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Advertising and solicitation are difficult and controversial issues. However, the difficulty and controversy surrounding these issues is neither justification for ignoring nor opposing the changing environment. In the next five years, the number of attorneys is expected to increase drastically. With this increased competition among attorneys, may come the need to advertise to maintain or gain enough clients to survive economically. This article discusses advertising and solicitation as a service to both consumer and attorney. In addition, the article outlines the legal background of advertising and solicitation by attorneys and the marketing of legal services.

LEGAL ADVERTISING AND SOLICITATION

*Gene W. Murdock**

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For the past several years the issues of lawyer advertising and solicitation have created a continuing controversy among members of the legal profession. Balanced against a concern for tradition and professionalism is the consumer's "need to know." Although many Wyoming attorneys are not familiar with the alternatives available or the consequences of choosing a particular alternative, they are faced with the decision of whether to advertise. Part I of this article will review the legal background of advertising and solicitation by attorneys, discussing United States Supreme Court decisions, the response of the organized bar, and recent litigation.

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Part II of this paper deals with the marketing of legal services. The purpose of this section is threefold: first, to increase awareness of the changing competitive environment characterizing the legal service marketplace; second, to educate lawyers on the effects of advertising by discussing some of the fallacies that exist; third, to suggest some implementation guidelines for those lawyers who want to advertise.

I. LEGAL BACKGROUND

A. *Bates v. State Bar of Arizona*

The United States Supreme Court decision in *Bates v. State Bar of Arizona*¹ "will effect profound changes in the practice of law."² In *Bates* the Court held that state regulations prohibiting the advertisement of routine legal services violated the first amendment.³

The appellants, Bates and O'Steen, operated a legal clinic in Phoenix, Arizona. To generate business they placed a newspaper advertisement which read "Do You Need a Lawyer? Legal Services at Very Reasonable Fees."⁴ The services advertised were: divorce or legal separation—uncontested, \$195; preparation of all court papers and instructions on how to do your own simple uncontested divorce, \$100; adoption—uncontested severance proceeding, \$235; bankruptcy—nonbusiness, no contested proceedings, \$305 individual, \$410 couple; and change of name, \$115.

Bates and O'Steen conceded that the advertisement violated Rule 29(a) of the Arizona Supreme Court.⁵ After being suspended from the practice of law by the Arizona

1. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

2. *Id.* at 389 (Powell, J., dissenting).

3. *Id.* at 384. The decision was five to four with Justice Blackmun writing for the majority consisting of himself and Justices Brennan, White, Marshall, and Stevens. Justice Powell was joined in a dissenting opinion by Justice Stewart; Chief Justice Burger and Justice Rehnquist dissented in separate opinions.

4. *Id.* at 385.

5. Disciplinary Rule 2-101(b) of the CODE OF PROFESSIONAL RESPONSIBILITY had been adopted by the Arizona Supreme Court as Rule 29(a):

A lawyer shall not publicize himself, or his partner, or associate or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television advertisements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

State Bar the two lawyers appealed to the state supreme court. They contended that the advertising ban violated Sections 1 and 2 of the Sherman Act and infringed their first amendment right to freedom of speech. The court rejected both claims but reduced the penalty for violation to a censure for both.⁶

On appeal to the United States Supreme Court Bates and O'Steen renewed their antitrust and first amendment arguments. The court granted review of the two questions:

1. Does a total ban upon advertising by private attorneys, enforced by an integrated bar and state supreme court, violate the Sherman Act notwithstanding the state action exemption?
2. Does such a ban violate the first amendment?

The Court unanimously rejected the antitrust argument,⁷ but reversed on the ground that the first amendment was infringed by the ban on lawyer advertising.⁸

The first issue, whether Sections 1 and 2 of the Sherman Act forbid state regulation by the Arizona Bar in restricting advertising by attorneys, was answered in the negative based on a previous Supreme Court opinion in *Parker v. Brown*,⁹ which set forth a state-action exemption to the Sherman Act. In *Parker* the Court held that the Sherman Act does not prohibit restraints imposed by a state when the restraints are an act of government.¹⁰ The Arizona lawyers in *Bates* unsuccessfully argued that since the disciplinary rule involved was derived from the Code of Professional Responsibility of the ABA, no state immunity should exist.¹¹ The Court, however, concluded that the Arizona court, not the bar association, is the ultimate body through which the state exercises its power over the practice of law.¹²

6. *In re Bates*, 113 Ariz. 394, 555 P.2d 640 (1976).

7. *Bates v. State Bar of Ariz.*, *supra* note 1, at 363.

8. *Id.* at 382.

9. *Parker v. Brown*, 317 U.S. 341 (1943).

10. *Id.* at 352.

11. *Bates v. State Bar of Ariz.*, *supra* note 1, at 362-63.

12. *Id.* at 362. For a more thorough discussion of the antitrust issue see Levin, *The State Action Exemption after Bates v. State Bar of Arizona*, 40 U.P.N. 215 (Winter 1977-1978).

The Court made a more extensive review of the first amendment issue. The majority based its decision on the precedent established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.¹³ In *Virginia Pharmacy* the Court held that commercial speech contains information valuable to consumers and is therefore entitled to first amendment protection.¹⁴ To determine the degree of protection to be accorded to purely commercial advertising, the Court employed a balancing test. It concluded that the state's interest in maintaining the professionalism of licensed pharmacists was outweighed by the public's right to the free flow of commercial information.¹⁵ In light of the decision in *Virginia Pharmacy* it was foreseeable that the *Bates* Court would extend first amendment protection to attorney advertising. In fact, the analysis of the first amendment issue in *Bates* was made with the assumption that *Virginia Pharmacy* would control unless the Arizona State Bar could show significant differences between the advertising of legal services and pharmaceutical services.¹⁶

The Court summarized six justifications that the state had raised in support of the advertising ban. Each issue was disposed of separately in the Court's analysis.

1. The bar association argued that advertising would have an adverse effect on professionalism. It would cause commercialism, erode the client's trust in his attorney, and affect the attorney's reputation in the community.¹⁷ Finding the argument to be without substance, the Court emphasized that the relationship of attorney and client is a commercial one.¹⁸ It was noted that it would be inconsistent,

13. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

14. *Id.* at 762.

15. *Id.* at 770.

16. After a comprehensive discussion of *Virginia Pharmacy*, the court said: "We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it. Like the Virginia statutes, the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance. Because of the possibility, however, that the differences among professions might bring different constitutional considerations into play, we specifically reserved judgment as to other professions."

Bates v. State Bar of Ariz., *supra* note 1, at 365.

17. *Id.* at 368.

on the one hand, to condemn the advance notification of financial terms to a potential client through advertising and yet, on the other hand, ethically require an attorney to promptly disclose the commercial basis of the relationship after that client has made an initial contact.¹⁹ In response to the loss of dignity concern, the Court observed that other professionals, such as bankers and engineers, advertise without an apparent loss of dignity.²⁰ A third reason for rejecting the bar association's argument was the fear that the lawyers' reluctance to advertise could be viewed as a failure to provide public service to the community.²¹ Relying on several reports the Court recognized that the legal needs of the public are not being met. Many people are unable to locate competent counsel when needed²² while others do not use attorneys' services because they grossly overestimate the cost of legal services.²³

2. The bar association contended that attorney advertising would be inherently misleading for three reasons: First, because of the unique and individual nature of lawyers' services they are not susceptible to price advertisement, i.e., they preclude comparison by consumers. Second, consumers must first consult a lawyer before they can ascertain their exact legal needs. Third, factors which are irrelevant to attorney selection are likely to be emphasized in advertisements.²⁴ The Court explained that although some legal services are unique, others, such as those advertised by Bates and O'Steen are sufficiently routine to lend themselves to advertising.²⁵ The fact that the Arizona State Bar itself sponsors a legal services program which includes fixed rates refutes its argument that routine legal services don't exist. Also, the Court asserted that consumers who recognize their need for legal services also recognize, at least in a

19. The court cited Ethical Consideration 2-19 of the CODE OF PROFESSIONAL RESPONSIBILITY which states that an attorney shall reach "a clear agreement with his client as to the basis of the fee charges to be made." *Id.* at 368-69.

20. *Id.* at 369-70.

21. *Id.* at 370-71.

22. *Id.* at 370 n.23 (citing CURRAN and SPAULDING, *THE LEGAL NEEDS OF THE PUBLIC* [Preliminary Report (1974)]).

23. *Id.* at 370 n.22.

24. *Id.* at 372.

25. *Id.* at 372-73.

general way, the nature of the services required.²⁶ Finally, the Court found that the public is able to make intelligent selections because consumers are aware of and can account for the fact that not all necessary information can be included in an advertisement.²⁷ If the public is misled, it is the duty of the bar association to assure full disclosure in advertisements and to provide consumer education.²⁸ A ban on advertising is not the solution.²⁹

3. The bar association maintained that advertising would stir up groundless litigation, thereby adversely affecting the administration of justice.³⁰ Although advertising might very well increase court activity, the Court reasoned that it might offer great benefits.³¹ Justice Blackmun noted that "the middle 70 percent of our population is not being reached or served by the legal profession."³² The court indicated that it could not accept the notion that it is better for a wronged person to suffer silently than to seek a legal remedy.³³ By permitting restrained advertising the bar association would meet its obligation to "facilitate the process of intelligent selection of lawyers, and . . . assist in making legal services fully available."³⁴

4. The bar association argued that advertising would create undesirable economic effects by causing increased fees and added expenses which would pose a barrier for young attorneys entering the profession.³⁵ The Court dismissed this argument, classifying it as "dubious at best," and noted that advertising could do the opposite, lower prices and facilitate the entry of young lawyers into the legal marketplace.³⁶ The Court suggested that the advertising of products generally tends to lower prices and possibly

26. *Id.* at 374.

27. *Id.* at 374-75.

28. *Id.* at 375.

29. *Id.*

30. *Id.*

31. *Id.* at 376-77.

32. *Id.* at 376.

33. *Id.*

34. *Id.* at 377, quoting from Ethical Consideration 2-1 of the CODE OF PROFESSIONAL RESPONSIBILITY.

35. *Id.* at 377.

36. *Id.* at 377-78.

the same could be true with legal advertising.³⁷ New practitioners could more easily attract clients and generate business.³⁸

5. The bar association contended that the quality of legal services would be adversely affected because advertising would result in undesirable packaging of services at a set price.³⁹ The Court answered that an attorney who is inclined to cut quality will do so, regardless of the rule on advertising, therefore a ban on advertising is an inappropriate solution to that problem.⁴⁰ In fact the chance of error might be reduced by a standardization of procedures, thereby increasing the quality of routine services.⁴¹ Also there was no causal relationship between standardized fees and adequate legal services.⁴²

6. The bar association maintained that advertising would lead to extreme problems of enforcement; consumers, because of their lack of sophistication and inability to assess the quality of services, are susceptible to deceptive advertising.⁴³ To safeguard consumers' rights a regulatory agency would have to oversee advertising and this would be burdensome on the bar.⁴⁴ In response the Court asserted that most lawyers are honest; those who are not would likely be reported by other members of the bar.⁴⁵

After analyzing the bar association interests advanced in support of the proscription of lawyer advertising, the Court said, "In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys."⁴⁶

The Court held that a state may not "prevent the publication in a newspaper of . . . truthful advertisement concerning the availability and terms of routine legal ser-

37. *Id.* n.35.

38. *Id.* at 378.

39. *Id.*

40. *Id.* at 378-79.

41. *Id.*

42. *Id.*

43. *Id.* at 379.

44. *Id.*

45. *Id.*

46. *Id.*

vices.”⁴⁷ Explicitly qualifying its holding, the Court reconfirmed its position that first amendment speech cases require individual analysis. The Court specifically noted that its opinion did not foreclose regulation of lawyer advertising by the state.⁴⁸ Some clearly permissible limitations and restrictions would include: (1) reasonable restrictions as to mere time, place and manner; (2) restrictions on false, deceptive, or misleading advertisements; and (3) proscription of advertisements concerning illegal transactions.⁴⁹ In addition, because of the complexity of legal services and the lack of public sophistication, higher standards of truth than those applicable to other forms of commercial speech might apply.⁵⁰ In some situations supplements to advertisements, such as of warnings or disclaimers, may be required to prevent deception.⁵¹ Finally, claims concerning the quality of legal services which cannot be verified may be prohibited as misleading.⁵²

Several conspicuous issues were left unresolved by the *Bates* decision. The Court did not state whether attorney advertisement over the broadcast media is entitled to first amendment protection. Because of the special problems associated with electronic media this question warranting special consideration was expressly reserved by the Court.⁵³ In addition, the decision did not apply to representations as to the quality of legal services, in-person solicitation, or basic factual information such as the attorney's name, address and phone number.⁵⁴ The Court acknowledged that “many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.”⁵⁵

47. *Id.* at 384.

48. *Id.* at 383.

49. *Id.* at 383-84.

50. *Id.* at 383.

51. *Id.* at 384.

52. *Id.* at 383-84.

53. *Id.* at 384.

54. *Id.* at 366-67.

55. *Id.* at 384.

It is significant to note that in the *Bates* decision the Supreme Court placed primary emphasis on the consumer's right to receive information rather than on the attorney's first amendment right to disseminate it. The Court recognized that the disciplinary rule of the ABA and the Arizona State Bar inhibited the free flow of commercial information and kept the public in ignorance.⁵⁶ Truthful advertising of legal services could serve an important societal interest by providing a benefit to individuals and society at large. The *Bates* Court acknowledged the significant problem of access to legal services experienced by nearly three-fourths of the public.⁵⁷ Although advertising is not seen to be the total solution, it would be of value by providing the public with information on the cost and availability of legal services.⁵⁸

B. ABA Code of Professional Responsibility:

1977 Amendments

In anticipation of the *Bates* decision the Board of Governors of the ABA established a Task Force on Lawyer Advertising.⁵⁹ The Task Force produced two proposals for amendments to Canon Two of the ABA Code of Professional Responsibility (A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available).⁶⁰ Proposal A,⁶¹ the most restrictive, has been described as "regulatory."⁶² It listed the types of information that may be provided in lawyer advertising if approved by the individual state authorities. Although Proposal A sought to regulate commercial advertising in advance, it relied on "after the fact" enforcement by disciplining violators. Retained in Proposal A were many of the former disciplinary rules which specified the type of information which could be published such as name, education, client reference, etc. It also added

56. *Id.* at 365.

57. *Id.* at 376.

58. *Id.* at 370.

