

In the

ORIGINAL

Supreme Court of the United States

IN THE MATTER OF R _____ M. J _____,

Appellant

)
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) NO. 80-1431
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Washington, D. C.

November 9, 1981

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IN THE SUPREME COURT OF THE UNITED STATES

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IN THE MATTER OF R_____M. J_____, :

Appellant : No. 80-1431

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Washington, D. C.

Monday, November 9, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:11 o'clock a.m.

APPEARANCES:

CHARLES B. BLACKMAR, ESQ., St. Louis, Missouri;

on behalf of the Appellant.

JOHN W. INGLISH, ESQ., California, Missouri;

on behalf of the Appellee.

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P R O C E E D I N G S

2

CHIEF JUSTICE BURGER: We will hear arguments next
3 in No. 80-1431.'

4

ORAL ARGUMENT OF CHARLES B. BLACKMAR, ESQ.,

5

ON BEHALF OF THE APPELLANT

6

MR. BLACKMAR: Mr Chief Justice, and may it please
7 the Court, the question in this case is whether a state may
8 adopt rules relating to legal advertising when the necessary
9 effect is to inhibit advertising which is truthful,
10 effectual, not misleading, and beneficial to the public.

11

QUESTION: Well, Mr. Blackmar, as to the
12 particular facts of this case, supposing we were to conclude
13 that under Bates the rules adopted by the Supreme Court of
14 Missouri were unconstitutional. Would we be free to roam at
15 large beyond this particular rule and say that A, B, C, D
16 are permitted, but E, F, G are not?

17

MR. BLACKMAR: I plead a particular case for a
18 particular client, Your Honor. I would say that the
19 decision should respond to the case. I would say, though,
20 that this form of rulemaking in which the Supreme Court of
21 Missouri says, this you may say and nothing else, would be
22 invalid.

23

I am not here to argue about what rules the
24 Supreme Court of Missouri might adopt. Bates specified
25 quite a few suggestions, such as arguing about the quality

1 of legal services and things like that. The Supreme Court
2 of Missouri did not follow those suggestions. It adopted a
3 rule listing ten permissible categories of information, and
4 saying this is all that a lawyer may advertise. I want you
5 to hold that rule invalid. What other rules they might
6 adopt, that is not my problem at this stage.

7 QUESTION: To reverse the judgment, we wouldn't
8 even have to hold that rule invalid, would we? All we would
9 have to say is that your client should not have been
10 privately reprimanded for advertising as he did because his
11 advertisement was permitted under the Constitution.

12 MR. BLACKMAR: You would have to say that, but I
13 believe you would necessarily have to say that the rule that
14 says that this you may say and nothing else is invalid,
15 because that rule would necessarily inhibit protected
16 speech.

17 Now, the balance of the Missouri rule, the A part
18 of the rule, which talks about advertising that is
19 misleading, self-laudatory, and so forth, you wouldn't have
20 to touch. That is not involved in this case. That is not
21 charged.

22 Of course, there is another part of this case,
23 Your Honor, Your Honors, that the Missouri rule completely
24 denies the mail as a medium of legal advertising. We argue
25 very strongly that the same advertisement that could be

1 published in the newspaper could be sent in the mail, and so
2 that is another part of the case which supports the judgment
3 of the Supreme Court of Missouri. It is not discussed in
4 the least in the opinion of the court, but nevertheless, it
5 certainly is present in the case, because it consists of one
6 of the four charges.

7 QUESTION: Now, every member of the bar, in order
8 to practice in the state, must be a member of this
9 association. Is that right?

10 MR. BLACKMAR: Yes, it is an integrated bar. Yes,
11 Your Honor. Your annual license fee makes one a member of
12 the bar. But now, I might say there is much
13 misunderstanding on this, that the disciplinary proceedings
14 are something that the Missouri bar has nothing to do with.
15 Those have been totally pre-empted by the Supreme Court of
16 Missouri, and by a constituent body called the advisory
17 committee of the Missouri bar.

18 QUESTION: You mean they are the enforcement arm?

19 MR. BLACKMAR: They are the enforcement arm of the
20 Supreme Court. I think that is important, because they are
21 selected by the Supreme Court.

22 QUESTION: Are they not in effect the enforcement
23 arm of the integrated bar, too?

24 MR. BLACKMAR: I would say that the enforcement
25 proceeding is entirely in the hands of the Supreme Court.

1 The integrated bar has no authority in these premises. The
2 confusion of terms, I submit, is the responsibility of the
3 court, which has created these two bodies which have
4 Missouri bar in them. Disciplinary proceedings are the
5 province of the court entirely.

6 I think the greatest vice in the rule under
7 consideration is that it does something that is
8 unprecedented in First Amendment experience, and that is to
9 have a system in which the regulatory authorities specify
10 the manner of speech, rather than leaving it to the speaker
11 to select his or her own form of expression, subject to
12 proper rules that might be drafted, and subject to the rules
13 which the Supreme Court of Missouri has but which are not
14 involved in this case, which prevent the freedom of speech.

15 QUESTION: Now, this, I gather, is the prior
16 restraint argument?

17 MR. BLACKMAR: I think it would be a prior
18 restraint argument. It says, this you may say and nothing
19 else. Now, it is a rule of general application, Your
20 Honor. There is no provision for applying to the advisory
21 committee or to the court for permission to advertise in a
22 particular way. The Appellant, the lawyer tried that. He
23 sent this ad to the advisory committee, and was curtly told
24 that it does not comply with the rules because it has
25 unauthorized matter.

1 So, I think that there is no question at all that
2 this is a prior restraint in that it absolutely forbids
3 certain forms of expression.

4 QUESTION: The rule prohibiting self-laudatory
5 advertising would likewise be a prior restraint then,
6 wouldn't it?

7 MR. BLACKMAR: It would be present, in that it
8 does not pass in advance on what the speaker says. In other
9 words, he takes a chance that something that he might say
10 might be found to be a violation of the self-laudatory
11 rule. By the way, that is not charged in this case, Your
12 Honor.

