by our office in 'Newsday.'

"We think you will agree that the fee of $235.00 is very competitive, nev-
response and was discontinued. The homeowner letter, however, was highly successful and generated fees in excess of $100,000. On April 7, 1978, the New York Joint Bar Association Grievance Committee initiated disciplinary proceedings against the two attorneys. The complaint alleged that the attorneys had engaged in illegal and unethical practices and professional misconduct.

The attorneys responded with a three-pronged defense. First, they argued that DR 2-103(A) and the statute were unconstitutional restrictions of permissible commercial speech. Second, the attorneys stated that their actions had been in good faith reliance on Bates. Finally, they argued that the letters were in full compliance with the advertising guidelines adopted by the New York State Bar Association and the New York Appellate Division, Second Depart-

1. See note 31 supra.
2. See note 31 supra and accompanying text.
3. The complaint specifically alleged "'illegal and unethical practices and professional misconduct' . . . " in violation of the New York Code of Professional Responsibility and the New York anti-solicitation statute. 70 A.D.2d at 256, 420 N.Y.S.2d at 563 (quoting Joint Bar Association Grievance Committee for the Tenth Judicial District notice of petition dated April 7, 1978). The appropriate section of the New York Code of Professional Responsibility in force at the time of the Koffler mail out reads: "'A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.'" 51 N.Y.2d at 145, 412 N.E.2d at 930, 432 N.Y.S.2d at 875 (quoting New York Code of Professional Responsibility DR 2-103(A) (1975)). Although this section was amended in 1979 to comply with Bates, the amendment has the same scope when applied to the issue of direct mail communication and thus has no bearing on the present discussion. Id. at 145 n.3, 412 N.E.2d at 930-31 n.3, 432 N.Y.S.2d at 875 n.3. Section 479 of the New York Judiciary Law reads:

It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

N.Y. JUD. LAW § 479 (McKinney 1968).
The appellate division referred the case to a retired court of appeals judge for a referee’s hearing. The referee found that the attorneys’ actions in direct mail communication with prospective clients violated both the statute and DR 2-103(A). The violation was not found on the basis of their use of direct mail communication but, rather, because the content of the direct mail communication constituted solicitation, not advertising. The appellate division affirmed the referee’s findings and held that direct mail communication with prospective clients for pecuniary gain was beyond the bounds of permissible commercial speech and was properly proscribed by the Code and the statute prohibiting solicitation.

The essence of the appellate division rationale was the determination, after detailed review of Bates, Primus, and Ohralik, that the letters constituted solicitation and, thus, could be proscribed. The court found the proscription proper because there was an alternative channel, newspaper advertising, that did not present the dangers associated with direct mail: Loss of anonymity; invasion of privacy; and undue influence.

The court considered the attorneys’ reliance on Bates and, although such reliance was mistaken, determined it to have been in

95. 70 A.D.2d at 256, 420 N.Y.S.2d at 563. The pleadings of the two parties illustrate a basic problem concerning the use of direct mail communication. The result of a challenge to proscription of the use of direct mail communication can turn on semantics, the advertising-solicitation dichotomy. See notes 12-13 supra for a discussion of the dichotomy and its fallacy. If direct mail is considered advertising and complies with Bates, it is readily permissible in the absence of an explicit statutory prohibition to the contrary. In a case of statutory proscription, a viable argument exists based on the constitutional grounds of first amendment protection for commercial speech. See notes 38-70 supra and accompanying text. If, on the other hand, the direct mail communication is construed as solicitation, the arguments will involve the question of attorney motive for pecuniary gain and the various evils associated with solicitation. See notes 97-109 infra and accompanying text.

96. 70 A.D.2d at 256, 420 N.Y.S.2d at 563.
97. Id. at 256-57, 420 N.Y.S.2d at 563.
98. Id. at 254, 420 N.Y.S.2d at 562.
99. Id. at 272, 420 N.Y.S.2d at 573. The court found Bates inapplicable because the Supreme Court there did not answer the question of whether direct mail solicitation of prospective clients constitutes advertising. Id. at 262, 420 N.Y.S.2d at 567. The court found Primus “not pointedly relevant to this case, since here it is clear that the respondents’ mail solicitation offering legal services was solely for their pecuniary benefit.” Id. at 266, 420 N.Y.S.2d at 569. The court classified the direct mail effort as solicitation and, relying on Ohralik, indicated that it was properly prohibited as an invasion of privacy and a violation of the “high standards [of] licensed professionals.” Id. at 274, 420 N.Y.S.2d at 575.
100. Id. at 272 n.4, 420 N.Y.S.2d at 573 n.4.
good faith; and neither attorney was disbarred, suspended, or censured. Attorneys Kofller and Harrison then appealed as a matter of right on the constitutional grounds of improper proscription of commercial speech.

B. Reasoning of the Court of Appeals

On appeal, the New York Court of Appeals first defined the issue in the case as the constitutionality of a proscription of direct mail communication with potential clients concerning legal fees and services, and limited appellants to contesting DR 2-103(A) and the statute as applied to their activities. The court derived the limitation by classifying the direct mail communication as commercial speech to which overbreadth analysis is inapplicable. The court refused to rule on whether solicitation of clients through materials addressed to real estate brokers seeking referrals of closings could be proscribed. The reasons for this refusal were threefold: The readily distinguishable nature of third party direct mail communication from direct mail communication to prospective clients; the absence of a complete factual record on the broker letters; and the incomplete consideration of the third party issue by the lower court. Having restricted the issue, the court proceeded to the problem of semantic classification of direct mail communication as advertising or solicitation.