59. *Supreme Court Holds Lawyers May Advertise*, 63 A.B.A.J. 1093, 1097 (1977).

60. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 91 (1980).

61. *Id.* at 97-116.

certain fee information which would not be deceptive nor easily misunderstood.

In contrast, Proposal B⁶³ did not list the specific items permitted to be advertised. It has been termed "directive"⁶⁴ because it allowed publication of all information not "false, fraudulent, misleading or deceptive" and only provided guidelines to determine what would constitute an improper advertisement. It authorized disclosure of the same fee information permitted under Proposal A. Neither proposal permitted solicitation.

Although Proposal A was adopted as DR 2-101 of the Model Code of Professional Responsibility,⁶⁵ both proposals

63. *Id.* at 117-33.

64. *Id.* at 93.

65. CODE OF PROFESSIONAL RESPONSIBILITY (as amended Aug. 1977). DR 2-101 provides in part:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105.

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments, in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Whether on initial consultation;

were circulated among the appropriate state regulatory agencies and the highest courts of the states. Since the ABA Code is only a suggested model, the individual states were free to adopt, modify, or reject it as they chose. Approximately fifty-seven percent (including Wyoming) of the fifty-one jurisdictions surveyed, followed the ABA in adopting what is substantially a Proposal A rule,⁶⁶ thirty-seven percent chose a Proposal B position, while three states have made no choice.⁶⁷ The ABA and those states who have adopted Proposal A have been criticized as giving a grudging response to the *Bates* decision.⁶⁸ "Even if that version could withstand constitutional scrutiny, it certainly is not openly responsive to the public's interest in the full, free flow of information, as expressed by the Supreme Court."⁶⁹

The same problem exists with respect to the use of electronic media. Although testimony before the ABA Task Force on Lawyer Advertising indicated that twenty percent of our adult population is functionally illiterate and therefore cannot be reached through print advertising,⁷⁰ ten

65. Continued—

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

66. Andrews, *supra*, note 60, at 136-46.

67. *Id.* Hawaii and Montana have adopted no new advertising rule since *Bates*; Texas merely suspended its rules to the extent they conflicted with *Bates*.

68. Shadur, *The Impact of Advertising and Specialization on Professional Responsibility*, 61 CHI. B. REC. 324, 325 (1980).

69. *Id.*

70. ABA Code of Professional Responsibility Amendments, 46 U.S.L.W. 1, 2

states still will not permit radio or television advertising.⁷¹ Proposal A, as first written and adopted by the ABA, permitted advertising on radio, but excluded television. In August, 1978, the ABA approved amendments to the Code of Professional Responsibility making television advertising a permissible medium;⁷² most states included the amendments in their rules. Only Indiana and Wyoming still follow the original version of Proposal A, specifically allowing radio advertising, but not television.⁷³

C. Solicitation

In *Bates*, the Court drew a distinction between advertising and in-person solicitation, expressly limiting its holding to advertising.⁷⁴ In May, 1978 the Supreme Court addressed the solicitation issue for the first time in *Ohralik v. Ohio State Bar Association*⁷⁵ and *In re Primus*.⁷⁶ Because the two cases present factual situations at the opposite ends

71. Andrews, *supra* note 60, at 136-46.

72. On August 9, 1978, the ABA House of Delegates approved the following amendments to Canon 2 of the CODE OF PROFESSIONAL RESPONSIBILITY. (Additions are in italics):
EC 2-8

Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers—and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, *television or radio*, should be formulated to convey only information that is necessary to make an appropriate selection. . . .

DR 2-101(B)

In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over *television or radio* broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner. . . .

DR 2-101(D)

If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

73. Andrews, *supra* note 60, at 138, 145.

74. *Bates v. State Bar of Ariz.*, *supra* note 1, at 366.

75. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

76. *In re Primus*, 436 U.S. 412 (1978).

of the spectrum, they provide little guidance for determining the outcome of cases between the two extremes.

Ohralik was characterized as a classic example of "ambulance-chasing."⁷⁷ Ohralik, a practicing lawyer in Ohio, solicited contingent fee arrangements from two teenage girls who had been injured in an automobile accident. He visited the driver of the car while she was still in traction in the hospital and offered to represent her. When she indicated she would like to discuss it with her parents he visited the parents carrying a concealed tape recorder. To them he explained the daughter's rights and liabilities and discovered that she could claim \$12,500 under her insurance policy. When he returned to the hospital the daughter signed a contingent fee contract. Without invitation, and again carrying a concealed tape recorder, Ohralik visited the passenger who had just been released from the hospital. The passenger orally agreed to a contingent fee contract. Later, when both the driver and passenger attempted to discharge him, Ohralik instituted suit for breach of contract against the driver and recovered a \$4,000 settlement. Subsequently, the Supreme Court of Ohio indefinitely suspended Ohralik from practice.⁷⁸ The United States Supreme Court affirmed.⁷⁹

In re Primus concerned a practicing lawyer from South Carolina who was also an officer of and unpaid lawyer for the local branch of the American Civil Liberties Union (ACLU). She was invited to address a group of women who had been sterilized as a condition of continued receipt of medical assistance. At the meeting Primus advised the women present of their legal rights and suggested the possibility of a lawsuit. At a later date Primus sent a follow up letter to one of the women present at the meeting. The letter urged the woman to file suit against the doctor who had performed the sterilization procedure and informed her that the ACLU would provide free legal representation. The Supreme Court

77. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 469 (Marshall, J., concurring).

78. *Id.* at 453-54.

79. *Id.* at 454.

of South Carolina disciplined Primus by public reprimand,⁸⁰ but the United States Supreme Court held the disciplinary action of the state unconstitutional.⁸¹

These companion decisions in *Ohralik* and *Primus* marked the first time that the Supreme Court had directly considered the constitutionality of state regulation of lawyer solicitation. The Court distinguished the two cases: Solicitation for personal gain, under circumstances likely to pose dangers, as in *Ohralik* is subject to state prohibition,⁸² whereas solicitation of clients by attorneys who are asserting political rights under the auspices of a group in the freedom of association context, as in *Primus* is protected by the first amendment.⁸³

In reaching its decision in *Ohralik* the Court refined the commercial speech concept as earlier enunciated in *Virginia Pharmacy* and *Bates*. Although both of those cases established that commercial speech is entitled to first amendment protection, the Court emphasized that the protection is limited. Furthermore, contrary to *Ohralik's* argument, it held that his in-person solicitation was not equivalent to the advertising in *Bates*. Because it presents a greater potential for abuse, the state interests in regulating solicitation are as strong as in advertising. To illustrate the potential dangers of solicitation, the Court analogized to the selling of ordinary consumer products. It noted that the potential for abuse is even greater when a lawyer who is trained as a persuader is the one doing the selling.⁸⁴ In addition, because the "buyers" or clients are frequently involved in a misfortune they are even more vulnerable to undue influence.⁸⁵ In contrast, an advertisement merely provides information and leaves the potential client free to act upon it or not. Advertising provides an opportunity for adequate comparison or reflection which may not be provided in solicitation.⁸⁶ A second

80. *In re Primus*, *supra* note 76, at 421.

81. *Id.* at 439.

82. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 449.

83. *In re Primus*, *supra* note 76, at 439.

84. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 464-65.

85. *Id.*

86. *Id.* at 457.

difference between solicitation and advertising is found in the fact that advertising is open to public scrutiny; solicitation has as its only witnesses the lawyer and the consumer.⁸⁷ Because of the need to protect consumers and the state's interest in maintaining standards for licensed professionals, the *Ohralik* Court held that a state could constitutionally prohibit in-person solicitation.⁸⁸ It is significant that the Court provided that the state prohibitions could be prophylactic measures⁸⁹ even though there was no showing in *Ohralik* that the attorney's conduct had resulted in the evils the state had anticipated, it was sufficient that *Ohralik's* conduct was the type likely to cause abuse.⁹⁰

In re Primus is easily distinguishable from *Ohralik* because the form of solicitation was so different. The solicitation was by mail, not in-person, and the attorney's purpose was not pecuniary gain.⁹¹ The lawyer solicited on behalf of the ACLU, not herself, thereby coming under the protection of constitutional associational interests.⁹² This case was not analyzed in terms of commercial speech as was *Ohralik*. Instead the Court based its reasoning on *NAACP v. Button*.⁹³ In *Button* the Court had held that a state could regulate only with "narrow specificity" if the activity involved was a form of political expression and association which was entitled to first amendment protection.⁹⁴ Because the Court could find no meaningful difference between the ACLU and the NAACP it found the reasoning in *Button* to be directly applicable to *Primus*.⁹⁵

87. *Id.* at 466.

88. *Id.* at 462.

89. *Id.* at 464.

90. *Id.* at 468.

91. *In re Primus*, *supra* note 76, at 414-15.

92. *Id.* at 439.

93. *NAACP v. Button*, 371 U.S. 415 (1963). Certain Virginia statutes made it a crime to use an agent to refer a potential client to a group of attorneys for assistance or to advise the potential client that his legal rights had been infringed. *Id.* at 422-26. The Court held that the state could not prohibit these activities as illegal solicitation because the NAACP activities were protected by the constitution as modes of expression and association. *Id.* at 428-29. In short, the NAACP solicitation was a form of constitutionally protected political expression.

94. *Id.* at 433.

95. *In re Primus*, *supra* note 76, at 426-31.

96. *Id.* at 432.

97. *Id.*

The Court recognized that legitimate state interests were involved⁹⁶ but asserted that the state of South Carolina had unnecessarily interfered with protected freedoms in an effort to protect those state interests.⁹⁷ Although the state argued that the disciplinary action was aimed only at the prevention of "undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils . . ."⁹⁸ it nevertheless attempted to prohibit all solicitation. The Court found this blanket prohibition impermissible and stated that actual harm would have to be shown before the solicitation by Primus could be proscribed.⁹⁹ Primus could not be disciplined unless the state could show that her solicitation was in fact "misleading," "overbearing" or had involved "other features of deception or improper influence."¹⁰⁰

In his dissent in *Primus* Justice Rehnquist predicted the trouble states would have in determining "the area in which it may regulate prophylactically and the area in which it may regulate only upon a specific showing of harm."¹⁰¹ The decisions in *Ohralik* and *Primus* require states to draw difficult distinctions on the basis of the content of the solicitation and the motive of the speaker.¹⁰² The states would have a more objective standard to follow, Justice Rehnquist argued, if they were allowed to proscribe all solicitation by lawyers, including that with associational interests.¹⁰³

In a concurring opinion in *Ohralik* Justice Marshall suggested an alternative way of distinguishing between permissible and impermissible solicitation.¹⁰⁴ He disagreed with Justice Rehnquist and contended that because of the significant benefits that can accrue to society from benign

98. *Id.*

99. *Id.* at 434.

100. *Id.* at 438. Contrast this with *Ohralik* where the Court required no showing of actual harm. Because of the potential for abuse the state could prophylactically prohibit in person solicitation. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 467.

101. *Id.* at 443 (Rehnquist, J., dissenting).

102. *Id.*

103. *Id.*

104. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 472 (Marshall, J., concurring).

solicitation, such activity should not be stifled with a sweeping nonsolicitation rule.¹⁰⁵ Marshall defined benign solicitation:

By "benign" commercial solicitation, I mean solicitation by advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter that is not frivolous.¹⁰⁶

Although the Supreme Court has never been presented with a case of benign solicitation, Justice Marshall's concurrence at least indicates the possibility that the Court would protect such activity. He presented several arguments in support of his position.

(1) Some people are either unaware that they have a legal problem or are unaware of the availability of an adequate legal remedy.¹⁰⁷

(2) Current rules discriminate against those in the middle and low income brackets because they know little about the law.¹⁰⁸

(3) The solo practitioner, especially one establishing a practice, suffers a greater burden under the current rules than does the large corporate-oriented firm that doesn't have to solicit in order to attract business.¹⁰⁹ If the Marshall position were adopted Canon Two of the ABA Code of Responsibility would have to be amended. Currently it does not permit even benign solicitation.¹¹⁰

105. *Id.* at 473-74.

106. *Id.* at 472 n.3.

107. *Id.* at 473.

108. *Id.* at 474-75.

109. *Id.* at 475-76.

110. "A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer." CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A). A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

The *Ohralik* and *Primus* decisions illustrate the potential for widely differing opinions as to what constitutes illegal solicitation. The two majority opinions, combined with the Marshall concurrence in *Ohralik* and the Rehnquist dissent in *Primus* dramatize the amount of discretion and the lack of guidance which has been given to the states and to the lower courts.

D. Beyond Bates, *Ohralik* and *Primus*

Much of the recent litigation has involved in-person solicitation much like that in *Ohralik*. Almost uniformly courts have agreed that such behavior can be proscribed by court rule or statute.¹¹¹ Equally prohibited is the use of laypersons to solicit professional employment in return for a share of legal fees.¹¹² However there has been considerable disagreement among the courts as to whether certain conduct

110. Continued—

- (2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.
- (3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.
- (4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.
- (5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-104(A) (1)-(5) [footnotes omitted].

111. *In re Perrello*, 394 N.E. 2d 127, 128-132 (Ind. 1979) (Attorney approached numerous individuals in the hallways of the municipal courts and offered unsolicited legal advice and his services as an attorney); *Pace v. State*, 368 So. 2d 340 (Fla. 1979) (Attorney made initial overture to high school athlete while on a recruiting trip and subsequently entered a retainer agreement with the athlete); *Woll v. Kelley*, 80 Mich. App. 721, 265 N.W. 2d 23 (1978) (Attorney solicited personal injury claims while engaged in ambulance chasing with a local union).
112. *In re Arnoff*, 22 Cal. 3d 740, 586 P. 2d 960, 150 Cal. Rptr. 479 (1979) (Court upheld the two year suspension of a lawyer for using "runners" or "cappers" to solicit clients); *In re Carroll*, 124 Ariz. 80, 602 P. 2d 461 (1979) (Lawyer suspended for one year for contracting with clients solicited by a private investigator in his behalf); *Florida Bar v. Meserve*, 372 So. 2d 1373 (Fla. 1979) (Attorney entered into a business relationship with a prison inmate where the inmate would solicit legal matters, draw legal pleadings and share fees with the attorney); *Kitsis v. State Bar*, 23 Cal. 3d 857, 860-63, 592 P. 2d 323, 325-27, 153 Cal. Rptr. 836, 838-39 (1979) (Attorney

in *Bates* protected advertising or *Ohralik* prohibited solicitation. Three cases, *Kentucky Bar Association v. Stuart*,¹¹³ *Allison v. Louisiana State Bar Association*,¹¹⁴ and *In re Koffler*¹¹⁵ involved very similar factual situations and illustrate the difficulties.