13 QUESTION: But the two, both of them would be
14 prior restraints.

15 MR. BLACKMAR: Well, I am thinking of the prior
16 restraint as something that says that unless you can fit
17 something into these particular categories, you may not say
18 it, and I think that would be different from the
19 self-laudatory ad, which seeks to provide an external
20 standard. By the way, I am not here to talk about the
21 validity or invalidity of prohibition on self-laudatory
22 statements, but I think that that sets an external standard
23 that the speaker has to conform to. It doesn't really -- it
24 doesn't really prohibit the speaker from using his or her
25 own language. It simply says that if you transgress this

1 line, you may be subject to censure.

2 Now, the rule before us says that if you say
3 anything such as this appellant said, he was licensed to
4 practice in Missouri and Illinois, and they say you can't
5 say that, or if he said he was licensed to practice in the
6 federal court, that is not one of the things that is listed,
7 so it can't be said.

8 QUESTION: Would it be appropriate in your view
9 for a lawyer who practiced personal injury law to say that
10 my average verdicts over the past 12 months have been
11 \$129,000, assuming that is a fact?

12 MR. BLACKMAR: I would note foreclose the right of
13 the state to regulate something like that, because I think
14 the state might well feel that it was misleading, Your
15 Honor, and it didn't talk about the case, it might present
16 an odious comparison. Yes, I would think, and we have said,
17 that if the state would adopt a rule that said, in effect,
18 that one may not advertise the results of his litigation,
19 the size of his verdicts, or the number of acquittals, or
20 something like that, I would not foreclose that kind of
21 rule. That is not this case, and so I am not going to argue
22 about it.

23 Now, until they have some valid regulation like
24 that, I would say that Your Honors' Central Hudson opinion
25 would stand in the way of doing that under a rule that is

1 not narrowly drawn.

2 QUESTION: There still would be some prior
3 restraint element, would there not?

4 MR. BLACKMAR: Yes, and perhaps you can't
5 completely foreclose prior restraint when you are talking
6 about commercial speech.

7 QUESTION: So there would be a balancing problem
8 with respect to the nature of the ad.

9 MR. BLACKMAR: I think there would be a balancing
10 problem. I believe at the time the SEC Act was passed in
11 1933 and 1934, I don't believe that at that time it was
12 really thought that commercial speech was subject to First
13 Amendment protection, but there one certainly has a kind of
14 prior restraint. You have to submit your --

15 QUESTION: Mr. Blackmar, ever since we have had
16 ethics and codes we have had prior restraint, haven't we?

17 MR. BLACKMAR: Well, I suppose that prior
18 restraint is inherent in a regulation of commercial speech.

19 QUESTION: Well, isn't the admonition against
20 ambulance chasing a prior restraint?

21 MR. BLACKMAR: Yes, and of course --

22 QUESTION: Stay away from ambulances.

23 MR. BLACKMAR: Of course, in the Ohralik opinion
24 the Court did balance one's right to speak against the
25 inhibitory effects of allowing a person to person

1 solicitation.

2 QUESTION: Well, the Court has never said, has it,
3 that prior -- the prohibitions against prior restraints are
4 absolute.

5 MR. BLACKMAR: I would say that is correct, Your
6 Honor, and I would say in commercial speech that it would
7 have limited application.

8 QUESTION: It would be weaker there, would it not?

9 MR. BLACKMAR: It would be weaker, but what the
10 Court has said, though, is that specifically legal
11 advertising, which is truthful and not misleading, is
12 protected speech which may be regulated only by narrowly
13 drawn rules directed to the purpose, and I think that that
14 really is sufficient to dispose of both parts of this case,
15 which involve an absolute prohibition against a printed ad
16 containing something that is not specifically prohibited,
17 and an absolute prohibition on the use of the mails as a
18 medium of legal advertising.

19 I think we will pretty much stand on that, that
20 whatever the state might do in the way of regulating legal
21 advertising, and it may do considerable, it cannot do it by
22 the form of rule that is involved in both parts of this
23 case.

24 By the way, the first rule, the Rule 2-101(B),
25 which relates to credit advertising, is a rule adopted by

1 the Supreme Court of Missouri in response to Bates, but the
2 second rule, Rule 102(A)(2), regarding mailed announcements,
3 is a pre-Bates rule. I think on the ground that the court
4 below did not consider that Bates applied to mail
5 advertising.

6 QUESTION: Mr. Blackmar, thinking about mail
7 advertising, let's assume that a lawyer had access to the
8 names of people who were admitted to the emergency room of a
9 great hospital in a large city. Could he use that list of
10 names to send invitations to come to see him when they got
11 well enough?

12 MR. BLACKMAR: I thought I might be asked that
13 question, Your Honor. That is a situation in which you
14 would have to decide just how far your Ohralik opinion went.
15 I have read the Ohralik opinion many times, and it laid
16 great stress on the coercive force of the lawyer at the
17 hospital with his contracts all ready to get signature.

18 Now, I have a hard time seeing how a letter could
19 be coercive in that sense. Maybe the Court would feel that
20 a letter to a person in a particularly vulnerable position
21 might have some of the vice of Ohralik, so I wouldn't
22 foreclose that kind of regulation.

23 By the way, the mailing involved in this case
24 consisted of two simple tombstone ads. I think it could not
25 possibly be considered misleading. All they said is, here I

1 am, here is my address, here is my phone number, I have
2 opened a law office.

3 QUESTION: Let me ask you about -- you say that it
4 couldn't possibly be misleading. Am I correct in thinking
5 that the tombstone ad, the first bar that your client
6 indicated he was admitted to was the bar of this Court?

7 MR. BLACKMAR: Not in the tombstone ad, Your Honor.

8 QUESTION: Not in the tombstone.

9 MR. BLACKMAR: Not in the mailed ad. The mail
10 was --

11 QUESTION: That is in the yellow pages?

12 MR. BLACKMAR: That is only in the yellow pages,
13 Your Honor.

14 QUESTION: Now, how can you justify -- what
15 possible value was there in putting that information in an
16 ad that went to the general public?