101. Id. at 274, 420 N.Y.S.2d at 575.
102. 51 N.Y.2d at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.
103. Id. at 144, 412 N.E.2d at 930, 432 N.Y.S.2d at 874.
104. Id. at 144-45, 412 N.E.2d at 930-31, 432 N.Y.S.2d at 874-76. Overbreadth analysis, used in cases involving restraints on speech, is defined as a showing that the challenged rule served to suppress speech, without requiring the individual challenging the restriction to demonstrate that his specific conduct was prohibited. A showing of general suppression of speech is sufficient to establish a first amendment violation. Bates v. State Bar, 433 U.S. 350, 379-380 (1977). Overbreadth is based on the premise that an overly broad statute might serve to chill protected speech. Id. at 380. This analytical approach is inapplicable to commercial speech because overly broad regulation is unlikely to inhibit such speech, with its link to commercial well-being and pecuniary interest. Id. at 380-81. See generally L. Tribe, supra note 20, at 710-12, 714 n.3; Note, The First Amendment Overbreadth Doctrine, 83 HARV. L. REV. 844 (1970).
105. 51 N.Y.2d at 144-45, 412 N.E.2d at 930, 432 N.Y.S.2d at 874.
106. Id. at 144-45 n.2, 412 N.E.2d at 930 n.2, 432 N.Y.S.2d at 874 n.2. Third party mailings will almost always involve in-person solicitation by the intermediary and therefore are closer to the Ohralik rule. Id.
107. Id. at 144-45, 412 N.E.2d at 930, 432 N.Y.S.2d at 874. For the lower court’s response to this refusal in Kofller, see In re Greene, 78 A.D.2d 131, 132, 433 N.Y.S.2d 853, 854 (1980) (per curiam) (direct mail to real estate brokers is a violation of the antisolicitation statute).
The court disagreed with the appellate division's conclusion that solicitation subject to proscription can be differentiated from constitutionally protected commercial speech by mere categorization.\textsuperscript{109} The court relied on the Supreme Court's statement in \textit{Bigelow} to conclude that the starting point to determine the constitutionality of proscriptive regulations is a basic balancing test. Regardless of the label employed—commercial speech, commercial advertising, or solicitation—the judiciary must assess the first amendment interest at stake and weigh it against the public interest served by the regulation.\textsuperscript{110} The court described the parameters of the question and resolved the semantic dilemma\textsuperscript{111} by adopting a commercial speech analysis.\textsuperscript{112}

The court supported its choice of a commercial speech analysis by first noting the semantic differences between advertising and solicitation.\textsuperscript{113} Semantic analysis, however, is nondispositive when the activity to be regulated evidences a dual nature: All advertising, directly or indirectly, involves solicitation.\textsuperscript{114} Proscription of the letters, the content of which did not violate DR 2-101\textsuperscript{115} of the Code because the letters, as direct mail communication, could also be construed as solicitation, generates three problems. First, the proscription ignores the strong societal and individual interests in advertising as a means of information dissemination and facilitation of informed choices by consumers. Second, the proscription produces confusion within the legal profession because there is no clear standard for judging the acceptability of advertising. Finally, the proscription suggests that there is something improper about an attorney's desire to earn a fee.\textsuperscript{116} The court's recognition that attorney direct mail communication related solely to the economic interest of the attorneys and the recipients eliminates the problems of a semantic analysis and is the first step in a commercial speech analysis.\textsuperscript{117}

A commercial speech analysis involves examination of the content and manner of a particular expression to determine whether a

\textsuperscript{109} \textit{Id.} at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{See} notes 12-13 \textit{supra} for a complete description of this dilemma.

\textsuperscript{112} 51 N.Y.2d at 146-47, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76. \textit{See} notes 113-31 \textit{infra} and accompanying text for court's commercial speech analysis.

\textsuperscript{113} 51 N.Y.2d at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.

\textsuperscript{114} \textit{See} notes 12-13 \textit{supra}.

\textsuperscript{115} 51 N.Y.2d at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.

\textsuperscript{116} 51 N.Y.2d at 146-47, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.

\textsuperscript{117} \textit{Id.} at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876. \textit{See} notes 136-40, 196-202 \textit{infra} and accompanying text for analysis of this first step.

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particular restriction violates the Constitution. The court relied on the four-part test presented by the Supreme Court in *Central Hudson* to examine the content of the attorney letters: (1) Whether the material was misleading or related to unlawful activity; (2) whether the governmental interests that the regulation sought to protect were substantial; (3) whether the regulation directly advanced those government interests; and (4) whether there was a less restrictive alternative than the present regulation. The court found that the content of the letters was not misleading or related to unlawful activity. There was a substantial government interest at stake, and advancement of that interest was directly related to the regulation. That interest is to prevent deception, invasion of privacy, overcommercialization of the legal profession, and conflicts of interest. Finally, a less restrictive alternative was available: A filing requirement, similar to the present fee statement filing requirement, easily could be applied to direct mail copy. The court then proceeded to an examination of the manner of communication in which the material was disseminated: direct mail.

