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An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising

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*The Contemporary Studies Project, inaugurated by the editors of the *Iowa Law Review* in 1970, is a systematic biannual analysis of a contemporary issue of relevance to Iowa's legal system. The Contemporary Studies Project usually has embraced an empirical approach, and this Project continues in that vein. The student authors and the *Iowa Law Review* gratefully acknowledge the University of Iowa Law Foundation and the Dennis Thorsen Memorial Fund for funding this Contemporary Studies Project. Dennis Thorsen coauthored the Contemporary Studies Project in Volume 63 and was Editor-in-Chief of Volume 64.

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I. INTRODUCTION

Since the Supreme Court held the prohibition of lawyer advertising unconstitutional in *Bates v. State Bar of Arizona*,[1] American lawyers have engaged in heated debate over the appropriateness of advertising for their profession. Although the debate over lawyer advertising—especially as it applies to mass media—raises relatively new issues for the profession, the

1. 433 U.S. 350 (1977).

concerns at the heart of the debate are the oldest that lawyers as a profession face. Lawyer advertising at its core is concerned with "professionalism": how lawyers, as an organized profession, ought to deliver legal service to the public.

Immediately following *Bates*, most state bar associations proceeded to regulate false and misleading advertisements.[2] Recently, however, concern with the image of lawyers has prompted many states to commence a "second wave" of attorney advertising regulation. Led by new bar rules in Iowa and Florida,[3] several states, through regulation, have attempted to supress "undignified," "tasteless," and "sleazy" lawyer ads.[4] Some have argued that lawyer advertisements have become the "graven image" of the profession. Indeed, state bar associations—in the spirit of a modern day Moses—often have acted through regulation to curtail or suppress the harsh imagery of lawyers who advertise. Recent regulation has focused particularly on mass media advertising, disclaimers, and maintaining professional "dignity" in messages to the public.

Apart from raising several constitutional questions,[5] this second wave reveals a fundamental tension which underlies the legal profession: Can lawyers make their services widely available to the public while sustaining a high level of quality? Why is the advertising of legal services at odds with sustaining minimal quality delivery of legal services? Further, does the legal profession's perception of "dignity" necessarily equate to quality of legal service?

A. Scope and Purpose

This Contemporary Studies Project[6] (Project) is an empirical examination of lawyer advertising. The Project focuses on the nature and effects of lawyer advertising and the regulation of lawyer advertising in Iowa. The purpose of the Project is to evaluate the advertising behavior of lawyers, the effect of lawyer advertising on the legal profession and on public access to legal services, the public opinion of lawyer advertising, and the general success of Iowa's regulatory approach to lawyer advertising. In conducting this evaluation, the Project considers the history of lawyer advertising and theories of professional regulation and advertising.

The Project is intended to provide bar associations with a basis for understanding the arguments for and against regulation of lawyer advertising and to evaluate the successes and failures of current regulatory approaches. The Project also informs the debate among lawyers about the appropriateness and effectiveness of lawyer advertising. The Project focuses on the Iowa Bar Association's generally "restrictive" approach in

2. *See* infra notes 73-93, 102-69 and accompanying text.

3. *See* infra notes 105, 107, 112, 134, 163-64, 170-226 and accompanying text.

4. Resnick, State Tries to Rein in Legal Ads, Nat'l L. J., Jan. 21, 1991, at 1, 22 (noting that at least 20 states are currently considering lawyer advertising regulations similar to Iowa and Florida restrictions).

5. *See* infra notes 55-71, 94-101, 117-29, 149-60, 217-26 and accompanying text.

6. The data collected in connection with the Project are on file in the University of Iowa College of Law Library.

regulating lawyer advertising.[7] The findings, conclusions, and recommendations of the Project, however, will be useful for other bar associations, especially those considering further restrictions on advertising by lawyers modelled after the Iowa approach.[8]

Advertising by lawyers always has been a "hot" issue within the bar,[9] and it is even more so in today's information age.[10] Although we do not expect our empirical findings to solve the current disagreement within the bar about lawyer advertising,[11] we do think that our findings illuminate and help refine the arguments used by both proponents and opponents of lawyer advertising. We also identify successes and failures in Iowa's current approach in regulating lawyer advertising. Finally, we offer proposals concerning the lawyer advertising debate.

B. Research Design and Methodology

We began the Project with a comprehensive survey of the voluminous literature addressing lawyer advertising. During this initial research stage, we sought to develop an historical perspective and identify the critical issues of disagreement concerning lawyer advertising within the bar. Once we identified these issues, we formulated several hypotheses and considered alternative methods for their empirical examination.

Due to resource and time limitations, mail surveys served as our primary research instrument. We supplemented this methodology with an innovative form of focus group research called "electronic message-testing."[12] Overall, the Project involved three primary research activities.

First, a two-page survey[13] was sent to a random sample of the general

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7. *See* infra notes 170-226 and accompanying text.

8. Iowa has taken an especially restrictive regulatory approach of electronic media advertising by lawyers. *See* infra notes 213-26 and accompanying text. The Iowa Supreme Court has also ordered that advertising by lawyers must inform potential clients of incidental costs of litigation and articulate a disclaimer. High Court Orders Warning Labels on Lawyer Ads, Des Moines Reg., May 4, 1989, at A8, col. 2. This revision of the disciplinary rules went into effect in June 1989. The Florida Supreme Court followed suit on December 20, 1990, by instituting strict new regulations of lawyer advertising in electronic media. At least 20 states are currently considering similar restrictions on electronic media advertising by lawyers. Resnick, supra note 4, at 1, col. 4.

9. *See* infra notes 39-75 and accompanying text.

10. *See, e.g.*, Resnick, supra note 4 (noting Florida's concern with possible misrepresentation to the public through television and radio advertisements by lawyers); Lawyers Tap Ads to Boost Clientele, Des Moines Reg., Dec. 17, 1989, at 1B (noting national trend to employ marketing firms for advertisement of legal services).

11. To be candid, the authors disagree among themselves as to the arguments for and against lawyer advertising. While one author has no resistance towards lawyers who advertise truthfully, the other author views certain types of lawyer advertising—at least in public media—as unprofessional and damaging to the legal profession. We note this implicit tension and our personal biases not to undermine the results of the Project, but to delineate its limitations.

12. We are thankful to Chris Wheeler of Rowan & Blewitt, Inc., a research organization in Washington, D.C., for conducting this portion of our research.

13. For a reprint of the population survey, see infra Appendix A.

populations of Iowa and Wisconsin.[14] Iowa and Wisconsin were chosen as comparative forums in order to develop a quasi-experimental research design because the states are geographically and demographically similar[15] and they have adopted different approaches in the regulation of lawyer advertising.[16] The central purpose of the population survey was to assess the effects of certain types of lawyer advertising on three areas: the public's perception of lawyers who advertise; lawyers as a professional group; and the court system.

The second primary research activity was a ten-page survey[17] sent to a sample of Iowa and Wisconsin lawyers.[18] The survey was modelled after a similar instrument used by the Federal Trade Commission (FTC) in preparation for a report describing the economic effects of lawyer advertising.[19] The questions asked by the survey concerned the nature of lawyer's advertising behavior,[20] the attitudes of lawyers towards the legal profession and lawyer advertising,[21] and the effects of lawyer advertising on legal service delivery.[22]

The third primary research activity was an electronic message-testing (EMT) session of sixty-three members of the public and twenty-seven law

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14. The sample was obtained from TeleConnect, Inc. of Cedar Rapids, Iowa. Of the 2022 surveys sent, 387 (19.1%) were completed and returned. Of the 1022 surveys sent to Iowa residents, 208 (20.4%) were completed and returned. Of the 1000 surveys sent to Wisconsin residents, 179 (17.9%) were completed and returned.

15. Wisconsin and Iowa are neighboring states with generally similar demographic characteristics. The national average per capita income is $12,772. The average per capita income for Iowa is $12,123 and the average per capita income for Wisconsin is $12,387. U.S. Dep't of Commerce, Bureau of the Census, County and City Data Book 8 (1988) (based on 1984 data). The national average percentage of adults with 12 years and above of education is 71.5%. The Iowa average percentage of adults with 12 years and above of education is 71.5% and the Wisconsin average is 69.6%. Id. at 5 (based on 1980 data). The average population per lawyer in the United States is 360. The average population per lawyer in Iowa is 471 and the average population per lawyer in Wisconsin is 462. U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 182 (1990) (based on 1985 data).

Iowa and Wisconsin do differ, however, in the percentages of their respective populations in urban and rural areas. The national average percentage of population in metropolitan areas is 77.1%. The average percent of population in metropolitan areas in Iowa is 43.5%, while the average in Wisconsin is 66.5%. U.S. Dep't of Commerce, Bureau of the Census, County and City Data Book (1988).

16. *Compare* infra notes 170-226 and accompanying text *with* notes 108, 131, 161.

17. For a reprint of the survey, see infra Appendix B.

18. The sample was obtained from TeleConnect, Inc. of Cedar Rapids, Iowa. Of the 978 surveys sent, 425 (43.5%) were completed and returned. For purposes of the Project, "completed" surveys include only those with a "yes" response to question 1, indicating only those lawyers who are in private practice. *See* infra Appendix B. A higher concentration of surveys was sent to Polk County, Iowa (which contains the Des Moines metropolitan area) and Dane County, Wisconsin (which contains the Madison metropolitan area) because of their high degree of urban and general demographic similarity.

19. Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising 83-99 (Cleveland Reg. Office and Bureau of Econ. 1984) [hereinafter FTC Report].

20. *See* infra Section IV.B.1.

21. *See* infra Section IV.B.2.

22. *See* infra Section IV.B.3.

students.[23] The EMT, by continuously surveying each respondent throughout exposure to the media, allows dynamic responses to media phenomena.[24] This research approach allowed an examination of the attitudes toward lawyer advertising generally and toward specific media advertisements held by a sample of both the general public and law students (future bar association members).[25]

C. *Organization of Discussion*

Following this introduction, Section II of the Project traces the history of lawyer advertising and discusses developments in the regulation of lawyer advertising since *Bates*. Section III discusses theories of professionalism, theories of the economic effects of lawyer advertising, and past empirical studies of the effects of lawyer advertising. Section IV presents an empirical analysis of the data collected in connection with the Project and discusses the results. In Section V, we make recommendations for the regulation of lawyer advertising to the Iowa Bar Association and other bar associations concerned with the regulation of lawyer advertising.

II. History of Lawyer Advertising Regulation

The historical development of lawyer advertising parallels the development of advertising in such fields as medicine and accounting.[26] Yet the regulation of lawyer advertising in the United States possesses a unique and ambivalent history of its own. Lawyer advertising was common in the early-nineteenth century and appeared regularly until the bar prompted ethical and regulatory prohibitions throughout the late-nineteenth and early-twentieth centuries.[27] For most of the early through mid late-twentieth century, state bars completely prohibited or severely restricted lawyer advertising in most media.[28]

Thirteen years ago, however, the United States Supreme Court extended constitutional protection to lawyer advertising in the landmark

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23. *See* Rowan & Blewitt, Inc., Message Testing and Analysis: Conducted for the University of Iowa College of Law by the Center for Communication Dynamics (Aug. 1989). This report is on file in the University of Iowa College of Law Library and is available from Rowan & Blewitt, Inc., Suite 1000, 1000 Vermont Ave., N.W., Washington, D.C. 20005.

24. Id. at 3. Unlike traditional media testing—which exposes a respondent to a single message and asks the respondent to assign a "grade" to the message at the end of a specified time period—electronic message-testing allows each respondent to articulate her reactions by turning a handheld dial continuously throughout the presentation. Id. The respondents were given instructions concerning the scales for each message.

25. *See* infra notes 428-48 and accompanying text. The EMT allows for interesting comparisons between the attitudes of these two groups.

26. Wolfram, Modern Legal Ethics 776 (Practitioner's ed. 1986) ("Lawyer advertising does not really have a history of its own; instead, most of the major moves and shifts in the area clearly parallel those in other fields such as medicine, dentistry, and accounting.").

27. *See* D. Calhoun, Professional Lives in America 82-83 (1965) ("Advertising by lawyers began to decline in Nashville during the 1840's and 1850's, revealing that the more respectable part of the bar no longer operated as a public institution where members advertised for practice from any farmer or planter who rode into town on Court day and picked up a newspaper."); infra notes 39-53 and accompanying text.

28. *See* infra notes 44-54 and accompanying text.

case of *Bates v. State Bar of Arizona*.[29] Six subsequent Supreme Court decisions have defined and expanded this protection.[30] These decisions have shifted the focus of the lawyer advertising debate from whether advertising should be permitted at all to what types of advertising states may regulate.

A. *Historical Regulation of Lawyer Conduct*

The American legal profession inherited much of its approach to ethics from England.[31] For many years, ethical norms and aspirations, rather than enforceable rules, governed the conduct of lawyers.[32] Mandatory codes of professional conduct have regulated lawyers for most of the twentieth century.[33] Most modern courts and legislatures adopt codes of professional conduct primarily for the purposes of determining a lawyer's responsibilities to the profession.[34] Codes serve the additional purposes of education, reinforcement of preexisting inclinations, and deterrence of undesirable conduct.[35]

Drafters also might be motivated by factors extraneous to facial purposes of professional codes. For instance, drafters of professional codes might be more compelled by protectionist concerns for self-interest than by concerns for the public good.[36] Lawyers have been criticized for potentially

29. 433 U.S. 350 (1977).

30. Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990) (state may not, consistent with first amendment, place an absolute ban on lawyer's good faith claims of certification where these claims may be presented in a way that is not deceptive); Shapero v. Kentucky State Bar Ass'n, 486 U.S. 466 (1988) (state may not impose blanket prohibition against targeted, direct-mail solicitation by lawyer for pecuniary gain); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (printed advertisements aimed at specific audience cannot be banned unless advertisements are false or misleading); *In re* R.M.J., 455 U.S. 191 (1982) (state cannot prohibit lawyer from listing fields of practice if listing is not false or misleading); *In re* Primus, 436 U.S. 412 (1978) (state generally needs to prove actual wrongdoing to discipline lawyer who engages in solicitation as protected political association); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state may, consistent with first amendment, impose blanket prohibition against in-person solicitation for pecuniary gain).

31. *See* infra notes 39-40.

32. Attanasio, Lawyer Advertising in England and the United States, 32 Am. J. Comp. L. 493, 502 (1986) (although advertising prohibitions were promulgated, they were not enforced); FTC Report, supra note 19, at 21 ("[D]uring the 1800s, prescriptions against advertising did not have much authority."). *See* infra notes 44-53 and accompanying text.

33. Wolfram, supra note 26, at 48. *See also* infra notes 54-93 and accompanying text.

34. Model Rules of Professional Conduct and Code of Judicial Conduct scope 12 (1984) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.").

35. Wolfram, supra note 26, at 48; Schwartz, The Professionalism and Accountability of Lawyers, 66 Calif. L. Rev. 669, 682 (1978) (although professional discipline is rare, "the existence of sanctions has a deterrent effect").

36. *Cf.* Bledstein, The Culture of Professionalism 108 (1976) ("medical profession found it necessary to protect its tangible interest with a national code. . . . the medical code etiquette became the means by which practitioners attempted to . . . restrict competitive practices [and] secure and maximize fee schedules"); Gilb, Hidden Hierarchies: The Professions and Government 20 (1966) (noting that many organizations employ the public interest as a "mask" in attempting to further their own interests); Illich, Disabling Professions 11, 20 (1977) ("public affairs pass from the layperson's elected peers into the hands of self accrediting elite");

protectionist regulation.[37] Since law is arguably the only profession which enjoys an absolute privilege of self-regulation,[38] it is a unique target for such criticism. Potential protectionism may justify a greater level of scrutiny in the examination of lawyers' codes of professional conduct.

1. Lawyer Advertising Regulations

The American legal community inherited a general sense of repugnance toward lawyer advertising from England.[39] In the eighteenth century, the lawyers of the English Inns of Court condemned lawyer advertising as beneath the dignity of the profession.[40] For many years in America, vague ethical norms, not professional codes, condemned lawyer advertising.[41] Alabama was the first state to adopt a legal code of ethics.[42] Although the Alabama Code explicitly permitted newspaper advertisements that tendered "professional services to the general public," it condemned as "wholly unprofessional all forms of self-laudation, newspa-

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Larson, The Rise of Professionalism: A Sociological Analysis 40 (1977) (asserting that standardization or codification of professional knowledge can be used as a method for market control); Barber, Control and Responsibility in the Powerful Professions, 93 Pol. Sci. Q. 599, 603 (1978-79) (professional codes have historically "contributed more to a monopoly of power and interest for the profession than was good for the public welfare.").

37. *See* Abel, American Lawyers (1989) (arguing that legal profession historically has acted to maintain its control over the regulation of lawyers and practice of law); Wolfram, supra note 26, at 48 (stating that protectionism might be a motivation for drafters of professional codes); Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 667 (1981) (rules designed primarily to legitimate the role of elite lawyers and secondarily for purposes of market control); Green, The ABA as Trade Association, in Verdicts on Lawyers (R. Nader & M. Green eds., 1976) (discussing that while the ABA slowly may be changing, it is still primarily concerned with preservation of the status quo for the benefit of its members); id. at 19 ("[W]hile law is supposed to be a device to serve society . . . it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers.") (quoting Fred Rodell). For a discussion of the economic benefits of self-regulation, see generally infra notes 325-82 and accompanying text.

38. The promulgation of lawyer regulations is an "inherent" power of the courts. Therefore, lawyers as a professional group enjoy a unique privilege of self-regulation regardless of legislative preoccupation of the field. *See* Board of Commissioners v. Baxley, 295 Ala. 100, 324 So. 2d 256 (1976) (statute regulating Alabama Bar is an exercise of judicial powers by the state and therefore is invalid under the state constitution); Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973) (statute regulating practice of law and distribution of fees paid by lawyers is exercise of judicial powers and therefore invalid under state constitution); Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718 (creation of a state bar by the state supreme court is a valid exercise of judicial function) *cert. denied,* 396 U.S. 939 (1969); *cf.* Note, The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation, 60 Minn. L. Rev. 783 (1976) (asserting that "virtually all courts claim the inherent judicial power . . . [to] generally regulate the practice of law").

39. Drinker, Legal Ethics 210 (1953) (stating that English trained barristers brought the advertising bans to America).

40. Francis & Johnson, The Emperor's Old Clothes: Piercing the Bar's Ethical Veil, 13 Willamette L. Rev. 221, 223-24 (1977) ("Advertising, it was believed, would be beneath their dignity. Since barristers were few and clients plentiful, there was no need for Madison Avenue.").

41. Wolfram, supra note 26, at 776; Attanasio, supra note 32, at 502.

42. Drinker, supra note 39, at 213.

per press notices, or editorials."[43]

2. *1908 ABA Canons of Ethics*

In 1908, the American Bar Association (ABA) adopted its Canons of Ethics.[44] The ABA Canons consisted of thirty-two advisory statements for lawyers. These statements established uniform standards for lawyers regardless of the state in which they were admitted to practice.[45] The preamble to the ABA Canons states the objective of maintaining "absolute confidence in the integrity and impartiality" of the administration of justice, as reflected in the "conduct and motives of the members of our profession."[46]

The ABA Canons did not completely prohibit advertising. According to Canon 27, "the customary use of simple professional cards is not improper" and "[p]ublication in reputable law lists in a manner consistent with the standards of conduct . . . is permissible."[47] The solicitation of professional employment was branded unprofessional, however, when accomplished "by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."[48] Canon 27 also warned of the "unprofessional" nature of other types of advertising, such as direct advertising through circulars or personal communication, indirect advertising through newspaper comments or photographs, and other "self-laudation."[49]

The ABA Canons were considered unnecessary and widely ignored for many regulatory purposes.[50] In 1910, only three percent of lawyers in

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43. Alabama State Bar Association Code of Ethics (1887). The Alabama Code was patterned after the lectures of Judge George Sharswood, published in 1854. *See* Attanasio, supra note 32, at 503 (noting that Sharswood's work was predicated on his 1854 view of a homogeneous, tightly knit rural community in which people knew lawyers personally).