17 MR. BLACKMAR: I suppose the general public would
18 have to decide that. That is something that lawyers quite
19 frequently advertise in Martindale. We have found over 100
20 in Missouri. I would argue for allowing the lawyer to say
21 something that is truthful, such as that he was an Eagle
22 Scout, or an all-American halfback.

23 QUESTION: How does that information help a
24 potential client make his decision as to whether or not to
25 retain that lawyer?

1 MR. BLACKMAR: You might doubt very much that it
2 does, Your Honor.

3 QUESTION: Anyone who has a case in this Court
4 probably knows that he can find a lawyer who is either
5 admitted or can get admitted to practice here.

6 MR. BLACKMAR: And I noticed the Chief Justice's
7 expression on the subject of admission of the last term that
8 I would say that that could be questioned. If a state felt
9 that that information were undesirable, they would have two
10 courses --

11 QUESTION: Or potentially misleading.

12 MR. BLACKMAR: If they thought it were potentially
13 misleading.

14 QUESTION: And it is potentially misleading, isn't
15 it? Doesn't it suggest that the man has a special
16 qualification that he really doesn't have?

17 MR. BLACKMAR: I doubt that it is, really, Your
18 Honor, because I think it is --

19 QUESTION: Mr. Blackmar, how far does that rule
20 go? Under our Rule 5, after you have paid your \$100, you
21 get a nice, pretty certificate. You have it framed, and you
22 hang it on your office wall or you hang it in your window,
23 or on the front door. Does this rule prohibit that?

24 MR. BLACKMAR: Of course, the rule does not
25 prohibit that because it relates only to credit

1 advertising. You can still put your certificate on your
2 wall, and you can still --

3 QUESTION: Well, this is printed. It is supposed
4 to be engraved, but it is not, really. It is just printed.

5 (General laughter.)

6 MR. BLACKMAR: Well, I don't know -- I don't know
7 that the regulatory authorities have ever gone that far,
8 Your Honor.

9 QUESTION: Well, might not that case arise if we
10 say that this was wrong?

11 MR. BLACKMAR: I suppose they would charge that
12 that was an advertisement, too.

13 QUESTION: If it is printed, it is deceptive in
14 two ways.

15 MR. BLACKMAR: If they think it is -- if they
16 think it is a bad thing.

17 QUESTION: What about a young lawyer sending out
18 an advertisement that he had never lost a case.

19 (General laughter.)

20 MR. BLACKMAR: I would say that they might charge
21 him with sending out a misleading ad under the rule which
22 exists for that purpose.

23 QUESTION: He hasn't lost one.

24 (General laughter.)

25 MR. BLACKMAR: If they are concerned about that,

1 then they can adopt a rule. By the way, if they think that
2 there is any danger in a lawyer announcing that he is a
3 member of the bar of this Court, I suggest two courses, one,
4 charging him with a misleading ad, which he wasn't charged
5 with, or two, adopt a specific rule, and I would say then
6 apply it to the people in Martindale.

7 QUESTION: Mr. Blackmar, is it proper in your view
8 for the state bar to prohibit presumptively misleading ads,
9 not those which are actually misleading, but those which
10 might easily be perceived as such, those which are --

11 MR. BLACKMAR: Yes, I think that would cover some
12 of the things that have just been discussed, Your Honor. I
13 would say that if they wanted to adopt a narrowly drawn rule
14 having that purpose, if they concede that there is a danger
15 in certain information, then the courts might be faced with
16 a balancing task. Specifically, I would say that the size
17 and verdicts, results received, or Justice Marshal's never
18 lost a case, things like that, I think, could very probably
19 be prohibited by a specific rule.

20 QUESTION: Let me ask you another question
21 relating to this case. Was the attorney in this case
22 disciplined also for his failure to include the disclaimer
23 language in the ads which were published? The rule required
24 apparently that any ad listing an area of practice indicate
25 in bold print that the listing of the areas of practice does

1 not indicate any certification of expertise.

2 MR. BLACKMAR: The record shows that he included
3 the required disclaimer, as soon as he was aware of it.
4 Now, we do not challenge the disclaimer as such. That was
5 specifically recognized by the Bates opinion as one means
6 that the state bar might use. We do believe that the
7 disclaimer could be misleading, because Missouri does not
8 choose to certify anybody as a specialist.

9 Under those circumstances, we believe that the
10 attorney ought to be able to state that fact along with the
11 disclaimer, because otherwise the reader might get the idea
12 that --

13 QUESTION: But that is not before us.

14 MR. BLACKMAR: That is not before us. No, Your
15 Honor.

16 QUESTION: And it is your position that in fact it
17 was included and that the disciplinary action was not based
18 in any way on the failure to include the disclaimer?

19 MR. BLACKMAR: The disciplinary action was not
20 based on a failure to include the disclaimer. Furthermore,
21 the court has made it quite clear that it -- the court
22 below, that it believes that this rule is valid, that it
23 will enforce it unless the result is otherwise in this Court.

24 QUESTION: Mr. Blackmar, getting back to
25 advertising that one is admitted to practice before this

1 Court, I gather your client never in fact had a case --
2 never appeared here to argue a case. Is that right?

3 MR. BLACKMAR: Not to my knowledge, Your Honor. I
4 don't know --

5 QUESTION: Yes. Well, I noticed from your
6 application that this is your first appearance. Is that
7 correct?

8 MR. BLACKMAR: This is my first appearance in
9 argument.

10 QUESTION: Would you be in a different position,
11 do you think, now, to advertise that you are qualified to
12 and admitted to practice before this Court even though he
13 couldn't?

14 MR. BLACKMAR: I have asked to get in here many
15 times, Your Honor, and --

16 (General laughter.)

17 MR. BLACKMAR: -- have not had the chance.

18 QUESTION: But are you in a different position now
19 that we finally did grant one of your petitions and you are
20 finally able to argue a case here?

21 MR. BLACKMAR: Well, I --

22 QUESTION: Would it be misleading for you to
23 advertise now that you are admitted to practice before this
24 Court?

25 MR. BLACKMAR: Well, at least I did get here

1 once. That is about all I could say.