The lawyers in *Stuart* mailed letters to real estate agencies which advertised and priced legal services.¹¹⁶ The letter advised the agencies that the lawyers handled all legal aspects of real estate transactions and listed fees for: Opinion of title, \$50; Deed preparation, \$15; and Mortgage preparation, \$15.¹¹⁷ The letter further guaranteed that every title opinion would be researched by an "approved attorney" who was a member of the Kentucky Bar Association and all opinions would be completed in forty-eight hours barring unforeseen complications.¹¹⁸ In *Allison*, attorneys mailed to certain employers a letter and brochure describing services offered as a part of a prepaid legal plan.¹¹⁹ *In re Koffler* involved an advertisement placed by an attorney in the real estate section of a local newspaper, stating that his legal fee for a real estate closing was \$235.¹²⁰ At a later date the attorney and his partner mailed letters reproducing the advertisement to approximately 7,500 homeowners and several hundred real estate brokers. Both the homeowners and brokers were informed that they could be represented for \$195, a \$40 savings from the price quoted in the newspaper advertisement.¹²¹

Although the factual situations in the three cases were remarkably similar the decisions of the courts were not. In

112. Continued—

was disbarred for employing three laypersons to solicit professional employment and offering to pay three others for referrals of personal injury clients); *In re Lebowitz*, 67 App. Div. 2d 240, 414 N.Y.S. 2d 735 (1979) (Attorney shared legal fees with a non-lawyer to induce the non-lawyer to refer criminal cases to his law firm); *Louisiana State Bar Ass'n. v. Beard*, 374 So. 2d 1179 (La. 1979) (Attorneys were suspended for two years for collaborating and dividing fees with a non-lawyer who would seek out personal injury victims to refer to the attorneys).

113. *Kentucky Bar Ass'n. v. Stuart*, 568 S.W. 2d 933 (Ky. 1978).

114. *Allison v. Louisiana State Bar Ass'n.*, 362 So. 2d 489 (La. 1978).

115. *In re Koffler*, 70 A.D. 2d 252, 420 N.Y.S. 2d 560 (1979).

116. *Kentucky Bar Ass'n. v. Stuart*, *supra* note 113, at 933.

117. *Id.*

118. *Id.*

119. *Allison v. Louisiana State Bar Ass'n.*, *supra* note 114, at 489.

120. *In re Koffler*, *supra* note 115, at 254-55, 420 N.Y.S. 2d at 562.

121. *Id.*

Stuart, the court reasoned that the letters did not pose threats of any of the evils of solicitation because there was no pressure or demand which would encourage a person to make a hasty, uninformed decision.¹²² Therefore, the court concluded that the only difference between the letters in *Stuart* and the advertisement in *Bates* was that the *Bates* advertisement was in a newspaper; *Stuart's* advertisements were mailed to real estate agencies.¹²³ The *Allison* court held to the contrary; it reasoned that the letters describing and offering the prepaid legal plan were closer to the behavior prohibited in *Ohralik* than they were to the communication in *Bates*.¹²⁴ The *Bates* communication was in the public domain "for all to see" while the mailed offers were private and presented greater potential for abuse.¹²⁵ The decision of the *In re Koffler* court was substantially in agreement with *Allison*. The court held that the letters went beyond the type of advertising allowed by *Bates*.¹²⁶ Citing *Ohralik* the court said that the letters were "clear examples of commercial speech, motivated by pecuniary interest and serving no purpose other than ultimately to secure a business transaction."¹²⁷

The comparison of *Stuart*, *Allison* and *Koffler* exposes the confusion that courts face in attempting to draw an advertising-solicitation distinction. The question has been posed as "what test is to be used by the courts in determining the constitutional permissibility of restrictions upon commercial speech by attorneys."¹²⁸ A balancing test could be used to determine if the state interest outweighs the value of the speech activity.¹²⁹ It has been suggested that advertising by direct mail could be constitutionally proscribed¹³⁰ based on (1) the fact that the state has an interest in preventing false, deceptive, and misleading advertising and

122. Kentucky Bar Ass'n. v. Stuart, *supra* note 113, at 934.

123. *Id.*

124. Allison v. Louisiana State Bar Ass'n., *supra* note 114, at 496.

125. *Id.*

126. *In re Koffler*, *supra* note 115, at 271, 420 N.Y.S. 2d at 572.

127. *Id.*

128. Note, *Three Years Later: State Court Interpretations of the Attorney's Right to Advertise and the Public's Right to Information*, 45 Mo. L. REV. 562, 571 (1980).

129. *Id.* at 572-73.

130. *Id.* at 576.

(2) although the value of the information is great, it can be communicated in other ways, such as by newspapers.¹³¹ Even though it is recognized that a less restrictive means of regulation is available,¹³² the balancing test does not require choosing the least restrictive alternative.¹³³

Stronger arguments can be made for the opposing view that because of the significant benefits that can accrue to society from benign solicitation,¹³⁴ such activity should not be stifled with a sweeping nonsolicitation rule.¹³⁵ An alternative approach which focuses on the circumstances under which the solicitation takes place has been suggested as a two-pronged test:

- (1) any form of solicitation of clients in which the attorney communicates information that is false, deceptive, or misleading is prohibited; and
- (2) solicitation of clients in situations that, to an attorney of ordinary prudence, present a significant risk of undue influence, invasion of privacy, or overreaching is prohibited. Any solicitation undertaken during a period in which the client's judgment may be expected to be impaired, such as after an accident involving bodily injury or a funeral, unless a reasonable time period has transpired to allow for recovery, shall be presumed to be improper. (footnotes omitted)¹³⁶

Under this test many of the current difficulties and confusion surrounding the advertising-solicitation distinction could be avoided. Because the motive of the attorney¹³⁷ and

131. *Id.*

132. In *Stuart* the Kentucky Supreme Court suggested that a rule requiring that a copy of a mailed advertisement be sent to the bar association simultaneously with the mailing of the advertisement to the public would provide a workable system of control. *Kentucky Bar Ass'n. v. Stuart*, *supra* note 113, at 934.

133. *Three Years Later*, *supra* note 128, at 576.

134. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 472 n.3 (Marshall, J., concurring).

135. *Id.* at 473-74.

136. Note, *Benign Solicitation of Clients by Attorneys*, 54 WASH. L. REV. 671, 689 (1979).

137. In *Ohralik* the Court focused on the motive of the soliciting attorney and the commercial nature of the speech. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 455-59.

the classification of speech as commercial or associational¹³⁸ would be irrelevant, the two-prong test helps to eliminate the confusion about the outcome of cases such as *Stuart*, *Allison*, and *Koffler*, which fall between the poles of *Primus* and *Ohralik*. However, application of the two-prong test would have produced exactly the same results in *Ohralik* and *Primus*. *Ohralik* solicited under improper circumstances when the client's judgment could be expected to be impaired. In contrast, *Primus* did not present false, misleading or deceptive information, nor did she solicit under improper circumstances. Applying this test to *Stuart*, *Allison*, and *Koffler* would likely have resulted in opposite holdings in *Allison* and *Koffler* unless the information communicated could be shown to be false, deceptive or misleading.¹³⁹ The solicitation by mail in all three cases is not likely to produce a risk of undue influence or invasion of privacy since letters produce only a slight inconvenience and can be easily discarded. Finally there is no evidence that letters were sent to clients whose judgment could be expected to be impaired.

As a result of similar litigation, several states have already taken steps to strike down general prohibitions against advertising and solicitation. The Virginia Code of Professional Responsibility has been amended to allow attorneys to advertise without restriction as long as the advertisement contains no "false, fraudulent, misleading or deceptive statement or claim."¹⁴⁰ The Virginia State Bar recognized that the amendment is broader than *Bates* requires, but concluded that attempts to further restrict advertisements would cause unnecessary challenge and eventually fail to "stand the test of constitutional scrutiny."¹⁴¹ It was acknowledged by the Bar that the amendment was drafted

138. The activity in *Primus* was protected as a form of political expression and an exercise of associational freedom. *In re Primus*, *supra* note 76, at 439.

139. The *Stuart* decision has been criticized as allowing unqualified, non-routine, therefore misleading, services to be advertised. Comment, *Kentucky Supreme Court Holds Attorney Advertising in the Form of Private Mailings Protected by the Constitution*, 30 S.C.L. REV. 455, 459-60 (1979).

140. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY D. R. 2-101, 2-102, 2-103.

141. *Business Associations*, 66 VA. L. REV. 205, 214, citing VA. BAR NEWS 12 (Feb. 1979).

broadly in an effort to avoid another "embarrassing court decision."¹⁴²

The District of Columbia has also amended its Code of Professional Responsibility. It now allows advertising and solicitation by attorneys.¹⁴³ As revised, the Code prohibits solicitation only if it involves the use of "false, fraudulent, misleading, or deceptive claims, if it involves the use of undue influence, or if the potential client is apparently in a physical or mental condition that would make it unlikely that he or she could exercise a reasonable, considered judgment as to the selection of a lawyer."¹⁴⁴ Note that this amendment is consistent with the concept of benign solicitation as discussed by Justice Marshall in *Ohralik*.¹⁴⁵

Following the lead of the District of Columbia, the Board of Governors of the California Bar tentatively adopted an advertising rule that allows solicitation with the following prohibitions: the use of false or misleading statements, the use of coercion, duress, or harassment, and representations made when a potential client is in a distressed state and cannot exercise reasonable judgment.¹⁴⁶ Because of the court decisions in *Button* and *Primus* which gave constitutional protection to solicitation by group-associated lawyers, the California Committee on Professional Responsibility recommended approval of solicitation. The committee chairman explained that the panel was persuaded that only by extending solicitation rights to all lawyers can the lawyers without associational interests be protected from unfair competition.¹⁴⁷

142. *Id.* citing Richmond Times-Dispatch, Jan. 20, 1979 § B. at 1, col. 7. The court decisions striking down bar rules are *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (minimum fee schedule endorsed by the bar constituted price-fixing in violation of the Sherman Act); *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (certain restrictions on attorney comments concerning pending civil litigation violate first amendment); *Consumers Union v. ABA*, 470 F. Supp. 1055 (E.D. Va. 1979) (certain restrictions on lawyer advertising violate first amendment). *Id.* at 214 n.72.

143. 47 U.S.L.W. 2050 (July 25, 1978).

144. Welch, Bates, *Ohralik*, *Primus*—*The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. REV. 585, 609 n. 95 (1978).

145. *Ohralik v. Ohio State Bar Ass'n.*, *supra* note 75, at 472 n.3 (Marshall, J., concurring).

146. *Barriers Against Solicitation Crumbling*, 64 A.B.A.J. 1492 (1978).

E. Proposed Rules

In 1980 both the American Bar Association (ABA) and the American Trial Lawyers of America (ATLA) published drafts of proposed codes of ethics. The ABA's Commission on Evaluation of Professional Standards, chaired by Robert J. Kutak (thus commonly referred to as the Kutak Commission), prepared what is called the Model Rules of Professional Conduct. The Model Rules are being scrutinized as a replacement for the Code of Professional Responsibility which was adopted in 1969 and amended relevant to advertising in 1977 and 1978. The Kutak Commission has expanded the concepts of advertising and solicitation in Part 9 of the Model Rules:

9. INFORMATION ABOUT LEGAL SERVICES

Introduction: To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek a clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not previously made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching. Regulation is therefore necessary. The Rules governing advertising and solicitation permit public dissemination of truthful information about legal services, while prohibiting misleading communications and restricting direct solicitation.

9.1 Truthfulness

A lawyer shall not make any false, fraudulent, or misleading statement about the lawyer or the lawyer's services to a client or prospective client. A statement is false, fraudulent or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not misleading;

(b) Is likely to create an unjustified expectation, or states or implies that the lawyer can achieve results by legally improper means; or

(c) Compares the quality of the lawyer's services with that of other lawyers' services, unless the comparison can be factually substantiated.

9.2 Advertising

(a) A lawyer may advertise services through public communications media such as a professional announcement, telephone directory, legal directory, newspaper or other periodical, radio, television, or general direct mailing, subject to the requirements of Rules 9.1 and 9.3.

(b) A copy or record of an advertisement in its entirety shall be kept for one year after its dissemination.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by this Rule.

9.3 Solicitation

(a) A lawyer shall not initiate contact with a prospective client if:

(1) The lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) The person solicited has made known a desire not to receive communications from the lawyer;

(3) The solicitation involves coercion, duress, or harassment.

(b) Subject to the requirements of paragraph (a), a lawyer may initiate contact with a prospective client in the following circumstances:

(1) If the prospective client is a close friend or relative of the lawyer;

(2) By a letter concerning a specific event or transaction if the letter is followed up only upon positive response by the addressee; or

(3) Under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal services.

(c) A lawyer shall not give another person anything of value to initiate contact with a prospective client on behalf of the lawyer.¹⁴⁸

The Model Rules have been criticized as expanding the concepts of solicitation and advertising "far beyond any rational basis which improving the quality or availability of legal services and informing the public would warrant."¹⁴⁹ Specifically attacked were Rules 9.1(a), 9.1(c), 9.3(b)(2), 9.3(a) and 9.3(b). Rule 9.1(a) received criticism for including the word "material."¹⁵⁰ It is argued that lawyers should not be able to defend themselves on the grounds that they bear no responsibility for their non-material misrepresentations of fact.¹⁵¹ Rule 9.1(c) was criticized as dubious because its simplicity would allow unhelpful and misleading comparisons of legal services to be made.¹⁵² Because Rule

148. ABA MODEL RULES OF PROFESSIONAL CONDUCT. A revised draft is expected to be issued by the commission in May, 1981. See, *Kutak Panel Report: No Mandatory Pro Bono*, 67 A.B.A.J. 33 (1981).

149. Elliott, *The Proposed Model Rules of Professional Conduct: Invention Not Mothered by Necessity?*, 54 CONN. B. J. 265, 281 (1980).

150. Shadur, *supra* note 68, at 325.

151. *Id.*

152. Elliot, *supra* note 149, at 282. "This presumably would allow Attorney Anacin to advertise: 'My services as a zoning lawyer get better results than those of the other three lawyers in town. In the last five zoning cases each of us handled before the ZBA Attorney Tylenol received 2 variances, Attorney Bufferein received one, and Attorney Excedrin received 4. Only I was granted all 5 variances I sought.' Clearly, so simplistic an appeal flies directly in the face of the Supreme Court's intent that the public receive information helpful to it in seeking legal advice. Failing to discuss the facts, the law and the merits of the 20 applications is, to say the least, unhelpful and misleading."