The court's proposed test for the examination of the constitutionality of a manner restriction was drawn from the Supreme Court in *Consolidated Edison Co. v. Public Service Commission* and *Virginia Pharmacy*. The test contained three elements: (1) Whether the restriction was reasonable; (2) whether the restriction served a

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119. 51 N.Y.2d at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876.

120. *Id.* at 148, 412 N.E.2d at 932, 432 N.Y.S.2d at 876. The committee did not allege in its complaint that the attorney's letter was either misleading or related to unlawful activity.

121. *Id.* at 148-49, 412 N.E.2d at 932-33, 432 N.Y.S.2d at 877. The direct relation between the regulation and the advancement of a government interest was deemed to be minimal because the prevention of deception was the only directly related government interest of the interests noted. *Id.* Invasion of privacy, overcommercialization, and conflicts of interest were distinguished as inapplicable to direct mail communication. The recipient of a lawyer's letter may escape the letter's influence merely by transferring it from the envelope to the wastebasket. *Id.*

122. *Id.* at 150, 412 N.E.2d at 933, 432 N.Y.S.2d at 878. The *Stuart* court suggested the filing of direct mail copy with the bar association. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).

123. 51 N.Y.2d at 150, 412 N.E.2d at 933-34, 432 N.Y.S.2d at 878. *Id.* at 150, 412 N.E.2d at 933-34, 432 N.Y.S.2d at 878.


125. The *Consolidated Edison* Court merely reiterated the test proposed in *Virginia Pharmacy*. *Consolidated Edison*, 447 U.S. at 535. These two cases are indistinguishable on their facts from *Koffler* when considered in the broad context of commercial speech.
significant government interest; and (3) whether the restriction al-
lowed ample alternative channels of communication. 126 The court 
found that an absolute proscription was unreasonable in light of a 
less restrictive alternative: filing a copy of the letter with the state 
bar association. 127 The court’s previous content analysis of govern-
ment interest served to demonstrate the existence and significance of 
the government interest advanced by the regulation for purposes of 
the manner analysis. 128 That there was no information available to 
the court presenting comparative costs and effectiveness of suggested 
alternatives led to the determination that there was no basis to con-
clude that ample alternative channels of communication existed in 
addition to direct mail communication. 129 The court concluded that, 
under either a content or a manner analysis, absolute proscription of 
attorney direct mail communication is not constitutionally viable be-
cause absolute proscription violates the attorney’s first amendment 
rights in commercial speech. 130

The court of appeals, therefore, held that direct mail solicitation 
of potential clients by attorneys is constitutionally protected com-
mercial speech that may be regulated but not proscribed. 131

IV. ANALYSIS

The discussion in this section will cover three major areas: Dis-
tillation of the Koffler court’s rationale into an analytical approach 
to be utilized in cases wherein the Bates line is nondispositive; com-
parison of the Koffler rationale with the other three state court 
cases 132 that dealt specifically with attorney direct mail solicitation of 
prospective clients; and criticisms of Koffler.

A. The Koffler Approach

There are three inquiries in the Koffler approach: (1) Whether

126. 51 N.Y.2d at 150, 412 N.E.2d at 934, 432 N.Y.S.2d at 878.
127. Id. at 150, 412 N.E.2d at 933, 432 N.Y.S.2d at 878. The court analogized this 
direct mail copy filing requirement to the New York requirement of filing retainer fee 
statements with the court. Id. See note 122 supra and accompanying text. The New 
York court rule does not provide for any review of the statements once they are filed. 22 
NYCRR 691.20 (1979). There is, however, an implicit assumption that filing, in and of 
itself, is sufficient to control any unsavory practices in the area of fees and retainers.
128. See note 121 supra and accompanying text.
129. 51 N.Y.2d at 150, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.
130. Id. at 143, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.
131. See note 21 supra.
132. See note 21 supra.
the communication is commercial speech;\textsuperscript{133} (2) whether a proscripti­
on of the content is constitutional;\textsuperscript{134} and (3) whether the proscripti­
on of the manner of dissemination is constitutional.\textsuperscript{135}

The first inquiry involves the use of the \textit{Central Hudson} definition of commercial speech: 
\textit{``[e]xpression related solely to the eco­
nomic interest of the speaker and its audience.''}\textsuperscript{136} This definition
encompasses not only the advertising and solicitation dealt with in \textit{Bates} and \textit{Ohralik} but also any commercially motivated communication not included in \textit{Primus}.\textsuperscript{137} The importance of this first deter­
mination is that it avoids the semantic problem inherent in the
classification of a communication as being either solicitation or ad­
vertising.\textsuperscript{138} Furthermore, the determination of commercial or non­
commercial speech establishes the standard of constitutional review
to be used in the case.\textsuperscript{139} Application of the \textit{Central Hudson} definition as the threshold step of the \textit{Koffler} approach will result in the
utilization of \textit{Primus} as dispositive case law for those communica­
tions that are not economically motivated and thus not commercial
speech.\textsuperscript{140} Economically motivated communications will be termed
commercial speech and are subject to application of the remaining
two inquiries of the approach.