44. ABA Canons of Professional Ethics (1908) [hereinafter ABA Canons]. The ABA Canons were copied largely from the Alabama State Bar Association's 1887 Code of Ethics. Wolfram, supra note 26, at 54.

45. The Canons were applied in all states, as amended, until the adoption of the Code in 1970. *See* infra note 54.

46. ABA Canons, supra note 44, at 3.

47. Id. Canon 27. Canon 27 states:

> Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses; branches of the profession practiced; date and place of birth and admission to the bar; schools attended; with dates of graduation, degrees and other educational distinctions; public or quasi-public offices; posts of honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; foreign language ability; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented.

Id.

48. Id.

49. Id.

50. Wolfram, supra note 26, at 50.

the United States belonged to the ABA.[51] Moreover, most lawyers were general practitioners in small communities who rendered legal services on a one-to-one basis to people they knew.[52] Appropriately, the ABA Canons have been interpreted as "an assertion by the elite lawyers in the ABA of the legitimacy of their claim to professional stature."[53]

3. The Model Code of Professional Responsibility and Bates

The original 1969 Model Code of Professional Responsibility (Model Code) prohibited most lawyer advertising in much the same manner as the ABA Canons.[54] In August 1977, the Supreme Court, in *Bates v. State Bar of Arizona*,[55] extended first amendment protection to fee advertising by lawyers under the commercial speech doctrine. Immediately following *Bates*, the advertising provisions of the Model Code were amended.[56]

Bates arose when the Arizona bar disciplined two lawyers under state lawyer advertising provisions for placing a newspaper advertisement of "legal services at very reasonable rates" accompanied by a list of specific fees for certain legal services.[57] The *Bates* Court stated that commercial speech "serves individual and societal interests in assuring informed and reliable decision making."[58] Because of its concern with the public need for legal services, the Court rejected the argument that the practice of law is unique and should not be analyzed under the "commercial speech" doctrine.[59] The

51. Hurst, The Growth of American Law: The Law Makers 289 (1950).

52. Andrews, Lawyer Advertising and the First Amendment, 1981 Am. B. Found. Res. J. 967, 968; Attanasio, supra note 32, at 503 (noting homogeneous, rural society in which most people knew lawyers personally and lawyers could recognize their legal problems).

53. Wolfram, supra note 26, at 54 (citation omitted).

54. The general language of the original Code, however, is more prohibitive than the ABA Canons: "A lawyer shall not publicize himself, his partner, or associate 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(B) (Final Draft, 1969). This draft was adopted by the ABA House of Delegates in 1970. Model Code of Professional Responsibility (1970).

55. 433 U.S. 350 (1977).

56. In addition to immediate post-*Bates* amendments, minor amendments to DR 2-101 and 2-102 were made in August 1978, February 1979, February 1980, and August 1980. Wolfram, supra note 26, at 1021.

57. *Bates*, 433 U.S. at 350. The services listed were uncontested divorce, uncontested adoption, uncontested personal bankruptcy, and change of name. The two lawyers were recent honors graduates who operated a legal clinic that did a high volume of standardized work at low cost. The lawyers believed that they needed to advertise in order for the clinic to survive. Id. at 353-54. The lawyer advertising provisions effective in Arizona at the time were modelled after the ABA Code.

58. Id. at 364-65.

59. Id. at 371-72. Commercial speech is speech that proposes a commercial transaction. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 761 (1976). Traditionally, commercial speech lacked constitutional protection. *See, e.g.*, Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (first amendment forbids blanket ban on communicating information in public, but government may regulate such dissemination of "purely commercial speech"). Over the years, the Supreme Court narrowed the scope of *Chrestensen*. *See* Bigelow v. Virginia, 421 U.S. 809, 819-20 (1975) (communications conveying information

Court also rejected arguments that lawyer advertising: has an adverse effect on professionalism;[60] is inherently misleading because legal services are individualized;[61] has an adverse effect on the administration of justice by encouraging fraudulent claims and excessive litigation;[62] has the undesirable economic effects of increasing fees and creating a substantial entry barrier to young lawyers;[63] has an adverse effect on the quality of legal services;[64] and should be banned due to enforcement difficulties.[65]

Although the *Bates* Court held that a blanket ban on lawyer advertising violates the first amendment,[66] it specifically stated that a state can restrain

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about commercial activities related to the public's "constitutional interests" may deserve first amendment protection). In 1976, the Court explicitly extended a level of first amendment protection to commercial speech. *Virginia Citizens Consumer Council*, 425 U.S. at 770 (commercial speech entitled to first amendment protection but certain regulation still permissible). Today, commercial speech receives substantial first amendment protection. *See, e.g.*, Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) (credit reportings entitled to the substantial protection afforded by first amendment); Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985) (first amendment protects lawyer advertising which accurately represents information regarding legal rights of potential clients); *see also* infra notes 94-101 and accompanying text (commercial speech is not subject to the overbreadth doctrine).

60. *Bates*, 433 U.S. at 368-72. The Court felt it was deceiving for fee-earning lawyers to conceal that they were engaged in commercial activity. Moreover, the Court said "the absence of advertising may be seen to reflect the profession's failure to reach out and serve the community." Id. at 370.

61. Id. at 372-75. The Court found that "routine" legal services can be advertised for a set price because consumers of legal services are capable of diagnosing their need for legal representation, and prohibition of lawyer advertising would only increase existing client ignorance. Advertisements for routine legal services are not misleading if the lawyer fully performs the service for the advertised fee. However, "[t]he only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, a change of name, and the like—the very services advertised by appellants." Id. at 372.

62. Id. at 375-77. The Court "[could] not 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. Rather, the Court stressed the role of advertising in informing the public about lawyers and legal rights. Id. at 376 n.32.

63. Apparently, the Court dismissed this argument as irrelevant to first amendment considerations. Id. at 377. The Court found it plausible that advertising would effectively increase price competition, thus reducing an artificially high level of fees. Id. Moreover, advertising could allow new attorneys to penetrate the market more rapidly by increasing their contacts with the community. Id. at 377-78.

64. Id. at 378-79. The Arizona Bar argued that advertising would induce the lawyer to cut quality in order to deliver a standard package of services, regardless of individual client needs. The Court reasoned that restricting advertising was not the best way to deter the incompetent practice of law. Id. at 379. Lawyers who are inclined to deliver low quality services will continue to do so regardless of advertising. Further, some programs prescribe maximum fees, and standardizing legal services might actually reduce the likelihood of error. Id. at 378-79.

65. Id. at 379. The Court noted the traditional practice of lawyers to uphold the integrity and honor of their profession. In addition, the legal system provides adequate standards for lawyer advertising. Id.

66. Id. at 383. The Court rejected the argument that Arizona's disciplinary rules violated the anticompetitive clauses of the Sherman Act, 15 U.S.C. §§ 1-7 (1988), and found that the Arizona Supreme Court was entitled to state action immunity. Id. at 359-63. The Court distinguished Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), which held minimum fee schedules for attorneys violative of the Sherman Antitrust Act. The *Goldfarb* Court found the conduct was that of the bar association and not the state itself. Id. at 791. Arguably

"false, deceptive, or misleading" advertising and advertising of illegal services.[67] Additional "reasonable restrictions on the time, place, and manner of advertising" by the state are constitutional.[68] Such restrictions might include disclaimers to protect the public,[69] limitations on in-person solicitation,[70] and regulations required by advertising on electronic media, as based on the "special consideration" noted in *Bates*.[71]

Whether *Bates* prompted intense competition in legal advertising is debatable.[72] However, *Bates* clearly hurled state bar associations and courts into an extensive reworking of constitutionally permissible limits of state regulation.[73] Substantial controversy erupted within state bar associations over whether *Bates* should be read broadly to protect all advertising that is not false or misleading or narrowly to protect only limited types of information.[74] This controversy resulted in diverse regulatory approaches among the states.[75]

The amended Model Code allows lawyer advertising, although not without restriction.[76] The Model Code states that "[a] lawyer shall not . . . use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or

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anticompetitive behavior of the legal profession is exempt from federal scrutiny so long as the regulation involves direct and active involvement by the state's supreme court. *See* Wolfram, supra note 26, at 42; *See also* Maute, Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine, 13 Hastings Const. L.Q. 487, 488, 528 (1986) (comparing antitrust and first amendment analysis of lawyer advertising cases, and opining that latter doctrine should be preferred).

67. *Bates*, 433 U.S. at 383. States may require a higher standard of integrity for legal advertising than for other types of commercial advertising because the "public lacks sophistication concerning legal services." Id.

68. Id. at 384.

69. Id. *See* infra notes 132-37 and accompanying text.

70. Id. *See* infra notes 138-48 and accompanying text.

71. Id. *See* infra notes 165-69, 213-26 and accompanying text.

72. *See* Ramson, Counselor, Advocate, Salesman? Attorney Advertising and Solicitation: An Overview, Ariz. Att'y 18 (Oct. 1988) (noting the magnitude of the lawyer advertising trend); *see also* Reidinger, Lawpoll, 70 A.B.A. J. 25 (1987). *But cf.* Wolfram, supra note 26, at 780 n.46 (claiming *Bates* had remarkably little effect on the way that most lawyers conduct their practices; citing the same data as Ramson, but looking only at earlier years); LawPoll: Lawyer Advertising Levels Off: P.R. Use Growing, 70 A.B.A. J. 48 (1984). The percentage of lawyers who advertised rose sharply as the attorney's income and the size of the law firm decreases. Lawpoll: Advertising Attracting Neither Participants Nor Supporters, 67 A.B.A. J. 1618 (1981).

73. *See* Wolfram, supra note 26, at 780 (noting that the narrow reading of *Bates* by some states and the proposed amendments to the ABA's Model Code of Professional Responsibility have provided a "minimally constitutional set of rules").

74. Andrews, supra note 52, at 986-88; Wolfram, supra note 26, at 780 n.48.

75. *See* Andrews, Birth of a Salesman: Lawyer Advertising and Solicitation 43 (1980); infra notes 102-69 and accompanying text (discussing current state regulations).

76. Model Code of Professional Responsibility DR 2-101 (1981). *See* Andrews, supra note 52, at 971. The Model Code was amended to conform with *Bates*. *See* supra note 56 and accompanying text; *see also* Wolfram, supra note 26, at 780 n.48 (noting that following *Bates* some states only prohibited "false or misleading advertising," while other states only accommodated *Bates* with great reluctance).

unfair statement or claim."[77] Further, advertising is limited to specific information, which must be "presented in a dignified manner."[78] The Model Code does not distinguish between electronic media and print media in its restrictions of the content and manner of advertising.[79]

Immediately following the *Bates* case, many states adopted the Model Code's strict regulatory approach.[80] Subsequently, political, social, and cultural concerns leading to divisive debates over the provision of legal services and lawyer advertising caused extreme variation among the states in their acceptance of the Model Code.[81] In 1977, the president of the ABA appointed a Commission on Evaluation of Professional Standards (Kutak Commission) to conduct a thorough examination of ethical premises and problems within the legal profession.[82]

4. The Model Rules of Professional Conduct

The Kutak Commission proposed a report to reform the Model Code to the ABA House of Delegates in 1981.[83] This report was adopted as the Model Rules of Professional Conduct (Model Rules) in 1983.[84] Advertising provisions of the Model Rules allow a lawyer to advertise services through

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77. Model Code of Professional Responsibility DR 2-101 (1986).

78. Id. DR 2-101(B). A lawyer may only advertise the following items:

> [N]ame, address and telephone number; fields of law in which the lawyer practices; date of birth; date and place of admission to bar; schools attended; public or quasi-public offices; military service; legal authorships; legal teaching positions; bar association memberships and positions; memberships in other legal groups; technical and professional licenses; memberships in scientific, technical, and professional associations; foreign language ability; names and addresses of bank references; names of clients regularly represented; prepaid group legal services plans in which lawyer participates; whether credit arrangements are accepted; office and telephone answering service hours; fee for an initial consultation; availability of written fee schedule or estimated fees; contingent fee rates; range of fees; hourly rates; and fixed fees for specific legal services.

Id.

79. "If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer." Id. DR 2-101(D) (1981). Compare Iowa's regulations, which distinguish print and electronic media, infra notes 213-26 and accompanying text.

80. *See* Wolfram, supra note 26, at 780 n.48. Thirty-one states based their rules in part on DR 2-101 of the Model Code. These states allowed lawyers to list "only those items specified in DR 2-101." Andrews, supra note 52, at 986-88. The other nineteen states adopted a more permissive approach, and allowed advertising that was not "false, fraudulent, misleading, or deceptive." Id. at 988.

81. Wolfram, supra note 26, at 50. Many factors precipitated debates within the bar: the Watergate episode, Supreme Court advertising and solicitation decisions, Securities Exchange Commission attacks on lawyers, and criticisms that the Model Code was too oriented toward the adversary model and insufficiently concerned with the public interest of clients. Pirsig & Kirwin, Professional Responsibility 25 (4th ed. 1984).

82. ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Chairman's Introduction (Proposed Final Draft, 1981) [hereinafter "Proposed Model Rules"].

83. Id.

84. Model Rules of Professional Conduct (1984).

public media, including radio and television.[85] The only qualifications are that the advertisement may not be "false or misleading,"[86] it must contain the name of at least one lawyer responsible for its content,[87] and it must be kept on record for two years after its dissemination.[88] The Model Rules address several additional aspects of advertising, including payment for promotion,[89] communication of fields of practice,[90] firm names and letterheads,[91] and solicitation.[92] The Model Rule's regulatory approach, unlike that of the Model Code, does not limit advertisements to specific information.[93]

B. Constitutionality of Commercial Speech

State action affecting lawyer advertisements that are solely commercial speech is subject to the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[94] The state may completely prohibit misleading

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85. Id. Rule 7.2.

86. Id. Rule 7.1.

87. Id. Rule 7.2(d).

88. Id. Rule 7.2(b).

89. Id. Rule 7.2(c). The rule states:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or written communications permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Id.

90. Id. Rule 7.4. A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is a specialist unless admitted to patent practice, admiralty practice, or other practice of specialization designated by state. Id.

91. Id. Rule 7.5. *Cf.* Model Code of Professional Responsibility DR 2-102 (1986) (regulating professional notices and letterheads of lawyers and law offices).

92. In-person, telephone, and certain direct mail solicitation are generally prohibited. Model Rules of Professional Conduct, Rules 7.2 (a), 7.3 (1984).

93. *See* id. Rule 7.1 (allowing lawyer to make any communication so long as not false or misleading). Compare Model Code of Professional Responsibility DR 2-101(B) (1987) (listing specific items which may be advertised).

94. 447 U.S. 557 (1980). In *Central Hudson*, the Court articulated the following test:

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

The Court's analysis of lawyer advertising cases distinguishes between substantial and arguable state interests. Wolfram, supra note 26, at 781. An example of a substantial interest is the prevention of consumer fraud through false or misleading communications; the prevention of consumer confusion caused by the word "clinic" in a firm name would be an arguable interest. A state may regulate advertising in order to protect a substantial interest if the state also demonstrates: (a) the lawyer's communication violates a specific rule; (b) the facts of the particular case show that a substantial state interest is in fact violated; and (c) the

or deceptive speech or speech concerning an unlawful activity.[95] The state may restrict all other commercial speech if: (1) the state asserts a substantial interest in restricting the speech; (2) the restriction directly promotes that state interest; and (3) the restriction "is not more extensive than is necessary to serve that interest."[96] This test has been applied so strictly that it has never upheld a regulation of lawyer advertising.[97]

The overbreadth doctrine allows a party to challenge a regulation on its face as overbroad even if it is not overbroadly applied to the facts at hand.[98] To the extent that lawyer advertising is commercial speech, it is not subject to the overbreadth doctrine.[99] A recent case, however, suggests the overbreadth doctrine may apply to noncommercial aspects of a commercial message.[100] The Court has suggested that lawyer advertisements may contain noncommercial messages, such as political and associational information.[101] An argument exists that the overbreadth doctrine applies to this noncommercial content of lawyer advertisements.

C. Recent Regulation of Lawyer Advertising by the States

States remain deeply divided over the regulation of lawyer advertising.[102] With the exception of California,[103] each state has adopted its own version of either the Model Code or the Model Rules, sometimes with minor revisions.[104] Some state codes allow lawyer advertising only in

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regulation is not applied any broader than necessary to maintain the state's specified interest. Id.

95. *Central Hudson*, 447 U.S. at 566.

96. Id. Under the Supreme Court's most recent formulation, "no broader than necessary" does not mean that no less restrictive alternatives exist. Instead, it means that the regulation is reasonably related to a substantial state interest. Board of Trustees of New York v. Fox, 492 U.S. 469, 480 (1989).

97. *See* Ramson, supra note 72, at 19.

98. Tribe, American Constitutional Law §§ 12-27, 28 (2d ed. 1988) (discussing the overbreadth doctrine).

99. Id. at 1023 n.5. *See* supra note 59 (discussing *Bates* and inapplicability of overbreadth to commercial speech).

100. A recent Supreme Court case mentions in dicta that although commercial speech is not protected by the overbreadth doctrine, the noncommercial content of commercial messages is subject to first amendment guarantees. Where a law restricting commercial speech is valid as applied, an overbreadth challenge may protect the noncommercial content of the message of the speech. *Fox*, 492 U.S. at 481-84.

101. *In re* Primus, 436 U.S. 412, 431 (1978) (noting communication of advertisements by ACLU lawyers as means of political expression and association provided useful information).

102. *See* Andrews, supra note 75, at appendix III (surveying approaches of the states); Andrews, supra note 52, at 969 n.11 (noting that the amended code sections reflect the wide variety of state regulation over type, content, and format of lawyer advertising and solicitation); Wolfram, supra note 26, at 781-85 (examining state approaches to different lawyer advertising issues).

103. Wolfram, supra note 26, at 64. Many local bar associations in California have adopted the Model Code as part of their bylaws. Opinions of California courts and bar ethics committees refer to the Model Code for guidance where the California Rules are silent or obscure. Id.

104. Though the Model Code initially was accepted uniformly among the states, states have been more hesitant in adopting the Model Rules. Id. at 63.

those situations where the Supreme Court has delineated constitutional protection,[105] while others liberally permit lawyer advertising with few additional restrictions so long as it is not false or misleading.[106] Recent lawyer advertising trends among the states pull at the extremes. On the one hand, several states have instituted efforts to curb advertising.[107] On the other hand, many states have adopted very liberal rules that only prohibit false or misleading advertising.[108]

1. General Approaches Among the States

A state clearly may prohibit lawyer advertising which is "false or misleading."[109] States that have adopted the Model Code also tend to

105. *See* States Continue Efforts to Regulate Advertising, 5 Law. Man. on Prof. Conduct (ABA/BNA) 277-78 (discussing regulations in Iowa and proposed restrictions in Florida); *see also* Marcotte, Lawyer Ad Limits, 75 A.B.A. J. 42 (1989); Peltz, Legal Advertising—Opening Pandora's Box? 19 Stetson L. Rev. 43, 103 (1989) (discussing pending regulations in Florida).

106. *See* FTC Report, supra note 19, at 103-05 (grouping states as "liberal," "moderate," or "restrictive," according to lawyer advertising content and media restrictions).