9.3(b)(2) would permit mail solicitation of potential clients "By a letter concerning a specific event or transaction" it was characterized as "barratry."¹⁵³ Finally, concerning solicitation, Rules 9.3(a) and (b) are described as creating a "circular dilemma, a kind of *Catch 22*."¹⁵⁴ Rule 9.3(b) is seen as limiting the circumstances under which an attorney may solicit. Although Rule 9.3(b) was made subject to Rule 9.3(a) it appears that Rule 9.3(b) could be read to bar direct mailings permitted by Rule 9.3(a).

The ATLA has published a public discussion draft entitled *The American Lawyer's Code of Conduct*.¹⁵⁵ Part VII, "Informing the Public About Legal Services" concerns advertising and solicitation:

7.1. A lawyer shall not knowingly make any representation that is materially false or misleading, and that might reasonably be expected to induce reliance by a member of the public in the selection of counsel.

7.2. A lawyer shall not advertise for or solicit clients in a way that violates a valid law imposing reasonable restrictions regarding time or place.

7.3. A lawyer shall not advertise for or solicit clients through another person when the lawyer knows, or could reasonably ascertain, that such conduct violates a contractual or other legal obligation of that other person.

7.4. A lawyer shall not solicit a member of the public when the lawyer has been told by that person or someone acting on that person's behalf that he or she does not want to receive communications from the lawyer.

7.5. A lawyer who advertises for or solicits clients through another person shall be as respon-

153. *Id.* at 281-82. This clearly would permit letters by an attorney (1) to newlyweds, congratulating them on their nuptials and offering his services for closings, estate planning or dissolutions; (2) to widows, commiserating on the loss of a beloved spouse, and offering to handle his estate; and (3) to the victim of an automobile accident, expressing concern, and offering to represent him against the driver when he recovers. Barratry is defined as the offense of stirring up groundless judicial proceedings.

154. Shadur, *supra* note 68, at 328.

155. THE AMERICAN LAWYER'S CODE OF CONDUCT, Roscoe Pound—American Trial Lawyers Foundation, Washington, D.C. (1980).

sible for that person's representations to and dealings with potential clients as if the lawyer acted personally.

Comment

Access to the legal system is essential to the exercise of fundamental rights, particularly those rights relating to personal autonomy, freedom of expression, counsel, due process, and equal protection of the laws. Yet members of the public are frequently unaware of their need for legal assistance and of its availability. It is therefore important for lawyers to provide members of the public with information regarding the availability of lawyers to serve them, the ways in which legal services can be useful, and the costs of legal services. Lawyers are therefore encouraged to advertise and to solicit clients, subject only to restrictions relating to false and misleading representations, harassment, violation of reasonable time and place regulations, and inducing violations by others of contractual or other legal obligations.

Solicitation refers to spoken communication, in person or by telephone, intended to induce the other person to become a client.¹⁵⁶

Because the Code of Conduct is relatively recent there has been little opportunity for published comments on it. The Commission has emphasized that nothing is final about the draft, not even the title.¹⁵⁷ One apparent characteristic of the Code, which could be viewed as a positive or negative feature, is its aspirational and imprecise format. Its preamble indicates "it will point to goals not always achievable and will express values whose relative weights will depend upon innumerable variations in factual context."¹⁵⁸ If the goal of the ATLA is to create an aspirational document, the imprecision will indeed be beneficial. However, it is apparent that what is needed by the American lawyer today is a more precise document which indicates what conduct is within the bounds of ethically acceptable practice.

II. THE MARKETING OF LEGAL SERVICES

In view of the *Bates* decision and the proposed changes in the canons of ethics that would further relax restrictions on advertising and solicitation, one would expect that lawyers would be anxious to exercise their freedom to market their services. However, a mid-1979 survey by the ABA found that only 7% of all lawyers had advertised at least once.¹⁵⁹ This represented a growth of 4% from a similar survey in 1978 but an ABA official commenting on the latest survey stated that the percentage seems to have plateaued since the mid-1979 survey.¹⁶⁰ Another ABA commentator has stated that:

more attorneys want to advertise and are currently doing so. Many attorneys do not advertise because of peer pressure and lack of familiarity with advertising techniques.¹⁶¹

The twin issues of peer pressure and a lack of understanding of advertising techniques are interrelated. Peer pressure not to advertise stems in part from the lack of understanding of how advertising works. There is little anyone can do about peer pressure. In a system based on self regulation, peer pressure almost seems to be a necessary enforcement mechanism. There is, however, a great deal that can be done with regard to increasing the understanding of advertising by professionals. The following sections will attempt to demonstrate that marketing can pay off financially, enhance the profession in the eyes of the public, and not degrade the quality of services.

A. *The Future*

Changes in the legal profession have been occurring at a rapid pace that is not likely to decline in the future. This changing environment poses dangers for lawyers who tend

157. *Id.* at 2.

158. *Id.* at 3.

159. WALL STREET J., Dec. 18, 1980, at 27, col. 1.

160. *Id.*

161. ABA Commission on Advertising, *Informational Report*, Feb. 1979, as cited in CONSUMER INFORMATION REMEDIES, POLICY SESSION Federal Trade Commission Bureau 241 (1979).

to be tradition bound to the extent that they either ignore or fail to recognize the implications of the changing environment. The most important change is a coming surge in competition.¹⁶² Legal clinics are gaining in numbers and expanding in terms of services offered. The model of success in legal clinics is the eight-year old Legal Clinic of Jacoby & Meyers. Jacoby & Meyers had forty-nine outlets in New York and California in December 1980 with plans to open thirty more in January of 1981.¹⁶³ A tremendous expansion rate is not the only competitive threat that is posed by legal clinics. Van O'Steen, the attorney who first pushed for freedom to advertise, is preparing ads aimed at expanding the traditional consumer oriented legal clinic services to businesses and to professionals needing help with licensing agencies.¹⁶⁴ Van O'Steen & Partners is also upgrading its appearance to appeal to a larger target market.¹⁶⁵ These moves by Van O'Steen illustrate the classic marketing theory know as the Wheel of Retailing.¹⁶⁶ This theory simply states that low margin, high volume operations tend to upgrade increasing their margins and improving their appearance in order to trade up to a higher caliber of consumer. Only the most naive private practitioner will assume that legal clinics will confine their business to divorces, wills, name changes and other so called routine services.

Additionally, the belief that lawyers practicing in less populated areas, such as Wyoming, needn't be concerned about competition from legal clinics is equally naive. Legal clinics that were, in the past, overwhelmed by administrative and marketing problems are teaming up with firms that have both the capital and marketing skill to be formidable competitors nationally. Perhaps the best example of such a mutually beneficial pairing is the agreement between H & R Block and Hyatt Legal Services to open hundreds of legal

162. Falk, *Lawyers are Facing Surge in Competition as Courts Drop Curbs*, WALL STREET J., Oct. 18, 1978, at 1, col. 1.

163. *H & R Block: Expanding Beyond Taxes for Faster Growth*, BUSINESS WEEK, Dec. 8, 1980, at 78.

164. Wall Street J., *supra* note 159.

165. *Id.*

166. This theory can be found in most basic marketing textbooks. See MCCARTHY, *BASIC MARKETING* 346 (1978).

clinics nationwide over the next five years.¹⁶⁷ Since the plan includes housing the legal services in the same quarters as Block's tax preparation offices, it is reasonable to assume that anywhere an H & R Block office is found is also a potential location for Hyatt Legal Services. Block is providing the marketing muscle for an aggressive advertising campaign aimed at educating the consumer of legal services and selling Hyatt's ability to meet some of their needs.¹⁶⁸

While opponents to legal clinics will generally acknowledge the lower prices of clinics they frequently argue that such reduced prices mean a corresponding reduction in the quality of services.¹⁶⁹ Those favoring clinics argue that the costs of advertising and the lower prices may be covered by increased efficiencies due to specialization and volume rather than a reduction in quality of services performed.¹⁷⁰ The only available study designed to directly address the price/quality relationship used both subjective (consumer satisfaction survey) and objective (size of support payments awarded) measures to conclude that a clinic's (Jacoby & Meyers) services were of equal or better quality than individual law firms as well as being lower priced.¹⁷¹ Jacoby & Meyers now plan to use the results of this study in their advertisements.¹⁷² The first part of the study provides the theoretical base for demonstrating that advertising can lower costs of legal services. The second part of the study consisted of a mail survey of Los Angeles consumers who had some previous contact with the clinic of Jacoby & Meyers. The

167. *H & R Block*, *supra* note 163, at 76.

168. *Id.* at 78.

169. The literature contains numerous statements anticipating loss in quality from the lower prices that may result from advertising. An early vehement expression of this philosophy is found in the Chapter *It Pays to Advertise, Does It?* of COHEN, *THE LAW: BUSINESS OR PROFESSION?* 178 (1924). More recent expressions of the need to separate legal services from the marketing of other services abound but one of the stronger statements is in Jeffers, *Institute on Advertising Within the Legal Profession—Con.*, 29 OKLA. L. REV. 620-21 (1976).

170. The theory behind this argument is summarized in Muris & McChesney, *Advertising and the Price and Quality of Legal Services: The Case for Legal Clinics*, 1979 AM. B. FOUNDATION RESEARCH J. 179, 179-93 (1979).

171. *Id.*

172. Pendelton, *Pioneer Legal Advertisers Plan TV for New York Bow*, 78 ADVERTISING AGE 3 (1978).

results are subject to criticism concerning the sample,¹⁷³ the practical (versus statistical) significance,¹⁷⁴ and the interpretations placed on the results.¹⁷⁵ In spite of these concerns the study was carefully done and found that Jacoby & Meyers was described as more prompt, interested and honest; as better at explaining matters, keeping clients informed, and paying attention to its customers; and, finally, as more fair and reasonable in its charges than traditional firms.¹⁷⁶ Not satisfied with this subjective measure of superiority the authors wisely sought to substantiate quality superiority in an objective fashion. The objective measure chosen was the size of the monthly child support payments to the spouse who retained custody of the children in a divorce proceeding. A multiple regression analysis with the monthly support award as a dependent variable and gross income (husband and wife), expenses (husband and wife), number of children, and clinic representation (husband and wife) as predictor variables revealed that clinic representation of the wife significantly increased the size of the per child award.¹⁷⁷ Clinic representation of the husband reduced the monthly payment but not by a statistically significant amount.¹⁷⁸

173. Although the authors attempt to justify their use of Jacoby & Meyers' mailing list for the sample (*see* Muris & McChesney, *supra* note 170, at 197), it is reasonable to assume that the consumers who had no other legal experience except with the clinic might conclude that the mailed questionnaire came from Jacoby & Meyers. If some of the respondents (52 users of traditional services and 22 users of clinic services) made the connection the sample would be biased.

174. Some of the results (*see* Muris & McChesney, *supra* note 170, at 199), were so close in terms of mean consumer ratings that the fact that they were statistically significant may have little practical application. For example, ratings were based on a four point scale: 1 = excellent, 2 = good, 3 = fair and 4 = poor. The mean overall rating for traditional firms was 2.53 versus a mean overall rating of 2.17 for the clinic. Although this can be interpreted as statistically significant in favor of the legal clinic (less than a one in ten chance that the clinic does not provide better overall service), the practical significance of a difference that does not even represent a movement of one half of a scale point is questionable (overall they both are fair to good).

175. The results (*see* Muris & McChesney, *supra* note 170), apply only to those routine services studied and should not be generalized to situations which might be more characteristic of traditional firms rather than legal clinics, i.e., the comparison was made in the clinics area proficiency (routine services) and results may differ if the clinics lawyers were compared in the traditional firm's area of proficiency (nonroutine services).

176. Muris & McChesney, *supra* note 170, at 198.

177. *Id.* at 205.

178. *Id.*

Another form of competition for the traditional client lawyer relationship is being practiced by Mr. O'Steen's former partner, John Bates.¹⁷⁹ Bates is now designing self-help packets for people who want to save money by handling some of their own legal work. A divorce kit selling for \$16.95 (complete with forms and instructions) is a very popular item in view of Arizona's "no fault" divorce law. Bates started designing the kits when he felt that the self-help trend was eating into the profitability of the clinic business. The Law Store Inc., a California based operation, also sells kits.¹⁸⁰ A divorce kit that sells for \$125 includes a Law Store attorney drafting the paper work, helping in the preparation of a property settlement (including a review before the client goes to court), and unlimited phone consultations. Other packets include wills (\$30), name changes, adoptions and collection of small claims. Prices for these services are reduced for those who belong to an affiliated operation, Group Legal Services Inc.

Group and prepaid legal service plans represent still another present and future competitive threat to traditional firms.¹⁸¹ Group Legal Services Inc. serves 460 organizations in California with costs of \$35 to \$60 a year per person for unlimited phone consultation, and limited letter writing, phone call, and document review services. The changing competitive environment also includes challenges to the bans that prohibit nonlawyers from giving legal advice or performing legal tasks, improved lawyer referral services offering specific price information, and large national firms crossing state lines to compete with local law offices.¹⁸² Couple the increased numbers and aggressiveness of these alternatives to traditional law firms with a projected increase in the number of lawyers from approximately 500,000¹⁸³

179. Falk, *supra* note 162, at 17, col. 1.

180. *Id.* Similar to the H & R Block expansion, The Law Store is talking to department store chains about getting help with going national.

181. *Id.*

182. *Id.*

183. Stern, *How to Find the Right Lawyer at the Right Price*, FAMILY WEEKLY, Feb. 8, 1981, at 9.

current lawyers to 750,000 by 1985¹⁸⁴ and the future of the legal profession looks extremely competitive.

B. Fallacies

The first fallacy that must be overcome by lawyers desiring to advertise is the tendency to project one's own feelings onto others. This simply means that lawyers should not assume that consumers view legal ads with either the same intensity or emotion as themselves. Many lawyers have negative reactions to legal advertising and toward those who are doing the advertising.¹⁸⁵ This philosophy or attitude appears to be stronger among older lawyers and those who practice in larger firms with a large percentage of business and institutional clientele.¹⁸⁶ A survey conducted prior to *Bates* found three primary reasons for opposition to advertising:

1. A combination of professional and philosophic considerations. Many lawyers apparently feel that the lawyer client relationship is personal and unique and advertising is antithetic to the fiducial nature of this relationship.
2. The apparent fear of deceptive and misleading advertising. Such fear is likely founded on the belief that the public will not regard legal service ads as credible; confidence in the profession will be impaired; honest lawyers will be placed at a competitive disadvantage by their refusal to engage in untruthful advertising.
3. A status quo attitude. It is not unreasonable to suspect that prospering law practices feel

184. Frierson, *Legal Advertising*, 2 BARRISTER 6 (1975) as cited in Victor, *A Commentary on Legal Advertising*, 66 WOMEN LAW J. 6, 8 (1980).

