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Constitutional protection of commercial speech and recognition of professional services as a type of commerce have unfettered legal advertising.[1] The consequent burgeoning of such advertising has fostered considerable controversy, compounded significantly by bar standards in many states that permit some forms of legal advertising but prohibit others.[2] Predictably, challenges have arisen to test the constitutionality of limitations placed on professional promotion.[3]

These challenges involve issues of social science as well as of constitutional law. They reflect a trend, predicted by Holmes,[4] that has seen in this century growing numbers of administrators and judges use social sciences, especially economics, to help evaluate policy-related facts.[5] Currently, mainstream economic theory emphasizes the importance of advertising in promoting efficient consumer choice by reducing information costs.[6] This article complements economic theory by bringing other social sciences to bear on the nature of information and on how non-

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1. For a discussion of the genesis of the commercial speech doctrine, see *infra* notes 96-107 and accompanying text. The Supreme Court recognized legal services as a type of commerce in Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-88 (1975).

2. A variety of bar standards permitting and prohibiting forms of legal advertising are examined in the cases. *See infra* notes 108-254 and accompanying text.

3. These challenges are considered *infra* notes 108-254 and accompanying text.

4. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

5. *See generally* THE USE AND ABUSE OF SOCIAL SCIENCE: BEHAVIORAL RESEARCH AND POLICY MAKING (I. Horowitz 2d ed. 1975); G. LYONS, THE UNEASY PARTNERSHIP: SOCIAL SCIENCE AND THE FEDERAL GOVERNMENT IN THE TWENTIETH CENTURY (1969); P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972); Boedecker, Morgan & Volz, *The Evolving Role of Consumer Research in Public Policy: A Judicial Perspective*, 10 ADVANCES IN CONSUMER RES. 268 (1983); Warren, *Science and the Law: Change and the Constitution*, 12 J. PUB. L. 3 (1963).

6. *See infra* notes 66-71 and accompanying text.

verbal as well as verbal information affects consumer behavior and choice. It focuses on the behavioral effects of nonverbal advertising information and considers why these effects may contain a greater potential for materially harmful deception when they influence purchase of legal services rather than of minor consumer products. It also examines first amendment implications of limiting the use of certain nonverbal techniques in legal advertising, concluding that the Constitution need not render void bar standards containing such limitations.

One especial caveat is in order. Social science comprises a variety of disciplines, each engaged in constructing what are in essence "maps" of human behavior. Just as geographers design different maps to focus on topographic, demographic, political, or climatic components of the same geographic territory, social scientists construct different maps (models, theories, paradigms) to help illumine the same territory: human behavior. As neither in geography nor social science can a map describe fully its territory, this article does not try to set forth a map that explains all human behavior. It attempts a more modest mapping to assist courts and regulators in understanding how certain nonverbal advertising techniques may affect consumer learning and behavior. The map presented here is not beyond dispute—no map ever is—but its contours are drawn from the mainstream of current behavioral research. As such, it is useful in helping evaluate the issue addressed.

I. The World of Information: Interpretation and Rational Behavior

Information bombards us constantly in a myriad of visual, auditory, olfactory, and tactile forms which may be as blatant as a punch in the nose or as subtle as a change in barometric pressure. So potentially overwhelming is the "blooming, buzzing confusion" of information which surrounds us that the brain may act more as a reducing valve to limit the flow of information to only that information relevant to its goals rather than as blotter paper to absorb everything.[7] Even with its large storage capacities, the brain can process only limited information; still less can

7. D. Goleman, Vital Lies, Simple Truths: The Psychology of Self Deception 20-21 (Touchstone ed. 1986); R. Ornstein, The Psychology of Consciousness 19-24 (1972); Marschak, *The Economics of Inquiring, Communicating, Deciding*, 58 Am. Econ. Rev. 12 (Supp. 1968).

be dealt with at an attentive, critical level. What ultimately reaches full human consciousness constitutes but a small subset of the aggregate information received and processed by the brain.

Once information reaches the brain, it must be interpreted for meaning. The problem becomes how to extract the causal structure of the environment from experienced events and to use it to predict future events. At every level of phylogenetic complexity, not just with humans, a basic rule of learning is that "temporal relationships among events are interpreted as causal."[8] "Where there is smoke there is fire" is a truism because temporal contiguity between smoke and fire has been noted and used to infer causality.

The study of temporal contiguity and other behavioral rules lies in the realm of the social sciences. A general tenet of these disciplines is that humans act rationally on information received. Nobel laureate Herbert Simon has stated that the view of human behavior as rationally ordered "is endemic, and even ubiquitous, throughout the social sciences."[9] This view proceeds from a quite specific use of the term *rational*, one that differs importantly from common lay and dictionary meanings.

Common usage distinguishes rational from irrational behavior, with the former arising from a conscious, logical reasoning process and the latter attributed to an emotional or intuitive—often unconscious—response to information. To social scientists, however, there is no irrational behavior as such, since by definition rationality means that *all* human actions arise from a consistent ordering of alternative courses of action to maximize achievement of desired goals.[10] This ordering is based necessarily on available information which may include emotional cues and misapprehensions. So defined, rationality implies more than cool cognitive appraisals of situations. It also compre-

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8. Miller, *Lessons from the Lab*, SCI. NEWS 394 (1983) (statement of Randolf Menzel of the Free University of Berlin).

9. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1 (No. 2 1978); *see also* van Praag, *Linking Economics with Psychology* 6 J. ECON. PSYCHOLOGY 289, 290 (1985).

10. It is this consistent ordering process toward goals that makes behavior "rational," not whether the goals are appropriate or appropriately attained. Ludwig von Mises concludes: "Action is, by definition, always rational. One is unwarranted in calling goals of action irrational simply because they are not worth striving for from the point of view of one's own valuations." L. VON MISES, EPISTEMOLOGICAL PROBLEMS OF ECONOMICS 35 (G. Reisman trans. 1960).

hends situationally inappropriate emotional responses and causally non-conscious behavior.[11] Since human behavior flows from a consistent ordering of alternative possibilities of action to maximize goal achievement, the key to understanding it lies simply in the nature of available information and goal-orientation.

The concepts of temporal contiguity between events as the basic learning principle and of rationality as the premise for behavior are important to subsequent explanations regarding advertising effectiveness and desirable limitations on legal advertising. As the next section explains, these concepts apply to nonverbal as well as verbal information.

II. The Significance of Nonverbal Information to Behavior

Words which include speech and written language, are an important communicator of human information, but they are by no means the only one. Even during speech much communication is nonverbal.[12] Gestures, body posture, eye contact, and tonal inflections all modify and shape the meaning of speech in major ways. Even the supremely verbal institution of law recognizes the informativeness of nonverbal communication during speech (as in the significance of demeanor evidence).[13]

A. Emotion as Nonverbal Communication

Much nonverbal information in human communication is

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11. *Id.* at 34; Simon, *supra* note 9, at 3.

12. *See generally* D. Drucker, R. Rozelle, & J. Baxter, Non-verbal Communication: Survey, Theory and Research (1982); A. Mehrabian, Nonverbal Communication (1972); J. Wiemann & R. Harrison, Nonverbal Interaction (1983). The importance of nonverbal communication in advertising is reflected by the statement: "Nonverbal communication is clearly the frontier in communications research today." Haley, *Benefit Segmentation—20 Years Later*, 1 J. Consumer Marketing 5, 12 (No. 2 1983); *see also* Bonoma & Felder, *Nonverbal Communication in Marketing: Toward a Communicational Analysis*, 14 J. Marketing Res. 169 (1977); Haley, Richardson & Baldwin, *The Effects of Nonverbal Communications in Advertising*, 24 J. Advertising Res. 11 (No. 4 1984).

13. *E.g.*,

> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) (citations omitted).

emotional.[14] Interest, surprise, enjoyment, distress, anger, fear, shame, contempt, and disgust are all conveyed in large measure nonverbally by the tone and body of a communicator.[15] Effective communication between persons presupposes that each can "read" the nonverbal emotional information given by the other. Misunderstandings arise when this is not the case, even though all verbal definitions in communication are comprehended perfectly.[16] That interpretation of emotional information is often non-conscious does not diminish the vital role proper interpretation plays in successful communication.[17]

In addition to being a vehicle of information between communicators, emotion performs two basic internal roles in human information processing. First, it provides a monitoring function that cues the brain to attend to goal-related elements of information out of the entire field of information, something the brain could never do alone by conscious, thoughtful evaluation of every information source impinging it.[18] Second, emotion activates behavior with goals of approach or avoidance of persons, objects, or situations.[19] Since behavior is rational and emotion elicits behaviors of attending, approach, and avoidance, emotional responses must be taken as rational. The emotional sys-

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14. "The communication of affect . . . relies much more on the nonverbal channels." Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 157 (No. 2 1980) (citations omitted). A creative director of Compton Advertising described nonverbal communication as "vibes." He stated that vibes are "the unspoken, unpictured, unsung element in your commercial that communicates at an intuitive level, loud and clear. . . . You pick up vibes with your feelings." ADVERTISING AGE, Feb. 12, 1979, at 57 (quoting Julius Harbarger). Significantly for this article, he added: "And the vibes of a commercial can be a more important form of communication than the words." *Id.*

15. Tomkins, *The Quest for Primary Motives*, 41 J. PERSONALITY & SOC. PSYCHOLOGY 306, 325 (1981). *See generally* P. EKMAN, THE FACE OF MAN (1980); C. IZARD, THE FACE OF EMOTION (1971). Mehrabian finds that 93% of emotional expression is nonverbal. Mehrabian, *supra* note 12, at 182; *accord* Zajonc, *supra* note 14, at 153.

16. *Cf.* "The language of emotion is more than words. People also convey information about their feelings by nonverbal signs, and these two sources of information are not always consistent." R. PLUTCHIK, EMOTION: A PSYCHOEVOLUTIONARY SYNTHESIS 95 (1980). For evidence that nonverbal communication is the primary conveyance of emotional meaning, see A. Mehrabian, *supra* note 12, at 182; Zajonc, *supra* note 14, at 153.

17. *See infra* notes 25-29 and accompanying text.

18. *See* Greenberg, *Memory Research: An Era of Good Feeling*, 114 SCI. NEWS 364 (1978); A. HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 28 (1983); C. IZARD, HUMAN EMOTIONS 143 (1977).

19. *See* D'Andrade, *The Cultural Part of Cognition*, 5 COGNITIVE SCIENCE 179, 191 (1981); C. IZARD, *supra* note 18, at 3; Zajonc & Markus, *Affective and Cognitive Factors in Preference*, 9 J. CONSUMER RES. 123, 124 (No. 4 1982).

tem consistently orders information and behavior alternatives to maximize goal achievement although, like the cognitive system, it may be fooled by misinformation.

B. Classical Conditioning as a Map for Learning Nonverbal Information

Classical conditioning is an important paradigm explaining the learning of nonverbal information which in humans often has emotional content. It illustrates the basic rule of learning that temporally contiguous events are treated as causally related. Classical conditioning does not explain all human learning; notably it falls short in delineating complex, cognitive verbal learning. For this article the paradigm's chief value lies in elucidating elegantly the acquisition of emotional learning and the activation of emotional response.

The Russian physiologist Ivan Pavlov developed the classical conditioning paradigm from a series of experiments that showed the ringing of a bell alone could cause dogs to salivate if the ringing had previously been associated with food, which naturally produced salivation.[20] He formalized the paradigm as follows: An unconditioned stimulus (food) elicits a natural response (salivation). If a conditioned stimulus (bell ringing) is paired temporally with the unconditioned stimulus learning takes place. The conditioned stimulus will come to elicit the response even in the absence of the unconditioned stimulus and will also trigger approach or avoidance behavior in the same way the unconditioned stimulus will. Experiments with classical conditioning reveal that the paradigm applies to humans as well as canines[21] and that it efficiently explains certain basic physiologi-

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20. An account of these experiments is found in I. PAVLOV, ESSENTIAL WORKS (M. Kaplan ed. 1966). *See generally* R. CIALDINI, INFLUENCE: THE NEW PSYCHOLOGY OF MODERN PERSUASION 184-199 (1984); Reed & Coalson, *Eighteenth Century Legal Doctrine Meets Twentieth-Century Marketing Techniques: F.T.C. Regulation of Emotionally Conditioning Advertising*, 11 GA. L. REV. 733, 745-48 (1977).

21. States neurologist Michael Gazzaniga:

> What we all tend to forget is that the rich capacity of the vertebrate brain to learn conditioned associative responses is an active brain function that humans have in common with all the nonspeaking subhuman vertebrates such as your pet dog. Humans are constantly being conditioned to have particular emotional responses, and the particular modules in the brain that store that information can become activated for expression by any number of means.

M. GAZZANIGA, THE SOCIAL BRAIN 78 (1985). *See generally* Staats & Carlson, *Classical Conditioning of Emotional Responses and Effects on Social Behavior: A Bibliography*, 5 UNIV. HAW., DEP'T OF PSYCHOLOGY TECH. REP. (April 1970).

cal learning, including the learning of emotion, which manifests itself physiologically.[22]

At first blush the classical conditioning paradigm seems to do little more than state formally the rule of temporal contiguity, but it has deeper implications. For instance, classical conditioning shows how learning can be manipulated to produce responses inappropriate to actual goal attainment. The ringing bell did not lead to satisfying the hunger of Pavlov's dog even though the dog had been conditioned to respond as though it would. The response was rational in the sense previously discussed—the dog was merely misinformed. Pavlov's ringing bell is the nonverbal equivalent of the verbal lie, and both verbal statements and emotion-invoking nonverbal representations may induce goal-oriented behavior (reliance) that, although rational, derives from misinformation. As subsequent sections assert, classical conditioning using nonverbal, emotion-inducing techniques explains an important component of advertising effectiveness.

C. The Non-Conscious Causal Potential of Nonverbal Information

The communication of information that stimulates the receiver below the level of conscious awareness is highly controversial. There exists concern that it may be impossible for consumers to respond reasonably to "subliminal" information that they can neither see nor hear consciously. In spite of research that suggests the existence of subliminal perception[23] however, there is yet little conclusive evidence that information conveyed subliminally can affect consumer purchasing behavior.[24]

Of much greater potential significance to advertising regula-

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22. "[N]early all the physiological indices of emotion can be conditioned through variations of the basic classical conditioning procedure." D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 42 (1970); *see also* R. PLUTCHIK, *supra* note 16, at 240; M. RAY, ADVERTISING COMMUNICATION MANAGEMENT 250 (1982).

23. *See, e.g.*, N. DIXON, SUBLIMINAL PERCEPTION: THE NATURE OF CONTROVERSY (1971); L. SILVERMAN, F. LACHMAN & R. MILICH, THE SEARCH FOR ONENESS (1982); Kunst-Wilson & Zajonc, *Affective Discrimination of Stimuli That Cannot Be Recognized*, 207 Science 557 (1980); Shevrin & Dickman, *The Psychological Unconscious: A Necessary Assumption for all Psychological Theory?*, 35 AM. PSYCHOLOGIST 421 (1980).

24. W. LEISS, S. KLINE & S. JHALLY, SOCIAL COMMUNICATION IN ADVERTISING 304 (1986). *But see* Cuperfain & Clarke, *A New Perspective of Subliminal Perception*, 14 J. ADVERTISING 36, 40 (No. 1 1985) ("[I]t is possible to have an impact on viewers' stated preferences without their even being aware that their preferences are being addressed.").

tion is the learning from information that although consciously perceived, is not consciously appreciated for the *causal* impact it has on shaping subsequent behavior.[25] Nonverbal, emotionally charged advertising can affect consumers at the time of exposure and subsequently motivate them toward product or service purchase without their being aware of the relationship between the advertising and their purchase motivation.[26] Though seemingly ingrained in human nature, the conviction that personal behavior is coherently and consciously chosen is largely illusory. In addition to conscious decision-making, a variety of non-conscious influences also help shape behavior.[27]

Under most conditions the fact that a person does not always appreciate consciously the causal relationship between prior associations and present behavior does not interfere with efficient goal achievement.[28] The very universality of the rule of temporal contiguity strongly indicates its relative success in pre-

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25. *See generally* Broadbent, *The Hidden Preattentive Processes*, 32 AM. PSYCHOLOGIST 109 (Feb. 1977); Nisbett & Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOLOGICAL REV. 231 (1977); Shevrin & Dickman, *supra* note 23; Zajonc, *supra* note 14.

26. For evidence that consumers are often unaware of how advertising influences purchase motivation see Deighton, *How to Solve Problems That Don't Matter: Some Heuristics for Uninvolved Thinking*, 10 ADVANCES IN CONSUMER RES. 314, 315 (R. Bagozzi & A. Tybout eds. 1983); Krober-Riel, *Emotional Product Differentiation by Classical Conditioning*, 11 ADVANCES IN CONSUMER RES. 538, 539 (Kinnear ed. 1984); McGuire, *Some Psychological Factors Influencing Consumer Choice*, 2 J. CONSUMER RES. 307 (1976); Mittal, *Consumers Cognitive Journey Through the Product Forest*, 10 ADVANCES IN CONSUMER RES. 464, 467 (R. Bagozzi & A. Tybout eds. 1983). States Mittal:

> Self reflection as well as everyday empirical observations of others suggest that consumers buy many products simply because they feel 'emotionally attracted' toward them. In such instances, consumers do not always assess objective features of the products and may sometimes be even unaware of the bases for their purchase decisions.

Id.

27.

> [H]umans—no matter what their intellectual level, no matter what other beliefs they possess—believe unshakably that they are acting freely in 99 percent of their behaviors. The rational point that they are not has absolutely no psychological reality. Our immediate experience is too powerfully present in our minds, and it cannot be overridden by a textbook assertion.

GAZZANIGA, *supra* note 21, at 145; *see also* ZIMBARDO, "THE TACTICS AND ETHICS OF PERSUASION," ATTITUDES, CONFLICT AND SOCIAL CHANGE 183 (B. King & E. McGinnies eds. 1972) ("We comply, conform, become committed, are persuaded daily in the endless procession of influence situations that we enter, yet each of us continues to maintain an illusion of personal invulnerability."); *cf.* R. ORNSTEIN, MULTIMIND 21 (1986) ("We are not coherent. We do not always decide things reasonably. We are unaware of how we decide and even 'who' is deciding for us.").

28. *See* R. CIALDINI, *supra* note 20, at 19-21; van Praag, *supra* note 9, at 291.

dicting future relationships.[29] However, when contiguous events have been artificially manipulated, as in advertising, failure to identify how they can elicit future behavior prevents the more complex cognitive system from having the opportunity to check and override automatic processing of the emotional system.[30] Judges who ultimately determine the constitutionally permissible use limits of nonverbal, emotionally evocative advertising techniques in legal advertising must give weighty consideration to the quirk of human nature that blinds us to the influence of these techniques on our behavior.

III. Nonverbal Information and Advertising

In recent years several commentators have observed that much advertising, especially electronic media advertising, is largely noninformative.[31] A study of television advertising concluded that fewer than half of the commercials examined contained even one of some thirteen possible categories of product-intrinsic information.[32] That much advertising contains little product-intrinsic information, however, does not mean that advertisements are noninformative. The more productive approach concerns not whether advertising is informative but rather what kind of information it is that advertising contains.[33]

Analysis of what commentators have considered "informa-

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29. For humans the automatic associations represented in the rule of temporal contiguity may be necessary as an evolutionary mechanism to prevent information overload. *Cf.* R. Cialdini, *supra* note 20, at 21.

30. For a showing that "the evocation of moods and feelings by stimuli may be largely involuntary and automatic," see Batra & Ray, *Affective Responses Mediating Acceptance of Advertising*, 13 J. Consumer Res. 234, 235 (1986); *see also* Ornstein, *supra* note 27, at 192; Zajonc, *supra* note 14, at 156.

31. *See, e.g.*, Marquez, *Advertising Content: Persuasion, Information or Intimidation*, 54 Journalism Q. 482 (1977); Pollay, Zaichkowsky & Fryer, *Regulation Hasn't Changed TV Ads Much!*, 57 Journalism Q. 438 (1980); Resnik & Stern, *An Analysis of Information Content in Television Advertising*, 41 J. Marketing 50 (No. 1 1977).

32. *See* Resnik & Stern, *supra* note 31, at 51.

33. Commentators who criticize much advertising as noninformative, (*see supra* note 31) recognize the potential impact of nonverbal and emotional advertising:

> The lack of information may not be so surprising when one reflects on the frequency of television ads which speak of illusory social or psychological benefits attendant to product purchase and consumption. Messages whose core themes are "trust us," or "you deserve us" or "feel young" may prompt states of mind conducive to purchase, but not by the mechanism of information.