2 QUESTION: Do you think admission to this Court
3 and the certificate that accompanies it would convey to the
4 ordinary layman any notion or the notion that the person is
5 specially qualified, more qualified than the hundreds of
6 thousands of lawyers not admitted to this Court?

7 MR. BLACKMAR: I doubt that it would, Your Honor.
8 As I say, members of the bar do quite regularly list that in
9 the legal directories, but I don't believe -- I don't think
10 it would.

11 QUESTION: A representation emphasizing -- an ad
12 emphasizing that one was admitted to the bar of this Court,
13 if the purpose of it is not to entice some clients, what is
14 it?

15 MR. BLACKMAR: I suppose that he probably took his
16 lead from other members of the profession who publish the
17 fact quite freely. I suppose also the purpose of any
18 advertising isn't to entice clients. I wouldn't question
19 that.

20 QUESTION: But entice clients for the specific
21 purpose of handling a case in this Court.

22 MR. BLACKMAR: I doubt that a person would look in
23 the newspapers to try to find that, just as I doubt that a
24 person would look in the newspapers to try to find a lawyer
25 who practices financial institution law, such as the

1 committee permits, or international law.

2 QUESTION: I take it you would concede that the
3 admission to the bar of this Court and the receipt of the
4 certificate standing alone doesn't distinguish a lawyer from
5 every other lawyer that practices in his own state.

6 MR. BLACKMAR: I think it is no great
7 distinction. It is a credential that one requires to do
8 certain things.

9 QUESTION: Well, I wonder, Mr. Blackmar. For
10 example, it is certainly true that rarely does -- I don't
11 know when we will see you again. I hope soon, but it is not
12 often that private practitioners get more than once chance
13 to come here. Suppose you are employed in the Solicitor
14 General's office. We have had members of that staff who
15 have argued as many as 50 cases here. Now, if they go back
16 to practice in Missouri, you don't think they would be
17 qualified to advertise that they are admitted to practice
18 here, and have?

19 MR. BLACKMAR: You might have an ad in which one
20 says, I have argued 50 cases in the Supreme Court. That
21 appears to me to be the plainest fact, and I don't know why
22 somebody couldn't publish it for those who were interested
23 in knowing it.

24 QUESTION: But that is very different from the
25 hypothetical I was suggesting to you. I said that the

1 possession of that certificate standing alone, by which I
2 meant to exclude any experience in this Court, doesn't add
3 anything to the person's qualifications except that it is a
4 representation by this Court that we found that he was
5 admitted in the state of Missouri or wherever.

6 MR. BLACKMAR: It means that he could file papers
7 that others couldn't file, Your Honor.

8 If there are no questions, I will reserve the rest
9 of my time.

10 QUESTION: Mr. Blackmar, I would like to ask you a
11 question. Do you think that it would be proper and not
12 subject to state bar regulation for an attorney to send out
13 letters to people who are listed in the newspaper as being
14 widows of recently deceased spouses, listing an area of
15 expertise or practice as representation of widows? Is that
16 something that the state could not properly reach?

17 MR. BLACKMAR: That, I think, could very well be
18 considered, along the Ohralik line of a statement that might
19 have a coercive potential, and I think that the state might
20 reach something like that by an appropriately drawn rule,
21 but not by a blanket inhibition of the mail.

22 Thank you, Your Honors.

23 CHIEF JUSTICE BURGER: Mr. Inglish?

24 ORAL ARGUMENT OF JOHN W. INGLISH, ESQ.,

25 ON BEHALF OF THE APPELLEE

1 MR. INGLISH: Mr. Chief Justice, and may it please
2 the Court, the discussion that has been going on most
3 recently in this presentation by Mr. Blackmar I think really
4 gets at the heart of the issue, which I believe the Court
5 was trying to cover in the Bates case. I think in the Bates
6 case that what the Court was saying was, we believe there
7 should be more information flowing freely and cleanly to the
8 public so as to enable the public to have a more intelligent
9 way of making a decision in the selection of a lawyer.

10 Incident to that, of course, was this lawyer's
11 First Amendment right to speak, which is, of course, present
12 in any commercial speech case. I think what the Court has
13 to do is weigh these rights and these objectives in the
14 balance. We have seen that following Bates, a number of
15 courts have arrived at entirely opposite conclusions as to
16 what is necessary in order to achieve this balance. That
17 is, to enable the lawyer to speak freely, so that the public
18 will be more informed, which it must be, and with which we
19 concur, and at the same time protect the public from
20 potentially misleading or deceptive statements.

21 The statement with regard to the courts in which
22 the lawyer is admitted, I think, is potentially misleading.
23 I think that information is of value to other lawyers, and
24 it is published in professional publications. I think it is
25 necessary for referral work. But I don't believe --

1 QUESTION: Mr. English, getting back to the
2 colloquy with your colleague, what about the certificate of
3 admission to the bar of this Court that you post in your
4 office? Does that come within the prohibition?

5 MR. ENGLISH: I don't think so, Your Honor. I
6 think that -- within my office, I think that is entirely
7 appropriate. I have others there, and I intend to put this
8 one there when I get back. It took me 31 years to get here,
9 and I value the experience, but I don't believe that is
10 quite the same --

11 QUESTION: But I gather this prohibition is rather
12 a flat one, isn't it, against advertising that you are a
13 member of the bar of this Court?

14 MR. ENGLISH: Advertising, yes, but I think it
15 means advertising in the yellow pages, to the public
16 generally.

17 QUESTION: I see.

18 MR. ENGLISH: I think there is a difference
19 between that, Your Honor, and the client who comes into my
20 office. He is already there for some purposes, and seeing
21 this did not get him there.

22 QUESTION: While I have you interrupted, Mr.
23 English, is there any maritime or admiralty practice of any
24 consequence in Missouri? You do have some navigable streams.

25 MR. ENGLISH: There is some admiralty practice in

1 St. Louis, Your Honor.

2 QUESTION: Are there some who engage only in the
3 admiralty practice?

4 MR. INGLISH: I understand that there are.

5 QUESTION: And yet they are not permitted to
6 advertise that, are they, under this --

7 MR. INGLISH: Under admiralty, I don't recall that
8 they are. I thought there was a rule broad enough to
9 encompass that.