185. Dyer & Shimp, *Reactions to Legal Advertising*, 20 J. OF ADVERTISING RESEARCH 43 (1980). This study found negative attitudes toward hypothetical ads. Documentation of the negative attitudes of non-attorney professionals can be found in Darling & Hackett, *The Advertising of Fees and Services: A Study of Contrasts Between and Similarities Among Professional Groups*, 7 J. OF ADVERTISING 23 (1978), which compares attitudes of accounts, attorneys, dentists, and physicians. Another study by Shimp & Dyer measured attitudes toward advertising in general rather than toward hypothetical ads see Shimp & Dyer, *How the Legal Profession Views Legal Service Advertising*, 42 J. OF MKT. 74 (1978). Also See *Is Advertising Laying an Egg? Lawyers May be More Interested in Solicitation*, Law Poll, 64 A.B.A.J. 673 (1978).

186. Shimp & Dyer, *How the Legal Profession Views Legal Service Advertising*, *supra* note 185, at 80.

that advertising cannot possibly improve a successful situation. This view is most likely prevalent among those who believe that the potential for increased business will not cover the costs of advertisements.¹⁸⁷

Although the above attitudes were expressed prior to *Bates*, later surveys reveal similar attitudes.¹⁸⁸ Philosophical opposition to advertising of legal services may have lead some lawyers to improperly assume that the public has similar feelings.

Studies of consumers' attitudes fall into two categories: attitudes toward bar association advertising and attitudes toward advertising by individual firms. A study by the Ohio State Bar Association found that a random sample of 250 adults liked rather than disliked the Bar's advertising by a margin of better than 6 to 1.¹⁸⁹ Additionally, this survey revealed that consumers' responses to the question "I'd like to read you a list of occupations and have you tell me if you think very highly, somewhat highly, not too highly, or not highly at all of people in that occupation," were virtually unchanged from a pre-advertising study done in 1978.¹⁹⁰ In fact, since the "very highly" ratings of six other professions declined, the rating of lawyers relative to other professions actually increased during the ad campaign.¹⁹¹ Perhaps a more meaningful result of the campaign was that percent of respondents rating lawyers "not highly at all" declined from 20% in April of '78 to 15% in April of '79 (this was

187. *Id.* at 81.

188. *See* note 185.

189. This study was part of an extensive evaluation of the Ohio State Bar Association's airing of two television commercials. Although this study dealt with bar association, rather than individual or firm advertising, the favorable reaction (and overall success of the campaign) are important. Ohio State Bar Association Consumer Awareness & Attitude Study Wave III April, 1979, prepared by: The Marketing Research Dept., Fahlgren & Ferriss, Inc., May 10, 1979 No. 7162).

190. *Id.*, at 4.

191. *Id.* There is considerable question as to whether the fact that the ratings for attorneys did not decline with the other professions was actually due to the bar's advertising campaign or due to other environmental factors (e.g. the ill effects of Watergate wearing off) that were not controlled for in the evaluation of the campaign.

the time the campaign was run).¹⁹² This decline in negative opinions was not observed for the other professions.

The Illinois State Bar Association like the Ohio association also evaluated their program to promote selected legal services and improve the image of Illinois bar members.¹⁹³ The results of the evaluation of the second phase of campaign (theme was: Be Sure, Work With Your Lawyer) were impressive. The three week radio, newspaper and television campaign not only found exceptionally high recall and comprehension rates, but found that the audience's amount of confidence in lawyers was significantly affected as was the audience's behavioral intention (positively).¹⁹⁴ The campaign was specifically designed to encourage consumers to seek a family attorney and to have a will prepared. The test market area (Peoria) revealed 39% intended to seek a family attorney and 66% intended to have a will prepared compared to 30% and 52% respectively in the control (Rockford) group.¹⁹⁵

A study designed to compare consumer and attorney attitudes toward hypothetical, but realistic ads was conducted in Maryland.¹⁹⁶ The results show a marked contrast between the attitudes of consumers (a sample of 500 with a 38% response rate) and attorneys (500 with a 26% response rate).¹⁹⁷ In general lawyers had less positive views toward advertising than the potential clients. The consumers felt that the ads were more believable, clearer, more important, more helpful, more convincing, more imaginative, and in general liked the ad more than lawyers (all differences between lawyers and consumers were significant to the point of being found by chance in only one case in a thousand).¹⁹⁸ A study in the Metro Detroit area confirms these

192. *Id.* Again, in the absence of an experimental design with control groups to measure the effects of environmental factors, it is questionable that there is a true cause and effect relationship between the advertising and the decline in negative ratings.

193. *Illinois Bar Tests Legal Services Ads*, ED. & PUBLISHER, Jan. 14, 1978, at 20.

194. *Id.* at 22.

195. *Id.*

196. Dyer & Shimp, *Reactions to Legal Advertising*, *supra* note 185.

197. *Id.* at 46.

198. *Id.* at 48-49.

attitude differences as from 35% to 42% of consumers (4 groups totaling between 950 and 1,150 interviews) felt legal service advertising would be truthful while only 24% of the 2,036 attorneys responding thought such advertising would be truthful.¹⁹⁹ Consumers were more likely (61% to 69%) than lawyers (27%) to think advertising would increase prices and less likely (22% to 30%) than lawyers (47%) to feel that advertising would lower the quality of professional services.²⁰⁰

Attorneys also fear that advertising will damage the image of the profession. One might question the wisdom of protecting an image that has historically been negative.²⁰¹ A 1978 survey by National Opinion Research indicated that public esteem of the legal profession was greatly eroded since the 1960's²⁰² and the American Bar Foundation's own study found 50% or more of the public agreed with the following statements:

"(A) Lawyers are (not) prompt about getting things done;

(B) Lawyers are generally not very good at keeping their clients informed of progress on their cases;

(C) Lawyers' fees are (not) usually fair to their clients, regardless of how they figured the fee;

(D) Most lawyers charge more for their services than they are worth, (and)

(E) There are many things that lawyers handle—for example, tax matters or estate plan-

199. Bernacchi & Kono, *The Perceived Effects of Professional Service Advertising and Attitudes Towards Its Regulation*, (paper presented at the Midwest Business Conference, Chicago, Ill. 1978). The reason for the range of percentages (35% to 42%, 61% to 69%, and 22% to 30%) on the consumers' ratings is because each one of four different consumer samples was reported independently. Thus, the range of percentages from the group with the lowest (35% on truthfulness) to the highest percentage (42% on truthfulness) is reported for the four groups on each variable.

200. *Id.* at 2.

201. See for example Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 L. & Soc'y. REV. 427, 464 (1977) for a summary of major studies of attitudes toward lawyers that show, among other negative results, that attitudes vary inversely with frequency of contact.

202. Marshall, *Lawyers Struggle to Devise Workable Ad Code*, ADVERTISING

ning—that can be done as well and less expensively by non-lawyers—like tax accountants.”

Thirty percent or more of the respondents agreed that:

“(F) Lawyers will take a case . . . (even) if they (do not) feel sure they know enough about that area of the law to handle the case well;

(G) Lawyers work harder at getting clients than in serving them;

(H) Lawyers needlessly complicate clients’ problems (and)

(I) Lawyers do not care whether their clients fully understand what needs to be done and why.”²⁰³

Despite the current image problems, the view that advertising will erode public confidence is evident when attorneys agree with statements such as: “Public confidence in the law profession would be impaired by legal service advertising” (60% agreement), “Advertising of legal services would confuse rather than enlighten potential clients” (56% agreement), and “If legal service advertising were permitted, it eventually would degenerate into a circus of misleading and deceptive advertisements” (69% agreement).²⁰⁴

However, part of the current image of lawyers may be due to the ban on advertising. Advertising might remove some of the mystery surrounding lawyers resulting in more realistic expectations and a closer match between client’s needs and lawyer’s offerings.²⁰⁵ Most consumers are not socialized from childhood in the selection of a lawyer like they are in the selection of a doctor.²⁰⁶ Most people have contacts with and opportunities to select doctors throughout

203. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC*, 228-32 (1977).

204. Shimp & Dyer, *How the Legal Profession Views Legal Service Advertising*, *supra* note 185, at 79.

205. Morrison, *Institute on Advertising Within the Legal Profession—Pro*, 29 OKLA. L. REV. 609 (1976). The ABA survey. *see* CURRAN *supra* note 203, at 228, found that 83% of the respondents agreed that “A lot of people don’t go to lawyers because they have no way of knowing which lawyer is competent to handle their problem.”

206. Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, 14 LAND & WATER LAW J. 207, 213 (1976).

their life. Most consumers of legal services, however, only choose a lawyer once or twice and many have had no previous contact with or opportunities to select a lawyer.²⁰⁷ In view of the lack of use of referral services and the lack of advertising, consumers who do not know a lawyer or who do not know someone who knows a lawyer may possess a negative image of lawyers out of frustration with perceived inaccessibility.²⁰⁸

Although research on the impact of advertising on the image of the legal profession is minimal, one experiment specifically designed to test the impact of television advertising on the image of an advertising lawyer found that the advertising lawyer's image rating was lower than the same non-advertising lawyer's image.²⁰⁹ But, both the advertising and non-advertising lawyers' images were more positive than negative. Advertising seemed to create a less positive image rather than a negative image.²¹⁰ The experiment itself was designed to convey a positive image of the lawyer and the results are subject to several important limitations concerning the realism, generalizability, and validity of the experiment. The lack of empirical research on the impact of advertising of legal services on the image of lawyers leaves the question open to debate. However, the connection between the advertiser and the commercial should be stronger than the connection between the profession and the commercial. An advertisement is more likely to affect the image of the advertising lawyer than the profession.²¹¹ This fact should discourage the tasteless or deceptive ads which concern lawyers.

Since it is clear that lawyers have different attitudes than consumers toward legal advertising and in view of the

207. *Id.* at 216.

208. *See* note 205.

209. Murdock, An Investigation of the Relationships Between Attributes, Channels, Image and Intentions to Contact in the Advertising of Legal Services (unpublished doctoral dissertation, University of Nebraska, 1979) 110-13.

210. *Id.* at 123. The experiment was conducted on a non-random sample of Iowa consumers who had minimum previous contact with lawyers. The experiment used a mock advertisement that was not as realistic as a professionally done advertisement.

211. There is no reason to believe that the public will generalize to all lawyers the qualities portrayed (or lacking) in the advertisement for an individual lawyer.

lack of compelling evidence that advertising will harm the image of the profession in the consumers' eyes, lawyers considering advertising must be careful to separate their own emotions from the public's attitudes. There is a natural tendency to be highly involved with one's profession. Because of this involvement, lawyers may assume that consumers will watch, read, or listen to legal advertisements with the same intensity as they do. In reality consumers tend to disbelieve, distort, and ignore much advertising.²¹² When a consumer, because of a perceived legal need, does pay attention to legal advertising it would be a gross assumption to believe that the consumer would place the same interpretations and importance weights on the content of the ad that a lawyer would. This is the danger posed by projecting one's own feelings onto others.

For example, the more competent lawyers are, the more reluctant they may be to seek new business within the revised ethical restrictions of the professions. Lawyers may tend to view peers who advertise as less competent. Unfortunately, consumers are not prone to make the same distinction and, as a result, many of the most competent firms and individuals lose clients to their advertised competition. Additionally, *if* the lawyer's view of the relationship between competency and advertising (less competent lawyers advertise) is correct, the lack of competent advertisers certainly does not serve the public (which is unaware of the relationship) interest.

The second fallacy that must be overcome is the idea that advertising costs money while offering little or no economic benefit.²¹³ Advertising's cost should be weighed against its benefits but so should the costs of giving seminars, running for political offices, joining the country club, paying colleagues a percentage of fees for referrals, and redecorating the office. The traditional ways of generating and main-

212. One of the most enlightening discussions of the effects of advertising is in Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 THE PUB. OPINION Q. 349 (1965).

213. See the justifications 4 and 5 presented by the state in *Bates* in Part I of this paper. https://scholarship.law.wyo.edu/land_water/vol16/iss2/7

taining clients also have costs. The question must be whether the benefits of advertising outweigh the costs, not how much the advertising costs.

An assessment of the costs versus the benefits of advertising is a necessary but difficult part of the decision to advertise. The benefits of advertising are difficult to evaluate because the full effect of an advertisement may accrue several months after the ad is run.²¹⁴ Additionally, consumers may not be aware, willing, or able to state the effect an ad had on their decision process.²¹⁵ Difficulties in measuring the effects of advertising should not prevent advertising from being evaluated like any other investment.²¹⁶

Individual experiences with advertising have been mixed. A nationwide survey of 217 firms found that the responding lawyers made an average of \$7.93 in fees for each dollar spent on advertising.²¹⁷ Average revenue per case was \$215 with average advertising costs of \$27 per case.²¹⁸ Individual examples include two young lawyers operating a clinic in New York who had an initially bad experience with television advertising offset by the economical and novel approach of placing ads on 700 cars of the New York City subway.²¹⁹ After the campaign one of them concluded that the venture had "certainly paid for itself and then some."²²⁰

214. Hefferan, *Monday Memo: A Lawyer Learns of Broadcasting's Advantages*, BROADCASTING, Nov. 13, 1978, at 18. The lag between the time an advertisement is run and the time that the ad loses its effectiveness is an important concept to advertisers who have attempted to include this "decaying" effect in models of advertising effects. See e.g. AAKERS & MYERS, ADVERTISING MANAGEMENT 288 (1975).

215. See Krugman, *supra* note 212.

216. Most media representatives can help design methods to evaluate their advertising's effectiveness but because of possible media biases it may be better to seek independent evaluations or to design one's own measures. Some possibilities include using a special phone number in print or yellow pages ads that does not appear elsewhere or simply asking clients if they were influenced by advertising. More sophisticated methods of evaluation include experiments, surveys, recall and awareness measures. To quantify the true benefits of advertising is difficult because certain individuals (opinion leaders) tend to receive mass communication messages and pass them along to others. This multiple-step flow of communications may hide some of the benefits of advertising. See AAKER & MYERS, *supra* note 214, at 367.