The second \textit{Koffler} inquiry again resorts to \textit{Central Hudson} to
determine whether a given regulation may constitutionally proscribe
the content of a communication given a commercial speech status.
The \textit{Central Hudson} content analysis involves four separate subin­
quiries. First, the expression must concern a lawful activity and
must not be misleading.\textsuperscript{141} Second, the government interest asserted
must be substantial. Third, if both these inquiries yield positive an­
ers, the court must determine whether the regulation directly advances the government interest asserted and, fourth, whether there is

\textsuperscript{133} \textit{See} 51 N.Y.2d at 144-47, 412 N.E.2d at 931, 432 N.Y.S.2d at 875-76.

\textsuperscript{134} \textit{Id.} at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876.

\textsuperscript{135} \textit{Id.} at 147, 412 N.E.2d at 933-34, 432 N.Y.S.2d at 876.

\textsuperscript{136} 447 U.S. at 561.

\textsuperscript{137} \textit{Primus} dealt with communication that was not motivated primarily by the
speaker's pecuniary interest. \textit{See} 436 U.S. at 416. The \textit{Koffler} court characterized
\textit{Primus} as dealing with attorney-prospective client communication at the political and
associational level. 51 N.Y.2d at 147, 412 N.E.2d at 931-32, 432 N.Y.S.2d at 876.

\textsuperscript{138} \textit{See} notes 12, 109-17 \textit{supra} and accompanying text.

\textsuperscript{139} \textit{See} notes 66-69 \textit{supra} and accompanying text.

\textsuperscript{140} \textit{See} 436 U.S. at 431-33 for a discussion of the \textit{Primus} test and its application.

\textsuperscript{141} \textit{Bates} stated that communication concerning obviously illegal transactions
may be suppressed. 433 U.S. at 384. \textit{Pittsburgh Press} indicated an absence of first
amendment interest when the commercial activity about which the information to be
communicated is itself illegal. 425 U.S. at 388-89.
a less restrictive alternative to the regulation. If the communication is misleading or relates to unlawful activity, or the regulation directly advances a substantial government interest in the absence of a less restrictive alternative, the regulation is constitutional as applied to proscribe the content of the communication. In other cases, the regulation is an unconstitutional proscription of content. In either instance, a complete constitutional analysis of a regulation must include not only an examination of the proscription of content but also an examination of the regulation as a proscription on the manner of communication.

The final inquiry of the KoJler approach is a manner analysis that uses the approach proposed by the Court in Virginia Pharmacy to determine the constitutionality of regulations proscribing the manner of dissemination of commercial speech. The Virginia Pharmacy analysis involves three subparts: Whether the restriction is reasonable; whether the restriction serves a significant government interest; and whether the restriction leaves open ample, alternative channels of communication. If all three KoJler inquiries and their subparts are answered affirmatively, the regulation is a constitutional proscription of the manner of dissemination of commercial speech.

KoJler’s three-step analytical approach provides definitive guidelines to assist the courts in ruling on the constitutionality of

142. 51 N.Y.2d at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876. The Supreme Court, in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), used the Central Hudson approach and indicated the third factor presents the most difficult analytical task in the use of the approach. Id. at 508-09. Analysis of the third factor involves resolution of the conflicting interests of the government and those persons seeking to purvey goods and services through commercial speech. Id. at 512.

143. Other cases arise when the commercial activity about which the information is to be communicated is not misleading, deceptive, or illegal; when the government interest to be advanced by the regulation is insubstantial; or when there is a less restrictive alternative to the regulation. The KoJler court found a substantial state interest directly related to the proscription of attorney direct mail communication, 51 N.Y.2d at 149-50, 412 N.E.2d at 933, 432 N.Y.S.2d at 878, yet found the proscription unconstitutional on the grounds that less restrictive alternatives existed to further the interest. Id. at 150-51, 412 N.E.2d at 933, 432 N.Y.S.2d at 878.

144. Id. at 150-51, 412 N.E.2d at 933-34, 432 N.Y.S.2d at 878. Initially, it might appear that if a communication were constitutionally proscribed with regard to content, a manner examination would be unnecessary. A manner examination, however, is necessary in the interest of crisp and concise judicial analysis. If parties have received a decision on both content and manner, they have guidance that will enable them to revise either the communication and its dissemination or the state regulation in order to comply with the appropriate regulatory and constitutional standards without engaging in further litigation.

145. Id. at 150, 412 N.E.2d at 934, 432 N.Y.S.2d at 878.

146. Id.
regulations proscribing attorney communication with prospective clients. The significance of Koffler’s approach becomes apparent when the formula is compared with those rationales and approaches used by other state supreme courts in attorney direct mail communication cases.

B. **Comparative Analysis of the Koffler Approach**

Only three other state supreme courts have ruled in the area of attorney direct mail communication. This section will analyze the rationale in each of those cases and will compare each rationale with the Koffler approach.

In *Eaton v. Supreme Court of Arkansas*, two attorneys, who were partners in private practice, contracted with an advertising concern to distribute an advertisement for their law firm in a discount coupon packet mailed to 10,000 homes in North Little Rock, Arkansas. A complaint seeking disciplinary action followed in which the attorneys were charged with violation of DR 2-101(A) and DR 2-103(A) of the Arkansas Code of Professional Responsibility. The *Eaton* court used a general three-pronged test to examine and uphold the constitutionality of this proscription on attorney direct mail communication.