10 QUESTION: I don't find either it or --

11 MR. INGLISH: Patent? I thought --

12 QUESTION: -- or maritime.

13 MR. INGLISH: -- the admiralty, patent, and --
14 were permitted, I think, in another rule.

15 QUESTION: They are under another rule?

16 MR. INGLISH: I think -- well, at another place in
17 this rule. I think that the exception -- I believe. I may
18 be mistaken, Your Honor, but I know that -- and I did not
19 particularly look at it with regard to admiralty or patent.
20 A great many states have accepted that as a traditional
21 specialty.

22 QUESTION: Well, we have a decision, don't we -- I
23 can't recall the name of it -- which held that a state
24 couldn't disbar a patent lawyer for a patent -- that that
25 was something that had to be done by the Court of Customs

1 and Patent Appeals to which he was --

2 MR. INGLISH: I don't recall, Your Honor. I don't
3 recall.

4 QUESTION: Mr. English, you take your position
5 even though St. Louis, as is Kansas City, is on the border
6 of a great state? They are great cities on the border of a
7 great state, and you think it would not be of some help to a
8 litigant, a St. Louis resident who was injured in an
9 automobile accident in East St. Louis, when he is looking
10 for a lawyer, to know that he is admitted in the state of
11 Illinois?

12 MR. INGLISH: No, Your Honor, I would have to
13 frankly concede that that could be of value in those two
14 areas. I think what we are talking about, though, is the
15 blanket advertising of courts in which one is authorized to
16 practice, starting from this Court and going on down.

17 QUESTION: Of course, lawyers do this all the time
18 on their professional announcements, so we get them every
19 day.

20 MR. INGLISH: Yes, sir, that is correct.

21 QUESTION: And here in Washington, every firm has
22 a string that people asterisk, licensed to practice in
23 California, but not in the District, and so forth and so on,
24 right on their letterhead.

25 MR. INGLISH: Yes, Your Honor.

1 QUESTION: Is this all right? Would it be all
2 right under your Missouri bar rules?

3 MR. INGLISH: On the letterhead? I doubt very
4 seriously that it would, Your Honor. That might be
5 considered as advertising, and improper advertising.

6 QUESTION: Why is that misleading, Mr. Inglish?

7 MR. INGLISH: Justice O'Connor, I think it is
8 potentially misleading in that it could convey to the layman
9 that this lawyer has certain expertise that the other lawyer
10 does not have, and being admitted to this Court I don't
11 think indicates any such expertise, nor being admitted in,
12 for example, the United States Court of Appeals, or various
13 other places.

14 QUESTION: Or admitted to the bar of another state?

15 MR. INGLISH: That could have -- that could have
16 some value to a potential client. Yes, I would have to
17 concede that.

18 QUESTION: And aren't we dealing with that here,
19 in this case?

20 MR. INGLISH: We are dealing with that plus the
21 general rule that the state has prohibiting -- well,
22 actually indirectly prohibiting the listing of courts in
23 which you are authorized to practice, because, as Mr.
24 Blackmar has stated, the rule says you may say this and
25 nothing else, and it is not one of those things authorized.

1 QUESTION: Do you think -- Go ahead.

2 QUESTION: In Justice Blackmun's question, with
3 the asterisks showing admitted to practice in California but
4 not in the District, might not that supply an additional
5 element of truth, if the firm's letterhead says Washington,
6 D. C., and lists these people as partners, but then the
7 asterisks show that they are not actually admitted to
8 practice in the District, but only in California?

9 MR. INGLISH: That could be useful information.
10 Yes, Your Honor. I would have to concede that.

11 QUESTION: Mr. English, in Missouri are your
12 attorneys prohibited from running for office?

13 MR. INGLISH: No, Your Honor.

14 QUESTION: Of course not.

15 MR. INGLISH: No.

16 QUESTION: And there you advertise everything.

17 MR. INGLISH: And the rule expressly --

18 QUESTION: And they do.

19 MR. INGLISH: Yes, sir. And the rule expressly
20 provides for that. It says you may do that.

21 QUESTION: And they do.

22 MR. INGLISH: You may identify yourself as a
23 lawyer.

24 QUESTION: And don't you have some lawyers that
25 have never had political offices, they just run every two

1 years just so they can advertise?

2 MR. INGLISH: That does happen. The prosecuting
3 attorney is the best --

4 QUESTION: There is nothing you can do about that.

5 MR. INGLISH: I beg your pardon?"

6 QUESTION: There is nothing the state can do about
7 it.

8 MR. INGLISH: No. As a matter of fact, it is
9 recognized as a permissible item of advertising, I suppose.

10 QUESTION: Mr. English, one of the limitations in
11 the rule in question and at issue here is a requirement that
12 if a lawyer advertises expertise in the field of tort law,
13 that the words "tort law" be used. Do you think that the
14 public generally understands that better than personal
15 injury law?

16 MR. INGLISH: Your Honor, that has been changed to
17 negligence. It started out as tort law, and somebody
18 suggested -- I don't know how it happened -- to the court
19 that maybe a better word would be negligence. The Appellant
20 here wanted to use a term, and did use "personal injury".
21 Now, to me, the word "negligence" is more encompassing than
22 personal injury. Negligence would include personal injury.
23 And by limiting him to the word "negligence", I don't think
24 he has been harmed in any way, because I think he can
25 include in his advertisement more than he wanted to include.

1 QUESTION: But do you think that the use of the
2 terms "personal injury actions" is somehow presumptively
3 misleading in this context?

4 MR. INGLISH: Your Honor, if we got into a
5 subjective test of whether or not this Appellant has the
6 expertise to hold himself out as practicing law in the area
7 of personal injury, it might be misleading, but that would
8 be a subjective test. We have cited the case of Zimmerman
9 in New York, where, as I understand the rule, it is simply
10 that you can advertise anything you want to as long as it
11 isn't false, misleading, or deceptive.