107. Such states include Alabama, Florida, Illinois, Iowa, and Kentucky. *See* N.Y. Times, June 30, 1989, at 20Y. Iowa and Florida have been pushing the limits of constitutionally permissible regulations of lawyer advertising. States Continue Efforts to Regulate Advertising, 5 Law. Man. on Prof. Conduct (ABA/BNA) 277-78 (1989) (discussing regulations in Iowa and proposed restrictions in Florida). For a detailed discussion of Iowa's regulations, see infra notes 170-226 and accompanying text. Florida's proposed restrictions: (1) prohibit actors, lyrics, jingles, dramatizations, and testimonials; (2) require disclaimers advising consumers to ask for lawyer qualifications; (3) permit only Florida lawyers to appear in commercials; (4) require full disclosures of client fees and costs; and (5) completely ban direct mail to potential personal injury and wrongful death clients. Marcotte, supra note 105, at 42. A new bar committee would review all materials; violators would be required to forfeit their attorney's fees. Id. *See also* Peltz, supra note 105, at 103 (discussing pending regulations in Florida). The Florida regulations were approved, with minor modifications, by the Florida Supreme Court on December 21, 1990. *See* The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So.2d 451 (Fla. 1990).

108. *See, e.g.*, California State Bar Act, Rules of Professional Conduct Rule 1-400(D) (1990) (prohibiting untrue, false, confusing, and deceptive communications or solicitations); Wisconsin Supreme Court Rules, Rules of Professional Conduct for Attorneys Rule 20:7.1 (West Special Pamphlet 1989) (prohibiting lawyer from making false or misleading statements).

109. *See* Model Rules of Professional Conduct Rule 7.1 (1984) ("[A] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."). The Supreme Court has upheld most communications as not inherently misleading. *See* Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91, 106 (1990) (letterhead making bona fide claim of certification by national board not actually or inherently misleading); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (illustrations or pictures in advertisements not inherently misleading); id. (newspaper advertisement targeted to persons with specific legal problem and inviting them to use particular firm not inherently misleading); *In re* R.M.J., 455 U.S. 191, 205 (1982) (listing jurisdictions in which lawyer is admitted to practice not inherently misleading); id. (nondeceptive listing of areas of practice which deviates from precise areas required by disciplinary rule not inherently misleading); Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977) (offering legal services for uncontested divorce at "very reasonable prices" when price falls within range of prices commonly charged in lawyer's geographic area not inherently misleading); id. at 381-82 (referring to standardized legal practice that offers multiple services as "legal clinic" not inherently misleading); id. at 382 (failing to state consumer may perform service without lawyer's help not inherently misleading).

The Court, however, has held some types of advertising by lawyers misleading. *See Zauderer*, 471 U.S. at 652-53 (statement that no fee will be charged unless recovery is misleading unless

prohibit "self-laudatory" advertising[110] and require that communications about legal services be "dignified."[111] Iowa is one such state.[112] Significant differences exist among the states with respect to item prohibitions,[113] disclaimers,[114] solicitation and direct mail,[115] and electronic media advertising.[116]

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it informs client of liability for costs and expenses of litigation); *In re* R.M.J., 455 U.S. at 205 (listing lawyer as member of U.S. Supreme Court Bar in large capital letters might be misleading to general public unfamiliar with admission requirements); see also *Matter of Zang*, 154 Ariz. 134, 142, 741 P.2d 267, 275 (1987) (print advertisements referring to courtroom and trial expertise misleading where firm has policy of referring actions that went to trial to other lawyers), *cert. denied*, 484 U.S. 1067 (1988); Leon v. State Bar of Calif., 39 Cal. 3d 609, 626-68, 704 P.2d 183, 193-95, 217 Cal. Rptr. 423, 434 (1985) (direct-mail stating recipient needs $60 to apply for debt relief but failing to state lawyer's fees would be ten times that amount misleading).

110. The enforceability of prohibitions of "self-laudatory" statements is questionable. According to one author, these prohibitions apparently cover statements such as "most successful litigator" or "member of Million Dollar Verdict Club." *See* Wolfram, supra note 26, at 782.

111. Whether a statement is "dignified" is a purely subjective question. [1989-90 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 81:207. The state's interest in requiring "dignified" communications is questionable. *See Zauderer*, 471 U.S. at 648 ("[W]e are unsure that the state's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their first amendment rights."); *In re* R.M.J., 455 U.S. 191 (1982) (potential adverse effect of advertising on professionalism and quality of legal services is not sufficiently related to a substantial state interest to justify regulation; speech must also be misleading); *Bates*, 433 U.S. at 369-70, 383-84, (stating that claims that advertising will diminish the reputation of the legal profession are unsubstantiated and restrictions based on such claims are impermissible).

112. Iowa prohibits a lawyer from advertising statements or claims that are "false, fraudulent, misleading, deceptive, self-laudatory, or unfair." Iowa Code of Professional Responsibility DR 2-101 (1989). A 1989 ABA annual meeting, entitled "Lawyer Advertising: How Far Can Regulation Go?", discussed lawyer advertising regulations recently adopted by Iowa and Florida. 5 Law. Man. on Prof. Conduct (ABA/BNA) 277 (1989). Iowa's regulations have focused primarily on allowing only "informational" advertisements, requiring that information be presented in dignified manner and requiring a disclaimer on all advertisements. Id at 278. Additional Iowa regulations require filing direct-mail advertising documents for pre-dissemination review and limit electronic media advertising to a single non-dramatic voice. Id. The proposed Florida regulations, which were approved with minor modifications in December 1990, generally "aim to regulate not only false and misleading advertisements, but also advertisements that have an adverse impact on the administration of justice." Id. Additional proposed Florida regulations limit television advertisements to members of the Florida Bar and completely prohibit direct-mail solicitation in wrongful death and personal injury cases. Id. The Florida regulations were approved, with minor modifications, on December 21, 1990. *See* Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990). New Jersey, like Iowa, requires that television advertisements be "predominantly informational" and not solely promotional. *In re* Petition of Felmeister, 104 N.J. 515, 520-21, 518 A.2d 188, 194 (1986). For further discussion of Iowa's regulations, see infra notes 170-226 and accompanying text.

113. *See* infra notes 117-31 and accompanying text.

114. *See* infra notes 132-37 and accompanying text.

115. *See* infra notes 138-64 and accompanying text.

116. *See* infra notes 165-69 and accompanying text.

a. *Item Restrictions*

The Supreme Court has consistently struck down lawyer advertising regulations that do not pass the test articulated in *Central Hudson*. In *In re R.M.J.*,[117] the Court ruled that the state, which did not apply the *Central Hudson* test,[118] had wrongly disciplined a lawyer for not following the state's language and content restrictions.[119] The Court confirmed that states may prohibit false or misleading attorney advertising, but stressed that regulations may be no broader than necessary to prevent deception.[120]

Three years later, in *Zauderer v. Office of Disciplinary Counsel*,[121] the Court strongly reaffirmed a lawyer's first amendment right to advertise while emphasizing the public's right to be informed.[122] The Court struck down as unconstitutional state prohibitions on solicitation through advertisements concerning specific legal problems[123] and state restrictions on the use of illustrations in lawyer advertising.[124] The Court also questioned whether a "[s]tate's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify abridgement of their first amendment rights."[125]

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117. 455 U.S. 191 (1982).

118. *See* supra notes 94-97 and accompanying text.

119. The lawyer advertised that he was admitted to practice before the United States Supreme Court, and described his practice areas in language other than that prescribed by the state. Additionally, he did not employ the required disclaimer, and he mailed professional announcement cards to persons other than former clients. *In re R.M.J.*, 455 U.S. at 196-97.

120. Id. at 203. The Court noted that a state could require a lawyer to stamp "This is an Advertisement" on the envelope of a mailing. Id. at 206 n.20.

121. 471 U.S. 626 (1985). In *Zauderer*, a lawyer placed two newspaper advertisements. The first offered to defend drunk drivers and stated that the "full legal fee" would be refunded if the client was convicted of drunk driving. The second was directed at women who had been injured by the Dalkon Shield intrauterine device and included a line drawing of the device. Id. at 630-31.

122. Id. at 633.

123. Zauderer advertised that he would not charge attorney's fees unless the client received a recovery. The advertisement did not warn clients that they would be liable for "costs" even if their lawsuits were unsuccessful. The Court did find that the state could require disclosures relating to the terms of the contingent fee arrangement. However, unjustified or unduly burdensome disclosure requirements that chill protected commercial speech may violate the first amendment. Id. at 653-54 n.15.

124. The Court found that the use of illustrations or pictures in advertisements attract the attention of the audience and may serve to directly import information to the public. Thus, commercial illustrations enjoy the same first amendment protection as verbal commercial speech. Id. at 647.

125. Id. at 647-48. The Court noted that even if the state interest was substantial, a prophylactic rule could not be tolerated. Id. at 644. Although two cases have upheld attempts by states to regulate dignity in lawyer advertising against first amendment and vagueness challenges, the Supreme Court has never considered the issue. *See* Bishop v. Committee on Prof. Ethics and Conduct, 521 F. Supp. 1219 (S.D. Iowa 1981) (state may prohibit advertising through fliers, leaflets, billboards and telephone covers to prevent "commercialization" of the legal profession), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982) ; *In re* Petition for Rule of Court, 564 S.W.2d 638 (Tenn. 1978) (state may prohibit handbills because they are beneath the dignity of the legal profession). Many commentators consider the dignity standard too subjective to conform to the first amendment. [1989-90 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 81:206; Ramson, supra note 72, at 22 n.6.

In *Peel v. Attorney Registration & Disciplinary Comm'n*, the Supreme Court held that it is unconstitutional for a state to prohibit a lawyer from advertising as a "Certified Trial Specialist" by the National Board of Trial Advocacy.[126] A plurality of the Court held that Peel's advertisement of certification in a letterhead was not "actually or inherently misleading."[127] The Court also cited with approval the standard presented by Justice Powell in *In re R.M.J.*: "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."[128] Because the certification information Illinois prohibited in lawyer advertisements could have been presented in nondeceptive ways, the Court held this regulation unconstitutional.[129] Although some states allow lawyers to advertise any information so long as it is not false or misleading,[130] most states limit the information a lawyer may advertise to specific "informational" items.[131]

b. Labels and Disclaimers

The *Bates* Court noted that states may require disclaimers for lawyer advertisements.[132] States generally require two distinct sorts of disclaimers or qualifying language to accompany lawyer advertising. A popular approach requires a lawyer's communication to be labelled an "advertisement."[133] A less typical approach requires lawyer advertisements

126. 496 U.S. 91 (1990).

127. Id. at 111 (plurality); id. at 111 (Marshall, J., concurring).

128. The language originally appeared in *In re* R.M.J., 455 U.S. at 203; it is cited in *Peel*, 496 U.S. at 100-01 (plurality); id. at 111 (Marshall, J., concurring).

129. The court reaffirmed that a state retains the authority to regulate communications that are not misleading, but only where the state asserts a substantial interest. Id. at 4687 (citing *In re* R.M.J.). In concurrence, Justice Marshall, joined by Justice Brennan, suggested that Illinois could constitutionally require lawyers to provide additional information (e.g., explanations or disclaimers) with their certification claims. Id.

130. *See* supra notes 106, 108, 109.

131. Thirty-one states generally follow the Model Code. *See* supra note 80 and accompanying text. Several of these states, however, have a modified "informational" item list. The states which have generally followed the Model Code or modified the Model Code list include: Alaska, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia and Wyoming.

132. Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977). *See also In re* R.M.J., 455 U.S. 191, 201 (1982) (state may require warnings or disclaimers in order to dissipate the possibility of consumer confusion or deception).

133. For example, Arkansas requires communication to be clearly marked "Advertising." Arizona requires direct-mail communication to have printed on envelope and first page of the communication "ADVERTISING MATERIAL: THIS COMMERCIAL SOLICITATION HAS NOT BEEN APPROVED BY THE STATE BAR OF ARIZONA" in red ink in size at least double that used in communication. Florida requires advertising lawyers to "mark 'Advertising' on envelope and on top of each page . . . in type one size larger than the largest type used in the communication." Indiana requires identification of advertisement as such, unless its nature is apparent from the context. Iowa requires direct-mail communications to be labelled "ADVERTISEMENT ONLY" in red ink, 9-point or larger type. Massachusetts

to contain disclaimers of the advertisement's value.[134] For example, Alabama requires that any advertisement mentioning a fee include a message that no representation is made about quality or expertise.[135] However, *Bates* also noted the importance of narrowly drawn regulations.[136] Some have argued that mandatory disclaimers are tenuously relevant to an advertised message and thus are plainly inconsistent with the rationale of *Bates*.[137]

c. *Solicitation and Direct Mail*

Direct, personal solicitation of prospective clients by lawyers traditionally has been prohibited.[138] The *Bates* Court noted that in-person solicitation poses dangers of overreaching and misrepresentation.[139] One year

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requires each solicitation by written communication, audio or video cassette, or other electronic means to be clearly labeled "Advertisement" on its face and on any envelope or container. New Mexico requires "advertising material" on the face of the outside envelope and first page of communication, and if recorded communication, clearly state at beginning and end that it is advertising; South Carolina requires labelling "ADVERTISING MATERIAL" in prominent type on envelope and each page, and recorded message must clearly state at both beginning and end that communication is an advertisement. Virginia requires identification of public communication for which lawyer has paid unless it is apparent from context that it is such a communication. Wisconsin requires written communication to be conspicuously labeled "Advertisement." *See* [1989-90 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 81:403-04.

134. *See, e.g.*, Iowa Code of Professional Responsibility DR 2-101(A) (1989) (all communications must include: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."); South Carolina Rules on Lawyer Advertising Rule 7.3(c)(3) (Law Q. 1989) (communications must include: ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE, POST OFFICE BOX 11220, COLUMBIA, SOUTH CAROLINA, 29211-TELEPHONE NUMBER 803-734-1150."); *see also* [1989-90 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 81:405 n.83. Arizona has considered a disclaimer requirement identical to Iowa's. Letter from Steve Cox to Dean Paul Bender, Board of Governors of State Bar of Ariz. (March 16, 1989) (citing proposed ER 7.2 (e)(2), ER 7.2 (g)). The Florida Bar considered disclaimers that would state that selecting a lawyer is an important decision, that consumers should ask lawyers for their qualifications, and whether the lawyer in the ad will be doing the legal work. *Marcotte*, supra note 105, at 42. However, the only disclaimers submitted to the Florida Supreme Court for approval were disclaimers for electronic media advertisements. The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues, 571 So. 2d 451 (Fla. 1990). For policy reasons, the Florida Supreme Court refused to approve the disclaimer requirement for electronic media advertisements. Id. at 459.

135. Alabama Code of Professional Responsibility DR 2- 102(A)(7)(F) (1986).

136. *Bates*, 433 U.S. at 379-80.

137. *See* Spencer v. Justices of Pa., 579 F. Supp. 880, 891-92 (E.D. Pa. 1984) (stating mandatory disclaimer requirement is not the least restrictive alternative); Wolfram, supra note 26, at 782-83.

138. *See generally* Note, Constitutional Law—First Amendment—Commercial Speech—Attorney Solicitation—*In re* Von Wiegen, 34 U. Kan. L. Rev. 191, 194-95 (1985); Note, Lawyer Solicitation: The Effect of *Ohralik* and *Primus*, 13 Suffolk U.L. Rev. 960 (1979); Annotation, Modern Status of Law Regarding Solicitation of Business by or for Attorney, 5 A.L.R. 4th 866 (1981).

139. *Bates*, 433 U.S. at 366.

later, in *Ohralik v. Ohio State Bar Association*,[140] the Court unanimously decided that a state may, consistent with the first amendment, impose a blanket prohibition against in-person solicitation for pecuniary gain.[141] The Court found that in-person solicitations commonly exert pressure and require an immediate response.[142] In contrast, other types of lawyer advertising provide the opportunity for comparison or reflection.[143] This decision recognized the substantial state interest in regulating lawyers because of the role they serve in the administration of justice and as officers of the court.[144] Several commentators have argued that the outcome of *Ohralik*, which involved a classic "ambulance-chasing" lawyer, would have been different if the facts of the case had been less extreme.[145]

Both the Model Rules and the Model Code contain a general prohibition against in-person solicitation.[146] Most states have incorporated either the Model Rules or Model Code into their solicitation provisions.[147] The general trend among the states clearly favors prohibiting most, if not all, in-person solicitations by lawyers.[148]

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140. 436 U.S. 447 (1978). This was a classical "ambulance chasing" case. A lawyer solicited two teenagers in the hospital where they were recovering from an automobile accident. Id. at 449-50. One of the victims was still in traction. Id. at 450-51. Ohralik secured agreements of representation. Id. The clients both attempted to revoke their agreements with Ohralik and filed a complaint with the local bar. Id. The Ohio Supreme Court upheld the lawyer's suspension for violating Ohio's rules against in-person solicitation. Id.

141. Id. at 447.

142. Id.

143. Id. at 457.

144. Id. at 460.

145. *See* id. at 470 (J. Marshall, dissenting) ("[W]hat is objectionable about Ohralik's behavior here is not so much that he solicited business for himself, but rather the circumstances in which he performed the solicitation and the means by which he accomplished it."); *see also* Friedman, The First Amendment Case for Attorney Solicitation, 15 Colum. J.L. & Soc. Probs. 101 (1979); Comment, Benign Solicitation of Clients by Attorneys, 54 Wash. L. Rev. 671 (1979); *cf.* Freedman, Lawyers' Ethics in an Adversary System 113 (1975) (lawyers have something of a "professional duty to chase ambulances"). Some have argued that permissible forms of conduct with potential clients, such as luncheons, expensive brochures, membership in clubs, speeches to groups on general law-related topics, and meeting with heads of potential institutional clients, are still solicitation for pecuniary gain; only the audience is different. Elliot, Trolling for Clients, 60 Conn. B.J. 219 (1986). *Cf.* Comment, Benign Solicitation of Clients by Attorneys, 54 Wash. L. Rev. 671 (1979) (people in middle and low income brackets tend to know little about the law and are therefore injured by solicitation rules that keep legal information from them).

146. *See* Model Rules of Professional Conduct Rule 7.3 (1984) ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."); Model Code of Professional Responsibility DR 2-103 (1986) ("A lawyer shall not [except through lawful advertising referrals] . . . recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer . . . ."); *see also* Proposed Model Rules, supra note 82, at 194 (exceptions for relatives, close friends, public or charitable legal services organizations, or bona fide trade organizations).

147. *See* [1989-90 Transfer Binder] Law. Man. on Prof. Conduct (ABA/BNA) 81:2003.

148. *See* id. (detailing various states' restrictions on in-person solicitation by lawyers). It must be noted, however, that the U.S. Court of Appeals for the Eleventh Circuit recently held a Florida statutory ban on in-person solicitation unconstitutional. Fane v. Edenfield, 945 F.2d

In the companion case to *Ohralik*, *In re Primus*,[149] the Court held that a state may not prohibit direct mail solicitations involving matters of a "political or ideological" character not undertaken for pecuniary gain.[150] Primus, a lawyer affiliated with the American Civil Liberties Union, wrote a letter offering free legal representation to a woman who had been sterilized as a condition for receiving Medicaid.[151] The Court found the letter imparted important information and was not facially misleading.[152] Unlike in-person solicitation, the letter did not involve an "appreciable invasion of privacy" or provide an opportunity for overreaching or coercion.[153]

In *Shapero v. Kentucky State Bar Association*,[154] the Supreme Court ruled that a state may not, consistent with the first and fourteenth amendments, impose a blanket prohibition against targeted, direct-mail solicitation by a lawyer for pecuniary gain.[155] In ruling for a lawyer who sent a letter to people he knew were having their homes foreclosed, the *Shapero* Court relied heavily on *Zauderer*.[156] The *Shapero* Court also distinguished *Ohralik*[157] by focusing on the form of solicitation.[158] The Court found the in-person solicitation in *Ohralik* "rife with possibilities of overreaching, invasion of privacy, the exercise of undue influence, and outright fraud," and therefore impossible to regulate.[159] In contrast, a letter can readily "be considered later, ignored, or discarded."[160]

Some states require contemporaneous or prepublication review of direct-mail advertisements for specific services.[161] Others argue such

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1514 (11th Cir. 1991). The *Fane* court held that the ban violated the first amendment because it did not advance directly the state's interest in protecting the integrity, independence, and objectivity of an accountant while performing the "attest" function—the issuance of an independent opinion regarding a client's financial stability based on an audit or review of a client's financial statements. Id. at 1518-19. The court emphasized that the state's interest "could be equally well served" by a less restrictive regulation. Id. at 1520.