Pollay, Zaichkowsky & Fryer, *supra* note 31, at 446. Resnik & Stern specifically point out that they are not considering whether or not psychological advertising is informative. Resnik & Stern, *supra* note 31, at 53.

tive," (related to intrinsically objective product qualities) reveals that "informative" refers almost predominantly to verbally conveyed information about price, availability, physical performance, guarantees, product comparisons, and other intrinsic qualities.[34] However, information conveyed by advertising is a much broader concept than simply product- or service-intrinsic information. Information theory holds that "information is a name for the content of what is exchanged with the outer world as we adjust to it, and make our adjustments felt upon it."[35] In its most accurate sense information can arise from nonverbal and emotional stimulation as well as from verbal meaning, out of product-extrinsic as well as out of product-intrinsic references. Since nonverbal/emotional advertising associations affect consumer behavior (as intended by advertisers), they are properly characterized as information. More importantly, once advertising is understood in this way, the regulation of misinformation in advertising takes on a correspondingly broader connotation. *Under such a view regulators may justifiably prohibit as misinformative various nonverbal, emotional advertising techniques that motivate consumers toward specific lawyers based on extrinsic rather than intrinsic legal service characteristics.* The information contained in nonverbal, emotional advertising relates to subjective characteristics within the consumer and to execution qualities of the advertising itself, instead of to intrinsic product or service characteristics.[36] It produces feelings of elation, sensuousness, social affection, or appetitive desire.[37] Association of these feelings with a product or service contributes to consumer motivation necessary to cause the purchase of the product or service.[38] Appreciation of the extent and potential impact of such information in advertising is necessary to evaluate why prohibiting certain forms of it in legal advertising may be justified.

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34. *See supra* note 31.

35. 4 ENCYCLOPEDIA BRITANNICA 1010 (15th ed. 1984).

36. Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. MARKETING RES. 545, 547 (1978). *See generally* Shimp & Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 J. MARKETING 22-32 (1981).

37. Batra, *Affective Advertising: Role, Processes, and Measurement*, in THE ROLE OF AFFECT IN CONSUMER BEHAVIOR 63 (R. Peterson, W. Hoyer & W. Wilson eds. 1986).

38. For a classical conditioning perspective on this assertion, see McSweeney & Bierley, *Recent Developments in Classical Conditioning*, 11 J. CONSUMER RES. 619, 621 (1984).

A. *Emotion in Advertising*

The father of behavioral psychology in the United States, J.B. Watson, once stated: "To make your consumer react. . .it is only necessary to confront him with either fundamental or conditioned emotional stimuli."[39] Watson, an academic psychologist who became vice-president of J. Walter Thompson Advertising Agency, understood theoretically what many in advertising have grasped intuitively. Facts alone often do not provide the necessary impetus to induce consumers to buy advertised products and services.[40] To stimulate purchase, advertising may also need to motivate consumers. This requires conveying emotional information about the success, excitement, or joy that something sold will bring to consumers' lives, not just giving factual information about intrinsic characteristics.

During this century, the advertising practitioner's grasp of the vital role played by emotion in human behavior has grown.[41] This recognition has found an outlet in increased use of three emotion-evoking advertising techniques: music, graphic forms, and dramatic presentation.[42] These techniques are basically nonverbal, and the emotional information they convey requires little conscious cognitive effort on the part of consumers to evaluate.

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39. *See* S. FOX, THE MIRROR MAKERS 85 (1984); *cf.* D. COHEN, J.B. WATSON: THE FOUNDER OF BEHAVIORISM 189 (1979) ("[Watson] did repeat that to get the consumer to react, and buy, it was only necessary to arouse his emotions. . . . Advertising worked not so much by giving information as by arousing emotions.").

40. This view of persuasion is widely held by advertising agency personnel: "Advertising is not a debate. It's a seduction." A. RIES & J. TROUT, POSITIONING: THE BATTLE FOR YOUR MIND 76 (1981); *"Facts are not enough."* ADVERTISING AGE, July 9, 1979, at 49 (statement of William Bernbach). "[M]ost of the time, the facts of a product are perilously similar to the facts of its competition. That's when logic should yield to emotion." Cilo, *Emotion: a Powerful Tool for Advertisers*, ADVERTISING AGE, July 8, 1985, at 28.

Consumer research scholars hold the same view. *See, e.g.*, Coyne, *Putting Humpty Dumpty Back Together: Cognition, Emotion and Motivation Reconsidered*, 9 ADVANCES IN CONSUMER RES. 153, 154 (A. Mitchell ed. 1982). Gregory, *Determining the "Consumer Object,"* 13 APPLIED ERGONOMICS 11 (No. 1 1982).

41. *See generally* O. PEASE, RESPONSIBILITIES OF AMERICAN ADVERTISING 175 (1958); Curti, *The Changing Concept of "Human Nature" in the Literature of American Advertising*, 41 BUSINESS HISTORY REV. 335 (1967); McMahon, *An American Courtship: Psychologists and Advertising Theory in the Progressive Age*, 13 AM. STUD. 5 (No. 2 1972); Reed & Coalson, *supra* note 20, at 738-44. Current references to the importance of emotion in advertising, as found in the advertising industry's leading trade publication ADVERTISING AGE, are too numerous to cite.

42. *See, e.g.*, Krober-Riel, *supra* note 26, at 539-542; Mitchell, *The Effects of Visual and Emotional Advertising: An Information Processing Approach*, ADVERTISING AND CONSUMER PSYCHOLOGY 19 (L. Percy & A. Woodside eds. 1983); ADVERTISING AGE, July 23, 1979, at S-4.

1. *Music*

A primary purpose of music is to trigger emotion.[43] Listeners often "consume" musical emotion purely for private enjoyment, but music can be used manipulatively as well to enhance work production or to catalyze in store shopping behavior.[44] When paired with advertised products and services, music also provides a powerful association that can change the perception of what is advertised.[45] A survey taken of 400 persons active in advertising music production affirms the emotional function of this advertising technique. Asked why they use music in advertising, the respondents' most common reply was "[m]usic can create a strong emotional environment in which to deliver your message."[46]

2. *Graphics*

One of the most prevalent of all emotion-evoking advertising techniques is graphic art. Graphic art in the form of drawings or carefully retouched photographs accompanies nearly all print advertisements, except those appearing in classified sections of newspapers and magazines where intrinsic product/service information rather than emotional stimulation is the rule.

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43. *See* J. DAVIES, THE PSYCHOLOGY OF MUSIC 68-71 (1978); L. MEYER, EMOTION AND MEANING IN MUSIC (1956); M. SKILES, MUSIC SCORING FOR TV AND MOTION PICTURES 70-71 (1976).

44. *See* Milliman, *The Influence of Background Music on the Behavior of Restaurant Patrons*, 13 J. CONSUMER RES. 286 (1986); Milliman, *Using Background Music to Affect the Behavior of Supermarket Shoppers*, 46 J. MARKETING 86 (Summer 1982); MUZAK CORP., SIGNIFICANT STUDIES OF THE EFFECTS OF MUZAK ON EMPLOYEE PERFORMANCE (1974).

45. *See* Gorn, *The Effects of Music in Advertising on Choice Behavior: A Classical Conditioning Approach*, 46 J. MARKETING 94 (1982); Park & Young, *Consumer Response to Television Commercials; The Impact of Involvement and Background Music on Attitude Formation*, 23 J. MARKETING RES. 11 (Feb. 1986); Smith & Curnow, *"Arousal Hypotheses" and the Effects of Music on Purchasing Behavior*, 50 J. APPLIED PSYCHOLOGY 255 (June 1966). The creative director of an advertising agency has stated: "More than just good music with good lyrics, they capture that something inside of you that leaves you feeling very positive about what they are selling." Kingman, *And Now a Few Words That Sell*, ADVERTISING AGE, Oct. 24, 1983, at M-28 (statements of Ronald Travisano). The president of a music production company has stated: "You could input unrelated sounds into the product sell that would stimulate a purchase because of the emotions they elicit. All you have to do is look at a product and determine what sound makes it appealing." Fitch, *Dancing to an "Unheard" Melody*, ADVERTISING AGE, July 18, 1985, at 44 (statement of Shelly Palmer).

46. ADVERTISING AGE, Jan. 23, 1978, at 54.

In television the very nature of the medium makes predominant the graphic, visual components of advertising.

Advertisers associate temporally the aesthetic pleasure of graphic art, including its color, or the emotion elicited by visual symbolism with whatever is advertised in order to change perception and stimulate approach behavior (purchase).[47] Although some graphic techniques merely represent or describe what is advertised, as illustrated by technical drawings, even casual observation of advertising indicates that most graphic representations transcend factual description and are intended to induce emotional response. Research reveals that the perception-changing association process occurs even for graphics that are irrelevant to the advertiser's product or service.[48]

3. *Drama*

Dramatic presentation in advertising can encompass both music and graphic techniques, but it also goes beyond these to include story-form presentation or presentation in a striking, evocative style. Called "slice of life" advertisements, dramatically presented advertisements usually pair positive emotion or relief from negative emotion with consumption of the advertiser's product or service. The emotion that consumers experience vicariously from the dramatic skills of slice-of-life actors need not be intrinsic to the product or service. All that is necessary is that consumers be made to feel the temporally contigu-

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47. *See, e.g.*, Dooley & Haykins, *Functional and Attention—Getting Effects of Color on Graphic Communications*, 31 PERCEPTUAL AND MOTOR SKILLS 851 (1970); Mitchell, *The Effect of Verbal and Visual Components of Advertisements on Brand Attitudes and Attitude Toward the Advertisement*, 13 J. CONSUMER RES. 12 (June 1986); Mitchell & Olson, *Are Product Attribute Beliefs the Only Mediator of Advertising Effects on Brand Attitude?*, 18 J. MARKETING RES. 318 (1981); Sparkman & Austin, *The Effect on Sales of Color in Newspaper Advertisements*, 9 J. ADVERTISING 39 (No. 4 1980).

48. Mitchell & Olson, *supra* note 47, at 330. It is important to an understanding of how nonverbal, emotionally stimulating advertising techniques work that these extrinsic techniques need not be related to intrinsic product or service characteristics. John B. Watson stated: "In general then it seems safe to say that when an emotionally exciting object stimulates the subject simultaneously with one not emotionally exciting, the latter may in time (often after one such joint stimulation) arouse the same emotional reaction as the former." Watson, *A Schematic Outline of the Emotions*, 26 PSYCHOLOGICAL REV. 165, 184 (No. 3 1919). More recently, the president of Neuro Communication Research Laboratories commented: "Music, bleed print ads, sexy models, and eye-arresting color photographs are all used without any disclaimer, although their intent is to get the consumer to buy a product that may not bear the slightest resemblance to the overt message." Weinstein, *Beware Subliminal Laws*, ADVERTISING AGE, June 25, 1984, at 20.

ous relationship. Toothpaste may do little to promote love interest, and a new soap powder is likely irrelevant to familial harmony, but if dramatic presentation can induce consumers to feel (in a non-conscious causal way) that toothpaste and soap powder can achieve these effects, they will be motivated toward purchase.[49]

Although dramatic presentation is often accompanied by speech, words do not achieve the only, nor even the main, effect of dramatic advertising. The nonverbal components of such advertising—tone of voice, facial gestures, eye contact, body posture, spacial relationship between persons (proxemics), music, and beautiful photography—produce much of the emotion associated with the product or service.[50] That dramatic presentation is found almost exclusively in the electronic media, where nonverbal communication opportunities are greatest, and in magazine and newspaper graphics, underscores the importance of nonverbal expression to dramatic presentation. Finding dramatic advertising in print alone is comparatively rare.

B. Classical Conditioning and Advertising

For the last twenty years the primary theoretical framework for academic researchers of consumer behavior and advertising has been cognitive psychology.[51] Although in its broadest sense cognitive psychology includes the study of all thinking processes, including nonverbal as well as verbal processes, in actual development its chief focus has been verbal thinking, especially verbal memory and analysis.[52] Cognitive theorists have often used the computer's linear logic and sequencing as a model for human thinking.[53] In consumer psychology the cognitive approach engendered a theoretical view of consumer response to advertising as largely verbal problem-solving: Advertising information (ver-

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49. *See supra* note 48 for how it is possible for extrinsically associated feelings, rather than intrinsic product or service characteristics, to motivate purchase behavior.

50. *See generally supra* notes 12-16 and accompanying text.

51. *See, e.g.*, INTRODUCTION TO PSYCHOLOGICAL PROCESS AND ADVERTISING EFFECTS 2 (L. Alwitt & A. Mitchell eds. 1985); Nicosia, *Advertising Management and Its Search for Useful Images of Consumers*, in ADVERTISING AND CONSUMER PSYCHOLOGY 41 (L. Percy & A. Woodside eds. 1983); Zielinski & Robertson, *Consumer Behavior Theory: Excesses and Limitations*, 9 ADVANCES IN CONSUMER RES. 8 (A. Mitchell ed. 1982).

52. Estes, *The Science of Cognition*, in OUTLOOK FOR SCIENCE AND TECHNOLOGY: THE NEXT FIVE YEARS 165, 177-182 (Nat'l Research Council 1982).

53. *Id.* at 171; *see also* Kassarjian, *Consumer Research: Some Recollections and a Commentary*, 13 ADVANCES IN CONSUMER RESEARCH 6, 8 (R. Lutz ed. 1986).

bal) changes beliefs about products/services that produce changed attitudes and lead to new behavioral intentions (*e.g.*, regarding purchase).[54] According to this view, advertising's effect can be studied by testing consumers for verbal recall of advertising and asking them to report their attitudes and intentions.[55]

The problem with this highly verbal orientation to advertising effect is that empirical evidence suggests verbal decision-making processes do not precede consumer purchases a significant proportion of the time.[56] Other findings emphasize that verbal recall of advertising seriously understates the effect that nonverbal, emotional appeals have on consumers.[57] The implicit conclusion is that consumers often are not conscious of the causal relationship that prior advertising has to subsequent purchase behavior, especially advertising with emotional impact.[58]

Recently, consumer behavior scholars and researchers have

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54. This approach to attitude change derives from the Fishbein-Ajzen model. In recent years consumer researchers have "relied heavily" on this linear model, which argues that "attitudes can be changed only by changing underlying beliefs." Ray & Batra, *Emotion and Persuasion in Advertising: What We Do and Don't Know About Affect*, 10 ADVANCES IN CONSUMER RES. 544 (R. Bagozzi & A. Tybout eds. 1983). The development of the model is found in M. FISHBEIN & I. AJZEN, BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH (1975). Comments M. GAZZANIGA, *supra* note 21, at 4: "It has been a major assumption of many investigators in psychological research that the elements of our thought processes proceed serially in our 'consciousness' for construction into cognitions. I think this notion of linear, unified conscious experience is dead wrong."

55. This view also accords with the approach to meaning in advertising that relies on consumer survey techniques to establish deception. Although asking consumers what they believe about advertising is one way of determining deception, reliance only on surveys underestimates the total amount of misleading advertising. For instance, emotionally inducing associations and representations of quality can affect consumer behavior without consumers forming any specific beliefs about how advertising is affecting their behavior. For this reason, the verbal recall tested in consumer surveys does not adequately reflect the effect that emotional appeals have on consumers. *See infra* note 57.

56. For a review of the studies, see Olshavsky & Granbois, *Consumer Decision Making—Fact or Fiction?*, 6 J. CONSUMER RES. 93 (Sept. 1979); *see also* Claxton, Fry & Portis, *A Taxonomy of Prepurchase Information Gathering Patterns*, 1 J. CONSUMER RES. 35 (Dec. 1974); Newman & Staelin, *Prepurchase Information Seeking for New Cars and Major Household Appliances*, 9 J. MARKETING RES. 249 (Aug. 1972).

57. Gibson, *"Not Recall"*, 23 J. ADVERTISING RES. 39 (Feb.- Mar. 1983); ADVERTISING AGE, May 11, 1981, at 2; Watts, *Results Not Everything in Tests*, ADVERTISING AGE, February 19, 1979, at S-14; ADVERTISING AGE, Nov. 27, 1978, at 83.

58. "There may be reasons for assuming that, even when consumers want to, they often cannot tell a researcher why they prefer one store or brand over another." Muncy, *Affect and Cognition: A Closer Look at Two Competing Theories*, 15 ADVANCES IN CONSUMER RES. 228 (R. Lutz ed. 1986); *see also supra* note 26.

begun to criticize cognitive theory[59] and offer the classical conditioning paradigm to explain nonverbal and emotional advertising impact.[60] The classical conditioning paradigm is particularly applicable to electronic media advertising, which consumers generally receive passively since they control neither the opportunity to receive the information nor the pace and duration of exposure. With print advertising consumers must actively consider information presented and they may consider it at their own pace, with ample opportunity to reconsider it if desired. The self-determined control of information flow necessary to critical cognitive evaluation is absent in electronic advertising and this lack of control leads generally to passive exposure to information and the blank "TV" stare seen often on children and adults alike.[61] Learning under conditions of higher order cognitive passivity is explained well by classical conditioning and its illustration of the rule of temporal contiguity.[62] The communications research manager of the nation's leading soft drink manufacturer, which is a heavy purchaser of electronic media advertising, even deemed Pavlov "the Father of Modern Advertising" in recognition of classical conditioning's importance to his work.[63]

IV. An Evaluation of Limiting Certain Nonverbal Techniques in Legal Advertising

As Holmes predicted, economics has become the leading discipline of legal policy studies.[64] Its dominant role in illumi-

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59. Coyne, *supra* note 40, at 153; Kassarjian, *supra* note 53, at 6-7. Sheth & Gardner, *History of Marketing Thought: An Update*, in Marketing Theory: Philosophy of Science Perspectives 52 (R. Bush & S. Hunt eds. 1982).

60. Baron, *Sexual Content and Advertising Effectiveness*, 9 Advances in Consumer Res. 428 (A. Mitchell ed. 1982); Batra, *supra* note 37, at 60; Feinberg, *Credit Cards as Spending Facilitating Stimuli: A Conditioning Interpretation*, 13 J. Consumer Res. 348 (Dec. 1986); Gorn, *supra* note 45, at 94; Krober-Riel, *supra* note 26, at 538; Mitchell & Olson, *supra* note 47, at 327; Muncy, *supra* note 58, at 228; Park & Young, *Types and Level of Involvement and Brand Attitude Formation*, 10 Advances in Consumer Res. 321 (R. Bagozzi & A. Tybout eds. 1983); Ray & Batra, *supra* note 54, at 544; Shimp, *Attitude Toward the Ad as a Mediator of Consumer Brand Choice*, 10 J. Advertising 9 (No. 2 1981).

61. This statement does not mean that television viewers lack choice of whether or not to attend programs or advertising. Once viewers do attend, however, they process much information without critical deliberation. *Cf.* Krober-Riel, *supra* note 26, at 539 ("In general, pictures are processed automatically. This enables the recipient to acquire stimuli passively.").

62. *E.g.*, *id.*

63. Advertising Age, January 30, 1984, at 24 (statement of Joel S. Dubow).

64. Holmes, *supra* note 4.

nating policy issues makes significant an examination of economic theory regarding advertising. Following the development of the theory is a brief critique and a recommendation that the theory integrate the previously outlined view of nonverbal advertising impact. Finally, we evaluate why policy considerations support bar limitations on certain nonverbal techniques in legal advertising and suggest parameters for these limitations.

A. Economic Theory and Advertising

Traditionally, economists either ignored the economic impact of advertising or viewed much of it as a waste of resources (as in the case of "manipulative," "combative," or "persuasive" advertising).[65] Consumer tastes for products and services were taken as given; only the allocative results of consumer choice constituted the proper province of study for economists. At best, taste shifting advertisements were considered unproductive. Although economists appreciated that informative advertising might enhance economic efficiency, the role of information in consumer decision making was not elaborated and was left generally at the basic observation that advertisements informing the public of buying opportunities served a useful social purpose.

In recent years, however, a more sophisticated approach to the economics of information in decision making has emerged: one that emphasizes the costs (effort, time, and money) of acquiring, analyzing, and retaining information.[66] This approach views consumer tastes as constant, rather than changing, and focuses on the demand for goods, services, and experiences as a function of cost change related to available information.[67] Logically flowing from this approach is the conclusion that consumers actually demand advertising, which reduces their information costs in reaching decisions.[68]

According to this view, advertising at almost all levels promotes economic efficiency and rational decision-making. Even

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65. E. LEVER, ADVERTISING AND ECONOMIC THEORY 47 (1947); *see also* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 102 (1964).