The court first classified the communication as solicitation because the purpose of the communication was to urge a specific group of consumers to seek the attorneys’ services. The court stated that the purpose of the communication did not include provision of information to the consumer and facilitation of informed choice by allowing fee comparison. The court then examined the content of the communication and found that its “broad sweep, without any indication of charges” was insufficient to assist those in need of legal services in making an informed choice. The court concluded that it was appropriate to restrict content so devoid of consumer information. Finally, the court examined the manner of dissemination and found it deceptive, in that the inclusion of the communication in a packet with discount coupons could give the

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148. *Id.* at 576, 607 S.W.2d at 56.
149. *Id.* at 580-81, 607 S.W.2d at 59-60.
150. *Id.* at 580, 607 S.W.2d at 59. The advertisement did not list any fees. *Id.* at 581, 607 S.W.2d at 59-60.
151. *Id.* at 580, 607 S.W.2d at 59.
152. *Id.*
153. *Id.* at 581-82, 607 S.W.2d at 60.
false impression of discounted legal services.\textsuperscript{154} This indicated that the manner of dissemination therefore was impermissible.\textsuperscript{155} While the result arguably is proper in light of the facts of the case,\textsuperscript{156} the rationale is hardly a model for other courts. The discussion of the communication's content and the manner of dissemination indicates valid reasons that support the restriction. These reasons, deceptive manner of dissemination\textsuperscript{157} and content devoid of valuable and necessary consumer information,\textsuperscript{158} however, are very general in nature. They do not provide an approach, nor are they capable of distillation into an approach that would facilitate determination of the content and manner restrictions' constitutionality. The use of the solicitation-advertising dichotomy, furthermore, makes possible the indiscriminate placement of any activity into the category of solicitation. As the \textit{Koffler} court noted: "[A]ll advertising either implicitly or explicitly involves solicitation."\textsuperscript{159} In contrast to \textit{Eaton}, \textit{Koffler} provides an all encompassing threshold classification of the communication in question\textsuperscript{160} and distinct constitutional tests of content and manner restrictions that together provide guidance for subsequent decisions.

In \textit{Kentucky Bar Association v. Stuart},\textsuperscript{161} two attorneys were charged with unprofessional and unethical conduct because they mailed letters, quoting closing fees, on law office stationary to real estate brokers.\textsuperscript{162} The \textit{Stuart} court, in a \textit{per curiam} opinion, used a balancing test without distinction between content and manner, to strike down proscription of direct mail communication. This balancing test proposed that the government interest in prohibition must outweigh the individual and societal interest in commercial speech for the proscriptive regulation to be valid.\textsuperscript{163} This rationale is deceptively simple and imprecise. The proposal of a balancing test and the implication of commercial speech analysis represent the roots of a logical decision rationale. This proposal and implication standing

\textsuperscript{154} Id. at 580, 607 S.W.2d at 59.
\textsuperscript{155} Id.
\textsuperscript{156} Not only was the advertisement devoid of fee charges but it also was deceptive in that it gave the impression of discount legal fees by its inclusion in the discount coupon packet. \textit{Id}. See notes 151-54 \textit{supra} and accompanying text.
\textsuperscript{157} 270 Ark. at 580, 607 S.W.2d at 59.
\textsuperscript{158} Id. at 580-81, 607 S.W.2d at 59-60.
\textsuperscript{159} 51 N.Y.2d at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.
\textsuperscript{160} See notes 120-21 \textit{supra} and accompanying text.
\textsuperscript{161} 568 S.W.2d 933 (Ky. 1978).
\textsuperscript{162} Id. at 933.
\textsuperscript{163} Id. at 934.
alone, however, are incomplete as an analytical approach. A statement of the various factors that can tip the balance also is necessary. For example, this rough balancing test is nondispositive when one is presented with a situation wherein a substantial government interest, directly advanced by a restriction of attorney communication, can be furthered equally by a less restrictive alternative.\textsuperscript{164} Furthermore, the balancing test is nondispositive in the face of a significant government interest directly advanced by attorney communication restriction when there is a sufficient, alternative means of communication.\textsuperscript{165} The \textit{Koehler} approach avoids these problems by precisely presenting the dispositive factors in the form of elements to be considered in its manner and content restriction tests.\textsuperscript{166}

In \textit{Allison v. Louisiana State Bar Association},\textsuperscript{167} two attorneys sought to enjoin the state bar association from enforcing against them certain disciplinary rules that prohibit the direct mail marketing of prepaid legal services to various business groups.\textsuperscript{168} Commentators have construed the major thrust of \textit{Allison} to concern the marketing of prepaid legal plans.\textsuperscript{169} The use of direct mail communication as a means of information dissemination in \textit{Allison}, however, makes that case appropriate for consideration within the present discussion. \textit{Allison} held that the direct mail communication constituted solicitation for pecuniary gain and that it might be proscribed because of the state's traditional and important regulation of the practice of law.\textsuperscript{170} The \textit{Allison} rationale on direct mail communication is capable of distillation into a single classification test.