149. 436 U.S. 412 (1978).

150. Id. at 434. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 476 (1978) (Marshall, J., concurring) ("[I]t is open to doubt whether the state's interests are sufficiently compelling to warrant the restriction on the free flow of information which results from a sweeping nonsolicitation rule and against which the First Amendment protects."). The validity of "political" mailed solicitations in cases where the lawyer earns a fee has not been resolved by the courts. *See* Ramson, supra note 72, at n.7.

151. *Primus*, 436 U.S. at 416.

152. Id. at 435.

153. Id. at 412, 435 (letter sent by lawyer to client was used only for explanation of events).

154. 486 U.S. 466 (1988).

155. Id. at 478-79 (finding letter that liberally used underscored, upper-cased letters and included "subjective predictions of client satisfaction" still fell short of the solicitation impact of verbal solicitation).

156. 471 U.S. 626 (1985). *See* supra notes 121-25 and accompanying text.

157. 436 U.S. 447 (1978). *See* supra notes 140-45 and accompanying text.

158. *Shapero*, 486 U.S. at 472.

159. Id. at 475.

160. Id. at 476.

161. *See, e.g.*, Arizona Rules of Professional Conduct Rule 7.3(c) (West Supp. 1990) (requiring that a copy of targeted solicitation letter be submitted simultaneously to dissemi-

review is constitutionally suspect.[162] Recently, the Florida Bar proposed a complete ban on targeted mail solicitation of wrongful death and personal injury cases.[163] The Florida Supreme Court refused to approve this ban on constitutional grounds.[164]

d. Electronic Media Advertising

According to the *Bates* opinion, advertising on electronic media requires close examination.[165] Other cases have noted that electronic media advertising results in less consideration and deliberation by its audience than print advertising.[166] A few states permit electronic media advertising, but only under substantial restrictions that limit the information advertisers can provide.[167] Such limitations on visual or oral communication generally

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nation to both the clerk of the Arizona Supreme Court and the State Bar); Hawaii Code of Professional Responsibility DR 2-103(B) (Michie 1991) (requiring that a copy of communication be sent simultaneously to prospective client and Office of Disciplinary Counsel); Iowa Code of Professional Responsibility DR 2-101(B)(4) (West 1991) (requiring direct-mail advertisements to be filed and, for specific legal services, determination made as to whether false or misleading prior to mailing; the lawyer bears the burden of proof); Maryland Rules of Professional Conduct Rule 7.2 (Michie 1991) (copy of communication must be kept three years but not subject to review prior to dissemination); New Mexico Rules of Professional Conduct Rule 16-702 (Michie 1991) (requiring written advertisements to be kept two years after last dissemination along with record of when and where used, with no prior review); South Carolina Rules on Lawyer Advertising Rule 7.3 (Law. Co-op. 1989) (requiring that each written communication be filed with the Board of Commissioners on Grievances and Discipline within 10 days after it is sent and accompanied by a $10 fee; mandating also that lawyers who advertise must maintain a file to show how the lawyer knows the person solicited needs legal services and the factual basis for statements the lawyer makes in the communication, which the lawyer must turn over upon request); Wisconsin Supreme Court Rules Rule 20:7.3 (West Special Pamphlet 1990) (requiring copy to be filed with the Board of Attorney Professional Responsibility within five days after it was sent; no prior review required).

162. *Cf.* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976) (commercial speech doctrine "may also make inapplicable the prohibition against prior restraints"); Wolfram, supra note 26, at 783 ("extremely unlikely that the Supreme Court would permit a state to require a lawyer to litigate the constitutionality of an anti-advertising rule before advertising").

163. *See* States Continue Efforts to Regulate Advertising, 16 Law. Man. on Prof. Conduct (ABA/BNA) 277-78 (1989); Peltz, supra note 105, at 105-06; Marcotte, supra note 105, at 42.

164. "[W]e find that the United States Supreme Court's decisions in *Shapero* and *Peel* effectively hold that we cannot totally prohibit targeted mail advertising . . . ." The Florida Supreme Court also rejected the argument put forth by the Florida Bar that *Fox* overrules *Shapero*. Florida Bar: Advertising Issues, 571 So. 2d 451, 459 (1990).

165. 433 U.S. 350, 384 (1977).

166. Committee on Prof. Ethics and Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), on remand, 377 N.W.2d 643 (1985), appeal dismissed, 475 U.S. 1114 (1986).

167. *See* Iowa Code of Professional Responsibility DR 2-101(B)(5) (West 1991) (limiting electronic media advertisements to informational content and single, nondramatic voice not that of lawyer with no other background sound); New Jersey Rules of Professional Conduct Rule 7.2 (West 1991) (requiring that all advertisements be "predominantly informational" and that television advertisements not contain drawings, animations, dramatizations, music, or lyrics); Florida Bar: Advertising Issues, 571 So. 2d 451 (1990) (approving Florida Rule 4-7.2(b), which requires that electronic media advertisements contain only factual information, with no dramatizations, and that electronic media advertisements be conveyed by a single voice with no background music).

eliminate the dramatic value or attractiveness of such advertising.[168] The stricter regulation of electronic media advertising particularly affects multi-office legal clinics, which require television advertising in order to maintain business.[169]

2. *Iowa's Approach*

Iowa has adopted the "toughest" restrictions against lawyer advertising.[170] The Iowa Code of Professional Responsibility for Lawyers (Iowa Code), based on the Model Code, was originally adopted by the Iowa Supreme Court in 1971.[171] The Iowa Supreme Court periodically revises advertising rules upon the recommendation of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association.[172] The most recent revision was made in April 1989.[173]

a. Advertising Generally

DR 2-101 of the Iowa Code contains the key provisions concerning lawyer advertising.[174] This rule forbids a lawyer from using or participating

168. Wolfram, supra note 26, at 783.

169. Id.; *cf.* Nat'l L.J., Apr. 16, 1984, at 2, col. 2 (one national clinic spent 17% of total of $17,803,300 spent by all lawyers on television advertising in 1983). The Supreme Court has held that restrictions on the use of specific media could have the effect of prohibiting communication of specific messages to specific audiences, thus denying equal access to information. Linmark Assoc's, Inc. v. Willingboro, 431 U.S. 85, 92 (1977). For example, advertising limited to print media of general circulation is biased against persons whose income and education are lower than the average reading public. Grievance Comm. v. Trantolo, 192 Conn. 15, 470 A.2d 228 (1984) (restricting advertising to print media violates first amendment because it would deny the illiterate, handicapped, and those with financial difficulties access to information about legal services).

170. Podgers, Staff Counsel to ABA's Commission on Advertising, in 5 Law. Man. on Prof. Conduct (ABA/BNA) 288 (1989). *But see* Marcotte, supra note 105, at 42 ("Rules in Iowa, Mississippi, New Jersey, Nevada and South Carolina are also restrictive, but the Florida Bar's proposals are among the most comprehensive."). Although the regulations proposed by the Florida Bar clearly would have been the most restrictive, they were approved with modifications that leave them very similar to, and no more restrictive than, the Iowa Rules. *See* The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar— Advertising Issues, 571 So. 2d at 451.

171. The original 1908 ABA Canons were not specifically applicable in Iowa until 1958. The 1969 ABA Code was reviewed, studied, revised, and recommended by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association in 1970. *See* Gaudineer, Ethics: The Grievance Commission, 22 Drake L. Rev. 114 (1972).

172. *See* Committee on Prof. Ethics and Conduct v. Humphrey, 355 N.W.2d 565, 569 (Iowa 1984), on remand, 377 N.W.2d 643 (1985), appeal dismissed, 475 U.S. 1114 (1986); *see also* Iowa Code of Professional Responsibility DR 2-101(E) (1989) ("[C]ommittee . . . shall, from time to time, consider and recommend to the [supreme] court proposed amendments to [advertising] . . . rules.").

173. *See* Order of Iowa Supreme Court (filed Apr. 28, 1989), 5 Law. Man. on Prof. Conduct (ABA/BNA) 175 (1989).

174. Iowa Code of Professional Responsibility DR 2-101 (1989). A lawyer cannot give money or anything of value to representatives of the media in return for professional publicity in a news item. Id. DR 2-101(J). *See also* id. DR 2-103(A) (stating that a lawyer cannot recommend her employment to nonlawyer who has not sought advice regarding legal employment); id. DR 2-104(A) (regulating employment of lawyer by unsolicited, in-person advice).

in the use of any form of public communication containing a "false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement."[175] A lawyer cannot use or participate in the use of "any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim which is not verifiable."[176] All communications by a lawyer must contain a disclaimer stating that "[t]he determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise."[177]

b. Content Restrictions

In the tradition of the Model Code, the Iowa Code contains several restrictions on the content of lawyer advertisements. For example, all information must be presented in a "dignified manner."[178] The Iowa Code also restricts the informational content of an advertisement,[179] the manner in which fee information is presented,[180] and the areas of practice and specialization a lawyer may declare.[181]

i. Limitations to Informational Content

The Iowa Code limits a lawyer's communication to items that are "informational and not solely promotional."[182] Specific items categorized as "informational" by the Iowa Code include the following: Name;[183] fields of practice, limitation of practice, or specialization;[184] date and place of birth; date and place of admission to the bar of state and federal courts; schools

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175. Id. DR 2-101(A).

176. Id. "Limited and dignified identification" as a lawyer in political advertisements, public notices, bona fide business and civic announcements, legal documents or publications, and communications by a qualified legal assistance organization are exempt from DR 2-101. Id. DR 2-101(I). Professional notices, letterheads, signs, and cards must be in "dignified form" and may not violate DR 2-101(A). Id. DR 2-102(A). DR 2-102 also regulates firm names.

177. Id. DR 2-101(A). This disclaimer must be in 9-point type or larger. Id. DR 2-101(K). Recent amendments to the Iowa Code require this disclaimer for all advertisements. *See* Des Moines Reg., May 4, 1989, at 1.

178. Iowa Code of Professional Responsibility DR 2-101(C) (1989). The requirement that information be presented in a "dignified manner" has been questioned by some as pointless. *See* supra notes 110-11 and accompanying text.

179. *See* infra notes 182-86 and accompanying text.

180. *See* infra notes 187-95 and accompanying text.

181. *See* infra notes 196-201 and accompanying text.

182. Iowa Code of Professional Responsibility DR 2-101(C) (1989). *See* Committee on Prof. Ethics v. Humphrey, 355 N.W.2d 565, 570-71 (Iowa 1984), on remand, 377 N.W.2d 643, 647 (Iowa 1985) appeal dismissed, 475 U.S. 1114 (1986).

183. "[I]ncluding name of law firm, names of professional associates, addresses, telephone numbers, and the designation 'lawyer', 'attorney', 'law firm', or the like." Iowa Code of Professional Responsibility DR 2-101 (C)(1) (1989).

184. Limited to the extent permitted by Iowa Code DR 2-105. *See* infra notes 196-201 and accompanying text.

attended;[185] public or quasi-public offices; military service; legal authorships; legal teaching positions; memberships, offices, and assignments in bar associations; memberships and offices in legal organizations; technical and professional licenses; and memberships in scientific, technical, and professional organizations.[186] All other items are solely promotional.

ii. Fee Restrictions

A lawyer may use "restrained subjective" characterizations of fees,[187] but must avoid "unrestrained subjective" characterizations.[188] General print media, classified directory listings, in-person or written solicitations, direct mail, or electronic media advertising may communicate initial consultation fees,[189] availability of fee estimates,[190] and contingency fees.[191] A lawyer may advertise fixed fees for specific legal services or hourly fee rates only if specific limitations are disclosed in print at least as large as the fee information.[192] If a lawyer advertises fee information in the classified

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185. A lawyer may include dates of graduation, degrees, and other scholastic achievements. Iowa Code of Professional Responsibility DR 2-101 (C)(5) (1989).

186. Id. DR 2-101(C)(6)-(13).

187. For example, "reasonable," "moderate," and "very reasonable." Id. DR 2-101(A).

188. For example, "cut-rate," "lowest," "give away," "below-cost," "discount," and "special." Id.

189. Id. DR 2-101(D)(1).

190. Id. DR 2-101(D)(2).

191. Id. DR 2-101(C)(3).

> [P]rovided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence.

Id. *See* Committee on Prof. Ethics and Conduct v. Humphrey, 355 N.W.2d 565 (Iowa 1984), vacated 472 U.S. 1004 (1985), on remand, 377 N.W.2d 643 (Iowa 1985), appeal dismissed, 475 U.S. 114 (1986) (injunction upheld against television advertisement which did not assist viewer in making informed decision regarding legal services and which might make viewer believe that undertaking the listed actions was cost-free).

192. Iowa Code of Professional Responsibility DR 2-101(D)(4) (1989). The lawyer must disclose that: (1) fixed fees will be available only to clients whose matters are covered by the described services; and (2) if a client's matters are not covered by the advertised services, or if an hourly fee is stated, the client is entitled to, at no obligation, a specific written estimate of total fees. Id.

Under DR 2-101(E), "specific legal services" are limited to the following: Abstract examinations and title opinions not including services in clearing title; uncontested dissolutions of marriage without a custody dispute, alimony, child support, or property settlement; outright wills; income tax returns for wage earners; uncontested personal bankruptcies; name changes; simple residential deeds; residential purchase and sale agreements; residential leases; residential mortgages and notes; powers of attorney; and bills of sale. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association may recommend amendments expanding or constricting this list using the following criteria:

> 1) The description of the service would not be misunderstood by the average layperson or be misleading or deceptive;
>
> 2) Substantially all of the service normally can be performed in the lawyer's office with the aid of standardized forms and office procedures;

section of a directory, the lawyer is bound to render the stated service.[193] For other fee advertisements, a lawyer is bound to render service for the advertised fee for at least ninety days after the advertisement.[194] Interestingly, the Iowa Code forbids a lawyer from using advertised fee information for a specific service as an "indirect means" of attracting clients for legal services not related to the specific legal services advertised.[195]

iii. Practice Area Restrictions

A lawyer may indicate the areas of law in which the lawyer practices to particular areas of law, so long as the lawyer does not list more than three areas[196] and does not use the term "general practice" in the advertisement.[197] The Iowa Code limits the use of "clinic," "center," or similar collective terms.[198] If a lawyer practices only in the areas of law listed in the advertisement, the lawyer must precede the listing with the phrase, "practice limited to."[199] If, on the other hand, a lawyer practices primarily in listed fields but accepts other legal matters as well, the lawyer must

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3) The service does not normally involve a substantial amount of legal research, drafting of unique documents, investigation, court appearances, or negotiations with other parties or their attorneys; and

4) Competent performance of the service normally does not depend upon ascertainment and consideration of more than a few varying factual circumstances.

Id. DR 2-101(E).

193. Id. DR 2-101(D).

194. The lawyer is not bound to perform a service if the lawyer specifies a time period for performance in the advertisement, or if the client's matters do not fall within the described service. Id.

195. Id. A lawyer may not "advise the institution of litigation" in a communication unless it is disclosed "that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process." Id. DR 2-101(F).

196. Id. DR 2-105(A)(2). The areas of law a lawyer may specify include: administrative law; admiralty law; alternative dispute resolution; antitrust and trade regulation; appeals; banking; commercial and retail collections; constitutional law; corporation and business law; criminal law; debt and bankruptcy law; domestic relations and family law; environmental law; health law; immigration law; insurance law; international and foreign law; international trade and investment; discrimination and civil rights law; labor law; malpractice or professional negligence; military law; municipal law; pension and profit sharing law; personal injury law; product liability law; public utility law; real estate law; securities law; social security disability; taxation law; trademarks and copyright law; trial law; wills, estate, and probate law; and workers' compensation law. Id. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association shall consider and recommend to the Iowa Supreme Court amendments to rules expanding or restricting this list. Id. Special regulations govern lawyers admitted to practice before the United States Patent and Trademark Office. Id. DR 2-105(A)(1).

197. Id. DR 2-105(B).

198. Id. DR 2-101(G). These terms may only be used if a lawyer's practice is limited to specific services as defined in DR 2-101(E). *See* supra note 192. The costs of rendering these services "can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures." Iowa Code of Professional Responsibility DR 2-101(G) (1989).

199. Id. DR 2-105(A)(3)(a).

precede the listing with the phrase "practicing primarily in."[200] Prior to advertising a description or indication of limited practice in an advertisement, a lawyer must report to the Commission on Continuing Legal Education that the lawyer has: (1) devoted the greater of two hundred hours or twenty percent of her time spent in actual law practice to each specified field of practice for each of the last two years; and (2) completed at least ten hours of accredited continuing legal education courses in each specified field of practice during the preceding year.[201]

c. Medium Restrictions

Iowa does not subscribe to a wholesale prohibition against lawyer advertising in any medium—whether newspaper, telephone directory, in-person solicitation, direct mail, or electronic media. The advertising lawyer or firm must preserve a copy of each advertisement for at least three years and a record of the name and dates of the publication or medium in which the advertisement appeared.[202] A lawyer may advertise in newspapers, periodicals, shoppers, and other media published and distributed in the geographic area where the lawyer maintains offices or where a significant part of the lawyer's clientele lives.[203] Lawyers licensed to practice law in Iowa[204] may advertise in alphabetical listings,[205] classified listings,[206]

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200. Id. DR 2-105(A)(3)(b). If the lawyer describes or limits her practice in the advertisement, the lawyer must also include the following disclosure:

> A description or indication of limitation of practice does not mean that any agency or board has certified such lawyer as a specialist or expert in an indicated field of law practice, nor does it mean that such lawyer is necessarily any more expert or competent than any other lawyer. All potential clients are urged to make their own independent investigation and evaluation of any lawyer being considered. This notice is required by rule of the Supreme Court of Iowa.

Id. The advertisement must also include the disclaimer required in DR 2-101(A), see supra note 177 and accompanying text. Id.

201. Iowa Code of Professional Responsibility DR 2-105(A)(4) (1989). If a lawyer is unable to complete the required hours of continuing legal education, extensions may be granted upon specified written request under DR 2-105(D). Id.

202. Id. DR 2-101(B)(7).

203. Id. 2-101(B)(1). Such advertising is contingent on the publisher agreeing in writing to publish disclaimers required by 2-101(A) "in type size not smaller than 9-point on each page bearing the advertisement." Id. Lawyers can only distribute biographic and informational brochures or pamphlets to clients and members of the bar, when responding to direct requests. Iowa Code of Professional Responsibility DR 2-101(B)(6) (1989). These brochures must include the disclaimers required by DR 2-101(A). Id. DR 2- 101(B)(6); *see* DR 2-101(D); DR 2-101(F); DR 2-105(A)(3).

204. Or a law firm, "all of whose members are licensed to practice law in Iowa." Iowa Code of Professional Responsibility DR 2-101(B)(3) (1989).

205. Id. DR 2-101(B)(2)(a). A lawyer may only list her lawyer name, address, telephone number, and designation as a lawyer in alphabetical advertisement. Id. *See* id. DR 2-101(B)(3)(a) (law firm may list its name, members' names, address and telephone number in such advertisement).