66. The classic article is Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (No. 3 1961); *see also* Nelson, *Advertising as Information*, 82 J. POL. ECON. 311 (No. 2 1970); Stigler & Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 67 (No. 2 1977).

67. Stigler & Becker, *supra* note 66, at 77.

68. Ehrlich & Fisher, *The Derived Demand for Advertising: A Theoretical and Empirical Investigation*, 72 AM. ECON. REV. 366 (No. 3 1982); Telser, *Supply and Demand for Advertising Messages*, 56 AM. ECON. REV. 457 (No. 2 1966).

nonverbal, emotional appeals serve to reduce the cost of absorbing and retaining more substantive (but duller) information by making it more memorable.[69] Nor is it necessary for advertising to contain information about intrinsic product- or service-related characteristics in order to be valuable to consumers. It behooves sellers to advertise their better offerings widely; thus the quantity of advertising for a product may be taken as a signal of its quality in the absence of "substantive" or "intrinsic" information.[70] Consumer response to this signal may be conscious or non-conscious, induced by logic or emotion, but the result is the same: Consumers generally make efficient decisions when they purchase advertised products and services. An important, added consideration, which one economist describes as the nearest thing possible to a "free lunch," is that consumer response to advertised products often ultimately lowers product price as demand is redistributed to more efficient producers.[71]

Under this economic approach deceptive advertising is usually not a major marketplace problem. Deceptive advertising cannot fool consumers as to "search" qualities of advertised offerings, which are qualities detectable prior to purchase.[72] Although consumers can be misled as to "experience" qualities (those that cannot be discerned prior to actual product or service use) it does not pay sellers to make deceptive claims about inexpensive, frequently purchased offerings since such claims will deceive consumers only once, and damage to the seller's reputation and subsequent loss of business will outweigh any profit from the deception.[73] Consequently, the marketplace itself takes care of most advertising deception, a view apparently held by the present Federal Trade Commission where many economists and lawyer-economists who subscribe to advertising-as-informa-

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69. *See* Ehrlich & Fisher, *supra* note 68, at 366; Nelson, *The Economic Value of Advertising*, in ADVERTISING AND SOC'Y 59 (Y. Brozen ed. 1974).

70. *See* Nelson, *supra* note 69, at 50; Telser, *Advertising and the Consumer*, in ADVERTISING AND SOC'Y 31-32 (Y. Brozen ed. 1974).

71. Nelson, *supra* note 69, at 55.

72. *Id.* at 48; *cf.* Remarks by James C. Miller, former Federal Trade Commission Chairman, before the National Advertising Review Board 4 (Dec. 14, 1982) ("Deception is extremely unlikely, because unprofitable, when a product is inexpensive, *and* it is frequently purchased, *and* the advertising claim is one that is easy for consumers to evaluate.") (emphasis in original).

73. *See* Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 529-531 (1979); remarks by James C. Miller, former FTC Chairman, before the Advertising Federation of Australia 8 (Mar. 23, 1982).

tion theory are found.[74] Deception becomes profitable for sellers and is likely to occur only when reputation is unimportant (e.g., in one-time sales) or when goods and services involve "credence" qualities, which nonexperts cannot monitor even after consumption.[75] That providing legal services necessarily involves credence qualities will soon become important to this discussion.

B. A Critique of the Economic Theory of Advertising

Advertising-as-information theory helps clarify advertising's valuable role in promoting rational, efficient consumer decision making. That tastes for the satisfactions of products and services remain constant is a useful concept for predicting the result of providing information to consumers about such offerings, namely, that demand will increase due to lower information costs of obtaining additional satisfactions. The theory is subject to serious interpretational error, however, since economists largely ignore *how* decision-makers form preferences and focus almost solely on the *result* of rationality[76] (e.g., increased information engenders greater demand by lowering costs). A major interpretational error, for the purposes of this article, is the failure to appreciate the impact of nonverbal, emotional advertising information on consumer preferences.[77]

For economists subscribing to the theory advanced above, emotionally appealing advertising merely attracts attention to advertised offerings, increases memorability of intrinsic product-related information, and serves to impress consumers about which seller advertises most.[78] They fail to grasp that emotion

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74. *See, e.g.*, Miller, *supra* notes 72-73.

75. Jordan & Rubin, *supra* note 73, at 531; *see also* R. POSNER, REGULATION OF ADVERTISING BY THE FTC 8 (1973).

76. *See* P. EARL, THE ECONOMIC IMAGINATION 57 (1983); M. FRIEDMAN, PRICE THEORY 13 (1962); A. HIRSHMAN, SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION 9 (1982); L. VON MISES, *supra* note 10, at 168, Simon, *supra* note 9, at 2.

77. In general, "economists' almost universal neglect of preference formation has led them to construct theories that are in certain respects altogether unrealistic." Kapteyn & Wansbeek, *Empirical Evidence on Preference Formation*, 2 J. ECON. PSYCHOLOGY 137 (1982). Specifically, failure to appreciate how certain information affects consumer behavior causes economists at the very least to underestimate conceptually the amount of potentially misleading advertising.

78. *Cf.* Nelson, *Comments on Advertising and Free Speech*, in ADVERTISING AND FREE SPEECH 55 (A. Hyman & M. Johnson eds. 1977) ("Hyperbole plays a useful role in advertising. Exaggeration makes advertising more memorable. The more memorable advertising, the more efficient it will be from both a private and a social point of view, simply because memorability makes advertising perform its information function

generated by advertising attaches itself to sellers' offerings (as illustrated by classical conditioning) and causes consumers to react as though the offerings themselves generate the emotion.[79] If advertising techniques impute emotional satisfaction to a product, consumers may respond toward the product accordingly, in spite of the inability of the product to achieve the type or level of emotion portrayed. Since the association process can be both non-conscious and automatic,[80] consumers may never actively evaluate product use to determine whether or not it produces the "promised" emotional satisfaction. Classical conditioning suggests that the artificially conditioned relationship between emotional appeal and a product will wear out over time,[81] but since advertisers are adept at creating new advertising campaigns with fresh emotional appeal, it is arguable that an artificially conditioned relationship can be maintained. A rejoinder to the theory that emotionally appealing techniques stimulate purchase behavior is that it makes no difference why consumers respond as they do to advertising. Because the most heavily advertised offerings are generally the best,[82] the customers still choose efficiently. This argument suffers two shortcomings. First, there is no convincing empirical evidence that many heavily advertised offerings are superior to those less heavily advertised.[83] Second, neglecting to go beyond the revealed preferences

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better.").

79. *See generally supra* notes 12-63 and accompanying text.

80. *See supra* notes 23-30 and accompanying text. In advertising trade language the automatic, non-conscious process of association between an emotion-evoking stimulus and the advertiser's product or service is reflected in the number of trade references to pulling the "emotional trigger," setting the "emotional hook," and pressing the "emotional hot button." *See* Cilo, *Emotion: A Powerful Tool for Advertisers,* ADVERTISING AGE, July 8, 1985, at 28; Kingman, *Who's to Blame for Sameness in Ads? Not Us: Researchers,* ADVERTISING AGE, Feb. 2, 1981, at 41; Peterson, *Fragrance Ads: Last Bastion of Gut Hunch,* ADVERTISING AGE, Feb. 26, 1979, at S-1; Alsop, *Ad Agencies Jazz Up Jingles by Playing on 1960s Nostalgia,* Wall St. J., April 18, 1985, at 33, col. 1.

81. *See, e.g.,* McSweeny & Bierley, *supra* note 38, at 626-627.

82. *See, e.g.,* Ferguson, *Comments on "The Impact of Advertising on the Price of Consumer Products",* 46 J. MARKETING 102, 104 (Winter 1982); Nelson, *supra* note 69, at 50.

83. The empirical evidence on quality of advertising lawyers suggests that lower quality lawyers may be more likely to advertise than higher quality lawyers. *See* Murdock & White, *Does Legal Service Advertising Serve the Public's Interest? A Study of Lawyer Ratings and Advertising Practices,* 8 J. CONSUMER POL'Y 153 (1985). An economic explanation for this result is that inexperienced lawyers are using advertising to enter the market for legal services. For the proposition that in general "advertising levels do not necessarily provide correct information about quality," see Schmalensee, *A Model of Advertising and Product Quality,* 86 J. POL. ECON. 485, 498 (1978).

of consumers to analyze how they choose seriously begs the issue of whether, except for emotional misinformation, consumers would even make a purchase in a specific product or service category, instead of making a purchase in a different category or reaching a decision to save or invest.

Advertising-as-information theory is made more useful by integrating into its precepts the way in which consumers process nonverbal information. By considering the *process* as well as the *result* of rationality, the theory increases the scope and penetrating power of its analysis. Recognition that decision-makers react to nonverbally conditioned information as well as to information processed through higher-order cognitive interpretation fosters the conclusion that nonverbal as well as verbal misinformation can deceive consumers. It also illustrates why use of certain nonverbal techniques in legal advertising have deceptive potential.

C. *The Deceptive Potential of Certain Nonverbal Techniques in Legal Advertising*

Advertisers and consumer behavior scholars often claim that advertising "adds value" to products and services.[84] An alternative characterization of consumer preference for heavily advertised products is not that advertising adds "value" but that classically conditioned emotional stimuli induce preference.[85] Classically conditioned consumer response under such conditions also agrees with statements that nonverbal advertising stimuli are used to impute emotional satisfactions,[86] which are extrinsic to products and services yet which motivate purchase.

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84. "Can advertising alone enhance the product? There is evidence that it not only can but frequently does. . . . Suggestion (an ingredient of advertising) creates a certain value for an otherwise worthless product." S. DUNN, ADVERTISING: ITS ROLE IN MODERN MARKETING 86 (2d ed. 1969); *see also* M. MEYER, MADISON AVENUE, U.S.A. 310 (1958); C. SANDAGE & V. FRYBERGER, THE ROLE OF ADVERTISING 177 (1960); Reynolds & Gutman, *Advertising is Image Management*, 24 J. ADVERTISING RES. 27 (No. 1 1984); Treasure, *How Advertising Works*, in ADVERTISING AND SOC'Y 152 (Y. Brozen ed. 1979); Young, *Psychographics Research and Marketing Relevancy*, in ATTITUDE RESEARCH REACHES NEW HEIGHTS 221 (C. King & D. Tigert eds. 1970).

85. "But if you think about what Pavlov did, he actually took a neutral object and, by associating it with a meaningful object, make it a symbol of something else; he imbued it with imagery, he gave it added value. And isn't that what we try to do in modern image advertising?" ADVERTISING AGE, *supra* note 63. Describing the conditioning process as "added value" is hardly as accurate as characterizing it as "induced preference." In relation to legal advertising, such a process may also be denoted "deceptive."

86. *See, e.g.*, *supra* note 84; *infra* note 94.

That an advertiser's skill with music, graphics, and dramatization can induce consumer preference apart from any intrinsic product or service characteristics is evidence of the deceptive potential of these nonverbal techniques in legal advertising. When properly conditioned, consumers respond as if one product or service is superior to or different from other products or services in quality or ability to produce satisfaction although there may be no factual basis to suggest that actual use will reflect such differences. The implications of this manipulation do not necessarily justify a ban on nonverbal techniques for all advertising, since there are important differences in the consumer's ability to detect and appreciate the relative quality of legal services versus other consumer products and services. For example, suppose a lonely consumer buys a particular brand of toothpaste following exposure and conditioning to an advertising dramatization that associated irresistibility to members of the opposite sex with those who use the brand. The consumer may not actually believe that the brand produces sexual success and is not conscious of the cause-and-effect relationship between advertising and purchase. Since use of the toothpaste likely will not increase sex appeal in the dramatic fashion portrayed, there has been deception. Still, the consumer has a satisfactory toothpaste for cleaning teeth and freshening breath. The consumer can even dislike the taste of the toothpaste, throw it away, and lose only $1.50. He or she will then never buy it again.

Since legal services involve *credence* qualities,[87] a very different situation exists. Consumers are in no position to judge the effectiveness of estate planning, bankruptcy advice, or litigation counseling.[88] Also, the potential of harm arising from deception is much greater when consumers purchase legal services than when they select minor consumer products. On the basis of credence qualities and materiality of potential harm, therefore, lawyer advertising is distinguishable from many other forms of advertising. Because of the contribution that advertising intrinsic qualities of legal services can make to consumer information, this distinction is insufficient to warrant a total ban on legal advertising under either a policy or a constitutional analysis. It does, however, support limitations tailored to reducing the im-

87. *See supra* note 75 and accompanying text.

88. This is especially true since most consumers are one-time or occasional users of legal services. *See* Humphreys & Kasulis, *Attorney Advertising*, 21 J. ADVERTISING RES. 31, 33 (No. 6 1981).

pact of service-extrinsic advertising on consumer purchase behavior.

Under some circumstances emotionally appealing nonverbal techniques may not be so effective in lawyer advertising as in other types of advertising. When consumers are actively involved in seeking legal services, they may consciously evaluate lawyer advertising and may cognitively counter argue against nonverbal imputations of quality, superiority, satisfaction, or success associated with a lawyer or firm. However, a growing body of scholarship suggests that even when consumers are actively involved in acquiring advertising information, they may still be affected in their attitudes by positive feelings generated by advertisements.[89] Moreover, if consumers are not actively seeking legal services, and advertising is aimed at generating new demand for services and motivating consumers toward a particular lawyer, there is absolutely no behavioral reason why smoothly executed graphics, appealing dramatization or music cannot influence choice of legal services on the basis of these techniques rather than on attorney competence or some characteristic (price, location, availability) intrinsic to legal service. *To whatever extent these techniques are effective they are potentially deceptive*, since the emotional preference they induce is extrinsic to the service offered and is created by advertising art rather than lawyer competence.

It is not an adequate response to this critique to assert that emotionally inducing techniques merely call attention to the intrinsic characteristics of legal services. As classical conditioning emphasizes, the process does not end with attention, but it associates evoked emotion with temporally contiguous stimuli and affects behavioral change.[90] In legal advertising stirring music, impressive graphics, and evocative dramatizations associate positive emotion (or relief from negative emotion) with the advertising lawyer, thus creating the attitudinal and behavioral change that can sway consumers toward the advertising lawyer rather than another lawyer. This conditioning must be viewed as subtle, but what is subtle is not necessarily unimportant.

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89. *See* Gardner, *Does Attitude Toward the Ad Affect Brand Attitudes Under a Brand Evaluation Set?*, 22 J. MARKETING RES. 192 (1985); Lutz, Mackenzie & Belch, *Attitude Toward the Ad as a Mediator of Advertising Effectiveness: Determinants and Consequences*, 10 ADVANCES IN CONSUMER RES. 532 (R. Bagozzi & A. Tybout eds. 1983); Mitchell, *supra* note 47; Park & Young, *supra* note 45, at 12.

90. *Supra* notes 22 & 60.

D. Appropriate Bar Limitations on Nonverbal Advertising Techniques

Deceptive linking of emotionally motivating stimulation produced by nonverbal advertising techniques with a legal services offering suggests the desirability of bar limitations on use of nonverbal techniques. Bar limitations on music, graphics, and dramatization in legal advertising should focus on whether use of these nonverbal techniques provide service-intrinsic or service-extrinsic information.

Certain graphics (for example, a scale of justice to indicate that a lawyer is advertising or a Dalkon shield illustration to inform that the lawyer handles cases involving this product) convey service-intrinsic information. Drawn or photographed without dramatic embellishments, these graphics are likely to evoke little emotion that is not related intrinsically to the service offered. They are closer in function to writing than to art and their usage should not be limited by the bar. There are many historical precedents for nonverbal symbols that denote the offering of a service.[91]

Conversely, dramatic graphic techniques convey information that is substantially extrinsic to the service offered. This information is the emotion evoked by the execution qualities of the graphic that then attaches to the intrinsic service and can affect, deceptively, consumer response to the intrinsic service by conditioning a more favorable consumer response to the service than would occur without association of the extrinsic emotion.[92] A similar conditioning of service-extrinsic emotion to service-intrinsic information occurs when advertising uses music to help promote the sale of legal services.[93] Thus both dramatic graphic techniques and music warrant absolute bar limitations on their use.

As previously mentioned, there is overlap among nonverbal advertising techniques. Slice-of-life dramatizations often use music and camera art to evoke emotion. However, dramatic presentation itself refers to the vivid acting out of a scene or story, and as the pure dramatics of Charlie Chaplin and Marcel

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91. In ancient Rome, for example, the sign of a goat designated a dairy. A mule turning a grist wheel indicated a bakery. The sign of a boy being whipped revealed the presence of a Roman school. J. WOOD, THE STORY OF ADVERTISING 23 (1958).

92. *See, e.g., supra* note 48 and accompanying text.

93. *See generally supra* notes 43-46 and accompanying text.

Marceau illustrate, the technique of dramatic presentation should be considered nonverbal, even though a verbal script may accompany it. Advertising may use dramatization to make intrinsic claims about services or products (as in comparison of the braking ability of two automobile models or in demonstration of the shaving prowess of a razor blade) but dramatic advertising conveys extrinsic information as well. A primary use of dramatic advertising portrays emotional satisfaction of consumers—actors in reality—with a product or service.[94] This satisfaction may be entirely nonverbal, shown by facial gestures, eye contact, body posture, proxemics, and voice tone. As it represents extrinsic, subjective experience, it makes no testable intrinsic claim about the product or service. *Yet the association of emotional satisfaction with a product or service conditions consumers to respond as though the product or service leads to satisfaction.* As an example, advertising that shows smiling, relaxed clients coming out of a courtroom with a lawyer associates potentially deceptive feelings of satisfaction with the quality of the lawyer's services without making an intrinsic claim.

Dramatic advertising of legal services does not brainwash consumers into marching, stripped of free choice, into an advertising lawyer's office, but it does condition the emotional commitment that will help start the journey toward that office.[95] It will also help induce consumers to regard the lawyer favorably once they reach the office. Although advertising-stimulated emotional commitment is not the only factor likely to lead to consumer choice of a lawyer, inasmuch as it does contribute to choice it deceives, since it results from emotion stimulated by extrinsic art rather than from intrinsic service characteristics. Dramatizations can convey intrinsic information about price, lo-

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94. In legal service advertising emotional association may induce a feeling of "satisfaction" with the lawyer or firm advertised and can be interpreted as an implied quality claim. This interpretation agrees with economic analysis that views advertising as conveying implicit information about the quality of products and services. *See* Nelson, *supra* note 69, at 50. Stated the national director of research for Foote, Cone and Belding advertising agency: "With 'feeling' copy the intent often is to create a mood, or strong set of emotions, that *reflect favorably on the product's image and imputes satisfactions.* . .and this is often accomplished with nonverbal communications—music and visuals." ADVERTISING AGE, May 11, 1981, at 2 (statement of David Berger) (emphasis added); *cf.* BATRA & RAY, HOW ADVERTISING WORKS AT CONTACT, PSYCHOLOGICAL PROCESSES AND ADVERTISING EFFECTS 32 (L. Alwitt & A. Mitchell eds. 1985) (affective advertising associations can increase perceived utility of services).

95. For arguments that classical conditioning can influence "purposive and goal-directed" behavior, see B. SCHWARTZ, PSYCHOLOGY OF LEARNING AND BEHAVIOR 43 (1978).

cation, specialties, and other aspects of legal services, but this information can be communicated adequately without dramatic setting, absent only the extrinsic emotion created by dramatic techniques. Absolute bar limitation on use of dramatic techniques is therefore justified.

Lawyer advertising of intrinsic service information benefits the public by assisting consumers in locating competently delivered services at competitive prices, but except for certain use of graphics, bar limitations are appropriate for music, graphics, and dramatization, which create extrinsic emotional commitment toward the lawyer advertiser. As analyzed, both economic and consumer behavior theory support this result. Remaining are the constitutional implications of such limitations.

V. Constitutional Aspects of Limitations on Attorney Advertising

Although the United States Supreme Court has never explicitly ruled on the right of the states to bar the use of music, graphics and dramatizations, the Court has had the opportunity to consider several cases dealing with lawyer advertising and commercial speech. As will be seen in the following material, it is possible to argue that the Court would be receptive to a state rule prohibiting the use of music, graphics and dramatizations if one views these as techniques which deceive the public. A majority of justices on the Supreme Court think that more commercial information clearly benefits the public. However, advertisers do not have a constitutional right to deceive the public.

A. The Commercial Speech Doctrine

Before generally examining the relevant Supreme Court decisions on attorney advertising, this portion of the piece will first take a brief look at the commercial speech doctrine. After discussing the Supreme Court decisions in that area, we examine several recent cases that support our position on attorney advertising restrictions.