This classification test is the solicitation-advertising dichotomy,\textsuperscript{171} previously analyzed in the discussion of \textit{Eaton}\textsuperscript{172} and the

\begin{itemize}
\item \textsuperscript{164} An example of such an alternative is the possibility of filing a recorded telephone solicitation copy with the bar association or the court in addition to a ban on telephone solicitation. Each of these alternatives directly advances the important and legitimate state interest of prevention of deception. \textit{See} 51 N.Y.2d at 148-49, 412 N.E.2d at 932-33, 432 N.Y.S.2d at 877.
\item \textsuperscript{165} An example is the existence of a more cost effective method of attorney communication with prospective clients. Assume arguendo that electronic media is such a method, in addition to a ban on telephone solicitation. \textit{See} 51 N.Y.2d at 150, 412 N.E.2d at 934, 432 N.Y.S.2d at 878.
\item \textsuperscript{166} \textit{See} notes 122-27 \textit{supra} and accompanying text.
\item \textsuperscript{167} 362 So.2d 489 (La. 1978).
\item \textsuperscript{168} \textit{Id.} at 489.
\item \textsuperscript{169} \textit{Id.} at 496 (Tate, J., concurring); Politz, \textit{Professional Responsibility}, 39 LA. L. REV. 831, 837 (1978-79); \textit{Note, Constitutional Law-First Amendment-State Bar Association May Constitutionally Prohibit Attorneys from Soliciting Clients for Profit through the Mail}, 53 TUL. L. REV. 962, 962 (1979).
\item \textsuperscript{170} 362 So.2d at 496.
\item \textsuperscript{171} \textit{See} notes 110-17 \textit{supra} and accompanying text.
\item \textsuperscript{172} \textit{See} notes 159-60 \textit{supra} and accompanying text.
\end{itemize}
Koffler appellate division opinion.\textsuperscript{173} That dichotomy, even in combination with the very general manner and content tests, did not make either Eaton\textsuperscript{174} or the Koffler appellate division opinion\textsuperscript{175} models for other courts to follow. The dichotomy is manifestly unsatisfactory as a rationale that could provide an analytical approach for subsequent decisions. Although the forgoing discussion may lead the reader to believe that the three-step approach derived from Koffler is the best analytical instrument put forth by the state courts for cases not disposed of under the Bates line, the approach is not without criticism.

C. Criticism of Koffler

Koffler is subject to two kinds of criticism. First, the analytical approach underlying the Koffler rationale is rather structured and not the best choice of several alternative approaches.\textsuperscript{176} Second, although Koffler itself has not been the subject of reported criticism, the authority on which the court’s rationale is based has received sharp criticism.\textsuperscript{177}

The analytical approach that Koffler used, by the court’s own admission, is “structured”.\textsuperscript{178} Moreover, there is support in the case law for a more fluid balancing approach.\textsuperscript{179} The balancing approach is based on dicta from Pittsburgh Press which invited a balancing approach by implying that even advertising of an ordinary commer-

\textsuperscript{173} See notes 110-12 supra and accompanying text.
\textsuperscript{174} See notes 157-65 supra and accompanying text.
\textsuperscript{175} See notes 109, 110-17 supra and accompanying text.
\textsuperscript{176} Previous discussion has considered and rejected two of these approaches. See notes 84-87 supra and accompanying text (analysis using the Bates trilogy); notes 113-17 supra and accompanying text (semantic analysis through the “advertising-solicitation dichotomy”). A third approach is absolutism. Justice Black generally is regarded as the foremost exponent of such a position. He argued that the first amendment command that Congress shall make “no law” abridging freedom of speech and association is to be construed literally. Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 CALIF. L. REV. 935, 935-36 (1968). Limited first amendment protection, however, is the standard in the commercial speech area. See Bates v. State Bar, 433 U.S. 350, 363-64 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976). The absolutist approach is therefore inappropriate in the commercial speech context. See notes 186-95 infra and accompanying text for discussion of the remaining two approaches.
\textsuperscript{177} See notes 196-97 infra and accompanying text.
\textsuperscript{178} 51 N.Y.2d at 147, 412 N.E.2d at 932, 432 N.Y.S.2d at 876. See note 184 infra and accompanying text for a critique of the “structured” approach.
cial transaction could be accorded constitutional protection when the
first amendment interest outweighs the government interest supporting
the regulation. 180

Koffer's structured, analytical approach, considered in light of
the court's comment or constitutional commercial speech analysis, 181
essentially is a revival of Professor Nimmer's definitional approach,
enunciated in 1968. 182 The strength of the definitional approach lies
in the fact that it generates a rule that may be employed in future
cases without the need for a weighing of interests. 183 The approach,
therefore: Defines the scope of the first amendment with regard to a
particular category of speech; provides a measure of constitutional
certainty with regard to first amendment application; and minimizes
the possibility that uncertainty of first amendment protection may
serve to chill speech. 184

In addition to the absolutist 185 and definitional approaches,
there is a third approach that remains viable: pure, ad hoc balancing. 186
This approach, however, is subject to several criticisms. Justice Black,
a strong advocate for the alternative approach of
absolutism, 187 indicated that the use of ad hoc balancing tests,
whereby speech is left unprotected under certain circumstances, is a

180. 413 U.S. at 389.
181. 51 N.Y.2d at 146, 412 N.E.2d at 931, 432 N.Y.S.2d at 875.
182. Nimmer, supra note 176, at 942. Professor Nimmer describes the definitional
approach as the appropriate alternative to absolutism, see note 176 supra, and pure ad
hoc balancing, see note 186 infra. Balancing is used in the definitional approach not for
the purpose of determining which litigant should prevail in the particular case, but rather
to define which forms of communication merit first amendment protection. Nimmer,
supra note 176, at 942. Professor Nimmer's analysis deals with traditional first amend-
ment interests at a time when Valentine still negated first amendment protection for com-
mercial speech. See notes 39-69 supra and accompanying text. The difference between
the traditional standard of review, strict scrutiny, and the Central Hudson intermediate
scrutiny test does affect the discussion here. Use of intermediate scrutiny in commercial
speech analysis merely means that the state interest need not be virtually absolute in
order to prevail.