217. *Lawyer Ads Yield \$8 Per Dollar Spent: Survey*, 66 ABA J. 705 (1980). This was a nationwide survey of 217 firms with 33 firms supplying advertising information.

218. *Id.*

219. Slavin, *Lawyers and Madison Avenue*, 6 BARRISTER 46 (1979).

A different clinic found only modest newspaper results from three months of advertising but attributed 150 new clients to a successful \$10,000 television campaign.²²¹ A Chicago lawyer attributes 60% to 70% of her clients to an occasional six line ad (costing \$70) in the *Reader* (a free weekly distributed in Chicago).²²² But, a second lawyer credits the *Reader* for only 8% to 9% of his business.²²³ A third Illinois lawyer practiced for twelve years before trying advertising. He felt the advertising results were disappointing even though the \$9,000 print campaign paid for itself.²²⁴

The evaluations of the Ohio and Illinois bar association campaigns did not attempt to measure increases in client contacts but did find other favorable results.²²⁵ The Ohio study found significant increases in claimed awareness (36% increased to 68%) of legal advertising and unaided recall (32% increased to 64%) of legal advertising.²²⁶ The Illinois bar study found total recall (aided and unaided) of 78% with 68% comprehension.²²⁷

Not all advertising results are favorable. Advertising has been blamed for the bankruptcy of one Boston firm.²²⁸ Twenty-seven partners contributed \$9,500 each to a \$300,000 advertising effort. Although the advertising effort failed to generate enough clients to avoid bankruptcy, it is doubtful that the advertising expenditure alone was the cause of bankruptcy.²²⁹ Poor management is likely to have contributed to the bankruptcy. Had the firm remained solvent, the advertising may have eventually paid off.²³⁰ All of the above

221. Victor, *supra* note 184, at 7.

222. Galginaitis, *Lawyers*, ADVERTISING AGE, Dec. 24, 1979, at 5-6.

223. *Id.*

224. *Id.*

225. See notes 189 and 193.

226. Ohio State Bar, *supra* note 189, at 2. The increases are for the time period (April '78 to April '79) that the campaign was conducted. Unaided recall refers to the respondent's ability to recall all or part of the ads without any clues.

227. *Illinois Bar*, *supra* note 193, at 22. Part of the impressive result of the Illinois campaign was attributed to the novelty of legal advertising.

228. *Ad Campaign Fails, Law Firm Goes Bankrupt*, 67 ABA J. 25 (1981).

229. Alter, *No Pot of Gold Just Satisfaction*, ADVERTISING AGE Dec. 24, 1979, at 1, 5-8. Arnold Roseff chairman of the advertising agency handling this firm's campaign stated "the growth rate was positive, the venture was undercapitalized from the beginning."

examples (except the bar associations' campaigns) illustrate another fallacy concerning legal advertisements.

This third fallacy is the belief that the only purpose of advertising is to attract new clientele.²³¹ Some lawyers reason that advertising would be of little economic benefit to their practice because word-of-mouth and referrals generate all the business they can handle. This line of reasoning not only ignores the changing competitive environment, but also ignores the multitude of advertising objectives other than the objective of creating business in general.

One alternative objective is to inform the public of preferred areas of practice. This objective is concerned with selecting a specific market segment or segments rather than appealing to the total market. To facilitate and recognize this objective of advertising, bar associations with foresight are addressing two collateral issues: certification and mandatory continuing education.²³² Even though lawyers can not yet hold themselves out as specialists in a given field, advertising can still indicate desired areas of practice. As F. Lee Bailey stated in justifying his ad on the front page of the New York Times "It (advertising) can establish an area of expertise where the public does not expect it to be."²³³ Bailey used advertising to break his "nothing but murder cases at \$100,000 a clip" image and promote his desire to handle cases involving wrongful deaths and injuries from plane crashes.²³⁴ Another attorney who specialized in customs and trade law felt that advertising was the best way to make potential clients aware not only that his firm exists but that his specialty exists.²³⁵

Conversely, advertising can also be used in a demarketing sense to discourage certain types of clients.²³⁶ Firms that

231. Slavin, *supra* note 219, at 50.

232. *Attorneys Cautious on Advertising*, Aug. 1977, at 13.

233. Slavin, *supra* note 219, at 51.

234. Rozen, "Times" Front Page Lures the Lawyers, *ADVERTISING AGE* Jan. 15, 1979 at 22. Bailey's partner, Aaron Broder, stated "I think established lawyers also have a right to let the public know what they do, just like the new firms." Broder also commented that the response to the ad was so good he was "thinking about jingles."

235. Slavin, *supra* note 219, at 50.

236. See Kotler & Levy, *Demarketing Yes, Demarketing*, 49 *HARV. BUS. REV.* 74 (1971), for an introduction to demarketing.

do not wish to handle routine divorces, name changes, and wills can make the public aware of this fact. If a firm does not care to serve the price sensitive consumer, an ad indicating a minimum charge of \$100 per hour ought to screen out the underfinanced consumers. Indeed, if consumers perceive a price quality relationship, such an ad may attract more business than one touting services for \$20 per hour.²³⁷

Established firms can also benefit by using advertising with the objective of image building rather than client generation.²³⁸ A professionally designed ad reinforcing the leadership, competency, and reputation of a firm may have client retention as its objective. Image building advertising can also have a positive effect on the firm's employees. As one advertising lawyer candidly put it "basically we like seeing our names on the front page."²³⁹

Advertising with the objective of educating the consumer also creates economic benefits. Such advertising reduces search time for consumers and can result in a more mutually satisfying exchange relationship because educated consumers have more realistic expectations with regard to fees and services.²⁴⁰ Because advertising can play an informative role, it can help consumers recognize a legal problem,

237. There is no reason to believe that consumers will automatically choose the lowest priced lawyer. Third party payment mechanisms and high involvement (the consumer has been charged with first degree murder) situations are two examples of factors which may make price less important than other attributes such as quality. The price-quality relationship has been extensively researched outside of the legal market place. A summary of the research concludes that a positive price-quality relationship is most likely when:

1. The consumer has confidence in price as a predictor of quality.
2. There are real and perceived quality variations between brands (lawyers).

3. Quality is difficult for the consumer to judge in other ways.

See ENGLE, BLACKWELL & KOLLAT, *Consumer Behavior* 3rd ed. 370-71 (1978). The last two situations seem to characterize lawyers but the ABA legal needs survey, CURRAN, *supra* note 203 at 231, found 68% agreement with the statement "Most lawyers charge more for their services than they are worth." Most consumers appear to have an acceptable range of prices and disregard unacceptably high or low prices.

238. This is sometimes referred to as institutional advertising. Such advertising is currently popular with oil companies who must sell their company rather than their product because of energy conservation concerns. See Thompson, *The Image Doctors: A Guide to the Personal Packaging Consultants*, II MBA MAGAZINE 1 (1977).

239. Rozen, *supra* note 234, at 62.

240. Brickman, *Advertising: A Business Technique for Lawyers*, 24 VA. B. NEWS

it can inform them of their rights, it can create an understanding of what the law provides.²⁴¹ Such information tends to expand the overall demand for legal services even though the information may be provided by a specific law firm. This benefits all lawyers, and informing consumers of their legal rights will not increase unwarranted litigation unless lawyers choose to bring such cases into court.

A fourth fallacy is that advertising, particularly television advertising, will be deceptive.²⁴² Advertising itself is neither inherently deceptive nor non-deceptive.²⁴³ Advertising does not possess the characteristic of intentional deception, advertisers do. Legal services advertising will be overtly deceptive only if advertisers choose to make it deceptive. Certainly it should be easier to regulate public statements made in mass media than statements made across a desk in the privacy of a lawyer's office.²⁴⁴ Those inclined to deceive clients will do so with or without advertising.

Viewing legal advertising as deceptive because of the transitory or commercial nature of some media ignores the consumer decision process and grossly underestimates the ability of consumers to evaluate advertisements.²⁴⁵ Those who feel advertising will deceive or confuse consumers assume that consumers will act on the basis of advertising alone. It is clear from research on the consumer decision process that consumers making important (in their perception) decisions generally go through a hierarchy of steps,

241. Lieberman, *Commentary/Legal Affairs: The ABA Misses the Mark on Advertising*, BUS. WEEK Aug. 29, 1977, at 74.

242. This thought is clearly stated in *Bates* and in the revised CODE OF PROFESSIONAL RESPONSIBILITY, see notes 1 and 53 *supra*. See also Green, *Don't Exclude Lawyer Broadcast Ads*, ABA Urged, ADVERTISING AGE, Aug. 8, 1977 at 3, 6, in which numerous prominent spokespeople make the point that excluding broadcast media suggests a "paternalistic exclusion," "might impede competition or interfere with the right to communicate," and "deprive the very consumer we want to reach." Comments attached to the proposed new Code of Professional Conduct reiterate the importance of television advertising, see Alter, *ABA Studies Easing of Lawyer Ad Code*, ADVERTISING AGE, Feb. 18, 1980, at 2 & 78.

243. *Editorial Viewpoint, Ad Freedom Needs a Voice*, ADVERTISING AGE, Oct. 18, 1976, at 14.

244. Morrison, *supra* note 205, at 618.

245. See generally note 237 and ENGLE cited therein at, 17-39 and 213-299.

which move them from awareness to action.²⁴⁶ In the initial stages of the decision process consumers are more heavily influenced by mass media (if appropriate information is available).²⁴⁷ Mass media are most effective in creating the awareness and interest which characterize the initial stages of the decision process.²⁴⁸ Once the consumer is aware and interested he engages a search for additional information in order to make a decision and then takes action based on the decision. In these later stages of the decision making process, consumers tend to rely more on information gathered through word-of-mouth sources than mass media sources.²⁴⁹ The word-of-mouth information is used to supplement, verify, and reinforce (or refute) information gathered through the mass media.²⁵⁰ The key point is that consumers do not simply view an advertisement by an attorney and then decide to contact that attorney. Even when a sense of urgency provokes the consumer to contact an attorney solely on the basis of advertising, it would be unusual for the consumer *not* to continue to seek information to verify the decision. In short, the consumer views information sources as complementary and not as competitive. Thus, deceptive advertising is subject to exposure in the consumer's decision process. Additionally, the likelihood of exposure by other consumers, competitors, or regulatory bodies provides a strong argument that the advertising attorney would seek to protect his advertising investment by avoiding deceptive advertising and providing a high quality product.²⁵¹

Even if the advertising is not deceptive it has been argued that consumers are not capable of evaluating services of such importance, varying quality, and sophistication as legal services.²⁵² Consumer surveys tend to indicate just

246. *Id.* The stages in the decision process vary with different models of consumer behavior but one of the more popular sequences for use in persuasive promotion is the AIDA model which suggests the promotional tasks of attention, interest, desire and action *see* MCCARTHY, *supra*, at 411 & 412.

247. ENGLE *supra* note 237, at 237-57.

248. *Id.*

249. *Id.*

250. *Id.* The number of sources consulted is partially dependent on the perceived risk of making the wrong decision.

251. This argument is well stated in Baird, *Advertising by Professionals*, Original Paper 8 INTERNATIONAL INSTITUTE FOR ECONOMIC RESEARCH (1977).

252. *Bates v. State Bar of Ariz.*, *supra* note 1 at 379.

the opposite.²⁵³ Consumers desire more information when choosing attorneys and feel that legal advertising will aid their decision making process.²⁵⁴ This is another area where consumer and attorney attitudes toward legal service advertising differ. Consumers capable of judging and selecting legal services in the absence of any advertising information should be able to make better decisions with the increased information advertising can provide. When a consumer chooses to retain an attorney who does not advertise, the consumer can still use advertised prices and other information for similar services offered by other attorneys as a point of reference.²⁵⁵ The consumer has a right to know and as attorneys recognize and respect this right consumers will become more knowledgeable about what constitutes a legal problem, what to expect if someone advertises a routine divorce for \$250, and what to look for when choosing an attorney.²⁵⁶ Because of the years of banning advertising and the failure of traditional mechanisms to adequately convey the necessary information, consumers may initially experience confusion and deception.²⁵⁷ But, if advertising becomes commonplace and consumers gain experience with evaluating legal service ads the confusion and chance for deception should decrease.

A fifth fallacy is that lawyers and/or bar associations know what information consumers need in order to select a lawyer. This fallacy manifests itself in an ethical code designed to regulate legal advertising rather than to aid consumer decision making.²⁵⁸ As a result, the list of allowable

253. See note 185.

254. Smith & Meyer, *Attorney Advertising: A Consumer Perspective*, 44 J. OF MKT. 56, 56-63 (Spring, 1980). This study reveals that "personal information sources, which dominate the actual attorney choice process, do not possess much relevance by the very people who have employed them." The study also found past dissatisfaction with previous attorney selections based on limited information. Forty-eight percent of the consumers who had previously employed an attorney said they would have liked additional information before actually making their choice. According to the authors this suggests "the need for other than personal communication to guide the selection of legal counsel. It is here, that the removal of professional advertising bans might most benefit the public."

255. Baird, *supra* note 251.

256. Smith & Meyer, *supra* note 254.

257. CURRAN *supra* note 203, at 228, documents the failure of traditional mechanisms at matching clients with lawyers.

258. Smith & Meyer, *supra* note 254.

advertising content emphasizes harmless, objective facts, which are assumed to be useful to consumers in choosing a lawyer, but which are more likely to be useful to lawyers trying to regulate legal advertising. As a consumer moves through the decision process he needs several types of information.²⁵⁹ Advertising can provide much of this information, but the consumer derives the greatest benefits when evaluative information is stressed.²⁶⁰ In order for information to be useful in evaluating lawyers it should possess two characteristics: importance and variance (or difference).²⁶¹ Importance should be measured from the consumer's perspective. It is frequently assumed that price is an important factor in the consumer's decision to choose a lawyer.²⁶² If one assumes that price is an important factor to consumers it also seems logical to assume consumers will use price in choosing a lawyer. However, the consumer can use price only if the price between lawyers also possesses the characteristic of perceived variance or difference as well as perceived importance. For example, if three lawyers in town each advertise routine divorces and their prices are \$150, \$148, and \$145 plus court costs then price is not likely to be a factor in a consumer's decision to choose one of the three to handle his divorce case. The minimal variance in prices does not provide adequate information for a decision. Thus, although the consumer desires to use price (assumed importance) the lack of variance in prices means that he must make his choice decision on attributes other than price. Both the characteristic of importance and the characteristic of variance must be present for a consumer to use an attribute in evaluating alternatives. The example given lacked variance but a lack of importance would have also forced the consumer to make a decision on other attributes. For example, if price is relatively unimportant to the consumer even a substantial variance in price (\$200, \$100, and \$50) would not influence the choice process because price is not

259. ENGLE, *supra* note 237, at 237-57.

260. *Id.* at 393.