The commercial speech doctrine was first enunciated in *Valentine v. Chrestensen.*[96] In that case, the Supreme Court de-

96. 316 U.S. 52 (1942). This case dealt with an attempt by a submarine owner to advertise the exhibition of his submarine through the use of handbills. The city of New York had an ordinance that prohibited the distribution of commercial advertising handbills. *Id.* at 53.

cided that purely commercial speech was not protected by the first amendment.[97] Over time, however, the Court began to move away from this rather extreme position in the direction of a rule that offers some protection to commercial speech.[98]

The first case that moved the Court in the direction of a rule protecting commercial speech was the 1973 case *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.[99] This case dealt with a newspaper's placement of help-wanted advertisements under either a "help-wanted male" or a "help-wanted female" column. The Court characterized the speech in question as noncommercial speech even though it involved an advertisement.[100]

Pittsburgh Press was then followed by *Bigelow v. Virginia*.[101] In that case a Virginia newspaper published an advertisement by a New York City organization regarding the availability of abortions in New York City (at that time abortions were legal in New York City but were not legal in Virginia). The editor of the Virginia newspaper that carried the advertisement was convicted of violating a Virginia statute which made it illegal to encourage or prompt the procuring of an abortion. The Court struck down the editor's conviction because the Court regarded the speech in question as being more than commercial speech as it contained information of clear public interest.[102] Clearly, the Court was moving in the direction of abandoning the commercial speech doctrine that it had announced in 1942 in *Valentine v. Chrestensen*, by the time *Virginia State Board of*

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97. The Court stated on this point:

> This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

Id. at 54.

98. *See* Breard v. City of Alexandria, 341 U.S. 622 (1951) (upholding an ordinance that excluded uninvited solicitors of magazine subscriptions from private residences); Martin v. City of Struthers, 319 U.S. 141 (1943) (invalidating the application of an ordinance prohibiting door-to-door distribution of handbills advertising a religious meeting).

99. 413 U.S. 376 (1973).

100. *Id.* at 384.

101. 421 U.S. 809 (1975).

102. *Id.* at 822. In a sense, the Court used a balancing test to determine the constitutionality of the statute. It weighed the first amendment interest at stake against the public interest that the regulation served. *Id.* at 818.

Pharmacy v. Virginia Citizens Consumer Council, Inc.[103] reached the Court.

Virginia State Board of Pharmacy dealt with a consumer group that felt the prices charged by pharmacists were too high. The group thought the solution to the problem of high prices was to permit pharmacists to advertise the price of drugs.[104] The Virginia Citizens Consumer Council challenged a Virginia statute that prohibited pharmacists from advertising prescription drug prices. The Court held that commercial speech was protected by the first amendment.[105] In deciding to shift the law in the direction of protecting commercial speech, Justice Blackmun reasoned that the public not only needs to know about political events, it also needs information about commercial matters as well. People cannot determine what is in their best interest financially unless they have access to all the relevant facts.[106] The Court thus decided that commercial speech, such as the advertising of drug prices, was protected by the first amendment. However, the Court did indicate that commercial speech could be subjected to some state regulation.[107]

B. Lawyer Advertising and The Supreme Court

Perhaps because of long-standing strictures against legal advertising combined with the constitutional opportunism grasped by attorneys following *Virginia State Board of Pharmacy*, a disproportionate number of commercial speech cases reaching the Supreme Court have concerned legal advertising. A reading of

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103. 425 U.S. 748 (1976).

104. In Bates v. State Bar of Ariz., 433 U.S. 350 (1977), the Court addressed the argument that advertising supposedly increases the cost of services. Justice Blackmun observed: "The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced." *Id.* at 377. For a discussion of the economic ramifications of restraints on advertising, see generally Whitman, *Advertising by Professionals*, 16 AM. BUS. L.J. 39, 42-45 (1978).

105. 425 U.S. 748, 769-70 (1976).

106. *See id.* at 770. The Court thus decided to base its decision to extend the protections of the first amendment to commercial speech upon the right-to-know principle. *Id.* at 769-70. The belief that the first amendment was designed not only to protect political speech but also commercial speech has been criticized. *See* Cox, *The Supreme Court 1979 Term Forward: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 28 (1980).

107. The Court ruled that commercial speech could be subject to reasonable time, place, and manner restrictions. 425 U.S. at 771. False and misleading advertising could also be prohibited. *Id.* States also can prohibit advertisements that promote illegal transactions. *See id.* at 772.

these cases reveals that the Court has not yet arrived at a truly consistent constitutional philosophy regarding commercial speech, either in general or as applied to attorneys. However, it does support an analysis that the Court has decided nothing that would deny constitutionality to a ban on the use of certain emotion-evoking nonverbal techniques in legal advertising.

1. Bates

In *Bates v. State Bar of Arizona*,[108] the Supreme Court announced that the first amendment to the Constitution[109] prohibits states from barring advertisements by attorneys. Prior to that decision, the American Bar Association, through its disciplinary rules, had prohibited such advertising.[110] Many states, including Arizona, had adopted these rules.[111] The Court addressed two issues: whether Arizona's regulation of attorney advertising violated anti-trust laws, specifically Sections 1 and 2 of the Sherman Act;[112] and whether the disciplinary rule violated the first amendment.[113]

In 1976, John Bates and his partner Van O'Steen ran a legal clinic in Phoenix, Arizona, providing routine legal services at moderate cost. Because they made a low financial return on their work, Bates and O'Steen found it necessary to increase their volume of business. On February 22, 1976, the two placed an advertisement in the Arizona Republic, a daily newspaper. The ad offered "legal services at very reasonable prices" and some fees for routine services were given.[114] The advertisement was a clear violation of the Arizona disciplinary rule, as the part-

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108. 433 U.S. 350 (1977).

109. The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

110. DR 2-101(B) of the American Bar Association Code of Professional Responsibility formerly read:

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1976).

111. Ariz. Rev. Stat. Ann. Rule 29(a) (Supp. 1976).

112. 15 U.S.C. §§ 1-2 (1976).

113. 433 U.S. at 353.

114. *Id.* For a reproduction of the advertisement, see app. A.

ners later admitted.[115] However, Bates and O'Steen argued that the rule was invalid as a restriction on competition and a violation of their first amendment right of free speech.[116]

After concluding that the actions of the Supreme Court were protected by the state action exemption to the Sherman Act, the Court examined the first amendment issue. Since the speech at issue in *Bates* was an advertisement for legal services, the Court characterized it as commercial speech. As such, this advertisement was protected by the first amendment.[117] According to the Court, commercial speech often entails a balancing of interests: the listener's right to know and the speaker's freedom of expression.[118] The Court used this test in deciding whether price advertising by attorneys could be banned.

According to representatives of the state of Arizona, several interests would be furthered by restricting attorney advertising.

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115. 433 U.S. at 355.

116. *Id.* at 356-57.

The Supreme Court first addressed the antitrust issue under the Sherman Act, specifically as it applied to state actions. *Id.* at 359. Citing Parker v. Brown, 317 U.S. 341 (1943), the Court held that Arizona's regulation of advertising by attorneys "is at the core of the State's power to protect the public." 433 U.S. at 361. As such, the state had a legitimate interest in regulating advertising, and its action was exempt from the Sherman Act.

In reaching this conclusion, the Court distinguished two seemingly applicable cases. The first, Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) held that the publication of a fee schedule and its enforcement by the county bar association was not a state action. Therefore, the state-action exemption of *Parker* did not apply. *Id.* at 790. In *Bates*, the Court distinguished *Goldfarb*. Arizona expressly commanded that there be no attorney advertising. In *Bates*, therefore, the state action exemption should apply. 433 U.S. at 360.

The second case distinguished by the Court in *Bates* was Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). In *Cantor*, an electric utility distributed "free" light bulbs, concealing the cost in state-approved utility rates. The Court denied the utility a state-action exemption when a retailer sued for restraint of competition. Just as the state had only approved the action of another entity, Bates and O'Steen argued that Arizona had only approved that action of the American Bar Association by adopting its code of professional responsibility. 433 U.S. at 360. The Court disagreed, saying that the state in *Cantor* had no interest in the price of light bulbs, but Arizona had a legitimate interest in regulating the behavior of its attorneys. *Id.* at 361.

117. 433 U.S. at 363; *see also*, Buckley v. Valeo, 424 U.S. 1 (1976); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

118. Prior cases decided by the Court followed this balancing test. For example, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), held that the advertisement of prescription drug prices was protected commercial speech. The Court looked specifically to the interests in the free flow of speech versus the interests promoted by the advertising ban. However, the Court restricted its holding to the pharmacy profession, leaving the question of legal advertising open. *Id.* at 773, n.25.

First, Arizona argued that advertising would have an adverse affect on professionalism, making attorneys businessmen rather than gentlemen.[119] The Court found the argument "strained."[120] Attorneys must earn a living, and they have a duty to reveal their fees to clients as soon as feasible.[121]

Arizona next argued that attorney advertising was "inherently misleading" for three reasons: 1) each client's need for services is unique and any comparison by advertisement would, therefore, be difficult; 2) the client does not always know in advance what type of service he needs; and 3) advertisements do not reflect an attorney's level of skill.[122] The Court rejected these arguments. It stated that restrained advertising need not be inherently misleading.[123]

The third point addressed by the Court was the argument that advertising would have an adverse effect on the administration of justice. Arizona argued that advertising led to litigation, upsetting societal relations. Again, the Court balanced the benefits of advertising against the harm. The Court stated that it could not accept the idea that it is better for a person to suffer a wrong silently, rather than going to court.[124] The education that

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119. Bates v. State Bar, 433 U.S. 350, 368 (1977).

120. *Id.*

121. *Id.*

The Court stated that, "[i]f the commercial basis of the relationships is to be promptly disclosed on ethical grounds once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he answers at the office." *Id.* at 369. Further, when Arizona argued that advertising would diminish the reputation of attorneys in general, the Court found that the opposite was true. It was the lack of advertising that hurt the reputation of attorneys. The Court observed that "[t]he absence of advertising may be seen to reflect the profession's failure to reach out and serve the community." *Id.* at 370.

122. *Id.* at 372.

123. *Id.* The Court recognized that many legal services are unique and therefore are not the proper subject for an advertisement. Indeed, the only services that "lend themselves" to advertising are routine, standardized services such as those advertised by Bates and O'Steen. *Id.* Second, the court decided that, even though the client may not know every type of service he may need, advertising provides the general information necessary to identify the basic service he does need. *Id.* at 374. The Court also disposed of the third argument rather quickly. When choosing an attorney, the consumer needs as much information as he can get. This need is frustrated by a ban on ads. Better to have incomplete accurate information than none at all. *Id.* at 374-75. The Court thus balanced that consumer's need to know against that state's interest in banning advertisement and came down on the side of the consumer.

124. 433 U.S. at 376. This is a very strange argument that is frequently discussed in the newspapers. Many columnists seem to feel there is something wrong with informing the public about the law. This issue was addressed in Zauderer v. Office of Disciplinary Counsel of the Supreme Court, 471 U.S. 626 (1985). The Court specifically held in that

advertising provides is important in reaching those who have a fear of contacting an attorney. In addition, a rule favoring advertising would facilitate observance of Ethical Consideration 2-1, which obligates attorneys "to assist in making legal services fully available."[125]

The fourth argument dealt with the undesirable economic effects of advertising. Arizona argued that advertising increases overhead, resulting in higher costs for consumers. The higher cost of practice also keeps out young attorneys. The Court found these suggestions "dubious" and unrelated to the first amendment.[126] A ban on advertising has the opposite effect on price, the Court said. When consumers have access to price information, retail prices are often dramatically lower than without advertising.[127]

Arizona argued as its fifth point that advertising would have an adverse effect on quality of services rendered by attorneys. Attorneys might advertise a particular service and perform only the advertised service regardless of the client's need.[128] The Court reasoned that shoddy work would not be deterred by a ban on advertising.[129]

The final argument considered by the Court was that if advertising was permitted, the states would have difficulty in enforcing restrictions which were allowable. The court decided that difficulties in enforcing advertising restrictions did not provide enough support for a ban on attorney advertising. Attorneys abide by many codes and oaths, the Court said, and requiring them to follow one more rule is not a great burden.[130]

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case that an attorney may not be disciplined for soliciting business through advertisements that contain legal advice on specific legal problems. *Id.* at 625-26.

People need to be informed of their legal rights. Obviously, they cannot enforce a right they do not know exists. In fact, the public does want lawyers to advertise. Robert Hite, a marketing instructor at Colorado State University, found that 84% of those surveyed felt they would like to learn useful information about lawyers' services and their special talents. 71 AM. B. J. 146-47 (Nov. 1985).

125. Bates v. State Bar, 433 U.S. 350, 377 (1977).

126. *Id. See supra* note 104. It is incorrect to state that *more* competition, which advertising creates, would increase prices. Economists generally believe competition *decreases* prices. If attorneys advertise, they will have to absorb the cost of advertising rather than passing the cost on to consumers of legal services.

127. 433 U.S. at 377.

128. *Id.* at 378.

129. *Id.* at 378-79. It found further support for its' rejection of this argument in Arizona's standardized fees. The Court reasoned that standardized services may reduce error. *Id.*

130. *Id.* at 379. The Court also discussed the overbreadth doctrine under the first

The Court then examined the advertisement in question.[131] Arizona argued that the Bates & O'Steen advertisement was misleading and, therefore, unprotected under the first amendment. Specifically, the advertisement used the undefined terms "legal clinic" and "very reasonable."[132] Furthermore, the advertisement contained a price for name changes, but failed to inform consumers that they did not need an attorney to change their names.[133] Once again, the Court refused to accept Arizona's argument. Justice Blackmun thought the term "legal clinic" was clear and that the fees advertised were "very reasonable."[134] It should be noted that the terms "legal clinic" and "very reasonable" concern service intrinsic characteristics. There was nothing in this advertisement that might be characterized as product extrinsic references. The graphic illustration of the scales of justice, although an illustration, conveys service intrinsic information that evokes little emotion.

The Court was correct in implicitly permitting the use of such an illustration as well the phrases "legal clinic" and "very reasonable." The public wants and needs more concrete information of this nature concerning lawyers. The Court ruled states could not prohibit the advertising of routine professional services.[135] However, the Court expressly stated that some regulation of attorney advertising is permissible. Only the total ban on attorney advertising was held impermissible. False, deceptive, or

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amendment. The doctrine is a departure from the traditional rule that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court. When it comes to commercial speech, the doctrine is applied less vigorously. Commercial speech is linked to commercial well-being, and is not particularly susceptible to destruction by overly broad statutes. *Id.* at 380-81. For that reason, the Court declined to apply the overbreadth doctrine in *Bates*. *Id.*

131. *See* app. A.

132. 433 U.S. at 381.

133. *Id.*

134. *Id.* at 382. It should be noted that for many years in many states, attorneys were ethically obliged to charge a *minimum* fee for their services. Generally the fee to be charged was listed in a minimum fee schedule distributed by a state or county bar association. These fee schedules undoubtedly kept legal fees higher than they would have been in the absence of such schedules. Minimum fee schedules were struck down by the Supreme Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). For a discussion of the case, see Ward, *Lawyers Advertising*, 32 J. Mo. B. 87 (1976). Once the Court struck down minimum fee schedules attorneys were free to charge any price for their services. The fees charged by Bates & O'Steen were low for that time.

135. Bates v. State Bar, 433 U.S. 350, 382 (1977).

misleading advertising remained subject to restraint. Also, time, place, and manner restrictions could still be imposed.[136]

The decision in *Bates* established the right of attorneys to engage in the advertising of prices of routine professional services. It was still unclear, however, whether the Court would allow states to restrict attorney advertising to the narrow confines of routine legal services. Furthermore, such matters as advertising the quality of legal services rendered, giving legal advice in advertising, the use of direct mail or television and a host of other matters were left for future cases to resolve. Consequentially, *Bates* settled very little.

2. *In re Primus*

Directly after *Bates*, the Supreme Court took up the issue of in-person solicitation by attorneys—a topic avoided in *Bates*. *In re Primus*[137] concerned an attorney, Edna Smith Primus, who was associated with the Carolina Community Law Firm and was an officer and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU). Primus attended a meeting where women were present who had been sterilized as a condition of continued receipt of medical assistance in Aiken County, South Carolina. In August of 1973, the ACLU decided it would file suit on behalf of any persons sterilized under that program. Primus was informed that Mary Williams was willing to sue, and Primus wrote Williams on August 30 offering the ACLU's free representation. Williams met with the doctor who had performed the operation and later told Primus that she was not interested in bringing suit. There was no further communication between Primus and Williams.

A complaint was filed against Primus with the Board of

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136. *Id.* at 384. In dissent, Chief Justice Burger argued that advertising would harm the general public. The sale of legal services, he said, could not be packaged adequately to make price advertising accurate. *Id.* at 386 (Burger, C.J., dissenting in part). He decried the failure of the Court to list those services that were routine, and stated that the ABA was unable to police its ranks effectively, at least when it came to ethics. *Id.* at 387. Instead, the profession should practice and perfect programs before advertising becomes widely used. *Id.* at 388.

Justice Powell shared Burger's concern over lack of standardization in legal services. Almost no divorce is standard, Powell said, but rather involves differing issues of alimony, support, and property division. *Id.* at 393 (Powell, J., dissenting in part). Prices that are "reasonable" can vary in terms of attorney experience and client needs. The majority looked only at the going rate for services to determine that $195 was reasonable for a divorce. *Id.* at 394-95 (Powell, J., dissenting in part).

137. 436 U.S. 412 (1978).

Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. A panel appointed by the board found Primus guilty of soliciting a client on behalf of the ACLU, and the panel's findings were adopted verbatim by the Supreme Court of South Carolina. The court ordered a public reprimand.

Primus argued that her activities involved constitutionally protected expression and association. Her argument, however, was based on *NAACP v. Button*[138] and not on cases decided in the commercial speech area. The Court agreed with Primus that the rule in *Button* controlled the decision in her case. In *Button*, the Court ruled that the activities of the NAACP did not constitute solicitation that could be prohibited because the activities of the NAACP were forms of political association and expression fully protected by the first and fourteenth amendments. The Court in *Primus* found that the ACLU's litigation activities were similar in form to those of the NAACP[139] Primus was communicating an offer of free legal assistance and not soliciting for personal gain. Any award of attorney fees in litigation would be returned to the ACLU's general fund and not inure to Primus.

The Court stated that restrictions on association and political expression are restrictions on fundamental rights and, therefore, must meet the test of strict scrutiny.[140] Any regulation must be narrowly tailored, and the disciplinary rules failed that test.[141] Disciplinary Rule 2-103(D)(5)[142] prevented an ACLU at-

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138. 371 U.S. 415 (1963). In *Button*, the Court had ruled that the litigation assistance offered by the NAACP was a form of political expression and association, fully protected by the first and fourteenth amendments. *Id.* at 428-29. Soliciting prospective litigants to further the civil rights objectives of the organization was protected by the first amendment and could not be regulated by the state as improper solicitation. *Id.* at 428-30.

139. 436 U.S. at 427-28. "The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.* at 431. This sentence invokes the protections of both the first and fourteenth amendments and the commercial speech doctrine.

140. *Id.* at 426, 432.

141. *Id.* at 433.

142. South Carolina's DR 2-103(D) provided in part:

> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgement is exercised on behalf of his client without interference or control by any organization or other person:
>
> (1) A legal aid office or public defender office . . . .
>
> (2) A military assistance legal office.
>
> (3) A lawyer referral service operated, sponsored, or approved by a bar

torney from ever offering the group's legal services to a lay person, and the rule punished every solicitation regardless of proof of undue influence, overreaching or invasion of privacy. The rule as written would have had a "dampening" effect on Primus' rights.[143] The court stressed that Primus' speech was part of her constitutionally protected right of association and was intended to convey her beliefs and ideas. Her action was not really in-person solicitation.

3. *Ohralik*

In the companion case to *Primus*, *Ohralik v. Ohio State Bar Association*,[144] the Court ruled that a state may proscribe in-person solicitation designed for pecuniary gain and conducted in circumstances likely to result in adverse consequences. Ohralik's behavior is the reason why disciplinary rules were first written. He was an experienced lawyer who visited two young accident victims and offered them his services. One was still in the hospital when Ohralik first visited her, and the other had just been released from the hospital. He took pictures of the first woman while she was in traction and later obtained a written contingent-fee contract from her. When Ohralik went to see the second woman, he took along a concealed tape recorder. She orally agreed to his contingent-fee representation. Both women later

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association representative of the general bar of the geographical area in which the association exists.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purpose of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.