206. Id. DR 2-101(B)(2)(b). Lawyers may advertise under general heading of "Lawyers," "Attorneys," or areas of practice listed in DR 2-105(A)(2), *see* supra note 196. *See* id. DR 2-101(B)(3)(b) (same for law firm).

or display and box advertisements of telephone directories.[207]

i. Solicitations

In Iowa, a lawyer may not solicit legal business in-person or by telephone.[208] A lawyer, however, may solicit business by direct mail subject to certain restrictions.[209] The Iowa Code distinguishes between solicitations made to the general public and those made to persons who may need specific services. A lawyer may solicit the general public via direct mail so long as other relevant provisions of the Iowa Code are met.[210] However, if a lawyer intends to engage in direct-mail solicitation of persons who may be in need of a specific legal service, then the lawyer must submit proposed documents to the Committee on Professional Ethics and Conduct of the Iowa State Bar Association prior to mailing.[211] The lawyer may disseminate the documents by direct mail only if the Committee renders a finding that the solicitation is not "false, deceptive, or misleading."[212]

ii. Electronic Media

Iowa's electronic media restrictions are among the most stringent in the United States.[213] The Iowa Code permits information to be communicated over radio or television "only by a single nondramatic voice, not that of the lawyer, and with no other background sound."[214] On television, the Iowa Code allows no visual display except the words in print articulated by

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207. Id. DR 2-101(B)(2)(c). Disclaimers are required. Id. *See* id. at DR 2-101(B)(3)(c) (such advertising by law firm may contain the firm name, names of individual members, address, and telephone number, and must include certain disclaimers).

208. Id. DR 2-101(B)(4)(a).

209. Id. DR 2-101(B)(4)(b). Any solicitation by direct mail and its envelope must contain in red ink, in 9-point or larger type, a disclaimer stating "ADVERTISEMENT ONLY." A copy of all direct-mail advertising must be filed with the Administrator of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association prior to or contemporaneously with mailing. Id. DR 2-101(B)(4)(b),(d).

210. These untargeted mailings must include disclaimers, id. DR 2-101(B)(4)(c); be marked "ADVERTISEMENT ONLY"; and be filed with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. *See* supra note 209.

211. Iowa Code of Professional Responsibility DR 2-101(B)(4)(b) (1989). The occurrence or condition giving rise to the need for specific legal services must be known or, upon reasonable inquiry, be possible of being known by the lawyer. The soliciting lawyer bears the burden of proof regarding:

> i) the truthfulness of all facts contained in the proposed communication;
>
> ii) how the identity and specific legal need of the potential recipient were discovered; and
>
> iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

Id.

212. Id. "No information disseminated by the soliciting lawyer shall make any reference to such submission and finding." Id.

213. Reynoldson, The Case against Lawyer Advertising, 75 A.B.A. J. 60, 60-61 (1989) (surveying Iowa's regulation of lawyer television advertising).

214. Iowa Code of Professional Responsibility DR 2-101(B)(5) (1989).

the announcer.[215] To the extent possible, electronic media communications must be limited to the geographic area where the lawyer maintains offices or where a significant part of the lawyer's clientele lives.[216]

In *Committee on Professional Ethics and Conduct v. Humphrey*,[217] the Iowa Supreme Court upheld the constitutionality of Iowa's advertising restrictions.[218] The *Humphrey* court interpreted *Bates*[219] as protecting informational communication, but not protecting speech of a promotional nature.[220] Further, the court relied on the warning in *Bates* that electronic media advertising "will warrant special consideration."[221] The *Humphrey* court reasoned that the possibility of deceit was sufficient to uphold the regulation[222] and that the regulations were sufficiently limited because they only prohibited items that "would manipulate the viewer's mind and

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215. Id.

216. Id. These advertisements must contain disclosures required by DR 2-101(A), DR 2-101(D), DR 2-101(F). *See* supra notes 177, 192, 195.

217. 355 N.W.2d 565 (Iowa 1984), vacated, 472 U.S. 1004 (1985) (in light of Zauderer v. Office of Disciplinary Counsel, 471 U.S. 629 (1985)), on remand, 377 N.W.2d 643 (Iowa 1985), appeal dismissed, 475 U.S. 1114 (1986).

218. Iowa Code DR 2-101(A) prohibits "self-laudatory" statements. *See* supra note 175 and accompanying text. DR 2-101(B)(5) prohibits television advertisements containing background sound, visual displays, and more than a single, nondramatic voice. *See* supra note 214 and accompanying text. The court held that DR 2-101 is not more extensive than necessary to protect state interests since it merely prohibits the "tools" of manipulation. *Humphrey*, 355 N.W.2d at 571. The court also held that the terms "non-dramatic voice" and "laudatory" are not too vague. Id.

219. 433 U.S. 350 (1977).

220. *Humphrey*, 355 N.W.2d at 570-71. The court found the *Bates* rationale inapplicable to irrelevant information, defined as information "mak[ing] no contribution to informed decision making." Id. at 570. The court concluded that prohibiting such information does not impede, but rather advances rational decision making by the public and maintains the bar's professionalism. Id. *See also* Bishop v. Committee on Prof. Ethics, 521 F. Supp 1219, 1229 (S.D. Iowa 1981) (interpreted by *Humphrey* court to allow prohibition of all electronic promotional advertising).

On appeal, the *Humphrey* court continued to draw the line "between the dissemination of protected information and crass personal promotion." *Humphrey*, 377 N.W.2d at 647. It refused to believe that the public entitlement to legal information protected in *Bates* and *Zauderer* extended to "electronically conveyed image-building." Id.

221. *Humphrey*, 355 N.W.2d at 569-70 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977)). The dissent, however, interpreted the dicta from *Bates* not as meaning electronic advertising is potentially more misleading, but rather as meaning that it requires "special consideration" of problems such as its nonselectivity and transitory nature. *See Humphrey*, 377 N.W.2d at 656-57; *Humphrey*, 355 N.W.2d at 573 (Larson, J., dissenting).

222. *Humphrey*, 355 N.W.2d at 570. The court, "[w]ithout suggesting that the advertisements here were deceitful, . . . [determined that] in the medium defendants chose, the public could well be misled by them." Id. The court supported state regulation of "those types of advertising which result in intrusion, intimidation, overreaching, or undue influence" Id. (interpreting *Ohralik*, 436 U.S. at 462). The court also allowed state regulation of "advertisements which are inherently likely to deceive, or which the experience has proven to be subject to abuse." Id. (relying on *In re* R.M.J., 455 U.S. at 202-03). *But see* id. at 573 (Larson, J., dissenting) (applying the *Central Hudson* test, citing *Bates* and *In re* R.M.J. as evidence that the Supreme Court requires advertising to "be more than 'possibly' misleading" to withstand restrictions on such first amendment activity).

will."[223] On remand from the United States Supreme Court after its decision in *Zauderer*,[224] the Iowa Supreme Court upheld *Humphrey* because "the situation in electronic advertising lies closer to face-to-face solicitation . . . than to printed advertising."[225] The Supreme Court has never addressed whether this restrictive treatment of electronic media is constitutional. Many authorities, however, have criticized Iowa's approach as unconstitutional under the reasoning of the Supreme Court in other lawyer advertising cases.[226]

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223. Id. at 571. In reaching its conclusion, the court relied on unpublished empirical evidence collected by the Iowa State Bar Association in a small focus group setting. This survey questioned a group of representative persons on their attitudes about lawyers both before and after viewing television commercials. Following the viewing, opinions dropped significantly with respect to the following characteristics of a lawyer: Trustworthiness from 71% to 14%; professionalism, from 71% to 21%; honesty, from 65% to 14%. *See* Ward, The Case Against Lawyer Advertising, 75 A.B.A. J. at 60-61 (Jan. 1989).

224. 471 U.S. 626 (1985).

225. 377 N.W.2d 643, 646 (Iowa 1985). *Zauderer*, applying the *Central Hudson* test, held that a prohibition of "self recommendation" and a "blanket ban" on use of illustrations could not be upheld absent a showing that the advertisement was false or misleading, or that the state showed a substantial governmental interest in the regulation. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985). *See* supra notes 121-25 and accompanying text. In *Humphrey*, the Iowa Supreme Court recognized a substantial governmental interest in "fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer." *Humphrey*, 355 N.W.2d at 571 (citing Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977)). *But see* Committee on Professional Ethics and Conduct v. Humphrey, 377 N.W.2d 643, 657 (Iowa 1985) (Larson, J., dissenting) (noting that the Supreme Court expressly rejected this "paternalistic" approach in *Bates*).

On remand, the court did not apply the *Central Hudson* test or explore less restrictive measures. The court restated the governmental interest in regulating "a very real potential for abuse," reasoning that a viewer or listener of electronic media is allowed much less deliberation than the reader of printed media who has an opportunity "to pause, to restudy, and to thoughtfully consider" the printed advertisement. *Humphrey*, 377 N.W.2d at 646. The majority determined that *Zauderer* carefully omitted the subject of electronic media advertising. Id. at 645-56. *But see* id. at 657-60 (Larson, J., dissenting) (*Zauderer* is controlling because: (1) it rejected the use of prophylactic restrictions of lawyer advertising in the presence of less restrictive means; (2) it emphasized that regulation of lawyer advertising is generally the same as regulation of other commercial advertising; and (3) it reaffirmed that the underlying rational for lawyer advertising is the public's need for information concerning their legal rights).

226. Most recently, Peel v. Attorney Registration and Disciplinary Comm'n, 496 U.S. 91 (1990), reaffirmed that states cannot prohibit advertising of information that is potentially misleading if it can also be presented in a nonmisleading way. Id. at 100-01. Iowa's approach prohibits the presentation of information through certain media, e.g., television commercials with actors and background sound, that can be presented in a nonmisleading way in those media. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980) (requiring courts to strike down regulations which are more extensive than necessary to meet governmental interest); id. at 564 n.6 (government interest exists in protecting professional reputation of lawyers, but recognizing that merely assuring dullness in lawyer television commercials may be more extensive than necessary); *Humphrey*, 355 N.W.2d at 572 (Larson, J., dissenting) (both Iowa's content and technique regulations are unnecessarily restrictive, and combine to violate the first amendment by "inhibiting dissemination of relevant information without a showing of a substantial state interest"); Maute, supra note 66, at 519 (although narrowly designed stricter regulation of broadcast advertising should be upheld to promote important state interest of providing public with truthful information, Iowa's ban is overbroad to advance any state interest in fostering intelligent lawyer selection); Tomlins, Attorney Advertising, 3 Ann. Surv. Am. L. 639, 652-53 (1985) (asserting that

III. Lawyer Advertising and Conflicting Notions of Professionalism

Discussion within the bar concerning the appropriate level of regulation of lawyer advertising parallels the debate about whether lawyers should be allowed to advertise at all.[227] Opponents of lawyer advertising assert that it tarnishes the image of lawyers, undermines the judicial system, and may actually repel clients.[228] Proponents argue lawyer advertising increases business and provides the public with information necessary to make informed decisions about legal services.[229] Both would agree, however, that advertising in poor taste harms the image of the bar and causes the public to view the judicial system as a commercial enterprise.[230]

Bar associations assert several interests in regulating lawyer advertising. Among these interests are the preservation of both law as a "profession"[231] and the role of the lawyer as an administrator of justice.[232] Economic theory and empirical evidence, however, suggest that lawyer advertising, by increasing access to legal services, leads to overall gains in consumer welfare.[233] The essential question in the regulation of lawyer advertising, therefore, is whether advertising restrictions are effective means of preserving the judicial system's positive image and protecting the public's interest in access to legal services.

A. Professionalism and Lawyer Advertising

American lawyers have been recognized as an organized profession since the late nineteenth century.[234] The dominant definition of a profes-

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Humphrey, in failing to find advertisement in question misleading, was obligated to apply *Central Hudson* analysis; unlikely that regulations were drawn as narrowly as possible to meet concerns about deception; and although *Zauderer* did not address electronic media, its prohibition of blanket ban on illustrations because they are not inherently misleading seems to prohibit overbroad bans on electronic media advertising). Iowa's electronic media restrictions also may be invalid under an overbreadth challenge to noncommercial content of commercial speech. *See* supra notes 100-01 and accompanying text (discussing *Fox*). *But see* Ramson, supra note 72, at 21 (noting that the Court chose to dismiss appeal from *Humphrey* for want of a substantial federal question and arguing that the Court might uphold "this type of regulation since *Bates*, *R.M.J.*, and *Zauderer* can logically be limited to print communication").

227. Hazard, Pearce, & Stempel, Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. Rev. 1084, 1087 (1983).

228. *See generally* Bianchi, All Our Lawyers are Juris Doctors, 63 Fla. B.J. 63-65 (1989); Lawyer Advertising—Marketing, Professionalism, the Future, Res Gestae, Aug. 1988, at 63; Reynoldson, supra note 213 at 60.

229. *See generally* Calvani, Langenfeld, & Shuford, Attorney Advertising and Competition at the Bar, 41 Vand. L. Rev. 761 (1988); Cox, Attorney Advertising: The Alpha and the Omega!, Ariz. Att'y, Oct. 1988, at 23; Trapani, Advertisement v. Solicitation: *Shapero* Ends the Controversy Over Targeted Direct-Mailings by Attorneys, 63 Fla. B.J. 31 (1989); *cf.* Luban, Political Legitimacy and the Right to Legal Services, 4 Bus. & Prof. Ethics J. 43 (1985).

230. Lawyer Advertising—Marketing Professionalism, the Future, supra note 228, at 63 (stating there is little dispute that distasteful advertising hurts everyone).

231. *See* infra notes 234-59 and accompanying text.

232. *See* infra notes 260-99 and accompanying text.

233. *See* infra notes 325-82 and accompanying text.

234. Other "traditional" professions include medicine, teaching, and the ministry. Bowie, The Law: From a Profession to a Business, 41 Vand. L. Rev. 741, 743 (1988). Though the legal profession has a deep traditional foundation in England, its historical roots in America are

sion is a community of persons with specialized knowledge who operate in the public interest.[235] Sociological theories, such as the structural-functionalist school of Emile Durkheim, have given this definition theoretical force.[236] According to the structural-functionalist model, professions create social order in a society composed of self-interested individuals who lack common values and are unrestrained by the traditional institutions of the family, religion, and locality.[237] On this view, a profession acts as a moral protector by guarding society against professional members misusing privileged knowledge for self-gain.[238] A profession also creates confidence in the institutions which structure society as a whole by presenting itself as an altruistic community within an egotistic society.[239]

1. "Professionalism" Defined

The popular tendency is to define professions according to a dominant "trait" approach.[240] On this view, an activity or occupation qualifies as a profession if it sufficiently possesses each of many features or characteristics.[241] For example, the English Royal Commission on Legal

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much weaker. For most of the first hundred years of independence, the majority of law associations were either weak or confined to cities or counties. Abel, supra note 37, at 40; *see also* Larsen, The Rise of Professionalism 167-77 (1977) (analyzing the social evolution of the legal profession).

235. *See, e.g.*, Hansell, Professionalism: Alive and Well in Iowa, 50 Iowa St. B. A. News Bull. 4 (Jan. 1990); Luban, The Noblesse Oblige Tradition in the Practice of Law, 41 Vand. L. Rev. 717-23 (1988).

236. Durkheim, Professional Ethics and Civic Responsibility (1957). The first part of this section presents the professional concerns of lawyers within a Durkheimian framework. It is important to note, however, the influence of two alternative theories on notions of professionalism. First, Max Weber and his followers understand professions as establishing a sense of social closure in order to enhance their market power. Second, Marx and his followers understand professions as either a vestige of the petty bourgeoisie or a mediating functionary between the polars of capital and labor. *See* Abel, supra note 37, at 15-16; J. Kultgen, Ethics and Professionalism 62-66 (1988) (discussing these sociological models); id. at 72-98 (discussing the functionalist model). The second part of this section applies the neoclassical economic paradigm to give force to a Weberian understanding of professions.

237. Abel, supra note 37, at 16; *see* also Lombardi, Self-Regulation: Business and the Professions, 5 Bus. & Prof. Ethics J. 68, 70-71 (1986) (professional organizations are necessary to exert pressure for enforcement of organizations' public service goal).

238. *See* infra notes 239, 241, 327-28 and accompanying text.

239. Abel, supra note 37, at 16; Hall, Emile Durkheim on Business and Professional Ethics, 2 Bus. & Prof. Ethics J. 51, 56 (1982). Of course, many commentators espouse more negative perceptions of professions. *See e.g.*, Bowie, supra note 234, at 744 (claiming the problem in the legal system "is that most lawyers are using their specialized knowledge to enable the rich and powerful to exploit the poor and ignorant while enriching themselves in the process").

240. *See* Abel, supra note 37, at 16-17.

241. *See, e.g.*, Callahan, Ethical Issues in Professional Life 28 (1988) (stating that a profession requires extensive training, a significant intellectual component, and important service to society; other common factors are licensing, organization of members, and autonomy in their work); Barber, Some Problems in the Sociology of the Professions, 92 Daedalus 669, 672-73 (1963) (noting that the attributes of a profession include a high level of systematic knowledge, community-oriented interest, self-monitored behavior through an internalized code of ethics, and a system of rewards which symbolizes work achievement); Bayles, Professional Power and Self-Regulation, 5 Bus. & Prof. Ethics J. 26, 27 (1988) (arguing

Services defines the five central features of a profession as follows:[242] (1) A governing body with powers of control and discipline over its members; (2) education, training, practical experience, and continuing education in a specialized field of knowledge; (3) admission dependent on a period of training, including examinations and tests of competence; (4) self-regulation, requiring its members to observe higher standards than imposed from without; and (5) an emphasis on the priority of the client's interest.[243] It is axiomatic that lawyers as a community possess each of these

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that professions provide an important service, possess special knowledge requiring higher education, and exist as an organization); Bowie, supra note 234, at 743 (stating that a profession must be extraordinarily complex in its core of knowledge and have a theoretical grasp of that knowledge, which it must strive to improve and pass on to posterity in an organized fashion); Goldman, Professional Values and the Problem of Regulation, 5 Bus. & Prof. Ethics J. 47 (1988) (adopting Bayles' position but adding the attribute of self-regulation); Goode, Community Within a Community: The Professions, 22 Am. Soc. Rev. 200 (1957) (stating that the attributes of a profession include a sense of identity, terminal status, commonly shared values among members, common rule definitions, a common language not readily understood by outsiders, hegemony from the larger community, and control over the selection of recruits); Greenwood, Attributes of a Profession, 2 Soc. Work 44 (1957) (accepting the same attributes as Barber but also emphasizing the existence of a culture); Rice, Commentary on "Professional Values and the Problem of Regulation," 5 Bus. & Prof. Ethics J., No. 2, at 66, 66 (1988) (accepting Goldman's definition with the modification that the skill is predominantly mental rather than physical).

242. 1 The Royal Commission on Legal Services, Final Report, 1979, Cmnd. No. 7648, at 28, 30.

243. Id. at 30. The Model Rules adopt a less systematic definition:

> A lawyer is an officer of the legal system, a representative of clients, and a public citizen having special responsibility for the quality of justice . . . .
>
> [In professional functions] a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence on their behalf . . . .
>
> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

ABA, Comm. on Evaluation of Prof. Standards, Model Rules of Prof. Conduct 1-2 (Proposed Final Draft 1981).

One author defines professionalism as "public service, not self-service." Udall, Professionalism and its Fragile and Necessary Foundations, Ariz. Att'y, Oct. 1988 at 25, 26. The legal profession reminds lawyers of their duties to educate the public about the rule of law and the judicial system. It demands that lawyers do public, civic, and bar service. It inspires lawyers to do more than is required, even though their worthy actions may never be revealed. Id. Others assert that a professional's chief function is to use expert knowledge to "protect ignorant clients from exploitation, not to maximize income." Bowie, supra note 234, at 744; Metzger, What is A Profession?, 52 C. & U. at 8-9 (1976). The decline in legal professionalism could be attributed to lawyers' emphasis with "using their specialized knowledge to enable the rich and powerful to exploit the poor and ignorant while enriching themselves in the process." Bowie, supra note 234, at 744.

features and qualify as a profession.