12 This young lawyer put his name under each of the
13 categories in the yellow pages, and then after the fact the
14 disciplinary body said, but you don't have enough expertise
15 in all these areas to hold yourself out in this. Therefore,
16 they reprimanded him, disciplined him.

17 If I might just a moment address what my personal
18 thoughts are on that question, I think again that what this
19 Court is seeking to do is to provide information to the
20 public to enable it more intelligently to select a lawyer.
21 I think if the bar is at fault, it is in the fact that we
22 don't have specialization, which as Mr. Blackmar says, we do
23 not have in Missouri. A great many states do. We do not --
24 now, as a matter of fact, there are specialties, as has been
25 pointed out here, in admiralty. There are a great many in

1 Mr. Blackmar's city, St. Louis, who do nothing but medical
2 malpractice, who do nothing but personal injury work, who do
3 nothing but workers' compensation, and so forth.

4 Now, I think it is inherently misleading, as has
5 been pointed out even by Mr. Blackmar and in the -- I
6 believe maybe one of the amicus briefs, that when you say I
7 practice in these areas, whatever you call it, whether you
8 call it personal injury, or worker's compensation, or
9 whatever it is, and then at the bottom say, but I don't hold
10 myself out as having any expertise therein, you have
11 confused, at least, the public, because I thought the idea
12 was that we were to assist this public in finding a lawyer
13 who did have expertise.

14 QUESTION: But isn't that precisely what the
15 Missouri regulation permits, since it doesn't have
16 certification, it requires the disclaimer, and it says, you
17 will use only these areas of specialty in these descriptive
18 terms.

19 MR. INGLISH: That is correct, Justice O'Connor,
20 and frankly, if I were drafting the rule, I would opt for
21 what Tennessee did, in effect. They went a little too far,
22 because they wouldn't even permit the routine matters which
23 this Court said you cannot suppress, of the simple will, the
24 uncontested divorce, and so forth.

25 But what I would do, frankly, if I were drafting

1 the rule, which I think would be less misleading to the
2 public, would be to say, you may advertise the availability
3 and the prices of these routine legal services, which Bates
4 said you could do. As a matter of fact, I think the Court
5 was quite careful to make it clear that you intended to
6 limit that case to that situation, the availability and
7 prices of routine legal services, list them, and
8 incidentally, courts differ as to what they are. Iowa has
9 one list, Missouri has another. But nevertheless, whatever
10 it is. And then say, we will not prohibit lawyers -- I
11 mean, we will not permit lawyers to hold themselves out as
12 practicing in any area until and unless we do have
13 specialization, as Tennessee did.

14 QUESTION: Mr. English, may I interrupt?

15 MR. ENGLISH: Yes.

16 QUESTION: I think I may be troubled by something
17 that Justice O'Connor asked you. You are suggesting it
18 could have been a better rule. Tort isn't the most
19 informative rule to describe a personal injury specialist,
20 or a medical malpractice specialist. But do you defend this
21 rule as being constitutional? Do you defend the judgment of
22 the court below?

23 MR. ENGLISH: Your Honor, yes, I do defend the
24 rule.

25 QUESTION: You think it is adequate to say "tort"

1 and forbid any other word?

2 MR. INGLISH: As I answered Justice O'Connor, that
3 word was changed to negligence.

4 QUESTION: Yes, but he was disciplined because he
5 did not use the word "tort". Is that not correct?

6 MR. INGLISH: Well, yes, that is correct.

7 QUESTION: Now, do you defend that discipline?

8 MR. INGLISH: Yes, sir, I do, Your Honor.

9 QUESTION: So you really cannot rely on the fact
10 that now they say you can use the word "negligence".

11 MR. INGLISH: Well, no. That is true. It has
12 been changed. But that was only part of --

13 QUESTION: And do you not also agree that tort is
14 by no means the most informative word to describe that kind
15 of practice?

16 MR. INGLISH: I would agree with that.

17 QUESTION: And yet you defend --

18 MR. INGLISH: But that is only one of the items,
19 Your Honor.

20 QUESTION: No, but it is perhaps an important item
21 to a large number of people who would be using this kind of
22 method of finding clients.

23 MR. INGLISH: Unfortunately, Justice Stevens, the
24 court below did not tell us which of these items it was
25 considering as violative of the rules --

1 QUESTION: It really didn't tell us very much, did
2 it?

3 MR. INGLISH: They certainly did not. No, sir,
4 Your Honor. They just said, we hold our rules out, but --

5 QUESTION: But if we should say that in any
6 respect, because of the way they handled it, they had
7 violated the Constitution, then this judgment has to be
8 reversed, doesn't it?

9 MR. INGLISH: Yes, Your Honor, that is true.

10 QUESTION: No matter in what respect we find it --

11 MR. INGLISH: That is true, and there has been
12 some discussion prior to this concerning the fact that
13 perhaps you could do it on, you know, reverse on various
14 bases.

15 QUESTION: Well, it is enough if they were wrong
16 as to any one of them --

17 MR. INGLISH: That is correct.

18 QUESTION: -- since they didn't tell us what they
19 rested it on.

20 MR. INGLISH: That is correct, Your Honor, and
21 there has been discussion that this case is limited to the
22 facts before the Court, but so was Bates, and I have a very
23 strong feeling that regardless of what this Court does,
24 whether it affirms or reverses, or reverses and remands, its
25 opinion is going to receive construction which is going to

1 be hopefully of some help to the courts that are faced with
2 this problem, to conform with Bates, and I would hope that
3 the Court would engage in enough discussion that regardless
4 of what it does, whether it affirms or reverses, that the
5 disciplinary bodies, the bodies having jurisdictions over
6 lawyers in the various states would have a better idea of
7 how to conform with Bates and permit advertising.

8 QUESTION: But aren't we in a dilemma there, in
9 that we are supposed to make pronouncements only governing
10 the facts of the particular case, and yet obviously there is
11 some necessity for a broader discussion, and yet that would
12 go beyond our responsibility to decide Article II cases --

13 MR. ENGLISH: Your Honor, it would constitute
14 dictum to an extent -- but I know this Court is aware, we
15 have made it aware in briefs, certainly, of the
16 discrepancies that the various jurisdictions have concerning
17 their feeling about what they may do and must do and cannot
18 do following Bates.