143. 436 U.S. at 433.

144. 436 U.S. 447 (1978).

discharged the appellant, and he sued for breach of contract. They, in turn, filed a grievance with the county bar association. He was found guilty of violating Ohio's DR 2-103(A) and DR 2-104(A).[145]

Ohralik argued that his speech was protected under the rule set down in *Bates*. The Court distinguished the activity involved in *Ohralik* and the advertisement involved in *Bates*:

> In this respect, in-person solicitation serves much the same function as the advertisement at issue in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision making; there is not opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.[146]

In addition, the state's interest in protecting citizens from overreaching, underrepresentation, and misrepresentation by attorneys were particularly strong. Ohio also had an interest in reducing fraudulent claims, preventing an increase in litigation, and "debasing the legal profession."[147] Both interests were strong enough to uphold the disciplinary rules.

Appellant argued that there had been no actual proof of harm in his solicitation; however, the Court found the situation ripe for harm. As evidence of the potential for harm, the Court listed the following factors: two young women, injured and in the hospital; an experienced attorney with a hidden tape recorder; his emphasis on the contingent-fee arrangement, making

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145. DR 2-103(A) of the Ohio code stated: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1970). DR 2-104(A) stated:

> A lawyer who has given unsolicited advice to a layman 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 who the lawyer reasonably believes to be a client.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A) (1970).

146. 436 U.S. at 457.

147. *Id.* at 461.

his offer look like something for free; and his refusal to withdraw when asked.[148] Thus, the Supreme Court has given its blessing to state rules that prohibit attorneys from engaging in in-person solicitation designed for pecuniary gain.

It should be noted that the Court in *Ohralik* favored advertisements that provide information to the public. On the other hand, it objected to in-person solicitation because people may be pressured into making immediate decisions.

Just as a person may be pressured into making a decision based on an emotional response to comments make by an attorney in person, such a person may also be induced into selecting an attorney by the use of information that is extrinsic to the service provided.

4. *Central Hudson*

A case of major importance to attorney advertising, *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[149] involved the commercial speech doctrine. Specifically, the Supreme Court used this case to establish a four-part test to determine when regulations of commercial speech are valid under the first amendment. Although the *Central Hudson* case did not deal with lawyer advertising, the Court in this case adopted a test that has been used as the basis for evaluating under what circumstances a state may regulate attorney advertising.

In *Central Hudson*, the New York Public Service Commission banned all promotional advertising by electric utility companies.[150] The New York regulation was designed to reduce consumption of electricity during a time of national fuel shortage.[151] In an eight to one decision, the Court struck down the regulation despite the state's substantial interest in energy conservation.[152]

New York did not prohibit all advertising. It expressly allowed advertising that encouraged consumers to shift their use

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148. *Id.* at 467. After *Ohralik*, the Supreme Court decided a case dealing with optometrists, Friedman v. Rogers, 440 U.S. 1 (1979). The Court in that case upheld the right of states to prohibit the use of a trade name in connection with an optometric practice. Presumably, states can prohibit attorneys from using trade names as well.

Nevertheless, using a trade name or some symbol to identify one's firm, as the image of Betty Crocker is used to symbolize baking products, may be very effective.

149. 447 U.S. 557 (1980).

150. *Id.* at 558.

151. *Id.* at 559.

152. *Id.* at 557.

of electricity to periods of low electricity demand.[153] Nevertheless, *Central Hudson* challenged the restriction as a violation of its first and fourteenth amendment rights under the Constitution.

The Court quickly noted that the advertising involved the issue of commercial speech and, when reviewed, was allowed a great deal of latitude. Citing *Bates*, the Court stated that "[e]ven when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."[154] The Court recognized some limits on the doctrine, saying that "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."[155] The Court thus implied that if a commercial message inaccurately informs the public about a lawful activity, it may be suppressed. This would suggest that attorney advertising that is *deceptive* may be banned completely. If the structure of a given advertisement is designed, through the use of emotion-arousing techniques, to cause persons to come to conclusions that are not consistent with the facts, such an advertisement may be suppressed since it is potentially deceptive.

But between the two extremes noted by the Court, there were several guidelines for states to follow:

> The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory techniques must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the state's goal. Compliance with this requirement may be measured by two criteria. First, the restrictions must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[156]

The Court cited *Bates* and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[157] as exam-

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153. *Id.* at 560.

154. *Id.* at 562.

155. *Id.* at 563.

156. *Id.* at 564.

157. 425 U.S. 748 (1976). In *Virginia Pharmacy*, the state prohibited price advertising by pharmacists. The Court struck down the regulation based on the consumers'

ples of regulations struck down because they did not *directly* advance the state's interest. The Commission offered two interests as justifications for the ban on promotional advertising for utility companies. The first was energy conservation, a substantial interest in the days following the Arab oil embargo. The second interest was to keep the marginal costs to all consumers down (the Commission argued that advertising increased the marginal costs). The Court felt the second interest was not an adequate reason[158] because any casual relationship was purely speculative. The interest in energy conservation was much more immediate, according to the Court,[159] and was, in fact, directly tied to advertising.[160]

The Court, however, found that the restriction was not narrow enough, stating that a ban on all advertising suppressed even those ads that would not have resulted in a net increase in usage (i.e., ads designed to shift consumer demand to off-peak hours).[161] Consequently, the regulation failed to pass constitutional muster.

The *Central Hudson* case indicates that the first amendment provides no protection for misleading speech. Music, graphics and dramatic presentations may be misleading, thus a state may place restrictions on these techniques. Such techniques may mislead the public about the true characteristics of the advertiser. The states have a right to prevent the public from being deceived by an advertisement. A ban on music, graphics, and dramatic presentations would directly advance a state's interest in making certain the public is not misled. Furthermore, even with a ban on these practices, attorneys would still be able to provide the *service-intrinsic information* that the Court has found useful to consumers.

The *Central Hudson* case sent out a signal that the states needed to review the highly restrictive rules they had placed on the right of attorneys to advertise. Indeed, many states had already revised their rules to comply with what they thought the United States Supreme Court had ruled in *Bates*.

Following *Bates*, the Missouri Supreme Court revised DR 2-

"right to know." *Id.* at 757.

158. 447 U.S. at 568-69.

159. *Id.* at 569-70.

160. *Id.*

161. *Id.* at 570.

101, a rule that dealt with advertising by lawyers.[162] Attorneys were permitted, under this revised rule, *only* to advertise in newspapers, periodicals, and the telephone yellow pages. The advertisements were limited to ten categories of information.[163] The Advisory Committee to the Missouri Supreme Court also issued an Addendum to the rule concerning the listing of fields of practice and areas of law.[164] Missouri also permitted attorneys

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162. MO. ANN. RULES OF COURT, Rule 4, DR 2-101 (Vernon 1981).

163. Information that could be included in appropriate advertisements included the following:

> Name, address, and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for an initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified "routine" legal services. The routine services were an uncontested dissolution of marriage; an uncontested adoption; an uncontested personal bankruptcy; an uncomplicated change of name; a simple warranty or quitclaim deed; a simple deed of trust; a simple promissory note; an individual Missouri or federal income tax return; a simple power of attorney; and a simple will.

In re R.M.J., 609 S.W.2d 411, 412-13 (Mo. 1981), *rev'd* 455 U.S. 191 (1982).

164. The rule states in relevant part:

> The following areas for fields of law may be advertised by use of the specific language hereinafter set out:
> 1. "General Civil Practice"
> 2. "General Criminal Practice"
> 3. "General Civil and Criminal Practice"
>
> If a lawyer or law firm uses one of the above, no other area can be used. If one of the above is not used, then a lawyer or law firm can use one or more of the following:
> 1. "Administrative Law"
> 2. "Anti-Trust Law"
> 3. "Appellate Practice"
> 4. "Bankruptcy"
> 5. "Commercial Law"
> 6. "Corporation law and Business Organizations"
> 7. "Criminal Law"
> 8. "Eminent Domain Law"
> 9. "Environmental Law"
> 10. "Family Law"
> 11. "Financial Institution Law"
> 12. "Insurance Law"
> 13. "International Law"
> 14. "Labor Law"
> 15. "Local Government law"
> 16. "Military Law"
> 17. "Probate and Trust Law"
> 18. "Property Law"
> 19. "Public Utility Law"
> 20. "Taxation Law"
> 21. "Tort Law"
> 22. "Trial Practice"

to send announcement cards to "lawyers, clients, former clients, personal friends and relatives."[165]

5. *In re R.M.J.*

Following the revision of the Missouri rules, R.M.J., an attorney, placed an advertisement in a neighborhood newspaper that listed both the courts in which he was admitted to practice and certain areas of practice that were not part of the approved list. He later placed the same advertisement in a St. Louis phone book. Neither advertisement contained the required disclaimer of expertise. R.M.J. also sent announcements to persons other than those on the approved list. The state bar association challenged his actions. The Advisory Committee to the Missouri Supreme Court charged that R.M.J. had violated certain rules adopted by Missouri following the *Bates* case. It found R.M.J. to have violated these rules. Thereafter, R.M.J. appealed the case to the Missouri Supreme Court.

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23. "Workers Compensation Law"

No deviation from the above phraseology will be permitted and no statement of limitation of practice can be stated.

If one or more of these specific areas of practice are used in any advertisement, the following statement must be included. . .: "Listing of the above areas of practice does not indicate any certification of expertise therein." Rule 4, Addendum III (Adv. Comm. Nov. 13, 1977).

In re R.M.J., 455 U.S. 191, 195 n.6 (1982).

With respect to listing areas of practice, malpractice lawyer Duke Nordlinger Stern has cautioned lawyers against listing areas of practice. "[C]laims statistics from several insurance industry and bar sources strongly suggest that the less an attorney practices in a high risk area, the greater the probability of an error of omission." Stern and Luke, *Lawyer Advertising: Will Your New Client Also Become a Malpractice Claim?*, 1986 J. Mo. B. 411.

165. Mo. Rules of Court, Rule 4, DR 2-102(A)(2) (Vernon 1981).

The overall tone of these rules was to interpret the Supreme Court's decision in *Bates* very narrowly in order to permit only a very limited amount of legal advertising. The advertising had to appear in a very rigid form.

Once again, most lawyers at this point in time opposed legal advertising, as apparently did a majority of the Missouri Supreme Court. Not only lawyers were opposed to advertising, dentists were also opposed to professional advertisements. A. Barry Solomon, the operator of a dental clinic, observed, "[w]e were conditioned in dental school to believe that professionals shouldn't advertise." Kansas City Times, March 5, 1984, at B8, col. 2. An American Bar Foundation study found that 27 states had adopted such restrictive rules that the very ad in *Bates* would not be permissible in those states or under the ABA Model Code. L. Andrews, Birth of a Salesman: Lawyer Advertising and Solicitation 43 (1980). For a discussion of the arguments asserted by lawyers opposed to advertising, see Whitman and Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of* In re R.M.J., 57 St. John's L. Rev. 445, 475-80 (1983).

R.M.J. urged the Missouri Supreme Court to adopt the four-part commercial speech test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[166] but the court refused, stating that it "respectfully decline[d] to enter the thicket of attempting to anticipate and to satisfy the subjective ad hoc judgments of a majority of the United States Supreme Court."[167]

When the United States Supreme Court examined the case against the attorney in *In re R.M.J.*[168], it took the opportunity to reaffirm its prior holding in *Bates*. Specifically, the Court reviewed the rules of the Missouri Supreme Court in light of the commercial speech doctrine. The Court ruled that, while it was proper for states to regulate attorney advertising, the state must have a substantial interest in restricting advertisements. The state must also show than an advertisement in question is actually misleading. Missouri failed to show either in this case.

Justice Powell summarized the commercial speech doctrine saying:

> Truthful advertising related to lawful activities is entitled to the protections of the first amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.
>
> Even when a communication is *not misleading*, the state retains some authority to regulate. But the state must assert a substantial interest and the interference with speech must be in proportion to the interest served . . . Restrictions must be

166. *In re* R.M.J., 447 U.S. 557, 563-64 (1980). A copy of the advertisement is found in app. B.

167. *In re* R.M.J., 609 S.W.2d 411, 412 (Mo. 1981), *rev'd*, 455 U.S. 191 (1982). In dissent, two justices argued that the errors were not worthy of disciplinary review. Justice Seiler felt that R.M.J.'s ads may have been more helpful to the consumer than a corrected version. *Id.* at 416 (Seiler, J., dissenting). For example, R.M.J. used the term "personal injury" rather than the approved phrase, "tort law."

168. 455 U.S. 191 (1982).

> narrowly drawn, and the state lawfully may regulate only to the extent regulation furthers the state's substantial interest.[169]

Thus, before a state can regulate speech that is *not* misleading, the state must assert a substantial interest and the regulation must further that interest. The interference must also be narrowly drawn in proportion to the state's interest.[170]

In *R.M.J.*, the Court could find little, if any, evidence of deceit. The Court did pause to express its displeasure with R.M.J.'s advertised statement that he was admitted to practice before the Supreme Court. The Court found that in "bad taste" in light of the entrance requirements for the court's bar.[171]

Next, the Court noted that there was no record before it with findings that the ads were misleading. Nor did Missouri advance any substantial state interest to support its position.[172] Without evidence that the advertisement was misleading or that the regulation advanced a state interest, the Court concluded the information in R.M.J.'s advertisement was permissible.[173] The Court also ruled that R.M.J. could not be disciplined for the mailings he sent out.[174]

Justice Powell's *R.M.J.* test really has three distinct parts: The first part deals with *misleading* advertising, the second part deals with *potentially* misleading advertising and the third part deals with communications that are *not misleading*. Arguably, music, graphics and dramatic presentations are a method of advertising that is inherently misleading. Powell's opinion suggests

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169. *Id.* at 203 (emphasis added; citations and footnotes omitted).

170. *Id.*

171. *Id.* at 205.

172. *Id.* at 205-07.

173. *Id.* at 206-07.

174. The Court observed:

> Finally, appellant was charged with mailing cards announcing the opening of his office to persons other than "lawyers, clients, former clients, personal friends and relatives." Mailing and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path.

Id. at 206.

For a discussion of various state court decisions dealing with direct mail, see Whitman & Stoltenberg, *Direct Mail Advertising by Lawyers*, 45 U. PITT. L. REV. 381, 400-16 (1984).

that if this is true, such legal services advertising methods may be *prohibited entirely.*

However, these techniques probably fit more precisely in the "potentially misleading information" category. The Court will allow a prohibition on such advertising if the information can not be provided in a manner that is not deceptive. If it may be, then restrictions may be placed on such advertising that are *no broader than reasonably necessary* to prevent the deception. It would seem there is no way to prevent deception other than by an outright ban on graphics, music, and dramatic presentations. There is no way to present these techniques in a manner that is *not* deceptive because they arouse emotional responses that, if at all effective, cause persons hearing or seeing them to approach the advertising lawyer for reasons other than service-intrinsic information.

As noted earlier, if a court wishes to characterizes music, graphics, and dramatic presentations as *not misleading,* a characterization with which the authors of this piece would disagree, a state still may regulate such advertising. If a state chooses this approach, a ban would not be unreasonable because it would further the state's interest in seeing that the public is correctly informed about attorneys. There is no way to draw more narrowly such a restriction. The public still could get service intrinsic information about all attorneys even in the presence of such a ban.

6. *Zauderer*

The next major Supreme Court decision on attorney advertising continued to follow the *Central Hudson* test for commercial speech analysis. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*[175] involved two advertisements, one offering to represent women injured by the Dalkon Shield intrauterine device (IUD) on a contingent-fee basis and another advertisement offering to represent those charged with drunk driving offenses. The IUD advertisement included a line drawing of the Dalkon Shield and said "do not assume it is too late to take legal action."[176] The drunk driving advertisement stated that Zauderer's clients would receive a full refund of their legal fee if convicted. Ohio, bolstered by an earlier Supreme Court

175. 471 U.S. 626 (1985).

176. *Id.* at 631. For a reproduction of the advertisement see app. C.

ruling upholding its state interest in regulating attorney advertising,[177] argued that the advertisements were deceptive. The first advertisement specifically failed to include information telling potential clients that they would still be responsible for the *costs* (as opposed to legal fees) of bringing suit.[178] In addition, the advertisement included a line drawing of the Dalkon Shield.[179] The Dalkon Shield advertisement also was alleged to

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

178. The Court held Ohio's requirement that advertisements which refer to contingent fee arrangements that contain information regarding a client's liability for costs was reasonable. 471 U.S. at 653.

179. This was alleged to have violated Ohio's rule that prohibited the use of any illustration other than those permitted by Ohio's rules. Ohio essentially used a laundry list approach that specified the type of information that an attorney may include in legal advertising.

Ohio's Code of Professional Responsibility DR 2-101(B) reads as follows:

> 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, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except for the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:
>
> (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 is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;
>
> (3) Age;
>
> (4) Date of admission to the bar of a state, or federal court or administrative board or agency;
>
> (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
>
> (6) Public or quasi-public offices;
>
> (7) Military service;
>
> (8) Published legal authorships;
>
> (9) Holding scientific, technical and professional licenses, and memberships in such associations or societies;
>
> (10) Foreign language ability;
>
> (11) Whether credit cards or other credit arrangements are accepted;
>
> (12) Office and telephone answering service hours;
>
> (13) Fee for an initial consultation;
>
> (14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;
>
> (15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of

have violated Ohio's rules that prohibited soliciting business through advertisements that contain legal advice on specific legal problems.[180] The drunk driving advertisement appeared to

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court costs and expenses;

(16) 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 without obligation to 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;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

471 U.S. at 632 n.4.

This so called "laundry list" of permissible advertising is similar to the rules considered by the Supreme Court in *In re R.M.J.* Ohio's version of DR 2-101(B) differed very little from the A.B.A. Model Code of Professional Responsibility.

Counsel for the Office of Disciplinary Counsel argued to the Supreme Court that a "laundry list" approach as utilized in Ohio's DR 2-101(B) is the only practical way to police lawyer advertising. A precisely worded rule enables attorneys who see professional advertising to recognize advertising in violation of the rule and thus be in a position to report violations to the Office of Disciplinary Counsel. Consequently, the rules in question are rationally related to the state's compelling interest in preventing misleading advertising by lawyers. *See Court to Deal Again with Lawyer Advertising*, Nat'l L.J., Oct. 15, 1984, at 5, col. 1.

180. The Court ruled he could not be disciplined for violating these rules. 471 U.S. at 646-47.

DR 2-103(A) of the Ohio Code of Professional Responsibility reads: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1982).

Zauderer violated this provision because the advertisement by implication recommended his own employment: "Our law firm is presently representing women on such cases." *See* app. C.

DR 2-104(A) of the Ohio Code of Professional Responsibility states:

(A) A lawyer who has given unsolicited advice to a layman 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.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 3-103(D)(1) through (5), to the extent and under the conditions prescribed therein.

(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 condi-

be an offer to represent criminal defendants on a contingent-fee basis, a violation of the state's disciplinary rules.[181]

The Court first analyzed the IUD advertisement[182] and examined Ohio's rules prohibiting self-recommendation and the acceptance of employment resulting from unsolicited legal advice. It reviewed the content of the advertisement and found it to be *truthful and not misleading*. Given this finding, Ohio had to establish a substantial state interest in order to justify its regulation of this commercial speech.[183] The state suggested several interests furthered by its rules. Ohio argued first that the rules protect citizens from an invasion of privacy, undue influence, harassment, coercion, and pressure. The Court found these interests to be legitimate, but not present in the case. The advertisement in question did not pressure consumers, nor invade their privacy.[184] The Court then considered the concern that lawyers might stir up litigation by advertising. It concluded that even if advertisements increase litigation this is not a sufficient justification to prohibit legal advertising.[185] Ohio also argued that it needed such a prophylactic rule because advertising presents unique regulatory difficulties. The Court rejected this argument as well and found that Zauderer could not be punished for accepting clients as a result of placing a legal ad.[186]

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tions 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.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104 (1982).

This charge is presumably based upon the statement in the advertisement that the reader should not assume it is too late to take legal action against the Shield's manufacturer. *See* app. C.

181. 471 U.S. at 629-30. See app. D for a reproduction of the advertisement.

182. *Id.* at 639.

183. *Id.* at 641.

184. *Id.* at 642.

185. *Id.* at 642-43; *see* Bates v. State Bar, 433 U.S. 350, 375-77 (1977). As Justice Blackmun observed, "we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376.