English and early-American lawyers regarded themselves, and were viewed by the public, as professionals "dedicated more to serving the cause and administration of justice than to their own personal and financial interests."[244] Lawyers in America take an oath which proclaims their obligations to the courts, the clients, and the legal profession.[245] Some argue this oath obligates lawyers to keep abreast of developments in public matters, remain active in public activities, and take part in the public forum by defending, improving, or otherwise influencing public institutions.[246] Clearly, one of the lawyer's most important roles is to make legal services accessible to the public.[247]

The United States Supreme Court has not recognized protecting the image of lawyers *simpliciter* as a valid state interest to justify the regulation of lawyer advertising.[248] Recently, Justice O'Connor, in her dissent to *Shapero v. Kentucky State Bar Association*,[249] rejected this approach and argued that the line of advertising-solicitation cases is rooted in "defective premises and flawed reasoning."[250] According to Justice O'Connor, the state has a valid interest in preserving the "high ethical standards" of law as a profession.[251] Further, she reasoned that allowing states to constrain advertising would "play an important role in preserving the legal profession as a genuine profession."[252]

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244. Udall, supra note 243, at 25. However, the legal profession was much more established in England than in the early American colonies and remained that way until the late nineteenth century. *See* supra notes 31-41 and accompanying text.

245. *See* Morgan & Rotunda, Model Code of Professional Responsibility 218 (1988).

246. Levinson, Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications, 41 Vand. L. Rev. 789, 801-02 (1988). While some lawyers may prefer to ignore these duties, they are inescapable. Because of the public nature of the legal profession, lawyers retain these duties throughout their careers. Id. at 802; *see* Luban, Political Legitimacy and the Right to Legal Services, 4 Bus. & Prof. Ethics J., Nos. 3 & 4, Spring/Summer 1985, at 43 (arguing that increased access to legal services is a right without which individuals are denied equality before the law).

247. Levinson, supra note 246, at 804. This role requires lawyers, as a profession, to "retain distinctive attitudes, traditions, and methods of reasoning and analysis." Id.

248. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460-61; *see* infra Section III.A.2.

249. 486 U.S. 466 (1988) (holding that first amendment prohibits a total ban on targeted direct-mail advertising).

250. Id. at 480.

251. Id. at 490.

252. Id. at 491. Advertising is sure "to undermine professional standards." Id. at 485-86. Justice O'Connor further noted that the Court's advertising-solicitation decisions reflect the belief that our nation:

> will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations. In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

Id. at 491.

a. ABA Commission on Professionalism

The ABA has also emphasized the importance of law as a "profession." In 1986, the ABA Commission on Professionalism issued a report containing recommendations designed to enhance the professionalism of lawyers.[253] The report suggests reasons why the public might believe the legal profession "has abandoned principle for profit, professionalism for commercialism."[254] First, many blame lawyers for grave public crises, such as the increase in medical malpractice litigation and the high costs of liability insurance.[255] Second, the public views litigation as consuming large amounts of resources.[256] Third, many members of society feel that lawyers lack moral character.[257] Some commentators welcomed the report's approach,[258] while others criticized it.[259]

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253. ABA, Commission on Professionalism, "[I]n the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986) [hereinafter ABA Report on Professionalism]. The Commission recommends that all segments of the bar: (1) preserve and develop within the legal profession integrity, competence, fairness, independence, courage and a devotion to the public interest; (2) resolve to abide by higher standards of conduct than the minimum requirements of the ABA Code and Model Rules; (3) increase the participation of lawyers in pro bono activities and help lawyers recognize their obligation to participate; (4) refuse to make the acquisition of wealth a primary goal of law practice; (5) encourage innovative methods that simplify and reduce the costs of rendering of legal services; (6) educate the public about legal processes and the legal system; and (7) resolve to employ all the organizational resources necessary to assure that the legal profession is effectively self-regulating. Id. at 296-304.

254. Id. at 253-54.

255. Id. at 253.These suggestions raise very broad criticisms of the legal profession and assume lawyers do more harm than good. For example, although the existance of a medical malpractice "crisis" is a widely held assumption, careful analysis shows that it may not be true, or perhaps even backwards. Is the alternative of not holding professionals responsible for their negligence any more beneficial to society? *See* Michael Saks, Do we Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U. Pa. L. Rev. 1147 (1992); *See also* They're only Trying to Help, Newsweek, Jan. 27, 1992, at 47.

256. ABA Report on Professionalism, supra note 253, at 253-54.

257. Id. at 254. In a nonrandom survey of 234 corporate executives and judges conducted by the Commission, 6% of corporations utilizing lawyers rated "all or most" lawyers as "professionals." Only 7% felt professionalism was increasing among lawyers; 68% believed it had decreased over time. Similarly, 55% of the responding judges perceived lawyer professionalism as declining. ABA Report on Professionalism, supra note 253, at 254 (citing G. Shubert, Survey of Perceptions of the Professionalism of the Bar (unpublished 1985)).

258. *See* Bowie, supra note 234, at 755 (1988) (endorsing ABA report as fulfilling "its obligations to support the moral and political values that underlie the law—especially the values of equal opportunity, fairness, equality before the law, and justice").

259. *See* Levinson, supra note 246, at 791 (concluding the commission wrongly implied that professionalism cannot be equated with profit and commercialism with principle; use of the label "professional" may gratify some lawyers' egos "but will not help . . . articulate or accommodate [their] conflicting duties"); Rotunda, Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism, 18 Loy. U. Chi. L.J. 1149 (1987) (arguing law is improving as a "profession"). For a humorous response, see A. Roth & J. Roth, Devil's Advocates: The Unnatural History of Lawyers (1989) (surveying historical anecdotes, satires, poems, and sayings, and reassuring lawyers that people have always hated them).

b. *Professionalism Within an Adversary System*

The American legal system depends on public approval for its existence.[260] Some argue that professionalism is essential to the preservation of this system because the public consent that exclusively franchises lawyers and judges to operate a system of justice can be withdrawn.[261] Lawyers occupy a unique position to evaluate and change the legal system. This position stems from lawyers' knowledge of and extensive interest in the legal system, capacity to recognize its strengths and weaknesses, and ability to prescribe and implement reforms they believe, in good faith, will effectuate society's aspirations for the most desirable legal system.[262] When society demonstrates a need for change, lawyers have a duty to give serious attention to society's concerns.[263]

The American adversary system deeply affects the public's perception of legal professionalism and the need for reform. The "adversary ethic"[264] influences lawyers to consider the adversarial nature of the judicial process when resolving conflicts of duty between clients and others.[265] It is generally accepted that justice emerges when lawyers serve as zealous advocates for their clients and that allowing lawyers' duties to be biased toward the client best serves society.[266]

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260. Udall, supra note 243, at 26. The American system of justice endures by "the consent of the governed." Id.

261. Id. "If a majority of the governed come to regard" the legal profession as a mere trade, the justice system and its institutions may become extinct because under the Constitution, "every federal court except the Supreme Court" could be abolished. Id. *See* Levinson, supra note 246, at 804 (concluding society would be more supportive of the existing legal system "if [lawyers] effectively articulated the duties [they] owe to society, and . . . conscientiously carried them out").

262. Levinson, supra note 246, at 800.

263. Id. at 801; *see* Bowie, supra note 234, at 742 (stating that the legal profession should respond to negative public perceptions of lawyers, even if incorrect).

264. The late Justice Abe Fortas explained the American "adversary ethic:" "Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client's practices." Fortas, Thurmon Arnold and the Theatre of the Law, 79 Yale L.J. 988, 1002 (1970).

265. Levinson, supra note 246, at 799.

266. Id. *See* People v. Belge, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975) (finding duty of confidentiality more important than duty to notify public health officials about unburied corpses or reveal information to victims' families; society in general has an interest in preserving attorney-client privilege), aff'd, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976). *See also* Levinson, supra note 246, at 804 (arguing de-emphasis of adversarial process might transform judicial system into general problem solving technique that interfuses the traditional methods of lawyers with those of other professionals, and that this transformation should not occur without the sanction of society). *But see* Shaffer, The Unique, Novel, and Unsound Adversary Ethic, 41 Vand. L. Rev. 697 (1988) (criticizing "adversary ethic" for excusing lawyers from personal responsibility to act with integrity and administer justice). *Cf.* Freedman, Lawyer's Ethics in an Adversary System (1985) (suggesting that lawyers have a duty to "chase ambulances").

2. *Maintaining Professionalism: The Bar's Interest in Regulating Lawyer Advertising*

The Supreme Court has recognized the bar's interests in preventing consumer deception[267] and in maintaining the bar's integrity and professional image.[268] A related reason for regulating lawyer advertising, albeit invoked less often by the bar, is protecting the public from hasty or poor legal decisions.[269] The Supreme Court also has recognized the bar's interest in fostering rational decision making in the determination of the need for legal services and the selection of a lawyer.[270]

Lawyers play an important role in our society. As officers of the court, they swear to preserve the judicial system.[271] The public may view lawyers

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267. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977), (discussed supra at notes 55-71 and accompanying text); id. at 383 (false, deceptive, or misleading advertising is subject to restraint); id. at 383-84 (claims of quality or in-person solicitation might warrant restriction); id. at 384 (warnings or disclaimers may be required to prevent consumer deception); *In re* R.M.J., 455 U.S. 191 (1982) (discussed supra at notes 117-20 and accompanying text); id. at 202-03 (bar can regulate advertisements which are inherently likely to deceive, or which have been proven to be subject to abuse); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (discussed supra at notes 140-45 and accompanying text); id. at 462 (bar can regulate in-person solicitation resulting in intrusion, intimidation, overreaching, or undue influence). *See also* Bishop v. Comm. on Prof. Ethics, 521 F. Supp. 1219, 1229 (S.D. Iowa 1981) (electronic promotional advertisements not aiding public in making informed decisions and not protected by first amendment); Comm. on Prof. Ethics v. Humphrey, 355 N.W.2d 565, 568 (Iowa 1984) (regulation by bar permissible where particular advertising is inherently likely to deceive or where particular form or method has in fact been deceptive).

268. *Ohralik*, 436 U.S. at 460-61 (recognizing bar's interest in maintaining the integrity of the profession, but holding interest in the image of the profession is insufficient to justify regulation). The Iowa Supreme Court also recognized this interest in *Humphrey*. *See* Committee on Professional Ethics v. Humphrey, 377 N.W.2d 643, 646-47 (Iowa 1985) (prohibiting "image-building" through electronic media); supra notes 217-26 and accompanying text; *see also* Bianchi, supra note 228, at 63-65; Hansell, supra note 235, at 4 (stating concern is the negative image of the profession created by lawyer advertising); Lawyer Advertising—Marketing, Professionalism, the Future, supra note 228, at 63 (distasteful advertising harms the image of the Bar, and of the justice system); Reynoldson, supra note 213, at 60 (arguing enhancement of professionalism is principal concern in regulating lawyer advertisements).

269. *See* Calvani, Langenfeld, & Shuford, supra note 229, at 761; Cox, supra note 229 at 23-24; Trapani, supra note 229, at 31-33.

270. *See Peel*, 496 U.S. at 110 ("Information about certification and specialization facilitates the consumer's access to legal services and thus better serves the administration of justice."); *R.M.J.*, 455 U.S. at 200-01 (noting that a warning or disclaimer may be appropriate in order to dissipate consumer confusion or deception); *Ohralik*, 436 U.S. at 457 (stating in-person solicitation may disserve the individual and societal interest in facilitating informed and reliable decision making); *Bates*, 433 U.S. at 377 (noting that a rule restraining advertising would be in accord with the bar's obligation to facilitate intelligent selection of lawyers and to assist in making legal services available); Virginia State Bd. of Pharmacy v. Virginia Citizens' Consumer Council, 425 U.S. 748, 765 (1976) (recognizing society's general interest in fostering rational and informed decisionmaking).

271. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' "); supra note 245-46 and accompanying text.

as linked to the functions of the judicial system.[272] Because state courts depend on public respect for the vindication of their judicial power and their effectiveness is enhanced by the perception that the courts are aided by an alliance of competent and professional officers, these officers, in turn, should be perceived as having high "moral character."[273]

The primary justification for lawyer advertising is that it informs and educates the public about the availability and cost of legal services.[274] The bar typically concedes that neither lawyers nor the public benefit from sensationalist lawyer advertising. Such advertising has become commonplace despite the bar's regulatory efforts.[275] Regulating advertising that is in no way harmful, however, may stigmatize lawyers who legitimately advertise within the legal community and deter advertising which provides useful information to the public.[276]

Commentators have suggested several alternatives to media advertising which provide the public with information about access to legal services. Lawyers could, as is traditionally done in England and the United States, make their availability known to the public through reputation, conventional listings, participation in bar work, and various other civic activities.[277] Advertising might be performed more professionally with appropriate disclaimers and qualifications.[278] For example, lawyers who feel traditional

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272. *See In re* Primus, 436 U.S. 412, 422 (1978) (stating lawyers are essential to administering justice and have historically been officers of the courts); *Humphrey*, 377 N.W.2d at 648 (Reynoldson, J., concurring) ("Lawyers have been inextricably linked in the minds of persons generally, as well as in fact, to the functions of the courts and the adjudication process.").

273. *See Humphrey*, 377 N.W.2d at 652 (Reynoldson, J., concurring); infra notes 295-99 and accompanying text (discussing the nexus theory).

274. *See, e.g.*, Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 110 (1990) ("Information about certification and specialization facilitates the consumer's access to legal services and thus better serves the administration of justice."); Shapero v. Kentucky State Bar Ass'n, 486 U.S. 466, 478 (1988) (advertising of value to clients); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (advertising of value to consumers); *In re* R.M.J., 455 U.S. 191, 199 (1982) (rejecting the potential adverse effect of advertising on the adminstration of justice); *In re* Primus, 436 U.S. 412, 435-36 (1978) (solicitation aids in an informed decision to pursue litigation); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978) ("[M]eetings with the prospective clients apprised them of their legal rights and of the availability of a lawyer."); Bates v. State Bar of Ariz., 433 U.S. 350, 382 (1977) ("[A]dvertising will permit the comparison of rates among competitors.").

275. *See* Lawyer Advertising—Marketing, Professionalism, the Future, supra note 228, at 63 ("distasteful lawyer advertising hurts everyone"); Udall, supra note 243, at 25 (lawyer advertising, some of it offensive, has become commonplace); Law. Man. on Prof. Conduct (ABA/BNA) 81:208 (1988) (Preamble to ABA Aspirational Goals for Lawyer Advertising) ("[I]f advertising employs false, misleading or deceptive messages or degenerated into undignified and unprofessional presentations, the public is not served, the lawyer who advertised does not benefit and the image of the judicial system may be harmed.").

276. *See* supra notes 246-47.

277. Udall, supra note 243, at 26. This view has been subject to criticism. *See* Abel, supra note 37, at 119-22 (arguing this view tends to favor large, elite firms); Attanasio, supra note 32, at 510 (1984) (arguing English public has less need for advertising than United States public because of extensive government paid legal aid, which justifies English restrictions on advertising).

278. Udall, supra note 243, at 26. Alternatively, the bar could allow lawyers to advertise but require disclaimers and qualifications to accompany advertisements. Id. This approach has

means are insufficient could collectively contact and inform potential clients through institutional advertisements contracted for through bar associations.[279] This approach might make advertising appear more professional.[280] However, whether this approach would succeed equally in informing the public and providing access to legal services is an empirical question.

a. Aspirational Goals For Lawyer Advertising

In August 1988, the ABA's Commission on Advertising submitted several "Aspirational Goals for Lawyer Advertising" (Aspirational Goals) to the ABA House of Delegates for approval.[281] After nearly two years of

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been taken by several states. *See* supra notes 132-37 and accompanying text.

279. Udall, supra note 243, at 26.

280. Id.

281. Law. Man. on Prof. Conduct (ABA/BNA) 81:208-09 (1991). The Aspirational Goals are as follows:

> 1. Lawyer advertising should encourage and support the public's confidence in the individual lawyer's competence and integrity, as well as, the commitment of the legal profession to serve the public's legal needs in the tradition of the law as a learned profession.
>
> 2. Since advertising may be the only contact many people have with lawyers, advertising by lawyers should help the public understand its legal rights and the judicial process and should uphold the dignity of the legal profession.
>
> 3. While "dignity" and "good taste" are terms open to subjective interpretation, lawyers should consider that advertising which reflects the ideals stated in these Aspirational Goals is likely to be dignified and suitable to the profession.
>
> 4. Since advertising must be truthful and accurate, and not false or misleading, lawyers should realize that ambiguous or confusing advertising can be misleading.
>
> 5. Particular care should be taken in describing fees and costs in advertisements. If an advertisement states a specific fee for a particular service, it should make clear whether or not all problems of that type can be handled for that specific fee. Similar care should be taken in describing the lawyer's areas of practice.
>
> 6. Lawyers should consider that the use of inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings in advertising does not instill confidence in the lawyer or the legal profession and undermines the serious purpose of legal services and the judicial system.
>
> 7. Advertising developed with a clear identification of its potential audience is more likely to be understandable, respectful and appropriate to that audience, and, therefore, more effective. Lawyers should consider using advertising and marketing professionals to assist in identifying and reaching an appropriate audience.
>
> 8. How advertising conveys its message is as important as the message itself. Again, lawyers should consider using professional consultants to help them develop and present a clear message to the audience in an effective and appropriate way.
>
> 9. Lawyers should design their advertising to attract legal matters which they are competent to handle.
>
> 10. Lawyers should be concerned with making legal services more affordable to the public. Lawyer advertising may be designed to build up client bases so that efficiencies of scale may be achieved that will translate into more affordable legal services.

studying how lawyer advertising affects the image of the legal profession,[282] the Commission presented the Aspirational Goals in an effort to guide lawyers in achieving the benefits of advertising while minimizing or eliminating its negative effects.[283] The preamble to the Aspirational Goals recognizes that, although most people locate a lawyer through family, friends, and work associates, advertising, "when properly done," can help people better understand and obtain the legal services available.[284] Because lawyers are officers of the court, "they have a special obligation to assure that their conduct conforms to the highest ideals of the legal profession."[285] Thus, according to the Aspirational Goals, advertising lawyers should consider the possible effects of their advertising on both their own professional image and the public's perception of the judicial system.[286]

b. Iowa's "State Interest" in Regulation

The Iowa Bar's extensive restrictions on lawyer advertising have been justified by its interest in maintaining law as a profession.[287] After *Bates*,[288] the Iowa Supreme Court requested the Committee on Professional Ethics and Conduct of the Iowa State Bar Association to re-evaluate Iowa's rules concerning lawyer advertising.[289] The Committee was particularly concerned about allowing lawyers to advertise the availability of legal services while at the same time "safeguarding a relatively uninformed public from

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Id. Since the ABA does not regulate the conduct of lawyers, these Aspirational Goals have no binding effect on lawyers absent adoption by states. Id. at 208.

282. Aspirational Goals for Attorney Advertising, Ariz. Att'y, Oct. 1988, at 27.

283. Law. Man. on Prof. Conduct (ABA/BNA) 81:208 (1988) (Preamble); *see* 4 Law. Man. on Prof. Conduct (ABA/BNA) 269 (1988) (steps must inevitably be taken to ensure advertising is informative and helpful while simultaneously "upholding the dignity of the profession").

284. Law. Man. on Prof. Conduct (ABA/BNA) 81:208 (1988) (Preamble).

285. Id.

286. Id. "Accordingly, lawyer advertising should exemplify the inherent dignity and professionalism of the legal community. Dignified lawyer advertising tends to inspire public confidence in the professional competence and ability of lawyers and portrays the commitment of lawyers to serve clients' legal needs in accordance with the ethics and public service tradition of a learned profession." Id. Lawyer Ad Limits, A.B.A. J., Nov. 1989, at 42 (citing survey showing 11% of personal injury victims solicited by lawyers through mail were unable to serve as impartial jurors); *see* Reynoldson, supra note 213, at 61 ("The public perceives a strong nexus between courts and the lawyers who serve as officers of the court."). The Project did not find solid empirical support for Reynoldson's "nexus" theory, *see* infra notes 413-20 and accompanying text.