19 The Court has been made aware of a number of
20 advertisements that have appeared by lawyers. For example,
21 I sent in the Time Magazine one showing the hearse with no
22 frill wills, \$15. I don't believe honestly that that is
23 what this Court intended to encourage. I don't believe that
24 is the sort of thing that enables people to more
25 intelligently select a lawyer.

1 Mr. Blackmar has cited the work by Lori Andrews on
2 Birth of A Salesman, who is advocating the Madison Avenue
3 type of approach, and there also she has a number of
4 commercials that are shown on television, radio, newspapers,
5 which have been approved and are permitted, for example, in
6 Wisconsin, because apparently that state feels it must do
7 so, must permit this pursuant to Bates.

8 Therefore, as I said earlier, regardless of what
9 this Court does, I think its discussion, dictum, or whatever
10 it might be or otherwise, is going to be construed as some
11 guideline to the other courts.

12 QUESTION: But I must say, Mr. English, as my
13 Brother Rehnquist just suggested, if this is a case for the
14 application of the Stromburg rule, as I think you just told
15 me you thought it was, if we find anything at all that
16 violates the First Amendment, which is the issue tendered to
17 us, then we under Batchelor and Maryland, we just don't
18 reach these other issues. We simply set aside the judgment,
19 that is all, and not go into whether or not all the other
20 things similarly present constitutional infirmities.

21 MR. ENGLISH: Well, you are right, Your Honor, but
22 I anticipate -- I hope that the decision will be a little
23 more far-reaching than that, and be construed along with
24 Ohralik, Primus, Bates --

25 QUESTION: It has been suggested on occasion that

1 we have written opinions that go outside the --

2 MR. INGLISH: And in this case I would certainly
3 hope so.

4 QUESTION: Well, if what the organized bar in the
5 various states is seeking is some sort of test that will
6 enable the various organized bars to establish rules and the
7 test laid down in Bates as I understand it is that it be not
8 misleading or false, and I would think that a chain
9 drugstore advertisement supplement that appears in most big
10 daily papers, if it says "Window Cleaner, \$2.99", and if
11 they do have window cleaner for \$2.99, that would be neither
12 false nor misleading.

13 MR. INGLISH: But, Your Honor, I don't think that
14 is the sole test, when you go beyond the routine legal
15 services. As I understood Bates, when it said not false,
16 misleading, or deceptive, it was talking about routine legal
17 services, not the other areas, which I think that perhaps
18 Missouri and other states have gratuitously gone beyond in
19 permitting advertisement of other areas of practice.

20 I don't believe Bates went so far as to say that
21 you may advertise anything you want to as long as it isn't
22 false, misleading, or deceptive. Now, some states have such
23 a rule apparently construing this, but I would hope that the
24 Court would not adopt such a rule or enforce such a rule
25 upon the states, because it is subjective in nature, and we

1 were talking about prior restraint earlier here. To me,
2 that is prior restraint, when you say to me, you go ahead
3 and say whatever you want to and I will tell you later
4 whether it is all right or not.

5 Alabama has one. You may say what you want to,
6 and you mail it in within three days.

7 QUESTION: But, Mr. English, that doesn't respond
8 to the problem of this case, because there is no reason, in
9 light of what your present argument is, why the Missouri bar
10 couldn't have said the following expressions will be
11 permitted, but it did not need to go on and say nothing else
12 will be permitted.

13 MR. ENGLISH: Well, again, then you leave the door
14 open, because if you are going to authorize a listing of
15 areas, and you are going to give areas of practice, somebody
16 is always going to take issue with you and say, well, I have
17 a better word. I think personal injury is better than
18 negligence. Negligence is better than tort --

19 QUESTION: Well, then, if that happened presumably
20 on review of the case, most courts would give us some
21 information about why that wasn't a better word. Your court
22 apparently didn't want to do that.

23 MR. ENGLISH: No, it did not.

24 QUESTION: Why do you suppose that was the case?
25 Why wouldn't it help us with this problem, with the view of

1 the Missouri bar and what thinking went into this rule?
2 MR. INGLISH: I am sorry. I can't answer that
3 question.
4 QUESTION: You are stuck with that opinion, I
5 guess.
6 (General laughter.)
7 MR. INGLISH: Yes, sir. I can't answer the
8 question.
9 QUESTION: Mr. Inglish, do you want us to set down
10 these rules?
11 MR. INGLISH: No, Your Honor. No, I --
12 QUESTION: I hope not, because you would be the
13 first one to come up here and say we are trying to run the
14 country.
15 MR. INGLISH: No, Your Honor. As a matter of
16 fact --
17 QUESTION: What do you want us to do?
18 MR. INGLISH: Well, what I would like for you to
19 do is to affirm the decision of the lower court, and say
20 that the states --
21 QUESTION: Affirm it that the word "tort" is the
22 only word he can use? You want us to affirm that?
23 MR. INGLISH: Yes, Your Honor. Yes.
24 QUESTION: How?
25 MR. INGLISH: Well, I say -- here is why.

1 QUESTION: How?
2 (General laughter.)
3 MR. INGLISH: Well, on the basis that the state
4 should have the right to do the regulation within their own
5 bodies, and within their own territory.
6 QUESTION: Well, then, you don't need this Court.
7 MR. INGLISH: Well, only -- I think the states
8 should be given considerable leeway. Sure, I think if this
9 Court finds that that is an undue infringement upon his
10 right of free speech, that it does in fact --
11 QUESTION: How many people in your town know what
12 "tort" means?
13 MR. INGLISH: Well, let's see, there are -- how
14 many lawyers are there?
15 QUESTION: How many lawyers do you have?
16 (General laughter.)
17 QUESTION: How many lawyers do you have?
18 MR. INGLISH: About five of us, I think, Your
19 Honor.
20 QUESTION: That is about all. That is all that
21 know about "tort".
22 MR. INGLISH: Yes, that may well be.
23 QUESTION: Plus people who do crossword puzzles.
24 (General laughter.)
25 MR. INGLISH: That is true. But the point being

1 that either this Court is going to lay down some rules, or
2 you are going to let the states do it, and if you don't let
3 the states do it, there are going to be a lot of people
4 coming back up here and saying -- or, I don't know what the
5 states will do.