186. 471 U.S. at 646-47. Placing this advertisement was a financially successful move for Zauderer, who signed up over 70 cases as a result of these advertisements. But were the advertisements successful simply because no one else had advertised? *See* Whitman and Stoltenberg, *Evolving Concepts of Lawyer Advertising: The U.S. Supreme Court's*

The state's disciplinary rules also forbade the use of illustrations in advertising.[187] The Court, however, stated that drawings are a form of commercial speech protected under the first amendment.[188] The Court never considered the possibility that some drawings can be inherently misleading and subject to an absolute ban or potentially misleading and subject to restrictions that are no broader than reasonably necessary to prevent the deception. In fact, illustrations can be inherently or potentially misleading and should have been considered so under Justice Powell's *R.M.J.* test rather than considered as communications that are not misleading. The Court should have made a distinction between misleading graphics and the Dalkon Shield illustration used in this case which provided valuable service-intrinsic information—that the attorney would handle Dalkon Shield cases. Instead, the Court applied the *Central Hudson* test to the illustration. It ruled that the state had failed to present a substantial state interest that justified its restriction.[189] Again, the Court found that the drawing was *not deceptive or misleading* and put the burden on the state to show a substantial interest in restricting the use of drawings. While an illustration of a Dalkon Shield might seem innocuous, in fact such an illustration might evoke intense emotions in the mind of a woman permanently in-

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Latest Clarification, 19 IND. L. REV. 497, 535, n.204 (1986).

In dissent, Justice O'Connor, argued that Zauderer's offer of advice (his suggestion in the IUD advertisement that women not assume that time had run out on their possible claims) was legitimately restricted. According to Justice O'Connor, the state had a substantial interest in preventing undue influence and overreaching. Lawyers should not give "free samples" of their wares to customers who may choose an attorney based on that sample, she observed. 471 U.S. at 673 (O'Connor, J., concurring in part and dissenting in part). While the possibility of overreaching may be more obvious in in-person solicitation, it is still present in published offers of advice. *Id.* at 676 (O'Connor, J., concurring in part and dissenting in part).

187. Ohio's Code of Professional Responsibility, DR 2-101(B) stated in relevant part:

> The information disclosed by the lawyer in such publication or broadcast shall. . .be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except for the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1982).

188. 471 U.S. at 647.

189. *Id.* at 649. Justice White was joined by Justices Brennan and Marshall on this point. *Id.* at 656 (Brennan, J., concurring and dissenting in part). Justices O'Connor, Burger, and Rhenquist concurred in the Court's judgement on this point. *Id.* at 673 (O'Connor, J., concurring in part and dissenting in part). The Court was thus *unanimous* in its rejection of Ohio's rule prohibiting the use of illustrations.

jured by the product. This emotion generated by the illustration arguably might cause the woman viewing the advertisement to perceive the advertising attorney more positively than had the attorney advertised without such a picture. The Court never considered such an argument in arriving at its conclusion that Zauderer's Dalkon Shield illustration was neither deceptive or misleading.

The state argued that it needed to prohibit the advertisement in the interest of maintaining the dignity of its attorneys. The Court found this interest to be inadequate, stating that "the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it."[190] The state argued that the only way to regulate abuses of advertising illustrations was to ban them all. But the Court remained unconvinced that prophylactic rules were the only way to advance this state interest, especially because Ohio had failed to show any facts establishing an abuse of the right to advertise.[191] The Court reasoned that consumers rarely base decisions about legal services on visual illustrations in advertisements.[192] The Court found Zauderer could not be disciplined for the use of accurate and nondeceptive illustrations.[193]

The Court thus applied the third part of Justice Powell's *R.M.J.* test to a blanket prohibition on illustrations. The Dalkon Shield illustration was specifically found not to be deceptive or misleading. The Court never addressed the question of how a deceptive or misleading illustration should be handled. The Court merely found that the state of Ohio had failed to assert a substantial interest justifying a blanket restriction.

Although there may be no substantial state interest in a blanket ban on *all* illustrations there is a substantial state interest in a blanket ban on illustrations that convey information *extrinsic* to the services offered and which contribute to purchase behavior on that basis. Graphics like a Dalkon Shield provide the public with useful information relevant to the services offered by the attorney—that the attorney handles such cases. However, even the illustration considered by the Supreme Court

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190. *Id.* at 648.

191. *Id.* at 648-49.

192. *Id.* at 649. For an analysis of the factors that persons take into consideration in deciding to purchase a product, see Whitman, *Reliance as an Element in Products Misrepresentation Suits: A Reconsideration*, 35 Sw. L.J. 741, 765-70 (1981).

193. 471 U.S. at 649.

in the *Zauderer* case could evoke an emotional response. A woman injured by such an intrauterine device might be caused by the illustration to adopt an unjustifiably favorable attitude towards the advertising attorney. That being the case, a blanket ban on graphics that convey information *extrinsic* to the services offered should be permissible as such graphics are either misleading or potentially misleading. Such graphics cannot be presented in a manner that is not deceptive because the information they provide is extrinsic to the service provided, and it induces behavioral change (purchase) on the basis of non-conscious, automatic associations, rather than on principles of reasoned reflection.

The Court did not take up the issue of music, but presumably it would follow the *Central Hudson* test for music as well as graphics. Music provides only information *extrinsic* to the service provided, thus it can be banned outright. As with graphics, people may respond as though an attorney is more capable than in fact he or she is due to the positive emotions evoked by music that are associated with the attorney. Even if the music is viewed as not even potentially misleading, because of the emotion it evokes, it cannot be used accurately to inform the public about the attributes of the advertising attorney.

As for dramatic presentations, it is difficult to guess how the Court would treat such an advertising technique. Because it is inherently or potentially deceptive in that it provides information extrinsic to the services offered by the advertiser, it should be possible to ban dramatic presentations outright. Dramatic presentations cannot be provided in a non-deceptive manner because they evoke emotions that, if effective, enhance the viewer's attitude towards the advertising attorney.

Ohio next argued that the Dalkon Shield advertisement was deceptive because it failed to include information warning potential clients that they would remain responsible for the costs of suit even if the attorneys failed to make a recovery. Here, the Court declined to follow the same analysis it had used for speech restrictions. The Ohio rule merely involved the requirement that attorneys make a disclosure.[194] Ohio was not preventing its attorneys from speaking; rather it just required them to add something to their speech. Although the compulsion to speak can be just as violative of the first amendment, the Court found no such

194. *Id.* at 650.

violation in *Zauderer*.[195] As long as the required disclosure furthered the state's interest, it was a permissible restriction on the defendant's first amendment rights.[196] Here, the Court agreed that the advertisement could easily mislead a public unfamiliar with the terms "costs" and "fees" and the disclosure would help dispel that misunderstanding. Customers had an interest in knowing what costs they would be responsible for.[197]

The Court then discussed the drunk driving advertisement. It quickly affirmed the decision of the Ohio Supreme Court to reprimand Zauderer for placing this advertisement. The Court found the advertisement to be deceptive and a clear violation of Ohio's disciplinary rules.[198] The Court thus affirmed discipline for the drunk driving advertisement and the failure to disclose the required information, but vacated punishment imposed for the illustration and offer of legal advice.

Zauderer was the most recent Supreme Court pronouncement specifically dealing with attorney advertising. However, a recent commercial speech case of relevance to this discussion was decided in the summer of 1986: *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*.[199] Posadas Associates ran a Holiday Inn and casino. The group challenged a Puerto Rico statute that restricted advertising of casino gambling. Specifically, the statute prohibited casinos from promoting gambling to the residents of Puerto Rico. Advertising directed at tourists was allowed. Posadas sought a declaratory judgment that the statute and the regulations adopted pursuant to the statute were an unconstitutional violation of the first amendment, equal protection, and due process clauses.

When written, the statute[200] was designed to promote tourism. All casinos were off-limits to the residents of Puerto Rico,

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195. *Id.*

196. *Id.* at 651. The Court thus did not follow the *Central Hudson* test in analyzing this point.

197. *Id.* at 652-53. The growth in advertising by lawyers has greatly increased over the years. One in every four lawyers advertise in some form. *Have I Got a Deal For You*, 1986 A.B.A. J. 24 (Dec., 1986).

198. 471 U.S. at 654-55.

199. 478 U.S. 328 (1986).

200.

> The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while

but the casinos were allowed to advertise in any media outside of Puerto Rico.[201] The Condado Holiday Inn Hotel and Sands Casino was fined several times for violating the law. In 1979, the Tourism Company issued a memorandum interpreting the advertising restrictions. It stated that inside of Puerto Rico, the word "casino" could not be used on any matchbooks, napkins, banners, correspondence, or phone books.[202] The hotel was fined several times which led to its filing a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico.

The Superior Court found that the administrative interpretation of the act had been improper. It, therefore, issued a narrowing construction of the statute and regulation 76a-1(7) that limited the law to apply only to advertising designed to reach residents.[203] It ruled the Tourism Company's past application of the advertising restrictions had violated the hotel's constitutional rights. When the Supreme Court of Puerto Rico refused

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at the same time opening for the Treasurer of Puerto Rico an additional source of income.

Games of Chance Act of 1948, Act. No. 221 § 1 (May 15, 1948).

201. The original act prohibited a gambling room from advertising or offering its facilities to the public of Puerto Rico. P.R. LAWS ANN., tit. 15, § 77 (1972). The Act authorized an agency to issue and enforce regulations to implement the Act. The Tourism Company of Puerto Rico created and enforced two regulations at issue here. The first regulation reiterates the law that prohibits advertising or offering of its facilities to the general gambling public.

The second regulation provided:

> No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

P.R. R. & REGS, tit. 15, § 76(a)-1(7) (1972).

202. The tourism Development Company ruled:

> This prohibition includes the use of the word "casino" in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paperholders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico.

478 U.S. at 333.

203. The court narrowed the statute to cover only advertising contracted with an advertising agency for consideration; to attract residents to bet at the dice, card, roulette and bingo tables. *Id.* at 334-35.

The court also issued a narrowing construction of regulation 76a-1(7) to allow "within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident." *Id.*

to hear the case, the United States Supreme Court interpreted that action to mean that the narrowing of the statute had been approved *sub silento*.[204]

The U.S. Supreme Court found that the advertising involved in this case was commercial speech and should be judged by the guidelines of the *Central Hudson* case.[205] Despite the fact that Puerto Rican law prohibited it, the court decided that, in the abstract, advertising of casino gambling to residents of Puerto Rico was not illegal and, thus, the first prong of the *Central Hudson* test had been met.[206]

The governmental interest at stake here, required by *Central Hudson's* second prong, was the reduction of demand for casino gambling on the part of *residents* of Puerto Rico. The government was concerned for the health, safety, and welfare of its constituents, and it wanted to avoid organized crime and the disruption of cultural patterns.[207] The court had "no difficulty" accepting that the interest in the health, safety, and welfare of the citizens was a substantial governmental interest.[208]

The third prong of the *Central Hudson* test, discovering if the regulation directly advanced the asserted state interest, was easily established by the court. The ban on casino advertising satisfied this prong.[209]

The fourth prong of the *Central Hudson* test requires that any restrictions on commercial speech be no more extensive than necessary to serve the state's interest. The court found that the regulation-narrowing that the Superior Court of Puerto Rico undertook met this prong.[210]

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204. *Id.* at 339.

205. *Id.* at 340. So long as the advertising was not misleading or fraudulent and concerned a lawful activity, it falls within the protections of the first amendment. Any restriction on such advertising must directly advance a substantial government interest and be no more extensive than necessary. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

206. 478 U.S. at 340-41.

207. *Id.* at 341.

208. *Id.*

209. *Id.* at 341-42. "The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Id.* The Court did not agree with Posadas' argument that the regulation should fail because it was under-inclusive. Other types of gambling, such as horse racing and the lottery, were not prohibited from advertising to residents. The Court found this to be irrelevant, so long as the regulation reduced demand for the games.

210. *Id.* at 343. Posadas argued that the first amendment required the Commonwealth to promulgate additional speech to discourage gambling rather than restrict

Because the *Central Hudson* test was satisfied, the court held the hotel had no first amendment claim. It went on to discuss appellant's argument that the state did not have the power to restrict advertising that deals with gambling. The court noted that the state had the larger power to totally ban gambling, and that the power to regulate advertising related to gambling was a lesser-included power.[211]

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speech that promotes it. The Court rejected the argument, saying that the choice was up to the legislature and was not constitutionally required. *Id.* at 344.

211. *Id.* at 345-46. The Court also dismissed the claim of vagueness, stating once again that the narrowing done in the Puerto Rican courts eliminated that problem. *Id.* at 347-48.

The Court also noted that the advertising restriction was not constitutionally defective under its decisions in Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) and Bigelow v. Virginia, 421 U.S. 809 (1975). In these cases the states had no power to ban the advertisements because the activities in question (contraceptives in *Carey* and abortions in *Bigelow*) were constitutionally protected. Gambling on the other hand, may be prohibited outright. 478 U.S. at 345-46.

Justice Brennan in his dissent doubted that Puerto Rico had the power to suppress truthful commercial speech in order to discourage its residents from engaging in a lawful activity. *Id.* at 350. Citing *Bates*, Justice Brennan stated that Puerto Rico was depriving its citizens of accurate information, contrary to the policy behind the first amendment that more information is better than less.

Justice Brennan also analyzed the regulation under the four-prong test of *Central Hudson*. First, he stated that the legislative history did not show any evidence that serious harm would result from letting residents gamble. Proof of that exists in the fact that Puerto Ricans can engage in other forms of gambling without restriction. *Id.* at 352-54 (Brennan, J., dissenting). Perhaps the real purpose behind the restriction was to encourage Puerto Ricans to spend their gambling dollars on the lottery. *Id.* (Brennan J., dissenting). Second, even assuming that the state interest was legitimate, there was not proof that the regulation would reduce crime. Indeed, if the tourists were allowed to gamble, the crime was sure to stay. *Id.* at 355-56 (Brennan, J., dissenting). Third, there were less restrictive alternatives. Puerto Rico could address crime directly. It could limit the amount of gambling allowed, or promulgate additional commercial messages to discourage gambling. *Id.* at 356-57 (Brennan, J., dissenting).

> Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, "up to the legislature" to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to *prove* that more limited means are not sufficient to protect its interests, and for a *court* to decide whether or not the government has sustained this burden.

Id. (Brennan, J., dissenting) (emphasis in original).

Justice Brennan argued that the first amendment made the choice years ago between the dangers of suppressing information and the dangers of its misuse if freely allowed. *Id.* at 358 (Brennan, J., dissenting). In this case, he favored the free flow of information.

Justice Stevens found that Puerto Rico was guilty of prior restraint and of enforcing a vague standard. *Id.* at 359 (Stevens, J., dissenting). Additionally, he argued the Court was in effect allowing different lower courts to enforce different standards of speech for different sources. In Puerto Rico, it is now acceptable to regulate advertising that will

The *Posadas* case means that, as long as a state acts consistently with the *Central Hudson* case, a state can place limits on commercial advertising that is harmful to people. Advertising using techniques such as graphics, music, and dramatic presentations by attorneys are inherently or potentially deceptive and harmful to the public—although advertising of legal services is not in itself illegal. The government thus, has a substantial interest, as did Puerto Rico, in prohibiting deceptive advertising techniques. A ban on such techniques would advance the asserted state interest. A ban on such techniques would advance the asserted state interest. Furthermore, it is not more extensive than is necessary to protect the public from being deceived. Therefore, under the *Posadas* decision, it would seem such a ban could constitutionally be imposed. It should be noted the decision in *Posadas* perhaps can be restricted to the facts, on the other hand it may signal a lessening of the standard to be applied to advertising regulation.

C. Recent State Deceptive Advertising Cases

Several recent noteworthy lower court cases lend support to our contention that a ban can constitutionally be adopted by the state courts for graphics that convey information that is extrinsic to the legal services offered, as well as a ban on music and dramatic presentations. These court decisions suggest that some courts also believe such advertising techniques should be limited.

1. New Jersey

The Supreme Court of New Jersey in 1982 struck down its ban on attorney television advertising in the case *On Petition for Review of the Advisory Committee on Professional Ethics and DR 2-102(c)*.[212] The court did so based on its own finding that, under the facts of the case, the rule was unfair.

In that case, out-of-state attorneys petitioned the court to allow them to practice in New Jersey in spite of the fact that the then-current New Jersey ethical rules prohibited firms from practicing in New Jersey when named partners were not licensed

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appear in the *San Juan Star* and to forego regulation of the same ad if it will appear in the *New York Times*. No doubt the Court would strike down a regulation that had the same result in Illinois. *Id.* at 360 (Stevens, J., dissenting).

212. 89 N.J. 74, 444 A.2d 1092 (1982), *appeal dismissed*, 459 U.S. 962 (1982).

in New Jersey. The firm, Jacoby and Meyers, practiced throughout the United States, but neither named partner was admitted to practice in New Jersey. While ruling on that petition, the court struck down another New Jersey rule that prohibited all televised attorney advertising.[213]

Under the facts in review, Jacoby and Meyers practiced in New York and advertised its services on New York television. Due to the proximity of the two states, New Jersey residents were often exposed to that advertising.[214] The court felt that allowing Jacoby and Meyers to practice in New Jersey, while neither was licensed, was deceptive.[215] This deception would also be present in any TV advertising by Jacoby and Meyers. Further, should any New Jersey attorney affiliate with the firm, he would benefit unfairly from the advertising beamed from New York to New Jersey. The television advertising would thus be both unfair and deceptive. But there was no way the court could eradicate the effect of New York advertising reaching New Jersey consumers.

The solution, the court believed, was to study the effect of DR2-101(D), the ban on attorney advertising. It sent both ethical issues (the ban on TV advertising and the ban on attorney practice in New Jersey where a named partner is not licensed in that state) to a Supreme Court committee for study.[216]

The New Jersey Supreme Court in 1986, in *In re Felmeister & Isaacs*,[217] used a balancing test to devise a rule allowing some types of advertising and restricting others. Prior to the decision New Jersey allowed any advertising provided that the advertisements were "presented in a dignified manner without the use of *drawings, animations, dramatization, music, or lyrics.*"[218] Attorneys Felmeister and Isaacs attacked the rule, and the New Jersey Supreme Court revised it in three ways. First, the court restricted the limitations on drawings and dramatizations to TV advertisements. Obviously, a dramatization generally would be used on television. Second, it required that all attorney advertising (on television or elsewhere) be predominately informational, meaning that, "both in quality and quantity, the communication

213. *Id.* at 78-79, 444 A.2d at 1094.
214. *Id.* at 88, 444 A.2d at 1099.
215. *Id.* at 78, 444 A.2d at 1094.
216. *Id.* at 79, 444 A.2d at 1094.
217. 104 N.J. 515, 518 A.2d 188 (1986).
218. NEW JERSEY RULES OF PROFESSIONAL CONDUCT 7.2(a) (1984).

of factual information rationally related to a consumer's need for, and choice of, counsel predominates."[219] Third, advertisements that had no relevant information on the selection of an attorney were banned. It was not necessary for an attorney to use an advertisement devoid of factual information. The court strived to balance the need of the consumer to make an informed choice against the need of the attorney to generate business.

The court thought that the public "would be better served by more information about the legal system in order to know its legal rights and to help it choose a lawyer to enforce those rights."[220] The public also needed legal services at lower prices. Both of these interests are promoted through attorney advertising. But the court stated that the public should make *rational* decisions *based on facts and not emotion.*[221] The court admitted that television requires some non-rational information in order to attract and hold attention, but felt that such information should be held to a minimum. The bulk of the commercial should be *informative and factual,* in order to allow consumers to make informed choices. Through this balance, the commercials would become "predominately informative."

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219. 104 N.J. at 516, 518 A.2d at 189, n.1.

220. *Id.* at 523, 518 A.2d at 192.

221. *Id.* at 525, 518 A.2d at 193. A noteworthy federal case directly related to this discussion is Bishop v. Committee on Professional Ethics and Conduct, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated as moot,* 686 F.2d 1278 (8th Cir. 1982). In this case, the court decided that logos, drawings, colors, sounds and modifying words were of a promotional character. Because logos, drawings, colors, sounds and modifying words were promotional in character, as opposed to informational, the court felt they were potentially misleading. *Bishop,* 521 F. Supp. at 1226. Of course, advertising does have more than just an informational function. The American Bar Association's Commission on Advertising lists the following purposes for bar advertising:

> Bar association advertising is generally image-building, promotional, or informational. Image-building ads promote public understanding of the part that lawyers play in preserving the rights and freedoms of individuals. Promotional ads, such as ads which explain the need for a will, are intended to increase the use of lawyers' services. Informational ads help the public understand generally when they have a legal problem, when they need a lawyer to address that problem, and how to choose a lawyer.