287. *See* Hansell, supra note 235, at 4; Reynoldson, supra note 213, at 60.

288. 433 U.S. 350 (1977).

289. *Humphrey*, 355 N.W.2d at 568. The Committee conducted public hearings and examined the issue of lawyer advertising. The Iowa Supreme Court, after conducting its own study, adopted the committee's recommendations. Id. Iowa amended its rules after each of the *Bates*, 433 U.S. 350; *Bishop*, 521 F. Supp. 1219; and *Zauderer*, 471 U.S. 629, decisions. Iowa continues to adopt a "safe harbor" approach by restricting lawyer advertising to a specified list of allowable items and manners of dissemination. *Humphrey*, 355 N.W.2d at 569. Iowa's restrictions are narrowly drawn to limit protection of lawyer advertising to the minimum level required by the Supreme Court. *See* supra notes 170-226 and accompanying text.

misleading or potentially deceptive broadcast advertising practices."[290] In *Humphrey*, the Iowa Bar asserted that the state possesses an interest in preventing emotion from governing the selection of lawyers, guarding against both inadvertent and intentional deception of the public, and preserving the integrity of the legal profession.[291] The Iowa Bar further argued that the public needs objective information rather than persuasion, drama, and promotional appeals to intelligently choose a lawyer.[292] The *Humphrey* court accepted these arguments, finding a substantial governmental interest in "fostering rational, intelligent, and voluntary decision making in determining the need for legal services and selecting a lawyer."[293] On appeal, the court restated the governmental interest as regulating "a very real potential for abuse," emphasizing the potential lack of deliberation in responding to electronic media advertising.[294]

Chief Justice Reynoldson, in his concurrence, shared concerns about television advertising absent the safeguards provided by Iowa's rules. He argued that states indisputably possess a compelling state interest in being, and being perceived to be, "forums in which controversies will be seriously and dispassionately resolved, and justice administered, in a structured, disciplined, and dignified environment."[295] This state interest serves as the foundation of the "nexus theory" formulated by Justice Reynoldson. This theory holds that, in the public view, lawyers are "inextricably linked" to the judicial process.[296] Because of this nexus, Reynoldson suggests that "[t]he effectiveness of state courts, which have only moral suasion and public respect for the ultimate vindication of their judicial power, is enhanced by the perception that courts are served by a cadre of professional court officers."[297]

In addition to formulating the "nexus theory," Judge Reynoldson's concurrence addressed the courts' insufficient resources to police misleading lawyer advertising.[298] Thus, he commented on the difficulty of protect-

290. Brief for Plaintiff at 3-4, Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey, 377 N.W.2d 643 (Iowa 1985) (J. Allbee testifying). For a detailed recitation concerning the background of Iowa Code DR 2-101, see Rapp & Gillium v. Comm., 504 F. Supp. 1092 (S.D. Iowa 1980). Compare Florida, which is currently considering the broadest lawyer advertising restrictions of any state. N.Y. Times, June 30, 1989, § Y (Magazine) (The Law), at 20 ("What we're trying to do . . . is balance the First Amendment rights of lawyers against the public's need for fair and honest advertising.") (quoting S. Zack, head of Florida Bar).

291. Brief for Plaintiff at 3-4, *Humphrey*, 377 N.W.2d 643 (J. Allbee testifying).

292. Id. at 5. The Iowa restrictions on electronic media attempt to protect the public from manipulation by taking away the necessary tools—drama and emotion. "Without these potent tools, the manipulation, i.e., emotional and mood plays, implantation of perceived need, response-reaction and all of the other conditions used to control the public's mind, are powerless." Id. at 58.

293. 355 N.W.2d at 571.

294. 377 N.W.2d at 646.

295. 377 N.W.2d at 648 (Reynoldson J., concurring).

296. Id.

297. Id. at 652 (footnotes omitted).

298. Id. Reynoldson noted that "[t]he task would loom even larger if the sights, color, sounds, subliminal messages, and not-so-hidden persuaders of commercial television adver-

ing "the stature of the courts against the excesses of unprofessional court officers" if "solicitation for services in state courts is to be delegated to 'authoritarian' pitchmen utilizing all the slick imagery, promotion, and aggressive overreaching of Madison Avenue in the invasion of lay persons' living rooms."[299] Thus, Reynoldson upheld the Iowa rules as necessary to protect the integrity of the courts in fulfilling their primary function of administering justice.

3. Law Practice as "Business"

Whether or not there is a clear, causal connection between the line of Supreme Court lawyer advertising cases[300] and current public perceptions of the profession, some believe the practice of law is becoming a business rather than a profession.[301] While higher profits are not inherently evil, the legal profession's current business mentality may divert lawyers from attending their higher duties and quicken the decline of professionalism.[302] Lawyers have a duty to society, and self-interested pursuit of wealth might well impede the fulfillment of this duty.[303]

Business is not considered a traditional profession because profit maximization is its primary motive.[304] Business is thought generally to lack the altruistic spirit of other professions, such as doctors and lawyers.[305] Commentators, however, generally agree that differences between the conduct of lawyers and other professionals is narrowing. Some commentators suggest lawyers are acting less professionally than in the past, while

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tising were added to the burden." Id. at 649.

299. Id. at 652. Justice Reynoldson expanded further on the problems of policing lawyer advertisements:

> Solemn forums for the litigation of cases whose lawyer-officers resemble carnival barkers at the doors scarcely can avoid being viewed as carnivals, or at least, places where justice is bought and sold as in any marketplace. Judicial systems are not equipped, nor do they have the time, to police Madison Avenue.

Id. at 650.

300. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977); *see also* Udall, supra note 243, at 25 (claiming the *Bates* Court "declared that lawyers have become tradesmen").

301. Udall, supra note 243, at 26. "The profession is on a money-seeking binge. It appears to be driven by 'bottom-line' economics rather than public service where the seeking of income is an essential incident, not the primary goal." Id.

302. Id.

303. *See* Bowie, supra note 234, at 743-48 (stating lawyers should be motivated by an altruistic spirit in contrast to business people, who are primarily motivated to maximize their profit). *But see* Levinson, supra note 246, at 799-800 (arguing the pursuit of wealth is as legitimate an enterprise for lawyers as anyone else, except where the pursuit of wealth comes into conflict with other duties, especially duties owed to clients or society).

304. Friedman, Capitalism and Freedom 133 (1962) (business' sole social responsibility is to increase its profits while engaging in free competition without deception or fraud).

305. Bowie, supra note 234, at 745, 746 (arguing "invisible hand" economic theory is not applicable to lawyers; outcomes based on raw politics will not always be in the public interest).

nonlawyers are acting more professionally.[306] Others simply reject the idea of an inherent difference between the "professionalism" of lawyers and the "commercialism" of business.[307]

4. *Studies of the Effects of Advertising on the Professional Image of Lawyers*

The effect of lawyer advertising on the image of lawyers is of concern for three reasons: (1) If lawyers who advertise project a poor image to the public, this may reflect poorly on all lawyers; (2) negative imagery of lawyers in lawyer advertising may reflect poorly on the image of the legal profession; and (3) negative imagery of lawyers in lawyer advertising, by reflecting poorly on the legal profession, may undermine the legitimacy of the political system. While the Supreme Court has recognized the third concern as a valid state interest in regulating lawyer advertising, the first two concerns are constitutionally suspect.[308] Several studies have addressed empirically the effect of advertising on the image of lawyers and the legal profession. Most of these studies have attempted to examine whether public exposure to lawyer advertisements increased negative perceptions of lawyers. The studies, however, do not attempt to relate these findings to the state's interest in regulating lawyer advertising.

In 1983, the Iowa State Bar Association commissioned a research firm to conduct a survey of the public's attitudes and opinions toward law firms who advertise.[309] The primary objective of the survey was to determine the effect of certain lawyer television commercials on public perception of the legal profession.[310] The research firm selected a random sample from Linn County, Iowa, and four one-hour, in-studio sessions were held.[311] A majority of the sample (55%) thought television advertisements would give

306. Id. at 748. Bowie perceives that the public feels the practice of law has become a business and lawyers are motivated by greed. Id. at 741. Even though one may dismiss as uninformed the public's perceptions that lawyers overcharge, manufacture work, and create delays in order to make more money without producing anything useful, it is only prudent for the profession to take notice of how the public views the motives of lawyers. Id. at 741-42; *see* Anshen, Changing the Social Contract: A Role for Business, 5-6 Colum. J. World Bus. 6-14 (1970) (arguing business must play a greater role in resolving social problems).

307. Levinson, supra note 246, at 791. This author defines the term "profession" as a type of occupation entered into for compensation, and the term "business" as an enterprise conducted for profit. Id. at 792. These definitions regard a law firm as "a business that engages in the profession of practicing law." Id. The author does observe, however, that lawyers differ from individuals engaged in other occupations in many respects, such as "education, standards for admission, average income, [and] type of work." Id. Moreover, lawyers' "ability to manipulate, improve, or abuse the system that has been entrusted to [their] care" places them in a fiduciary position. Id. at 800; *see* Kultgen, supra note 236, at 145-46 (stating that despite a possible distinctive professional service motive, "professionals often are selfish and business people often are public spirited").

308. In *Ohralik*, the Supreme Court noted that protecting the image of lawyers *simpliciter* is an insufficient reason to justify regulation of lawyer advertising. 436 U.S. at 460-61.

309. *See* Lawyer Advertising—Marketing, Professionalism, the Future, supra note 228, at 61.

310. Id.

311. Id.

useful information and solicit new clients, but respondents generally did not believe that television commercials would answer many questions concerning legal rights.[312] After viewing lawyer television commercials, respondent's average perceptions of lawyer characteristics declined sharply: trustworthiness, from 71% to 14%; professionalism, from 71% to 21%; honesty, from 65% to 14%; and dignity, from 45% to 14%.[313]

Recently, the ABA conducted the Survey on the Image of Lawyers in Advertising.[314] The survey solicited lawyer and consumer reactions to print and television advertisements.[315] The questions asked were designed to discern attributes the public associates with a "dignified" image in lawyer advertising.

The survey results showed that dignified lawyer advertising reflects more positively both on specific lawyers who advertise and on the legal profession.[316] The results from the ABA study also suggest that neither medium, print nor television, inherently conveys a greater amount of dignity than the other.[317]

According to the survey, lawyer advertisements are most likely to be seen as "dignified" when they are viewed as "not tacky" and "convincing" to members of the public.[318] The study suggests that "dignity" is not closely related to the substantive message of the lawyer advertisements.[319] Production quality, however, is closely related to public perceptions of "dignity" in lawyer advertisements.[320] It follows that rules limiting production quality produce negative perceptions of lawyers—a result opposite of the one the rules were intended to accomplish.

The ABA study concluded that "dignified" advertising will best achieve professional, responsible, and effective advertising, and that the public and the legal profession would benefit from "dignified" lawyer advertising.[321] According to the authors of the study, dignified advertising

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312. Id.

313. Id. at 61-62; *see* supra note 223 (ISBA study); *see also* Reynoldson, supra note 213, at 60 (arguing results of this study show the "public perceives a strong nexus between courts and the lawyers who serve as officers of the courts").

314. ABA Commission on Advertising, Report on the Survey on the Image of Lawyers in Advertising (Jan. 1990).

315. The lawyer reactions to television advertisements were solicited while on-site at the ABA's 1987 annual meeting in San Francisco. Lawyer reactions to print advertisements were solicited through the mail. A total of 300 lawyers were subjects in the survey. A total of 300 consumers were presented television and print advertisements at shopping centers in Atlanta, Minneapolis, and Phoenix. Both lawyers and consumers completed the same survey instrument. Id. at 7-11.

316. Id. at 39.

317. Id. at 24. The most dignified commercial, according to consumers, was a television ad. Id.

318. Id. at 45.

319. Id. at 46-49.

320. Id. at 50-53.

321. Id. at 56.

is best promoted by the Aspirational Goals[322] and by regulatory approaches similar to Iowa's.[323] The study did not examine how public perception of lawyer advertisements as "dignified" affects the public perception of lawyers and the legal profession. Further, the study did not establish that undignified lawyer advertisements are viewed by the public in a negative manner.[324]

B. Economics of Lawyer Advertising

Economic theory and empirical evidence suggest lawyer advertising tends to facilitate public access to legal services, stimulate competition among lawyers, and lower lawyers' fees.[325] Economic theory assumes that a market for legal services exists. In this hypothetical market, lawyers and the public simultaneously pursue their self-interest through the exchange of legal services for compensation. Neoclassical economic theory provides an alternative to the Durkheimian model of professionalism presented above.[326] According to Max Weber and his followers, professions arise as the result of actors attempting to gain competitive advantages within a relatively free market.[327] Under this view, professions allow members to protect economic rewards and social status, which are in part a consequence of wealth and in part its legitimation.[328]

There are two plausible objections to applying economic analysis to legal services markets. First, one might believe that lawyers, unlike other "market actors," are not self-interested.[329] Second, one might argue that legal services are different from other goods and services because clients of legal services do not have insight to evaluate their legal problems and needs.[330] Therefore, a market imperfection exists and economic analysis cannot provide guidance.

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322. Id. For a discussion of the Aspirational Goals, see supra notes 281-86 and accompanying text.

323. ABA Commission on Advertising, supra note 314, at 4.

324. After concluding that "not tacky" best explains advertisements rated as being dignified, the study states "an advertisement that is tacky is not dignified and vice versa." Id. at 45. However, many additional attributes of advertisements were not included in the study.

325. Calvani, Langenfeld, & Shuford, supra note 229, at 775-79 (presenting economic arguments for the liberalization of restrictions on lawyer advertising).

326. *See* supra notes 234-39 and accompanying text.

327. Abel, supra note 37, at 15 (discussing Weberian theories of professionalism). *See generally* Freidson, Profession of Medicine (1970); Johnson, Professions and Power (1972); Larson, The Rise of Professionalism: A Sociological Analysis (1977); Weber, Law in Economy and Society (M. Reinstein trans. 1954).

328. Abel, supra note 37, at 15.

329. *See* Bowie, supra note 234, at 758-59 ("[T]o the extent that lawyers abandon altruistic motivation and become more like traditionally characterized business persons, the profession should feel considerable unease."); Reynoldson, supra note 213, at 61 (the legal profession, unlike business, is a "calling" that "still involves the unique and basic concept that a client's interests must be put before that of the lawyer.") (paraphrasing Justice Powell).

330. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 485-86 (1988) (O'Connor, J., dissenting) (arguing price advertising of legal services is misleading because consumers in general lack the expertise to determine how routine or complex their problem is and what type of service will best solve their problem).

However, neither of these objections withstand scrutiny. Even assuming that lawyers are economically self-interested, such an assumption does not necessarily preclude that a lawyer may also be altruistically inclined.[331] Moreover, economic theory makes assumptions about human nature in order to arrive analytically at conclusions, and so long as the conclusions predicted by economic theory are empirically accurate, economics is a useful explanatory device regardless of the empirical precision of its assumptions.[332] Thus, extending economic analysis to the legal services market is no different in spirit from the economic analysis of agencies[333] or politicians.[334]

Economists generally agree that the public and lawyers possess different levels of information concerning legal services in certain circumstances. The legal services market might be divided into individualized and standardized services to compensate for this discrepancy.[335] Standardized services are consistently recognized as appropriate for economic analysis because of their simple, homogenous nature. Furthermore, economists generally agree advertising is one way to reduce asymmetry of information between lawyers and the public in legal services markets.[336] The belief that typical consumers do not possess insight into their legal problems and needs might be overstated. A recent study shows an increasing number of individuals are adequately representing themselves in relatively standardized legal matters.[337] This study suggests, because certain legal transactions are relatively simple, lawyers can effectively communicate information

331. Self interest, though a necessary and significant motive, need not be the only motive. Brennan & Buchanan, Is Public Choice Immoral? The Case for the "Nobel" Lie, 74 Va. L. Rev. 179, 181 (1988). An individual might find it in her interest to pursue altruism, although many would consider this oxymoronic. Furthermore, altruism may be a trait which has survived in the evolution of egoistic individuals. *See generally* Axelrod, The Evolution of Cooperation (1984).

332. *See* Curtis, Microeconomic Concepts for Attorneys 4 (1984) (economics does not explain in detail the activities of economic units in the real world but instead establishes general principles concerning these activities).

333. Judges have also been subjected to economic analysis. *See* Spitzer, Multicriteria Choice Processes: An Application of Public Choice Theory to *Bakke*, the FCC, and the Courts, 88 Yale L.J. 717, 717 (1979) (applying public choice analysis to judicial decision making).

334. *See generally* Buchanan & Tullock, The Calculus of Consent (1962) (extending economic analysis to voting and other decision making by agencies and legislatures).

335. The Supreme Court in *Bates* originally distinguished between routine and nonroutine legal services, and extended constitutional protection to fee advertising for the former. 433 U.S. at 372-73. One can distinguish between individualized and standardized services depending "on the degree of risk that the particular problem poses for the client." Hazard, Pearce, & Stempel, supra note 227, at 1090-91. Risk depends upon: "1) the gravity of the consequences to life, liberty, or property . . . and 2) the probability that one or more of these consequences will actually occur." Id. Individualized legal services are appropriate in situations that involve relatively significant risks for clients and thus require involved, sophisticated lawyer involvement. To contrast, standardized services are appropriate for relatively routine situations that involve lower client risk and thus require comparatively little direct lawyer participation. Id.

336. *See* infra notes 343-44 and accompanying text.

337. Cox & Dwyer, A Report on Self-Help Law 70-91 (1987). In 1985, almost one-half of the approximately 14,000 marriage dissolutions in Maricopa County (Phoenix), Arizona, were handled by the parties themselves. In 1980, the fraction was about one-quarter. Id. at 2.

about these matters to the public.[338]

1. *Predictions of Economic Theory*

Economic theory offers several predictions of the effects of advertising. In general, lawyer advertising affects both price and quality of legal services.[339] Certain economic theories suggest advertising affects price through buyer search, seller competition, or entry barriers.[340] Alternative theories predict opposite effects on the price of legal services.[341] Similarly, the theoretical effects of lawyer advertising on the quality of legal services are ambiguous.[342]

a. *Effects on Price*

To make an informed decision about purchasing legal services, an individual must be familiar with the legal services provided by a large variety of lawyers or firms.[343] Advertising tends to reduce the costs of searching for the least expensive solution to a legal problem.[344] Therefore, advertising should stimulate fee comparison shopping and cause more individuals to obtain lawyers at lower fees.[345]

Economic theory also predicts that advertising increases competition among sellers of a good or service.[346] There are two views concerning the effect that seller competition will have on price. The "information/search"

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338. *See* Cox, supra note 229, at 23-24.

339. *See* infra notes 343-56 and accompanying text.

340. *See* infra notes 347-49 and accompanying text.

341. *See* infra notes 350-51 and accompanying text.

342. *See* infra notes 352-56 and accompanying text.

343. The first and possibly strongest source of consumer information is personal knowledge about a product. Relatively few individuals, however, have sufficient direct experience with legal services to make an informed choice among service providers. *See* Curran, The Legal Needs of the Public: The Final Report of a National Survey 185-86, 190 (1977).

A second source of information is reputation. However, some individuals have greater access than others to reputation information, and not all prospective purchasers of legal services are equally well-equipped to "assess the quality of service being received." For example, personal contact with a lawyer (one valuable source of reputation information) is concentrated most heavily among whites and property owners with high income and better education. Hudec & Trebilcock, Lawyer Advertising and the Supply of Information in the Market for Legal Services, 20 U.W. Ont. L. Rev. 53, 64-65 (1982); *see also* Hazard, Pearce, & Stempel, supra note 227, at 1084, 1090-91.