184. Id. at 945. Professor Tribe indicates that criticism of a structured definitional
approach centers on the feeling that the approach masks and attempts to escape a weigh-
ing of competing policy and value considerations. L. Tribe, supra note 20, § 12-2, at
582-84. This criticism is inappropriate as the structured definitional approach does in-
clude a weighing of those considerations, but only for the purpose of defining the scope
of first amendment protection. See note 161 supra.

185. See note 176 supra for description of the absolutist approach.
186. Pure ad hoc balancing involves a weighing of the government's interest in
speech regulation against the speaker's interest in communication in each and every case
without the application of any previously determined judicial rule. Nimmer, supra note
176, at 939.
187. See note 176 supra and accompanying text.
standing invitation to abridge speech at will.\textsuperscript{188}

Professor Nimmer criticizes ad hoc balancing on three grounds. First, each case in which the approach is used must involve a weighing of the specific interests at stake. Therefore, in the absence of a prior final adjudication of these same interests by the highest court, a speaker has no standard by which to measure the relative weight of his interest against that of those seeking to regulate his speech. This absence of a definite standard has a manifest chilling effect on speech.\textsuperscript{189}

The second criticism is that ad hoc balancing generally results in a favoring of the restriction of speech.\textsuperscript{190} The rationale for this criticism is twofold. Free speech issues generally are not raised unless there is a violation of a law that results in prosecution by the authorities.\textsuperscript{191} As those who run afoul of repressive laws and suffer prosecution are those who express the most unpopular ideas, it is too much to expect that the judiciary will remain untouched by such strong popular feelings. The mere possibility of an unconscious bias is sufficient to adversely affect reliable operation of the balance.\textsuperscript{192}

A final criticism of ad hoc balancing is that ingrained judicial deference to the legislature also may adversely affect the operation of the balance when the constitutionality of a legislative enactment is at issue. The result in such a situation is judicial abdication in the weighing process.\textsuperscript{193}

Proponents of ad hoc balancing advance it, despite its flaws, as a sensible alternative to absolutism.\textsuperscript{194} In the area of commercial speech, however, absolutism is inapplicable by definition.\textsuperscript{195} The flaws and criticisms noted above, in the absence of a pressing necessity for an alternative to absolutism, are fatal when, in a commercial speech context, ad hoc balancing is compared with the definitional approach.

The other kind of criticism of \textit{Koffler} is \textit{Koffler}'s choice of case authority in support of its proposed three-step analytical approach. The choice arguably is an endorsement of that authority. Criticism

\begin{itemize}
  \item \textsuperscript{188} Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting).
  \item \textsuperscript{189} Nimmer, \textit{supra} note 176, at 939.
  \item \textsuperscript{190} \textit{Id.} at 939-40.
  \item \textsuperscript{191} \textit{Id.} at 940.
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} \textit{Id.} at 940-41.
  \item \textsuperscript{194} \textit{Id.} at 939.
  \item \textsuperscript{195} See note 176 \textit{supra}.
\end{itemize}
of the authority, therefore, is tacit criticism of Koffler’s choice of that authority.

The first step of the Koffler analytical approach involves the use of the *Central Hudson* definition of commercial speech: “[e]xpression related solely to the economic interest of the speaker and its audience.”196 This definition is only one of two in the *Central Hudson* opinion.197 The other definition described commercial speech as “speech proposing a commercial transaction.”198 Justice Stevens, in his concurring opinion to *Central Hudson*, cited the two definitions and indicated dissatisfaction with them both: The first was clearly too broad and the second, although somewhat narrower in scope, was still overly encompassing.199 Justice Stevens’ criticism of the first definition is inappropriate with regard to its application in Koffler. The crux of the first step of the Koffler approach is the selection of a definition that is sufficiently broad to include all transactions which are not governed directly by the *Bates* line. The end result of utilizing a very broad definition of commercial speech is that Koffler and the *Bates* line will combine to provide complete, initial coverage of all transactions, thus avoiding the semantic problems of the advertising-solicitation dichotomy.200 The first *Central Hudson* definition is broad enough to accomplish this task of spanning the gaps in the *Bates* line.201 To foresake the use of this first, broad *Central Hudson* definition for the second definition would make the Koffler analytical approach properly subject to Justice Stewart’s criticism of restrictiveness associated with the second definition. The second definition pertains to communications that are akin to offers.202 Communications seeking to generate legal business but not rising to the level of an offer are not covered by the second definition. This failure of the second definition to be all-inclusive would give rise to the same semantic dilemma previously