261. Alpert, *Identification of Determinant Attributes—A Comparison of Methods*, 8 J. OF MKT. 184 (May, 1971).

262. This is evidenced by the discussion concerning price advertising's ability to lower prices. See, e.g., text at note 35 *supra*.

important to this consumer. The consumer must perceive prices as being different *and* as being important before price will be utilized in deciding which lawyer to retain.

One study testing some of the approved content²⁶³ for legal advertising reveals a number of content items that seem to be lacking either importance or perceived differences.²⁶⁴ Most of these content items failed on the criteria of perceived differences. Advertising might be able to enhance and emphasize differences that do exist (product differentiation) to thus make some of the content items useful.²⁶⁵ However, it seems that much of the approved content is not likely to be useful to consumers because of a lack of perceived differences and/or importance. Date and place of birth, date and place of admission to the bar, schools attended, public offices, military service, legal authorships, teaching positions, memberships, office hours, and even fees may not be the type of information that truly aids consumer decisions. But, this does *not* mean that such information is necessarily inappropriate for advertising.

This apparent contradiction is true because consumer decision making is a process characterized by the stages of problem recognition, search, alternative evaluation, choice, and outcomes. Consumers tend to use different sources of information at different stages of this decision making process. Advertising (especially broadcast media) appears to be most valuable to consumers in the initial stages of the decision process and is frequently supplemented by word-of-mouth sources in the evaluative stages.²⁶⁶ Thus, advertising may be best suited for conveying awareness and interest information related to problem recognition, *i.e.*, the existence of the firm, the fields of practice, and types of services available, common fees, and what constitutes a legal problem. Word-of-mouth sources may be best for conveying the

263. CODE OF PROFESSIONAL RESPONSIBILITY, *supra* note 65.

264. Murdock, *supra* note 209, at 101-06. The attributes identified as most important and exhibiting the greatest variance were competency, interest in and ability to explain problems, reputation, and truthfulness. None of these attributes are approved for advertising in the more restrictive code because of their quality implications.

265. *Id.*

266. See notes 245 & 246.

attributes needed to evaluate alternatives and make a decision, *i.e.*, competency, reputation, truthfulness, and empathy (all of these appear to rate high in both importance and perceived differences).²⁶⁷

Ads designed to convey evaluative information (information with importance and variance) can also serve to generate awareness and interest by their mere existence, but ads designed solely to create awareness (tombstone name and phone number ads) are unlikely to aid the decision process.²⁶⁸ Because of this dual capability, informative advertising provides consumers with the greatest benefits. It is clear that consumers' needs and wants rather than the legal community's desires should be a primary influence in determining the allowable content of legal advertisements.

However, the content fallacy has lead some lawyers to the decision that representations of quality are inappropriate objectives for legal advertisements.²⁶⁹ Yet, virtually all of the allowed content can connote quality to the consumer. Suggestions of ingenuity or of quality of service are made just as surely when a lawyer advertises a verifiable fact such as date and place of admission to the bar as when a lawyer (assuming he could) advertises an unverifiable fact such as the practice of aggressive matrimonial law. Puffery is an accepted part of advertising and consumers are not predisposed to interpret statements of quality as being anything but opinion.²⁷⁰ One common way to convey quality in advertising is by using testimonials of satisfied clients.²⁷¹

267. Murdock, *supra* note 264.

268. Tombstone ads typically contain information low in both importance and variance.

269. Bates v. State Bar of Ariz., *supra* note 34, at 366-67.

270. Levitt, *The Morality (?) of Advertising*, HARVARD BUSINESS REVIEW 91 (1970) argues that if products deliver expected benefits, then the ads are acceptable whether true or not. He states "The world works according to the aspirations and needs of its actors, not according to the arcane or moralizing logic of detached critics who pine for another age." For an opposing viewpoint see PRESTON, *THE GREAT AMERICAN BLOW UP*, 4 (1975). Preston thinks puffery is deceptive and should be illegal.

271. See, e.g., *Legal Ads Show Agency Secrets of Selling Certain Perishables*, 13 MKT. NEWS, Nov. 30, 1979. The senior vice president for Jacoby & Meyers' advertising agency comments that "we could hardly promise positive results or use testimonials" but the newest campaign comes very close. For example, one ad has an attractive, 30ish woman saying "I just got divorced. After 10 years of marriage, it's hard to start over. I didn't know where to turn, let alone if I could afford a lawyer. (Her son enters and sits next to her) Well, we got through the divorce, and now have a whole

Consumers apparently desire information concerning the quality of lawyers, but the accepted channel for this information is via word-of-mouth, not advertising.²⁷² Advertising using testimonials can take the acceptable, word-of-mouth source (the person giving the testimonial) and convey the desired information to many more people than is possible by word-of-mouth alone. The rationale behind allowing the listing in an advertisement (with their written permission) of names of clients regularly represented²⁷³ and not allowing these same clients to express their opinions on quality of service in an advertisement is obtuse at best. The listing of phone numbers would presumably generate phone calls. This rationale then seems to be saying that it is okay to make statements concerning quality over the phone but it is not permissible for the same people to make the same statements in an advertisement. Consumer directories (even Martindale-Hubbell to a certain extent) do not hesitate to judge the quality of professional services.²⁷⁴ Quality claims made in advertisements can be verified by consumers by simply consulting sources other than advertising. Paternalistic judgments of the consumer's ability to evaluate subjective information are unnecessary. In fact, an experiment involving legal advertising found that practitioner attributes (functional quality, and descriptive) and fee level information (above, at, and below market level) had no significant effects on the purchase probabilities or attitudes of respondents.²⁷⁵ Instead, the respondents' purchase probabilities and attitudes were significantly affected by the source of the infor-

271. Continued—

new life." A voice over them states "If you're getting divorced, you should know about a law firm called the legal Clinic of Jacoby & Meyers." The ads must work because case loads in other case types have held relatively constant for the clinic while divorce and criminal cases have increased significantly. The vice president states "In two years, we have increased Jacoby & Meyers' case load 56-fold." *Id.* at 15.

272. Smith & Meyer, *supra* note 254, at 60.

273. See note 65.

274. Piehler, *The Wisconsin Experience with Advertising Legal Services*, 1979 WIS. L. REV. 1251, 1283 (1979) recommends the use of consumer-oriented law lists and also recognizes that such lists are likely to contain quality judgments even though the recommendation is to avoid such judgments.

275. Kuehl & Ford, *The Promotion of Medical and Legal Services: An Experimental Study*, CONTEMPORARY MARKETING THOUGHT: 1977 EDUCATOR'S PROCEEDINGS 39-44 (Greenberg & Bellenger eds. 1977). This study was based on a well described (demographically) convenience sample of 108 Baltimore area adults.

mation: direct mail, direct mail plus a friend's recommendation, and direct mail, a friend's recommendation, and a professional referral.²⁷⁶ Purchase probabilities and positive attitudes increased with the number of sources and as the sources changed from impersonal to personal. These results simply indicate that rational consumers prefer to use multiple sources in making decision. Advertising can provide an important additional source of information to substantiate word-of-mouth information and vice versa.

It is hoped that the reader at this time is no longer passive concerning marketing and advertising. It should be apparent at this point that other individual professionals are not the only competition facing lawyers, that attorneys and consumers do not share a common view of advertising, and that many questions regarding the economies, objectives, deceptiveness, and content of advertising still await resolution. Even if these questions are never fully resolved, attorneys must make the decision to use or avoid advertising. Those choosing to advertise must learn how to implement advertising in a professional manner that will honor the consumer's right to know.

C. Implementation Suggestions

At this time consumers may benefit most from institutional advertising conducted by the local bar associations.²⁷⁸ As long as consumers remain functionally illiterate with respect to recognizing legal needs, it is hard to argue that consumers can use information in individual ads to properly select an attorney.²⁷⁹ Public education is a recognized responsibility of the bar and can be accomplished through advertising. It appears that institutional advertising is an effective way to supplement existing educational programs as well as educating consumers on terms (such as uncontested divorce) and ethical considerations associated with ads by individual lawyers.

276. *Id.* at 42.

277. *Id.* at 41-43.

278. Piehler, *supra* note 274, at 1281.

279. *Id.*

Advertising, whether it is implemented by bar associations or by individuals, is only one part of what should be a total marketing program. Professional marketing has been defined as:

1. Stating long-range marketing objectives and strategies.
2. Developing annual volume, growth and profit objectives, and detailed plans and budgets broken down into individual responsibilities.
3. Organizing regular training seminars to improve the professional person's effectiveness at marketing and personal selling.
4. Assigning formal responsibility to one or a few people to organize, manage, and motivate the marketing activity.
5. Allocating time and budget to support the marketing activity.
6. Setting up a system of controls and rewards tied to individual and group performance in attaining marketing goals.
7. Ensuring that the quality of professional work does not suffer as marketing activity is increased.
8. Using only those marketing tools and procedures that are consonant with the industry's code of professional ethics.²⁸⁰

To fully deal with marketing legal services would require a separate discussion. Marketing should not be equated with advertising or selling.²⁸¹ However, the following section will deal only with that portion of marketing characterized as advertising.

Bar associations or firms planning to do extensive advertising should seek the professional help of an adver-

280. Kotler & Conner, *Marketing Professional Services*, 41 J. OF MKT. 71, 73 (Jan. 1977). This is recommended reading regardless of one's advertising intentions.

281. *Id.* at 72. Marketing is a much larger idea than either advertising or selling; it includes pricing, product management and distributions.

tising agency.²⁸² This is the recommendation of the ABA's commission on advertising, which has prepared "how-to" books on institutional advertising and individual advertising.²⁸³ Although these books (some video tapes are also available) are excellent starting points, they are no substitute for advertising professionals. Advertising professionals should also be used with caution and extra supervision as few agencies are familiar with advertising in the professions. The agency may need extra guidance to assure that ethical standards and restrictions are met.

A basic plan for an advertising campaign should contain the following steps at a minimum: 1) Identifying and analyzing the target market; 2) Defining advertising objectives; 3) Creating an advertising platform; 4) Determining the advertising budget; 5) Developing the media plan; 6) Creating the advertising message; and 7) Evaluating the effectiveness of the advertising.²⁸⁴

Identifying the target market may involve an assessment of who is currently being served and the capabilities and resources of the firm.²⁸⁵ The target market should be described in both demographic terms (age, sex, income, geographic location, occupation, etc.) and in behavioral terms (lifestyle, attitudes, interests, opinions, benefits sought, etc.). At this point the decision should also be made to segment the market or to try to reach the total market. It is generally more efficient to pursue a specific segment or segments of

282. *Use Expert Help for Ads, Lawyers Told*, ADVERTISING AGE, Feb. 19, 1979, at 6.

283. *Id.* Three helpful publications are: BAR ASSOCIATION ADVERTISING—A HOW TO MANUAL, INDIVIDUAL LAWYER ADVERTISING—A HOW TO MANUAL, and BIRTH OF A SALESMAN. LAWYER ADVERTISING AND SOLICITATION BY LORI B. ANDREWS. The manuals are \$7 each and the Andrews book is \$5. All three can be obtained by writing; ABA, Attn: Order Billing Dept., 1155 East 60th St., Chicago, Illinois, 60637. There is a \$1 handling charge. Some video tapes are available also. One recommended video tape is QUALITY PRACTICE, which rents for \$50 and sells for \$150. Requests for video tapes take three weeks notice and should be addressed to the ABA, Jackie Carr, Circulation Manager, 1155 East 60th St., Chicago, Illinois, 60637.

284. Adapted from PRIDE & FERRELL, MARKETING, 436 (1980). Most of what follows can be found in introductory marketing or advertising college level texts.

285. A New York firm found that there was more to marketing than advertising. Four ads in business publications (\$30,000 worth) drew 1,000 responses from corporate clients; it was only then that the law firm realized that it had to assemble a sales presentation to handle the prospective corporate clients. Wall Street J., *supra* note 159.

the market such as low income, married, white women with children who are career oriented.²⁸⁶

Advertising objectives should be stated in specific, measurable terms if there is to be any chance of evaluating the effectiveness of the advertising. It is desirable to use a benchmark that represents the current situation of the firm and indicate how far and in what direction the firm desires to move from the benchmark.²⁸⁷ For example, an advertising objective (there can be primary and secondary objectives) for a law firm might be to increase the number of client inquiries from the present 50 per month to 100 per month by the end of the advertising campaign on April 1, 1981. Advertising objectives must be consistent with firm objectives. Possible objectives include expanding service to existing clients, cultivating high profit clients, widening and deepening personal referral sources, generating awareness, specialization, replacing clients, image building or modification, and client education.²⁸⁸

An advertising platform consists of the basic issues or selling points an advertiser desires to communicate. This is an appropriate area for marketing research on target market needs and wants. For example, a lawyer may desire to research those attributes that embody perceived importances and differences in order to influence the consumer's decision process.²⁸⁹ The platform states what the basic issues or selling points are but does not indicate the form they will take. An individual ad may center on one or all of the platform concepts. Jacoby & Meyers' original platform was to position the clinic as a "respectable law firm specializing in serving the middle class at reasonable cost."²⁹⁰

Basic approaches to budgeting include using a percentage of profit, an all-you-can-afford, a competitive parity,

286. The theory behind segmentation is basically to serve a portion of the market very well rather than serve the whole market only adequately. PRIDE & FERRELL *supra* note 284, at 150-57.

287. *Id.* at 437.

288. Kofler & Conner, *supra* note 280, at 73-76.

289. Murdock, *supra* note 209, and Alpert, *supra* note 261.

290. *Legal Ads*, *supra* note 271, at 15.

and an objective/task method.²⁹¹ The *ABA Lawyer Advertising Kit* recommends using a percentage of last year's gross profit.²⁹² The percentage of profit method is straightforward, easy to use, and is based on what can be afforded (the percentage is determined by the individual). The problem with using a percentage of profit approach is that profits dictate advertising expenditures when the correct cause and effect relationship is that advertising creates profits. A percentage of profits approach can lead to reduced advertising expenditures at the very time (when profits are declining) that advertising should be increased or maintained.