A.B.A. COMM. ON ADVERTISING, BAR ASSOCIATION ADVERTISING: A HOW-TO MANUAL 1 (1979). There is certainly nothing improper about an attorney placing advertising in order to promote his or her practice, and obviously, that is the reason lawyers advertise—to get business. While there is nothing improper about engaging in promotional advertising, there is something improper about engaging in promotional advertising that is false, deceptive or misleading—which the court in *Bishop* felt logos, drawings, colors, sounds, and modifying words were potentially misleading. It would be wrong, however, to state that all promotional advertising is potentially misleading.

The court gave examples of advertisements that it would consider inappropriate. For instance, if a radio advertisement depicted a car accident for 15 seconds and followed that with fifteen seconds of attorney introduction, that advertisement would be unacceptable. If the advertisement started with a very brief dramatization and spent the bulk of its time describing the firm, its hours, fee structure, etc., that advertisement would pass muster. The key, according to the court, is that the *non-rational (or emotional) element* of the commercial is *very brief* and used only for its ability to attract interest.[222] The court specifically prohibited advertisements that relied on shock value. Advertisements showing an attorney stepping out of a pool in full scuba gear would serve no purpose other than to irrationally appeal to consumers and, perhaps, cause a laugh or two. Such an advertisement, the court said, would bring the bar and bench into disrepute.[223]

The authors agree that lawyer advertising can help people learn valuable information. People need such information to select an attorney. However, emotional devices do not cause people to make rational decisions, therefore, they should be banned. The danger of emotional devices is particularly acute in legal advertising because people have no way to evaluate the services rendered by an attorney.

Only after the court had finished its balancing did it turn to the *Central Hudson* test. The state's interest in requiring that advertisement be *predominately informational* is to ensure that consumers make their choice of attorney based on *fact and not emotion.* "The mere statement of this interest is, we believe, sufficient to prove its importance," the court observed.[224] "It is acceptable for consumers to buy refrigerators based on emotion, but the choice of an attorney is a much more important selection. Accordingly, the state's interest in protecting a person's choice of an attorney is great."[225] The court gave a similarly slight review to the next *Central Hudson* requirement, stating

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222. 104 N.J. at 528, 518 A.2d at 195.

223. *Id.* at 530, 518 A.2d at 196. Apparently, such an advertisement was used in Wisconsin. In committee on Professional Ethics & Conduct v. Humphrey, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986), the Iowa Supreme Court mentioned an advertisement showing an attorney coming out of a pool and saying, "If [you're] in over [your] head with bankruptcy problems, call [us]." *Id.* at 650 (Reynoldson, C.J., concurring).

224. 104 N.J. at 535, 518 A.2d at 198.

225. *Id.* at 535, 518 A.2d at 198.

that "the direct relationship between the 'predominately informational' restriction and the state interest is apparent."[226]

The court spent a little more time on the least restrictive alternative test. There are two ways to get consumers to make a rational choice. The advertiser can be required to either disclose that the commercial is irrational or delete the irrational parts. A disclaimer on an advertisement would confuse the consumer, be less than effective, and be impractical.[227]

Thus, the New Jersey Supreme Court found that drawings, music, and dramatizations may be prohibited by the states consistent with the Supreme Court's decision in the *Central Hudson* case. It is necessary to ban such advertising techniques because no less restrictive alternative is available. Any useful intrinsic service information can be provided to consumers through advertising not using such techniques.

The court also analyzed a second rule in light of *Central Hudson*. This rule limits the prohibition of *dramatizations* to television commercials. A special danger exists because television has a greater power to influence a viewer subliminally, the court observed.[228] The state interest, then, is to prevent undue influence on consumers when they select an attorney.[229] The court referred to its earlier analysis, stating: "The regulation directly advances the interests sought to be served and its purpose cannot be achieved by any less restrictive alternative—the analysis of both these questions being similar to that provided above. . . ."[230] As noted earlier, it is difficult to imagine a dramatization in any advertising media other than television—except perhaps on radio. However, it is difficult to understand why the court simply did not prohibit the use of dramatizations outright, rather than limiting the rule to television.

The court then looked to its prohibition on "extreme portrayals," those advertisements with a total lack of relevance to

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226. *Id.* at 535, 518 A.2d at 200.

227. *Id.*

228. *Id.* at 535, 518 A.2d at 201. By "subliminally," it is assumed that the court means the influence of such advertising is not recognized consciously.

229. *Id.* at 535, 518 A.2d at 201.

230. *Id.* at 535, 518 A.2d at 201. In dissent, Justice Handler argued that the "predominately informational" requirement would be difficult to administer. *Id.* at 553, 518 A.2d at 208. (Handler, J., dissenting). It may also lead to censoring advertisements that are not misleading or untruthful. The majority failed to adequately analyze their rules in light of Hudson, and offered no proof that the interest was substantial. *Id.* at 557, 518 A.2d at 210 (Handler, J., dissenting).

the selection of an attorney. The interest in the prohibition of such advertisements was the preservation of confidence in the bar and bench. The court found the state's interest to be substantial one, but did not take the *Central Hudson* analysis any further. Extreme portrayals do not further a consumer's knowledge of facts concerning an attorney. They are used simply to stir up emotions; thus it is constitutionally permissible to ban them.

Felmeister & Isaacs represents the most sustained state court examination of the regulatibility of emotionally evocative legal advertising. Two other recent state supreme court cases show additional concern, however, with the impact of the nonverbal techniques discussed in this article.

2. Iowa

In *Committee on Professional Ethics & Conflict v. Humphrey*,[231] the Supreme Court of Iowa and the Iowa State Bar argued that their restrictions on electronic advertising were permitted within the rule of *Bates* and *Zauderer*. Both opinions specifically excluded any mention of electronic advertising when they discussed restrictions on advertising. *Bates* described the area as worthy of "special consideration." Those words gave Iowa all the support it needed to uphold its rule restricting television advertisements to only those *without background sound, visual displays, more than a single voice or self-laudatory statements*. Humphrey based his arguments on *Zauderer*, which struck down Ohio's blanket ban on the use of illustrations in print advertising. He also argued that Iowa had no substantial state interest, under *Central Hudson*, that supported the restrictions.

The Supreme Court of Iowa disagreed. Based on exhaustive ethics committee hearings, the state court held that the state interest in preventing undue influence on consumers was substantial.[232] The court believed that TV advertising was more like in-person solicitation than printed advertising, because of its potential for abuse and the possibility of undue influence. The TV advertisement is quick and flashy, while the printed advertise-

231. 355 N.W.2d 565 (Iowa, 1984), *vacated and remanded*, 472 U.S. 1004 (1985), *on remand*, 377 N.W.2d 643 (Iowa, 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

232. 377 N.W.2d at 646.

ment allows time for reflection, thought, and comparison.[233] The court felt that television allowed ripe opportunity for abuse.

This belief was born out by testimony of one of the law firm's advertising specialists. He testified that the firm planned to hire a former football player for its advertisements in order to give the firm a fighting image. The court held this up as an example of overreaching. *Zauderer* and *Bates were designed to provide* accurate information *to the public.* "Electronically conveyed image-building was not a part of the information package which has been described as needed by the public."[234]

The Iowa rule makes sense. The public needs factual information on attorneys—not exposure to messages designed to drum up a favorable attitude towards the advertiser. This ruling

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233. *Id.*

234. *Id.* at 647. In a separate concurring opinion, Chief Justice Reynoldson cited some examples of the abuse of television advertising. One advertisement, included in the opinion, showed a judge paying rapt attention to an attorney at the bench. The purpose of the advertisement was to convey the idea that the sponsoring law firm had the respect, and ear, of the court. *Id.* at 650 (Reynoldson, C.J., concurring). He also mentioned advertisements that included a "fake doctor" who told injured patients to think about a good attorney.

In dissent, Justice Uhlenhopp stated his belief that the remand from the Supreme Court included a review of *Humphrey* in light of *Zauderer.* "While *Zauderer* did not involve the electronic media, the Supreme Court must have believed it has relevancy to the present case." *Id.* at 654 (Uhlenhopp, J., dissenting). Because he read *Zauderer* to allow broad discretion to attorney advertising, he would have prevented enforcement of the rule.

In a separate dissent, Justice Larson decried the majority's failure to apply the *Central Hudson* test. All evidence on the commercials showed they were *not deceptive or misleading. Id.* at 656 (Larson, J., dissenting). Apparently, Larson noted, the majority felt that since the electronic media was a "special problem," it was distinguishable from other commercial speech cases and the court was free to fashion another test. This other test was "the possibility of deception." *Id.* "These commercials are admittedly not misleading or deceptive, yet they are to be banned because, under other circumstances in other cases, similar techniques and content might mislead someone." *Id.* at 657 (Larson, J., dissenting). This was an example of a prophylactic rule that was banned in *Bates,* Justice Larson commented.

Even if the interest was substantial, Larson continued, the majority did not look for less restrictive alternatives. Before the case was remanded, the majority had decided that their rule did not restrict information, but rather restricted tools of manipulation, such as background sound, self-laudatory statements, and visual displays. The effect, despite this turn of words, Larson stated, was a stranglehold on attorney advertising. Many other states had less-restrictive alternatives, including case-by-case reviews and a simple prohibition on false or misleading advertising. *Id.* at 657-58 (Larson, J., dissenting).

Larson also felt that *Zauderer* was applicable to *Humphrey* for several reasons. First, *Zauderer* reaffirms the Court's view on prophylactic rules. Second, it downplayed any differences in attorney advertising and that in other professions. Third, *Zauderer* emphasizes the underlying rationale that attorneys should advertise. *Id.* (Larson, J., dissenting) .

is consistent with our belief that dramatic presentations should be banned because they simply generate emotion. The harm flowing from such advertisement is that the client may base his or her decision to hire an attorney not on some fact concerning the attorney—such as the fact the attorney has practiced law for 20 years—but on artificially induced emotional response.

3. *Arizona*

The most recent case that concludes that lawyer advertising should be predominantly informational and should not utilize emotional, irrational sales pitches is *In re Zang*.[235] In this case, the Arizona State Bar charged two attorneys, C. Peter Whitmer and Stephen M. Zang, with numerous ethical violations. Among the many charges was the allegation that they engaged in false and misleading advertising. The charges were first presented to a Special Local Administrative Committee of the State Bar. The Committee found both attorneys guilty of six ethical violations. This decision was appealed to the Disciplinary Commission of the Court of Arizona which affirmed five of the six ethical violations found by the committee. Zang and Whitmer filed objections to the committee's report with the Arizona Supreme Court.

Zang and Whitmer were charged with having violated DR2-101(A)[236] and DR 1-102(A)(4).[237] Both the four print advertisements placed during 1982-1983 and the television advertisements run during this time period left the Special Local Administrative Committee and the Disciplinary Commission with the district impression that the attorneys were able to take, and were actually taking, personal injury cases to trial. The Committee and the Commission both felt the advertisements were false and misleading because the law firm had a policy of not taking

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235. 154 Ariz. 134, 741 P.2d 267 (1987), *cert. denied*, 108 S. Ct. 1030 (1988).

236. DR 2-101(A) reads as follows:

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

Id. at 140, 741 P.2d at 273 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1980)).

237. DR 1-102(A)(4) reads as follows: "(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." 154 Ariz. 140, 741 P.2d at 273 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-201(A)(4) (1980)).

cases to trial.[238] The court observed that if indeed these advertisements were false and misleading, they could be prohibited entirely.[239]

In considering the advertisements in question, the court ruled that it is not necessary to rely upon expert testimony to interpret the meaning behind these advertisements. It determined that an advertisement that depicts an attorney trying a case conveys the message that the attorney actually tries cases and is willing to try future cases.[240] The court viewed the advertising as false and deceptive because since the creation of the law firm in 1979 no attorney at Zang and Whitmer had tried a personal injury case to a conclusion. Zang had never tried a personal injury case at all. Whitmer had criminal trial experience, but his only personal injury trial experience had been more than ten years prior to the advertisements in question. Zang and Whitmer in fact had a firm policy not to take cases to trial. In the few cases they represented that needed to go to trial, the firm referred the cases to experienced personal injury trial firms. The court thus ruled that because the firm did not in fact intend to take any case to trial, the advertisements containing representations of their courtroom abilities were false, misleading, and untruthful.[241]

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238. 154 Ariz. at 141, 741 P.2d at 274.

239. *Id.* at 141-42, 741 P.2d at 274-75; *see In re* R.M.J., 455 U.S. 191, 203 (1982). The Supreme Court in *Bates* found Arizona's prohibition on lawyer advertising improper because it interfered with the public's need for information concerning the availability and terms of legal services, Bates v. State Bar, 433 U.S. 350, 379 (1977); *see supra* notes 135-36 and accompanying text. One might ask, did the Court really need a justification to extend the protection of the first amendment to commercial speech, or was it improper to ever exclude commercial speech from the protection provided by the first amendment. Many scholars have argued the first amendment should not have been extended to commercial speech. *See, e.g.*, Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 30 (1979). On the other hand, others have argued that the first amendment protects all speech that has an individual as its source. *See, e.g.*, Comment, *Commercial Speech and the Limits of Advertising*, 58 OR. L. REV. 193, 206 (1979).

The court in *Zang* did not consider the possibility of regulating truthful advertising as the advertising in this case was alleged to be false and misleading. 154 Ariz. at 141-42, 741 P.2d at 274-75, n.9. As noted earlier in this article, graphics, music and dramatizations can not only be characterized as inherently misleading, but also potentially misleading. Furthermore, even if a court wishes to characterize such advertising techniques as not even potentially misleading, a state still has a substantial interest in making certain the public receives accurate information about the attributes of the advertiser. *See supra* notes 193-211 and accompanying text.

240. 154 Ariz. at 142, 741 P.2d at 275.

241. *Id.* at 143, 741 P.2d at 276.

Zang and Whitmer argued that their advertisements were not untruthful because they suggested only that Zang and Whitmer had an unusually high level of expertise in personal injury law. Their expert argued at the hearings that the public was not misled because it already incorrectly believes that all attorneys appear in court. The court observed that merely because consumers erroneously believe something does not give an advertiser the right to portray its practice in a false light.[242] Zang and Whitmer also argued that their advertising was not false or misleading because they litigated as many cases as most other personal injury attorneys. The court rejected this argument because the firm referred only one percent of all its cases to trial lawyers—a percentage too small to justify the claim they were trial lawyers. Furthermore, it did not justify the implicit claim that they would personally represent their clients in court.[243] Finally, the lawyers argued that no one was harmed by their advertisements.[244] The court rejected that argument as well because the

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242. *Id.* at 143, 741 P.2d at 276.

243. *Id.* at 143-44, 741 P.2d at 276-77.

244. *Id.* at 144, 741 P.2d at 277. One might ask, if no one was injured, how did this case end up in court. The reason is that other attorneys no doubt objected to the advertisements in question. In fact, many objections to legal advertisements do not come from the public, (who probably want more information concerning legal services, not less) but rather from other attorneys. *See, e.g.*, Oliver, *Lawyer Advertising*, 7 CAL. LAW. 28 (1987). Pat L. Grisinger, supervising investigator with the California State Bar's Office of Investigations noted "A good portion of complaints about lawyer advertising come from other lawyers who are offended by an ad." *Id.* at 31. Any attorney who engages in advertising should bear this fact in mind. It is important, not only because an advertisement might lead to an investigation by the ethics committee of the state bar, but also because a great deal of peer pressure may be imposed on someone who engages in advertising. Furthermore, many attorneys are dependent on referrals from their colleagues which may suddenly dry up if an attorney places an advertisement. Dick & Gagen, *Effective Lawyer Advertising*, 33 PRAC. LAW. 65, 66 (Apr. 1987).

In fact, the legal profession has not always opposed legal advertising. There are three distinct periods in the United States in which lawyer advertising has been an issue. From the mid-1800's until the adoption by the American Bar Association of its first Code of Ethics in 1908 advertising was widespread. *See* Note, *Advertising Legal Services: The Case for Quality and Self-laudatory Claims*, 37 U. FLA. L. REV. 969, n.1 (1985).

One always wonders if the reason other attorneys object to advertising by an attorney is because they want to restrict, rather than increase, the competition between lawyers. The Supreme Court considered the question of whether state restrictions violated the antitrust law as an unlawful restraint of trade, but it decided the antitrust laws did not apply to disciplinary rules clearly articulated by the Arizona Supreme Court. *See* Whitman, *Advertising by Professionals*, 16 AM. BUS. L.J. 39, 46-50, 56-67 (1978). The Supreme court chose to impose more competition on attorneys *indirectly* by requiring the states to permit lawyers to advertise. Thus, what the Court could have done through the imposition of the antitrust laws on attorneys— that is, make the legal profession more competitive—it elected to do this by using the commercial speech doctrine. For a

advertisement was inherently misleading and potentially dangerous.[245] The firm placed this advertisement to attract clients. Those people who were attracted by the dramatic symbols of courtroom confrontation had a right to expect that the firm was prepared to go to trial. Such an advertisement creates a danger that people who have cases that need to be litigated would turn to this firm.[246]

The court then launched into a discussion of its future approach with respect to attorney advertising, which it freely admitted was dicta.[247] The court placed its blessing on advertising that informs consumers about their rights and about the availability of legal services.[248] It did concede, however, that another

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discussion of this point see, Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under the Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487 (1986). For an interesting discussion of another "profession" that for years attempted to restrict price advertising and tried to gain the status of a "profession" in order to escape the antitrust laws under the now discarded "learned profession" exception, see J. MITFORD, THE AMERICAN WAY OF DEATH 232-39 (1963). Much like the legal profession, the low volume, small producing funeral homes wanted to restrict competition. They were inefficient and needed high prices to stay in business. The big operators, like legal clinics, needed volume to operate funeral homes as a business. Thus, the big operators favored advertising and price competition. *Id.* at 238.

The legal profession has the same problems. Small firms and solo practitioners probably are not as efficient as larger firms and legal clinics. These more business-like operations probably are more efficient. The problem is, as it is for funeral homes, that smaller businesses often need higher prices than large businesses to survive. If all the "bread and butter" work of the average solo and small law firm is lost to legal clinics, attorneys will be forced to survive on the funds generated by their other work. Quite likely, the long term impact of intense competition will be that many smaller firms and solo practitioners are driven out of the legal profession. One might ask who will represent persons with more complicated legal problems that do not necessarily generate enough funds to merit handling them. It is quite likely that the impact of driving small practitioners out of the legal profession by depriving them of routine work will be disastrous for the rights of the average American. To some extent, our entire justice system is dependent upon the survival of solo practitioners and small firms.

245. 154 Ariz. at 144, 741 P.2d at 277.

246. *Id.* at 144, 741 P.2d at 277-78. Aside from the law, one of the authors argued in another context that courts ought not to permit false and deceptive advertising based on ethical considerations. *See* Whitman, *Advertising and Personal Injury Suits—Should Puffing Be a Defense?*, U.C. DAVIS L. REV. 617, 645-48 (1982). For a comprehensive discussion of the whole question of ethics in relation to law practice marketing see, Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601 (1986).

247. 154 Ariz. at 145, 741 P.2d at 278.

248. *Id.* at 145, 741 P.2d at 278. One should not jump to the conclusion that simply because a person or business advertises that this will generate substantial income for the advertiser. A very good example of advertising that worked quite successfully is that utilized by Philip Zauderer. As a result of his Dalkon Shield advertisement he received 234 inquiries and filed ninety-five lawsuits. He had received millions of dollars in settlements by the time the suit against him reached the Supreme Court. In the author's

purpose of advertising is to generate business for the advertiser. The court observed: "While this focus is *not* objectionable standing alone, it often leads attorneys to stretch the truth or to focus on dramatic, 'sophisticated' sales techniques that all too often provide little helpful information and consequently have a greater tendency to mislead consumers."[249]

The court clearly preferred factual statements as the following observation reveals:

While no doubt effective in attracting clients, dramatic, non-

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opinion this was a highly successful advertisement because it was directed at a very precise audience--women who had been injured by the Dalkon Shield. On the other hand, it is possible that such advertising works simply because no one else engages in it. *See* Whitman & Stoltenberg, *Evolving Concepts of Lawyer Advertising: The Supreme Court's latest Clarification*, 19 IND. L. REV. 497, 535 n.204 and accompanying text (1986).