196. See notes 136-37 supra and accompanying text.
197. 447 U.S. at 579 (Stevens, J., concurring).
198. *Id.* at 580. The context in which the Court expressed the second definition, *id.* at 562, was a citation to *Ohralik* and *Bates*. Arguably, in light of that context, the second definition is not intended as operative, but rather as descriptive of the *Ohralik* and *Bates* views on commercial speech.
199. 447 U.S. at 580 (Stevens, J., concurring).
200. See notes 12-13 supra.
201. Briefly, *Primus* disposed of an attorney’s solicitation absent a motive of pecuniary gain. *Ohralik* disposed of in-person solicitation for pecuniary gain that has the possibility of fraud, overreaching, and undue influence. *Bates* covered attorney advertising. See note 18 supra.
202. 447 U.S. at 580 (Stevens, J., concurring).
The four-step Central Hudson content analysis, used as the second part of the Koffler analytical approach, received criticism in Justice Blackmun's Central Hudson concurrence. Justice Blackmun stated that four-part content analysis was not representative of the prior Supreme Court opinions on commercial speech. He noted that the governing principle of those decisions was that the "[s]tate may 'not [pursue its goals] by keeping the public in ignorance.'" Essentially, he felt that the content analysis swept too broadly and solved the Central Hudson problem of manipulating the public's electrical consumption practices, through suppression of information, rather than through a direct attack on the problem itself. That criticism is inapplicable in the Koffler context because Koffler sought to deal directly with the conduct of a group of professionals as the group attempted to establish client relationships with the public. Moreover, a second response to Justices Stevens' and Brennan's criticism of Central Hudson is found when one observes that the five opinions to date citing Central Hudson do so favorably. The final part of the Koffler approach, manner analysis, is drawn from the Virginia Pharmacy and Consolidated Edison manner tests. Neither case has been criticized on its proposed manner analysis.

V. CONCLUSION

There are four Supreme Court decisions in the area of attorney
solicitation and advertising. *Bates v. State Bar of Arizona*\textsuperscript{212} manifested the Court’s explicit yet narrow approval of attorney advertising as commercial speech. *Ohralik v. Ohio State Bar Ass’n*\textsuperscript{213} demonstrated the Court’s aversion to in-person solicitation for pecuniary gain that is fraught with the dangers of deception, overreaching, undue influence, and commercialization. *In re Primus*\textsuperscript{214} was the culmination of the *Button* line: Collective activity, inclusive of solicitation, undertaken to obtain meaningful access to the courts, is a fundamental right protected by the first amendment. *Primus* also represented the Court’s concern with individual attorney solicitation undertaken as an expression of first amendment political and associational rights. *In re R.M.J.*\textsuperscript{215} both examined the specific question of whether the amended Missouri advertising rules conformed to *Bates* and provided some generalizations on commercial speech doctrine in the context of professional services advertising. None of these cases provided a concise, analytical approach to situations that arguably are both solicitation and advertising. The most striking example of such a situation is attorney direct mail communication with prospective clients.

*In re Koffler*\textsuperscript{216} enunciated such an approach in three steps: Classification as commercial speech under *Central Hudson*; the *Central Hudson* test to determine the constitutionality of restriction of content, and the *Virginia Pharmacy* test to determine the constitutionality of a restriction on manner of dissemination. This approach is one of four rationales advanced by state supreme courts deciding cases in this area.

In comparison with the other three state supreme court decisions, the *Koffler* analytical approach provides definitive guidance for judicial analysis in subsequent decisions. *Koffler*, in using the threshold commercial speech determination, neatly avoided the problem of the solicitation-advertising dichotomy that tainted the rationale in both *Eaton* and *Allison*. Furthermore, *Koffler*’s use of specific elements as a measure of the balance between substantial, significant, and important state interests served by the regulation and first amendment rights inherent in commercial speech, eliminates the problems of vagueness and the dearth of dispositive factors which plague the *Eaton* and *Stuart* rationales.

\textsuperscript{212} 433 U.S. 350 (1977).
\textsuperscript{213} 436 U.S. 447 (1978).
\textsuperscript{214} 436 U.S. 412 (1978).
\textsuperscript{215} 102 S.Ct. 929 (1982).
\textsuperscript{216} 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980).
$Koffler$, however, is not without criticism. An alternative to the $Koffler$ structured formula is the more fluid, ad hoc balancing approach. Yet, this ad hoc balancing approach is the subject of four major criticisms. Review of these criticisms results in the conclusion that the ad hoc balancing approach is unsuitable for use in the commercial speech area.

$Central Hudson$, the basis for the $Koffler$ formula, received criticism from the concurring $Central Hudson$ Supreme Court Justices. The Supreme Court criticisms are inapplicable to $Koffler$. The conclusion, in light of this discussion, is that the criticisms are insufficient to negate the proposed use of the $Koffler$ analytical approach.

Thus, in blending the prior decisions of the Supreme Court into its approach, the $Koffler$ court has filled the analytical void left by the Supreme Court's failure to rule specifically on situations that arguably are both solicitation and advertising. In future cases involving such dichotomous situations as attorney direct mail communication with prospective clients, the courts should utilize the three-step, $Koffler$ analytical approach to analyze the constitutionality of proscriptive regulations.

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