The all-you-can-afford approach is based on spending all that is left after all unavoidable expenses and a reasonable profit have been paid. This approach is also easy and straightforward, but it can lead to overspending. Advertising's benefits should exceed its costs and once the point of diminishing returns on advertising expenditures is reached it makes little sense to spend more money. Determining the point at which an advertising dollar no longer returns a dollar or more of benefits is extremely difficult, which is why the all-you-can-afford approach continues to be popular.²⁹³

A competitive parity approach does not mean that one spends the same amount as the competition. A parity approach would be to spend the same proportion of profits as the competition does on advertising. A small firm would not spend the same amount as a larger firm (assuming profits increase with size), but would spend the same proportion. This method makes a follower rather than a leader and assumes having the same objectives as the competition.²⁹⁴

The objective/task method starts with the setting of logical advertising objectives and then determines the advertising expenditures that are estimated to be necessary to

291. The following sections dealing with budgeting and media are adapted from DUNN & BARBAN, *ADVERTISING*, 266-86, 534-618 (1978).

292. *LAWYER ADVERTISING KIT*, section titled *Advertising, Publicity, Promotion Primer* 6 (1978).

293. See AAKER & MYERS, *supra* note 214, at 51-78 for a discussion of methods and models designed to optimize advertising expenditures.

294. DUNN & BARBAN, *supra* note 291, at 269.

achieve the objectives. This approach emphasizes setting objectives and measuring advertising results, both of which are desirable. The objective/task method demands realistic objectives and expectations in order to avoid leaving objectives unaccomplished. Other methods of budgeting are also available and may be useful for large operations. These other methods are mathematical and economic models designed to optimize advertising expenditures.²⁹⁵ Because of their sophistication, they require substantial amounts of data concerning how advertising affects profits and are not practical for most lawyers. A combination of approaches, a percentage of profits with task/objective, is probably the best budgeting method for the majority of lawyers.

The basic media available for advertising consist of print (newspaper, magazines and direct mail), broadcast (television and radio) and other (outdoor billboards, transit, point-of-purchase displays, special advertising, and directories).²⁹⁶ A recent survey indicates that *Yellow Pages* ads are more cost-effective than daily newspapers for legal advertising.²⁹⁷ The primary advantage the *Yellow Pages* offer is that most consumers who are looking in the *Yellow Pages* have already made the decision to contact a lawyer. They are only trying to decide which lawyer to contact. Thus, the consumer search process can be simplified by *Yellow Page* advertisements. The *Yellow Pages* are also an excellent illustration of the direct relationship between content and media. The much debated issue of price advertising becomes moot when a media that prohibits all price advertising (the *Yellow Pages*) is used. Although the *Yellow Pages* are important, they represent only one of some 4,000 existing directories.²⁹⁸ Other directories should also be evaluated as possible media for legal advertisements. Directories can be very good at reaching select (in terms of demographic or geographics) target markets.

Print media, particularly newspapers, are also an effective media for legal advertising. The *Lawyer Advertising*

295. *Id.* at 275-76.

296. *Id.* at 534.

297. *Is Advertising Laying an Egg?* *supra* note 185.

298. *DENNIS & RABIAN, supra note 291, at 616.*

Kit distributed by the ABA contains sample newspaper ads, sample newspaper and magazine articles, sample brochures, publicity guides and suggestions for using these materials.²⁹⁹ Newspapers offer flexibility, community prestige, intense coverage, and other advantages such as the ability to locate the advertisement in the section most likely to be read by the target market. Limitations of newspapers include a short life, hasty reading, and poor reproduction.³⁰⁰ An important point for legal service advertisers to consider is that media should be viewed as complementary not competitive. There is a tendency to put entire budgets into one media, *i.e.*, if an ad in the *Yellow Pages* is purchased no newspaper or other media is used. Media audiences do not necessarily overlap and media do not necessarily serve the same objective. Media complement each other rather than compete with one another. A newspaper advertisement might create the awareness (even if the consumer is not consciously aware) that causes the same consumer to say "I've heard of them" when viewing a complementary ad in the *Yellow Pages*.

Magazines offer the advantages of selectivity, quality reproduction, long life, possible prestige, and a variety of supplemental services. Magazines are of limited flexibility in area and time. Although many magazines offer regional editions, they can not match the geographic precision of newspapers, spot radio, and television. Magazines also require long lead times for submission of advertisements and it is virtually impossible to make last minute changes.³⁰¹

Direct mail offers great potential for lawyers but has yet to conquer the solicitation barrier.³⁰² Newsletters used to keep current clients informed might be expanded to include non-clients with similar problems and legal needs. The primary advantage of direct mail is its selectivity. For example, Alvin B. Zeller, Inc. offers to rent a mailing list of 170,000 real estate agents and brokers for \$25 per thousand names, 45,000 oil industry executives for \$30 per

299. See note 302.

300. DUNN & BARBAN, *supra* note 301, at 535-39.

301. *Id.* at 550-54.

302. *Lawyers Lose Cases Testing Use of Appropriate Media*, ADVERTISING AGE, Nov. 12, 1979, at 409. Also see Part 16 of this paper.

thousand names or 215,000 wealthy women for \$35 per thousand names among hundreds of other lists.³⁰³ Most categories can also be broken down by states, counties, cities, standard metropolitan statistical areas, or zip code areas and a deliverability of over 90% is guaranteed.³⁰⁴ Other advantages of direct mail include intensive coverage, speed, flexibility of format, complete information can be furnished, and the ability to personalize the information. Limitations of direct mail include high cost per reader, low quality mailing lists, and consumer resistance.³⁰⁵ Mailings can play an important role in retaining existing clients as well as encouraging new client contact, and perhaps, consumers want to be solicited to a certain extent.³⁰⁶ Certainly direct mailing pieces can become obnoxious, but the lawyer who uses direct mail to offend rather than to inform will suffer the consequences of choosing the wrong objective.

Television has a power that is difficult to comprehend.³⁰⁷ The primary advantage of television is its impact. It can reach large numbers of people with both visual and audio stimulation. The powerful impact of television is not justification for avoiding it as a media, but for using it wisely. Television offers the advantages of mass coverage, repetition, flexibility, and prestige (by careful choice of times and shows sponsored). Limitations include fleeting messages, costs (artwork and production more so than cost per viewer), mortality rate (the ads wear out fast-get old fast), distrust (people tend to believe print more than television), and lack of selectivity.³⁰⁸ Television advertising, because of its high production costs, is probably best suited to institutional advertising (advertising by bar associations to promote the profession) and to legal clinics. One caution on using television, very few people can create good advertisements on their own and

303. *Alvin B. Zeller Inc., 1980/81 Catalog of Mailing Lists*, 11, 10, 14 (1979).

304. *Id.* at 15.

305. DUNN & BARBAN, *supra* note 291, at 562-63.

306. Mailings can serve an informational objective that may be attractive to some consumers.

307. Currie, *Attorney Advertising Over the Broadcast Media*, 32 VAND. L. REV. 755, 765 (1979) provides a good summary of the powers of television. Surveys summarized show 98% of all households had televisions in 1977, average viewing time of seven hours (1978), and studies concluding that television is the most authoritative and best advertising medium.

308. DUNN & BARBAN, *supra* note 291, at 574-76.

even fewer should actually appear in their ads.³⁰⁹ The magic of television seems to compel people to appear in their own ads and lawyers, unfortunately, are no exception. Television is a media that demands professional assistance from an advertising agency.

Radio may have lost some of its effectiveness in recent years because of the popularity of car stereo systems and the ease of push-button station changing. Radio still offers several advantages and can be good complement to other media. Advantages of radio include immediacy (currentness), low cost, flexibility, audience selection, and mobility (follows the listener). Audience selection characteristics are an especially useful feature of radio. Properly selected spots during the day can reach housewives; sports programs can reach primarily male audiences; and advertising during the drive times (6-10 A.M. and 3-7 P.M.) can reach working people. Limitations of radio advertising include fragmentation (too many stations going after the same audience), transient quality, and lack of substantial research data on audiences compared to television.³¹⁰

The above represent the primary media that are available to lawyers. However, other media, such as transit advertising, have demonstrated potential in advertising legal services.³¹¹ The media vehicles used must be set forth in a media plan specifying the exact media, dates, times and details of the insertions. The general goal of a media plan is to reach the largest number of persons in the target market possible in the most effective and efficient (least cost) manner possible. The average number of exposures in a given time is often multiplied by the number of different people exposed to a media vehicle at least once in a given time period (reach) to give the total weight of advertising

309. *Ads Start to Take Hold in the Professions*, BUS. WEEK, July 24, 1978, at 124, contains this comment from the chairman of the ABA commission on advertising; "We've found that the most effective ads were done by professionals. Advertising is a specialized field that calls for specialists. Lawyers who do their own advertising will probably waste their time and money because they won't adequately determine what they're trying to inform the public of, and they can't define the market."

310. DUNN & BARBAN, *supra* note 291, at 592-94.

311. PAUP & FERRIS, *supra* note 284, at 444.

that derives from a particular media buy (gross rating points).³¹² Media planning is complex and requires careful consideration, for as one firm commenting on the disappointing results from a "practicing criminal defense" ad in the *New York Times* said, "Your basic criminal, of course, doesn't read the *New York Times*."³¹³

The creating of the message itself is, again, probably best left to advertising agencies. However, educational advertising needs the input of lawyers and all messages should be screened for possible misinterpretations and deceptive content. The message must not only be designed to fit the target audience but must also be compatible with the objectives, platform, and media. One commentator suggests the following for lawyers using print media: 1) Choose a specialty (area of practice); 2) Make useful ads—offer the audience something specific—a solution; 3) Each ad should draw a direct immediate response—it should stand on its own; 4) Write long headlines that promise something, and follow that with specific copy of considerable length that begins to fulfill that promise; and 5) Use long captions under photographs.³¹⁴

Perhaps the most important step in planning for advertising is setting up a methodology for evaluating the effectiveness of the advertising. A well-stated objective is the key to evaluating advertising's effectiveness. Evaluating a campaign to see if it accomplished its objectives is only one area of evaluation. Other areas include: evaluations of alternative ads to ascertain which is the best (pretesting) and evaluating the various strengths and weaknesses of media and media plans.³¹⁵ Advertising can be evaluated before, during and after the campaign. If the primary objective of the

312. For example the Maryland State Bar Assn. is launching an institutional ad campaign costing \$285,000 (\$40 contribution from each member). To save production costs they are using four 30-second television spots of which three are simply spots previously produced by other bar groups with new voice overs. The four flights of TV delivered 350 gross rating points a week on news and major sports events programs (including the Super Bowl).

313. Rozen, *supra* note 23, at 62.

314. Radding, *Seminar Tries to Crack The "Traditional" Barriers*, ADVERTISING AGE, Dec. 24, 1979, at S-5.

315. FINE & FINE, *supra* note 294, at 452.

campaign is communication oriented (rather than sales oriented) a pre-measure of awareness, understanding, or knowledge is usually necessary to evaluate the campaign's effects on these variables. Advertising should be evaluated and campaigns which are not producing the desired results (or adequate results) should be cancelled. Two cautions on evaluating advertising are necessary. First, advertising has been characterized as having a threshold (in terms of the amount done) that must be crossed before results will be substantial.³¹⁶ In other words, if you are going to advertise don't do it tentatively and expect large results. Advertising requires a commitment both philosophically and monetarily. Second, advertising's effects can be difficult to detect because of time lags, subconscious impressions, complex communication networks (someone recommends a lawyer to a client based on an ad, but the actual client never sees the ad), and the difficulties of determining why consumers actually made the decision to consult a given lawyer.³¹⁷

CONCLUSION

"One of the greatest failings of the organized bar in the past century since the American Bar Association was founded is that it has fought innovations. When greater competition has come to the legal profession, . . . when lawyers have begun to advertise or compete—in short, when the profession has accommodated the interests of the public—it has done so only when forced to."³¹⁸

Advertising and solicitation are difficult and controversial issues. However, the difficulty and controversy surrounding these issues is neither justification for ignoring nor opposing the changing environment. The better course of action is to adapt to the environment by recognizing the consumer's right-to-know and the lawyer's responsibility to inform and educate. The consumer's right-to-know was emphasized in *Bates* and is being reinforced by the proposed

316. AAKER & MYERS, *supra* note 214, at 51-53.

317. *Id.* at 249-394.

318. *President Carter's Attack on Lawyers*, President Spann's Response, and Chief Justice Burger's Remarks, 64 A.B.A.J. 840, 845 (1978) (text of President Carter's speech).

revisions in the ethical restrictions on advertising and solicitation.³¹⁹ Advertising can serve both the consumer and the lawyer and should be encouraged rather than discouraged. Refusing to plea bargain or refer clients to lawyers who advertise is a peer pressure violation of the consumer's right-to-know that renders revised ethical codes into worthless words.

Benign solicitation or solicitation complying with the suggested two-pronged test can help many consumers to become aware of their need for legal assistance and its availability.³²⁰ The underlying assumption characterizing the reaction of most lawyers and thus most bar associations seems to be that only the few less dignified, less ethical lawyers will use advertising or solicitation and that advertising and solicitation are guilty until proven innocent. This implicit assumption represents the attitudes of lawyers—not consumers, not the Supreme Court, not the Federal Trade Commission.³²¹

Advertising and solicitation will, no doubt, be abused by some lawyers and some consumers may be deceived or otherwise harmed. These perils must be weighed against the benefits from a free flow of information. The individual attorney should be free and self-confident enough to make the decision as to whether these tools of business are more useful than harmful. Those deciding to use advertising and/or solicitation (if it is allowed) must educate themselves in marketing. An understanding of marketing is necessary not only to protect themselves and the consumers, but also to assure that the maximum benefits are achieved. Most importantly, those using advertising and solicitation should be the most professional in the field, the most competent, the most ethical, and the best role models possible.

319. See *Bates v. State Bar of Ariz.*, *supra* note 1 and the text accompanying notes 148 and 155-56 *supra*.

320. See *Ohralik v. Ohio State Bar Ass'n*, *supra* note 75, at 472 n.3 and *Benign Solicitation of Clients by Attorneys*, *supra* note 136.

321. See *Bates v. State Bar of Ariz.*, *supra* note 1, at 372-73; *McChesney*, *supra* note 170; and the *Ohio State Bar Association Consumer Awareness & Attitudes Study*, *supra* note 169.

The image of the legal profession resides in the consumer's mind. The image is not what is true, but what the consumer (based on what he sees, hears, and experiences) believes to be true.