6 QUESTION: Mr. English, let me -- we are going to
7 adjourn for lunch pretty quick, but I wanted to ask you this
8 question, in response to your colloquy with Justice Brennan.

9 Suppose a state bar accuses someone, a lawyer, of
10 doing A and B, and whoever is the adjudicator finds that he
11 does both A and B, and they suspend him for doing A and B.
12 It happens that they may not constitutionally prevent him
13 from doing A, but they can prevent him from doing B. Well,
14 he has done both of them.

15 Now, did you agree with Mr. Justice Brennan or
16 Justice Brennan that the Stromburg rule would apply in that
17 situation, that the suspension must be lifted --

18 MR. ENGLISH: If this Court --

19 QUESTION: -- if one of the grounds is invalid?

20 MR. ENGLISH: No, I agree with that. Yes, I agree
21 with that.

22 QUESTION: What do you agree with?

23 MR. ENGLISH: The fact that -- well, if the
24 suspension would be lifted -- well, you are saying --

25 QUESTION: But does the suspension have to be

1 lifted?

2 MR. INGLISH: Well, was your question, if one of
3 them is valid, in other words, they properly reprimanded him
4 on one --

5 QUESTION: Right.

6 MR. INGLISH: Yes, then I think he is properly
7 reprimanded, even though he would --

8 QUESTION: But that wasn't what you and I were
9 talking about, I think.

10 MR. INGLISH: I don't think so.

11 QUESTION: I thought what we were talking about
12 is, they don't tell you on what ground they --

13 MR. INGLISH: That's correct.

14 CHIEF JUSTICE BURGER: We will pick that up at
15 1:00 o'clock, counsel.

16 (Whereupon, at 12:00 o'clock p.m., the Court was
17 recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

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AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. English, you may
continue.

ORAL ARGUMENT OF JOHN W. ENGLISH, ESQ.,
ON BEHALF OF THE APPELLEE - CONTINUED

MR. ENGLISH: Mr. Chief Justice, and may it please
the Court, to summarize in response to some of the questions
that have been asked here today, with regard to using the
term "tort law", I would not certainly want to be in the
position of trying to defend that as a better term than some
other term. I don't think it is. I don't think it is well
understood, but I don't really think that is dispositive of
the issue before the Court.

A great many states, following Plan A of the
American bar, now permit listing of areas of practice, and
some of them say you may use three or five or all, whatever
it is, and those -- the nomenclature differs. Now, are we
to say, or is this Court going to take them one by one and
say, well, we don't think that that is a proper term to use,
there is a better one?

There is no question but that the Appellant's
right to speak freely has been infringed upon, but this is
not a right that is absolute. This is commercial speech,
and I think the state has a right reasonably to infringe
upon his right to speak freely as long as it does not do it

1 unreasonably, and as long as it is in the furtherance of the
2 state interest, which concededly exists, and in the language
3 of Central Hudson does not go any farther than it needs to
4 go.

5 I think what the Court needs to do is look at the
6 Missouri rule and apply the Central Hudson test, which is
7 now the rule, and say, does it go beyond what is necessary
8 in order to protect the public's interest in not being
9 misled or deceived by legal advertising.

10 With regard to the other questions concerning if a
11 lawyer has violated -- is accused of violating two or more
12 rules, and then this Court finds that he is guilty of
13 violating one but not the other, then, of course, it would
14 still require affirmance.

15 I would hope that the Court would, in applying the
16 Central Hudson test, find that Missouri rules do not go
17 beyond that which is necessary to protect the state's
18 interest and affirm the decision of the Missouri court.

19 QUESTION: Mr. English, do you think we should
20 read the Missouri court's opinion as applying the Central
21 Hudson test?

22 MR. ENGLISH: It does not, Your Honor. It does
23 not. It is of very little help to this Court. It is of
24 very little help to me. But that is the decision of the
25 Missouri Supreme Court, and the one with which this Court is

1 faced.

2 If there are no further questions, that concludes
3 my argument.

4 CHIEF JUSTICE BURGER: Thank you.

5 Do you have anything further, Mr. Blackmar?

6 ORAL ARGUMENT OF CHARLES B. BLACKMAR, ESQ.,

7 ON BEHALF OF THE APPELLANT - REBUTTAL

8 MR. BLACKMAR: Mr. Chief Justice, and may it
9 please the Court, certainly this rule does not comply with
10 the Central Hudson test, because it does prevent the
11 dissemination of valuable information to the public.

12 Just one example. The record shows that this
13 lawyer was formerly employed by the Securities and Exchange
14 Commission. He can't say securities law, according to the
15 Missouri court, because that is not one of the listed
16 fields. That might be important to the public. I am
17 thinking of the person who is reading the Wall Street
18 Journal, or his daily paper, and owns a little stock, and
19 finds some kind of add about a class suit, and wants to know
20 whether to opt out of the suit, and that is just one of
21 dozens of examples.

22 I suggest that you give some attention to the
23 Arnold Phillips amicus brief, in which the lawyer wanted to
24 tell people about Chapter 13 of the Bankruptcy Act, and the
25 advisory committee said you can't do it, simply because it

1 is not one of the things that is listed.

2 Now, with regard to the considerable discussion of
3 being -- stating the fact of admission to the bar of this
4 Court, there is nothing to indicate that the result in the
5 court below would had been any different if that part had
6 not been contained in the ad, because they say you may have
7 absolutely nothing that is not listed. I submit the rule
8 cannot stand. No count can stand. The judgment should be
9 reversed.

10 Thank you.

11 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
12 case is submitted.

13 (Whereupon, at 1:05 o'clock p.m., the case in the
14 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

IN THE MATTER OF R_____ M. J_____, Appellant No. 80-1431

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BY Sharon Lynn Cunniff

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