A very good illustration of an enormously expensive advertising campaign that failed miserably was that recently conducted by Fred Alger Management. The company spent $13 million in the media promoting its firm as a mutual fund. This advertising campaign generated $9 million in new money for the firm to manage. This would generate only $90,000 in annual revenues. At that rate, it would take a *century* to generate $13 million. Alger failed because he based the entire campaign on statistics that showed that 40% of consumers buy mutual funds through direct marketing. *After* he spent the money he learned that these sales came from *existing* clients—not new ones. *See* Machan, *Live and Learn*, FORBES, September 7, 1987, at 135. There is an important lesson for attorneys here—a great deal of money can simply be thrown away on advertising. Much advertising conducted by all advertisers is simply a waste of money. As the wealthy Philadelphia merchant, Joseph Wanamaker, once lamented "I waste half my money on advertising, I just don't know which half."

249. 154 Ariz. at 145, 741 P.2d 278. The court is seriously mistaken on this point if it believes that sales techniques are best if they mislead persons. In fact, a salesman really tries to identify what a customer needs and wants and then tries to explain how his or her product satisfies this need. This is hardly an objectionable or evil practice as the court seems to imply, perhaps revealing a hidden distaste for salespersons. As an illustration of what a good salesman should do, consider these remarks on interview objectives:

> A prospect must make five decisions if a presentation is to end up with an order. The seller's objectives must be: (1) to help buyers realize *needs*; (2) to help them see that the offered *product* is the best solution for those needs; (3) to help them understand that *service* will be adequate; (4) to convince them that the benefits received outweigh the *price* paid; and (5) to help them feel that they should buy now.

W. GORMAN AND R. WENDEL, SELLING 288 (1983). People are greatly mistaken if they seriously believe that the best salespersons try to mislead customers. Once again, this illustrates the fact that judges quite often harbor views that are incorrect in light of what we know today in disciplines outside the law. One of the authors in a related article argued that judges misunderstand advertising theory which has caused them to develop rules that are inconsistent with what we know today about advertising theory. *See* Whitman, *Reliance as an Element in product Misrepresentation Suits: A Reconsideration*, 35 Sw. L.J. 741, 765-70 (1981). For a discussion of the role of advertising in the legal services market, see Hazard, Pearce & Stempel, *Why Lawyers Should be Allowed to advertise: A Market Analysis of Legal Service*, 58 N.Y.U. L. REV. 1084, 1094-1100 (1983).

> factual advertisements are more likely to misrepresent or omit material facts, or to create unjustified expectations about the results a lawyer can achieve than are advertisements that primarily convey factual information that will help consumers make rational decisions about whether to seek legal services.[250]

In addition to preferring factual statements, the court noted that the sale and use of legal services is fundamentally different from the sale of consumer products. The consequences of legal actions are very serious and people have less experience in purchasing legal services than in purchasing consumer products.[251] Of even greater concern to the court, however, was the

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250. 154 Ariz at 145-46, 741 P.2d at 278-279. It is perhaps interesting to note that the advertising profession itself has gone through various cycles with respect to its own belief as to what is the most effective type of advertising. One of the earliest types of advertising copy was primarily factual in nature. This type of advertising was widely used by direct mail firms and patent-medicine businesses. It was popularized by John E. Kennedy in the early twentieth century. Kennedy worked for J. Walter Thompson. He argued that a good advertisement should say in print what a salesman would say to a customer. "Instead of general claims, pretty pictures, or jingles, an ad should offer a concrete *reason why* the product was worth buying." S. FOX, THE MIRROR MAKERS 50 (1984). This was subsequently dubbed "reason why" advertising copy style. In time, reason why advertising copy lost popularity. It was replaced by "impressionistic copy" or "atmosphere copy." Collins & Holden's campaigns for Arrow Collar and Pierce-Arrow automobiles were prominent examples of impressionistic advertising. Virtually the whole advertisement was a picture. "These techniques acquired theoretical support from *The Psychology of Advertising*, an influential book by Walter Dill Scott of Northwestern University. Reason-why copy, Scott insisted, had been oversold. Customers might on occasion be directly persuaded, but more often they bought because of a suggestion at the right psychological moment. . . ." *Id.* at 70. The advertising profession has since this time drifted further and further in the direction of promoting artistic and creative copy and harbors a distinct distaste for the fact filled, tacky looking advertisements frequently used by persons in the direct marketing field even today. *See generally* SIMON, HOW TO START AND OPERATE A MAIL ORDER BUSINESS (3d ed. 1981); STONE, SUCCESSFUL DIRECT MARKETING METHODS (2d ed. 1979).

It is thus interesting to note that these courts have a distinct preference for advertising that explains why a person should patronize a given attorney when for many decades the advertising profession has drifted away from this advertising style.

Another person who laments the latest fad in commercial advertising, "life-style" advertising, remarked: "I wonder why so much of this New Wave advertising is determinedly non-verbal. Does Madison Avenue truly believe we have lost our capacity to think, that we now make our decisions strictly on the basis of our gut reaction to things?" Salerno, *What Are They Trying to Sell Anyway*, Wall St. J., October 15, 1987, at 32. col. 3.

251. 154 Ariz. at 146, 741 P.2d at 279. Even so, the concepts of effective advertising remain the same no matter what the product is. Dick & Gagen, *supra* note 244, at 67. The court's point that people do not have experience with legal services as opposed to consumer products is an interesting one. The very fact that they do not have experience with legal services is one of the main justifications for permitting attorneys to advertise. "[A]dvertising allows consumers to compare goods and services without having repeated, broad-based personal experience." Hazard, Pearce & Stempel, *supra* note 249, at 1096-

situation when the dramatic sales pitch was broadcast on television or radio. The Arizona Supreme Court did not feel compelled to place any special restrictions on television or radio advertising. Indeed, it felt some drama and music is acceptable in lawyer advertisements. However it felt advertising, particularly on radio and television, should be predominately informational in nature. In general, the court advised attorneys:

> Advertisements are likely to minimize the danger of violating ER 7.1 if they are designed to inform consumers of their rights and of the methods available to meet legal problems and crises; to inform the public of the availability and costs of services; or to convey accurate information relevant to making informed, rational choices of counsel, including information about counsel's availability and areas of practice.[252]

The court went on to suggest that the bar should examine advertisements to determine if they are informational or "are simply emotional, irrational sales pitches. While the latter may not be prohibited by ER 7.1, they should be examined to assure that they are neither false nor misleading."[253]

The court also reviewed the allegation that Zang violated DR 2-101(A) and DR 1-102(A)(4) by claiming to be a "fellow" in the American Academy of Forensic Sciences and the American College of Legal Medicine after his membership had been terminated by his failure to pay dues. On appeal Zang argued that this claim was immaterial as people were not mislead by his failure to disclose his lapse in dues. The court rejected this argument. It found a lawyer may not claim membership in an organization to which he does not belong.[254]

Unlike the New Jersey and Iowa courts, Arizona appears to have taken a more accepting attitude towards music, graphics, and dramatic presentation. Even if they are used on television the court decided that they could not be prohibited by ER 7.1. On the other hand, the court clearly favored advertising that is

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252. 154 Ariz. at 146, 741 P.2d at 279.

253. *Id.* at 146, 741 P.2d at 279. Once again, one wonders why an advertiser would make an "irrational" sales pitch. It would not seem like such advertising would sell many products. *See* W. Gorman & R. Wendel, *supra* note 249, at 288.

254. 154 Ariz. 147, 741 P.2d at 280. It should be noted that DR 2-101(B)(13) permits a lawyer to advertise his membership in a professional society. *Id.* The court only objected to the advertisement because *Zang* was no longer a member of the organizations listed in his advertising.

predominately informational. Had the court considered the issue of whether there was a possibility that consumers might be mislead by graphics, music, or dramatic presentations, perhaps it might have agreed that such advertising techniques might mislead consumers. Likewise, the court did not consider the question of whether, under the *Central Hudson* test, the state has a substantial interest in making certain the public receives intrinsic, rather than extrinsic, information about attorney services. Had it considered these points, the court may have agreed that certain graphics, music, and dramatic presentations can be prohibited. These advertising techniques do have the potential to cause consumers to patronize an attorney, based not upon the attributes of the attorney, but based rather on something in the advertising itself. As the Arizona Supreme Court observed, it would certainly be better for advertising to be predominantly, if not exclusively, informational in character as there is little chance that consumers will be confused by such material in advertising messages.

VI. CONCLUSION

Although the twentieth century has brought significant change in advertising techniques and media, legal analysis of advertising has largely remained mired in its centuries old, contracts-derived examination of the truth and falsity of various verbal claims about intrinsic product and service characteristics.[255] Courts and regulators, for the most part, have not examined the efficacy of nonverbal, product-and service-extrinsic techniques in inducing sufficient purchase behavior from mass audiences of consumer viewer/listeners to warrant large advertising expenditures. However, with the advent of lawyer advertising the issue of these nonverbal techniques and their emotion-evoking powers has been placed squarely into consideration. Three state supreme courts have already looked at various facets of the issue as it relates to the acceptability of legal promotion, and it is only a matter of time before the Supreme Court of the United States focuses on it.

When the Supreme Court does, it will face questions of legal doctrine:

1. Are nonverbal techniques inherently deceptive, or are they to be held to a lesser standard?;

255. *See* Reed & Coalson, *supra* note 20, at 735.

2. How are the techniques to be measured under the *Central Hudson* test?;
3. Is *Posadas* to be restricted to its facts, or does it signal a lessening of the finding necessary to uphold advertising regulation under *Central Hudson*?; and
4. What weight do the relevant opinions of the state supreme courts deserve?

Within this doctrinal context the court will also unavoidably face the theories and the facts of social science. Indeed, the Court's general protection of commercial speech has already been characterized as resting on economic analysis.[256]

In evaluating nonverbal advertising the Court, as it did in *Bates*, will confront the argument that advertising is useful in conveying service-intrinsic information to consumers. Further, the proponents of such advertising will maintain that use of nonverbal techniques (music, drama, graphics) merely catches the attention of consumers so they will receive and retain service-intrinsic information.

The authors assert that to understand fully the policy implications of nonverbal advertising, it is necessary to go considerably beyond the somewhat simplistic assumption that the evocation of attention through advertising is a phenomenon unrelated to the inducement to purchase. Attention is not an abstract principle but rather a process inextricably intertwined with either approaching or avoiding that which provokes attention.[257] It is a prelude to action.

In advertising the emotional stimulation of music, drama, and graphics evokes attention and induces purchase behavior as two sides of the same behavioral coin. Although emotional conditioning from nonverbal techniques may not have sufficient strength in any given instance to induce purchase behavior, when taken over the aggregate of consumers it must give advertisers a sufficient return on their advertising investment or they would not use it. This is because advertising containing music, drama, and graphics tends to be expensive to produce. In fact, as the increasing quantity of such advertising attests, advertisers seem quite convinced that the attention-evoking qualities of nonverbal techniques provide an emotional path to profits.

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256. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 46 (1985).

257. *See supra* notes 18-19 and accompanying text.

Furthermore, the information provided in lawyer advertising is not just verbal information concerning service-intrinsic characteristics, it also includes the feelings of confidence or quality associated by music, drama, or graphics with the advertising lawyer.[258] These emotions are evoked by nonverbal techniques entirely extrinsic to legal services, yet they are very capable of inducing consumers to respond favorably to an advertising lawyer through a process of information response that is both automatic and outside the awareness of those affected. Consumers will not be able to identify the advertising techniques as the cause of their confidence in or attraction toward the advertising lawyer.[259] In place of characterizing such response as *irrational*, it is more appropriate to call it *misled*.[260]

Finally, what is the appropriate regulatory response to the deception (inherent, it would seem) of emotionally arousing nonverbal techniques? One response is to decide that the effect of these techniques is de minimis. Consumers do not purchase something so important as legal services on the basis of thirty seconds of music, drama, and graphics. Tort suits are not toothpaste. To the contrary, however, theory, research, and experience suggests strongly that emotionally arousing advertising messages can create favorable images that attract consumers to lawyers, as well as to automobiles, politicians, or toothpaste.[261] The artistic slant may be slightly different in each instance, but the process of emotional image creation is the same and the nonverbal techniques of music, drama, and graphics are identical. To conclude that the influence of emotional image creation is unimportant in attracting potential users of legal services to lawyers is at odds with much of what is known about advertising communication.

Another response of the state courts and bar associations responsible for rules of professional conduct governing legal advertising is a case-by-case analysis of deception when music, drama, or graphics are used. The Supreme Court of Arizona seems to have espoused this approach, stating that the bar association should examine "emotional, irrational sales pitches" to

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258. *See supra* notes 35 & 94 and accompanying text.

259. *Cf. supra* notes 25-30 and accompanying text.

260. *Cf. supra* notes 9-11 and accompanying text.

261. *See supra* note 89 and accompanying text. The point is that emotional conditioning, such as by the nonverbal techniques discussed in this article, is a process basic to human learning.

determine that "they are neither false nor misleading."[262] The Supreme Court of New Jersey adopted a somewhat more restrictive standard, but one that finds permissible "predominately informative" legal advertising using brief, emotionally arousing techniques only to attract attention.[263]

Both of these approaches suffer the same shortcoming. Since the techniques they seek to regulate are nonverbal, and the information created by the techniques is extrinsic to legal services, there are no representations made to which standards of truth or falsity can apply. That nonverbal techniques induce consumers to feel good about (or have confidence in, or trust) an advertising lawyer cannot be proven true or false by examining the advertisement. Such techniques are misleading and deceptive in that they attract consumers to an advertising lawyer because of extrinsic art rather than intrinsic service characteristics, but there is no verbally logical way to divide permissible from impermissible uses of the techniques since the presentations created by the techniques *are not themselves structured by verbal logic*. Unless regulators are willing to make an I-know-it-when-I-see-it evaluation of every advertisement, which offers almost no practical guidance to advertising lawyers, there is no feasible regulatory method for allowing some but not all uses of music, drama, and graphics.[264] With their partial prohibitions of nonverbal techniques, Arizona and New Jersey are probably attempting to comply with *Central Hudson's* requirement that state limitation on commercial speech be no more extensive than necessary. The result, however, may be that state regulatory challenge to lawyer advertising under partial prohibitions of nonverbal techniques is met successfully by the assertion that the prohibitions are unconstitutionally vague.

A total ban on the nonverbal techniques of emotional inducement is a third regulatory response to the specific problems these techniques raise in lawyer advertising. Iowa took this

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262. *In re* Zang, 154 Ariz. 134, 146, 741 P.2d 267, 279 (1987), *cert. denied*, 108 S. Ct. 1030 (1988).

263. *In re* Felmeister & Isaacs, 104, N.J. 515, 528, 518 A.2d 188, 194-195 (1986).

264. *Cf.* J. MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR 104 (1985) (stating that the "feel good" nonverbal messages of advertising are "almost impossible to regulate" as they "cannot be proven true or false"). "By substituting images for claims, the pictorial commercial made emotional appeal, not tests of truth, the basis of consumer decisions." N. POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 127 (1985). Truth and falsity are a product of language. *Id*; *see also* Reed & Coalson, *supra* note 20, at 752.

course in its rules of professional conduct, which were upheld in *Humphrey*.[265]

The authors believe that a total ban is both desirable and constitutionally defensible. It avoids the impossible task of having to divide advertising containing nonlogical, emotional presentations into logical categories of what is and is not allowable. At the same time it constitutes a regulation only of the manner of advertising presentation, and it permits full expression of intrinsic information concerning legal services. To say that prohibiting music, drama, and graphics makes an advertising lawyer's message less attention provoking, less effective, or boring is to claim that the use of information extrinsic to legal services is required to propel consumers toward that lawyer. It is an argument for deception.

Since the early twentieth century, social science has assisted the judiciary in shaping the soft contours of the Constitution.[266] The unavoidable ambiguities of constitutional interpretation have emphasized the importance of policy considerations to determining the outcome of complex issues. Economic theory concerning the value of advertising to informed decision-making implicitly premised the Supreme Court's initial decision to protect commercial speech under the first amendment. Beyond this threshold of economic theory, other social science now waits to illuminate policy issues in setting professional conduct standards regarding certain nonverbal techniques of lawyer advertising.

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265. Committee on Professional Ethics & Conduct v. Humphrey, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986).

266. *E.g.*, the Supreme Court apparently relied on the extensive social science literature cited in then Mr. Brandeis' famous brief in deciding Muller v. Oregon, 208 U.S. 412 (1908), which upheld an Oregon statute regulating the hours of women's employment. In the brief Brandeis spent only two pages on constitutional argument but "devoted over a hundred pages to statistics upon hours of labor, American and European factory legislation, and the health and morals of women." A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 526 (3d ed. 1963).

Appendix A[266]

ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES
AT VERY REASONABLE FEES

- Divorce of legal separation—uncontested [both spouses sign papers]

  $175.00 plus $20.00 court filing fee

- Preparation of all court papers and instructions on how to do your own simple uncontested divorce

  $100.00

- Adoption—uncontested severance proceeding

  $225.00 plus approximately $10.00 publication cost

- Bankruptcy—non-business, no contested proceedings

  Individual
  $250.00 plus $55.00 court filing fee

  Wife and Husband
  $300.00 plus $110.00 court filing fee

- Change of Name

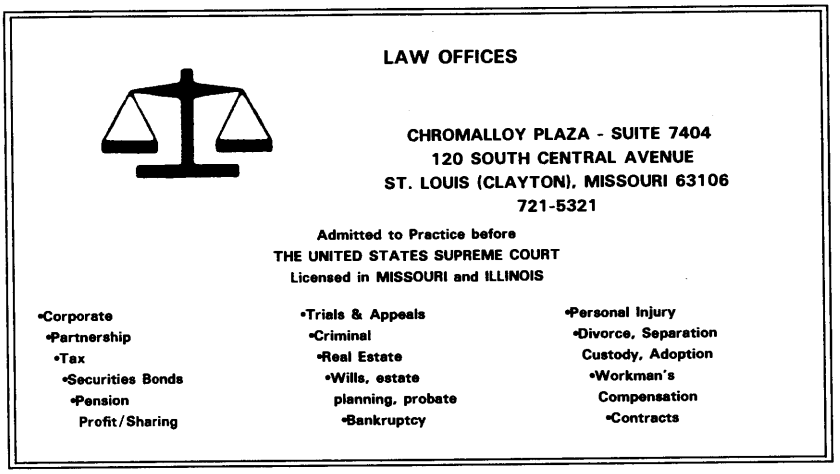
  $95.00 plus $20.00 court filing fee

Information regarding other types of cases furnished on request

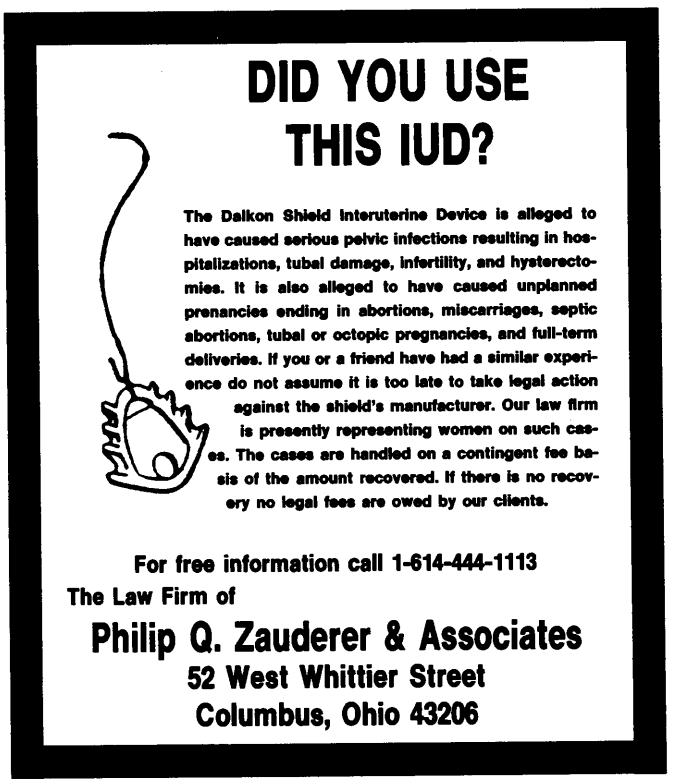
Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-8888

266. The ads reproduced here are not copies of the originals. They have been retypeset for purposes of readability.

Appendix B



Appendix C



Appendix D

DRUNK DRIVING

Full legal fee refunded if convicted of DRUNK DRIVING.

Expert witness (chemist) fees must be paid.

Call (614) 444-1113.

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