344. George Stigler, in a seminal article on the economics of information, presented the theory of buyer search. Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961). Under the assumption that consumers face a distribution of seller-quoted prices in a market for a homogeneous commodity, the rational consumer will continue her search process so long as the marginal benefits exceed the marginal costs. Id. at 216. Since advertising reduces search costs, consumers should obtain the commodity at lower prices. *See* Cox, Advertising Restrictions Among Professionals: Bates v. State Bar of Arizona, *in* The Antitrust Revolution 134, 137 (Kwoka & White eds. 1989); Calvani, Laganfeld, & Shuford, supra note 229, at 776.

345. Cox, supra note 344, at 137-38.

346. *See* Comanor & Wilson, The Effect of Advertising on Competition: A Survey, 17 J. Econ. Lit. 453, 459 (1979).

view hypothesizes that in markets for relatively homogenous products, advertising stimulates consumer price activity. This, in turn, causes the demand curve facing each seller to become more price elastic.[347] Consequently, any seller that raises prices experiences reductions in sales, and each seller faces incentives to lower prices.[348] Where the quality of goods or services cannot be thoroughly assessed by typical consumers, this theory is less applicable.[349]

The "product differentiation" view provides an opposite prediction. Firms which advertise differentiate their products in the eyes of the public. Consequently, they gain greater market power and insulate themselves from competition from rivals.[350] This view implies that advertising, by increasing the price of competition in a market, will have adverse entry barrier effects.[351]

b. Effects on Quality

The effects of advertising on product quality predicted by economic theory are ambiguous. One theory suggests that sellers who advertise will offer higher quality service on average.[352] Advertising increases consumer "search" for and experience with products, and consumers will purchase

347. In the case of search goods, this will be accomplished by directly informing consumers of the availability and qualities of alternative products. In the case of experience goods, advertising will indirectly increase consumer information by encouraging experimentation with more market brands. Nelson, Information and Consumer Behavior, 78 J. Pol. Econ. 311, 227 (1970). *See also* Hazard, Pearce, & Stempel, supra note 227, at 1092-94.

348. *See* Cox, supra note 344, at 137; Hazard, Pearce, & Stempel, supra note 227, at 1091-94.

349. Because of the high costs of quality comparison information, the consumer in markets for such goods is particularly vulnerable to fraud and deception. These goods have been called credence goods—goods the quality of which is difficult for the consumer to ascertain, even ex post. *See* Darby & Karni, Free Competition and the Optimal Amount of Fraud, 16 J. L. & Econ. 67 (1973).

350. The *Bates* case was brought on the opposite rationale: that advertising would allow lawyers to break into the market. Bates v. State Bar of Ariz., 433 U.S. 350, 378 (1977); *see* Calavani, Langenfeld, & Shuford, supra note 229, at 777 ("[A]dvertising tends to lower prices by making entry easier for new firms to gain recognition and challenge established firms."); FTC Report, supra note 19, at 82 ("[N]ew firms are kept at a competitive disadvantage during the time that consumers are less aware of their presence than of the older and more established firms.").

351. Entry barrier effects will exist if there are economies of scale to advertising. Two phenomena may lead to economies of scale: consumer brand loyalty and the accumulative effect of advertising. Either effect causes seller's promotion costs to be less per customer served than those of other new entrants to the market. Cox, supra note 344, at 139.

352. Nelson, Advertising as Information, 82 J. Pol. Econ. 729, 732 (1974); *see* Calvani, Lagenfeld, & Shuford, supra note 229, at 777-78 ("[A]dvertising may actually reduce consumer deception and improve the ability of consumers to evaluate the quality of legal services."); Hazard, Pearce, & Stempel, supra note 227, at 1099 (advertising "tends to cause consumers to seek information about the producer's reputation and about other consumers' direct experience"); Schulenburg, Regulatory Measures to Enforce Quality Production of Self-Employed Professionals—A Theoretical Study of Dynamic Market Processes, in Law and Economics and the Economics of Legal Regulation 133-47 (Schulenburg & Skogh eds. 1986) (criticizing existing regulatory measures and proposing a policy of market-oriented quality enforcement even for services which the consumer has difficulty evaluating in advance).

products with high quality-to-price ratios. Since advertising costs are invested, advertising sellers depend on repeat purchases and therefore tend to offer higher quality products than non-advertising sellers.[353]

An alternative theory predicts advertisers tend to provide poorer quality products than non-advertisers. Sellers of legal services possess more knowledge of what constitutes quality. Due to the general consumer's lack of knowledge regarding legal services, it is costly for the individual to evaluate the quality of such services, even after they have been rendered.[354] Although consumers might be willing to pay for quality, they may purchase low price, poor quality options because they cannot evaluate quality.[355] Because of consumer quality uncertainty, the opportunity for fraud by sellers is great.[356]

2. *Studies of Economic Effects of Lawyer Advertising*

Studies of advertising in various products and services markets support the hypothesis that advertising leads to lower prices by increasing seller competition.[357] Empirical research of the legal services market suggests lawyer advertising leads to lower fees for routine services.[358] Evidence from studies of both non-legal[359] and legal[360] markets concerning the effect of advertising on quality is ambiguous.

a. Non-Legal Products and Services

Studies of advertising in non-legal products markets support the hypothesis that advertising increases competition among sellers and therefore leads to lower prices.[361] A study of state bans on eyeglass advertising found an average difference between restrictive and non-restrictive states of five to six dollars for a thirty to forty dollar pair of eyeglasses.[362] Another study found that eyeglasses and lenses were generally less expensive if the dispensing optician or optometrist provided price information by tele-

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353. A problem with this theory is that it assumes that consumers can determine the quality of legal services both ex post and ex ante. Cox, supra note 344, at 140.

354. Id.

355. Akerlof, The Market for Lemons: Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488, 489-90 (1970) (bad goods and services may drive out good ones under quality uncertainty).

356. Darby & Karni, supra note 349, at 68.

357. *See* infra notes 361-67 and accompanying text.

358. Lawyer advertising research does not support the hypothesis that lawyer advertising leads to lower fees by increasing buyer search activity, but rather leads to lower fees through increased seller competition. *See* infra notes 373-77 and accompanying text.

359. *See* infra notes 368-69 and accompanying text.

360. *See* infra notes 378-82 and accompanying text.

361. Calvani, Lagenfeld, & Shuford, supra note 229, at 779-81; Cox, supra note 344, at 141-42, 148-49; Hazard, Pearce, Stempel, supra note 227, at 1109.

362. Eyeglasses in the state with the strictest advertising regulations sold for approximately $19 more per pair than the state with the least strict regulations. Benham, The Effects of Advertising on the Price of Eyeglasses, 15 J. L. & Econ. 337, 342-44 (1972).

phone and advertised outside of the telephone directory.[363] Similar studies of prescription drug[364] and retail gasoline[365] sales reveal substantial savings to consumers when advertising bans and restrictions were removed.

Studies of non-legal services markets provide similar support. For example, one study revealed that states with bans on advertising by optometrists and opticians had service prices approximately eleven percent higher than states with no bans or states with restrictions on one group but not the other.[366] Additional studies of optometric advertising bans found eye examination and glasses prices were significantly higher in areas with highly restrictive advertising regulations than in lesser restrictive areas.[367]

Studies of the effect of advertising on the quality of non-legal products and services markets present mixed findings. A study of prescription drug advertising suggested advertising regulations tend to affect prices directly, rather than indirectly, by serving as an incentive to provide lower quality services at a lower price.[368] However, later studies found no negative relationship between advertising and the quality of optometric services.[369]

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363. Maurizi & Moore, Price Advertising of Eyewear: An Analysis of Legal Restraints in Los Angeles (paper presented at annual meeting of W. Econ. Ass'n, June 1978), cited in Cox, supra note 344, at 141.

364. A study of prescription drugs showed that prices were approximately three percent higher in states with advertising bans than in those states without such bans. The aggregate potential savings to consumers from the elimination of prescription drug price advertising bans was estimated to be $135 million to $152 million. Cady, An Estimate of the Price Effects of Restrictions on Drug Price Advertising, 14 Econ. Inquiry 493, 510 (1976).

365. An early study assessed the impact of city ordinances prohibiting on premise advertising of retail gasoline prices. In the cities where such prohibitions existed, the dispersion in gasoline prices was higher, but the average price quoted was significantly lower than seven other cities. Maurizi, The Effect of Laws Against Price Advertising: The Case of Retail Gasoline, 10 W. Econ. J. 321, 323 (1972). Maurizi's early findings, however, were somewhat tainted because of the poor wholesale price data available. *See* Cox, supra note 344, at 141. A later study using a somewhat larger sample and better data showed prices on average were negatively related to posting of prices by retail gasoline stations. The potential dollar savings to consumers of universal posting were estimated to be from $500 million to more than $800 million annually. Maurizi & Kelley, Prices and Consumer Information 47 (Am. Ent. Inst. for Public Policy Res. 1978).

366. Feldman & Begun, Does Advertising of Prices Reduce the Mean and Variance of Prices?, 18 Econ. Inquiry 487, 491 (1987); *see* Feldman & Begun, The Effects of Advertising Restrictions—Lessons from Optometry, 13 J. Hum. Res. 247 (Supp. 1978) (finding state restrictions on optometric service price advertising raises the price of an eye examination by optometrists for presbyopic patients).

367. These studies were based on experimental data. Trained subjects with routine visual problems were sent to different cities across the United States to purchase eye examinations and glasses. *See* Federal Trade Commission Staff Report, Effects of Restrictions on Advertising and Commercial Practice in the Professions: The Case of Optometry 4-5, 39-47 (April 1980) (Wash. D.C.) [hereinafter FTC Report (Optometry)]; Kwoka, Advertising and the Price and Quality of Optometric Services, 74 Am. Econ. Rev. 211, 213-14 (1974).

368. Cady, supra note 364, at 493; *see* Cox, supra note 344, at 141.

369. One study measured service quality by: (1) thoroughness of eye examination; (2) accuracy of eyeglass prescription; (3) accuracy and workmanship of eyeglasses; and (4) extent of unnecessary prescribing. FTC Report (Optometry), supra note 367, at 6-26. The other study measured quality by the mean input time spent on eye examinations. Kwoka, supra note 367, at 215.

b. *Legal Services*

The *Bates*[370] decision prompted several studies of the effects of lawyer advertising on price and quality.[371] The studies hypothesized that lawyer advertising should lead to lower prices due to increased buyer search and seller competition. The studies also hypothesized lawyer advertising should not lead to a significant decline in quality. These studies determined that lawyer advertising leads to lower fees on average for routine legal services. The findings were ambiguous as to whether lawyer advertising has a positive or negative effect on quality.[372]

An empirical study of advertising and buyer search was conducted to test the hypothesis that lawyer advertising leads to lower legal fees because of increased buyer search activity.[373] The study found no evidence of a positive relationship between lawyer advertising and buyer search activity. In fact, the study found the average consumer was willing to pay the first price given, even if this price was higher than average price quotes.[374] One explanation for this may be that consumers are choosing between high priced sellers who offer some quality guarantee and low priced sellers who do not.[375]

A comprehensive study of lawyers' fees for routine services in sixteen different cities concluded:

> Attorneys in the more restrictive states, on average, charged higher prices for most simple legal services than those in the less restrictive states. The fact that stronger restrictions on advertising are associated with higher prices suggests that, in this type of market, the dominant effect of advertising is to enhance price competition by lowering consumer search costs.[376]

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

371. Significant variation in state regulation of lawyer advertising following *Bates* created an ideal environment for empirical studies of the effects of lawyer advertising. In 1978, the National Science Foundation (NSF) funded a pilot study of lawyer advertising and pricing behavior in Phoenix. The results of the study showed that several routine legal service markets (simple wills with and without a trust provision, uncontested divorces, and uncontested personal bankruptcies) were characterized by substantial fee variation and that each service tended to be priced on a flat fee basis. This suggested that consumers of routine legal services in the post-*Bates* era were highly ignorant of market alternatives and that it would be possible to measure actual attorney fees via surveys. Cox, DeSerpa & Canby, Consumer Information and the Pricing of Legal Services, 30 J. Indus. Econ. 305 (1982).

In 1980, NSF funded a follow-up study which compared lawyers' fees and advertising behavior across six cities with widely differing advertising regulations. In 1982, the FTC replicated the NSF study research design in eleven additional cities. *See* Calvani, Langenfeld, & Shuford, supra note 229, at 783-84; Cox, supra note 344, at 145-46.

372. *See* infra notes 378-82 and accompanying text.

373. Schroeter & Cox, Estimating the Distribution of Search Costs and Reservation Prices: An Application to Routine Legal Services Markets (1986) (paper given at Ariz. State Univ.).

374. Id. at 16-17, tbls 2 & 3.

375. Cox, supra note 344, at 138, 147-48.

376. FTC Report, supra note 19, at 79. In all cases except personal injury lawyers, lawyers who advertised a specific service tended to charge less than either lawyers who did not advertise at all or lawyers who did not advertise the specific service. Id. at 127. On average, however, data suggested that personal injury cases are less expensive in cities where

Another study using the same data but different empirical techniques also supports the finding that lawyer advertising leads to lower fees through increased seller competition.[377]

There are conflicting theories about the effect of advertising on the quality of legal services. One theory suggests that advertising should have either a positive effect or no effect on service quality. An alternative theory suggests that advertising leads to lower quality services. Both theories find support in empirical studies of the relationship between advertising and quality of legal services. An early study provided subjective and objective evidence to refute "the proposition that firms relying on advertising to charge lower prices will necessarily produce lower quality services."[378] Customers described a legal clinic which used advertising to attract clients as more prompt, interested, and honest; as better able to explain matters, keep clients informed, and charge more reasonable fees than traditional law firms.[379] Comparison of child support awards showed that the legal clinic obtained more favorable results for its clients than did the traditional law firm.[380]

Another study of legal services found, however, advertising and service quality are unrelated among attorneys within routine legal services markets, but suggested that for certain services advertising and average quality were inversely related.[381] A recent study of jury verdicts in Las

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advertising is allowed than cities which restrict advertising. Id.

Surveys interviewed 250 lawyers in each city with reference to the fees they charged for routine services. The services included: "a simple reciprocal will for a married couple with two children; a reciprocal will with a trust provision to take effect if both parents died within a short time of one another; an uncontested non-business bankruptcy for a husband and wife; an uncontested dissolution of marriage when there are no children and the property settlement has been agreed upon; and an automobile accident where the driver of the other car has admitted responsibility and there is no permanent pain, disability, or lost earnings capacity." The lawyers were asked the flat fee or hourly rate they charged for each of these services. They were also asked how many hours it would take them to complete each service and how many clients they had billed for each service in the past three months. For personal injury actions, lawyers were asked their contingency rates. Id. at 84-85.

377. Schroeter, Smith, & Cox, Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation, 36 J. Indus. Econ. 49-60 (1987). *But see* Abel, supra note 37, at 122 ("[T]he increase in the number and heterogeneity of lawyers following the erosion of professional control over the production *of* producers may have reduced professional control over production *by* producers, but it certainly did not lead to free competition.").

378. McChesney & Muris, The Effect of Advertising on the Quality of Legal Services, 65 A.B.A. J. 1503-06 (1979). The authors cautioned that their study examined only one legal clinic. Id. at 1506.

379. Id. at 1505.

380. Id. at 1506; *see also* Slonim, Survey: Ads Not Drawing Malpractice Claims, 67 A.B.A. J. 25 (1981) (reporting survey that found no correlation between legal firms that advertised and malpractice claims).

381. Cox, Schroeter, & Smith, Attorney Advertising and the Quality of Routine Legal Services, 2 Rev. Indus. Org. 340, 347 (1986). This study used attorney time input data as a proxy for service quality. The authors suggest that lawyers in these markets might be offering inefficiently high levels of service quality and that in more competitive markets brought about by advertising, lawyers might be forced to reduce their fees and the inefficiently high levels of quality they provide, thus increasing access to legal services. Id. at 347-48; Cox, supra note 344, at 152. For evidence consistent with this theory, see Feldman & Begun, The Welfare Cost

Vegas supports the hypothesis that jurors have a tendency to vote against personal injury plaintiff lawyers who advertise on television more often than against those who do not.[382]

IV. Empirical Analysis and Presentation of Results

The first three sections of the Project provide the reader with a framework in which to examine the data compiled in the Project. Theories of "professionalism" and economic theories of lawyer advertising provide important background for the next section.[383] This background, together with the Project data, "shape" the form of the lawyer advertising debate.

This section begins by addressing several issues concerning the public's attitudes toward lawyer advertising.[384] Next, the Project discusses attitudes of lawyers toward lawyer advertising. It also examines advertising behavior of lawyers, and advertising's effects on the delivery of legal services. The Project explores the relationships between the demographics of legal practice and lawyer advertising. Finally, it considers whether lawyer advertising affects the cost or quality of legal services.

Iowa and Wisconsin were chosen as comparative forums for this study because the states are geographically and demographically similar and because the states have adopted different approaches in the regulation of lawyer advertising.[385] The Iowa Bar has enacted extensive regulations intended to uphold the dignity of the profession.[386] The Wisconsin Bar, on the other hand, regulates lawyer advertising less restrictively.[387] The Project employed three primary research devices: a mail survey of the general Iowa and Wisconsin populations, a studio EMT session which examined the attitudes of the general public and law students, and a mail survey of Iowa and Wisconsin lawyers.

A. Public Survey

The population portion of the Project allows examination of several issues regarding the public's attitudes towards lawyer advertising: first, whether the public views lawyers who advertise less favorably than lawyers as a profession; second, if so, whether any negative perceptions of lawyers who advertise carry over to the public's perceptions of the court system; and third, whether exposure to lawyer advertising affects the public's perceptions of the truthfulness of these advertisements.

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of Quality Changes Due to Professional Regulation, 34 J. Indus. Econ. 17-32 (1985); Kwoka, supra note 367, at 211-16.

382. de Benedictis, Study Reheats Advertising Debate, A.B.A. J., Oct. 1991, at 28.

383. *See* supra notes 26-226 and accompanying text (providing history of and current approaches to lawyer advertising regulation); supra notes 227-324 and accompanying text (addressing the concept of "professionalism"); supra notes 325-82 and accompanying text (discussing the economics of lawyer advertising).

384. *See* infra notes 388-448 and accompanying text.

385. *See* supra note 15.

386. *See* supra notes 170-226 and accompanying text.

387. *Compare* supra notes 108, 133, 161 (noting Wisconsin regulations) *with* notes 170-226 and accompanying text (discussing Iowa regulation).

1. *Perceptions of Lawyers and Courts*

The population survey asked respondents to rate individually lawyers as a professional group, lawyers who advertise, and the court system for each of the following attributes: honesty, competence, helpfulness, effectiveness, and reliability. The scale ranged from a low score of one (1) to a high score of seven (7).[388] The Project hypothesized that if Iowa is successful in its efforts to uphold the dignity of the profession through extensive regulation of lawyer advertising, it would follow that the Iowa public holds a higher opinion of lawyers than does the Wisconsin public. In fact, the data supports this hypothesis. Table 1 shows that Iowa respondents rated lawyers more favorably on every attribute surveyed:

Table 1
Ratings of Lawyers as a Profession
(low = 1, high = 7)

Attribute	*Iowa*	*Wisconsin*
Honesty[389]	4.60	4 .11
Competency[390]	4.91	4.55
Helpfulness[391]	4.78	4.30
Effectiveness[392]	4.72	4.43
Reliability[393]	4.70	4.22

The survey attempted to determine whether this trend carried over to lawyers who advertise. Predictably, more people from Wisconsin have seen a lawyer advertisement: 96% of the Wisconsin public surveyed compared to 67% of the Iowa respondents.[394] Of those who had viewed a lawyer

388. *See* infra Appendix A, at questions 1, 2, 9.

389. A "t-test" was used to determine whether the mean values rating lawyers as a professional group varied significantly among Iowa and Wisconsin residents. The t-test produces probability statements regarding whether two independently sampled populations represent a single population. *See* R. Sprinthall, Basic Statistical Analysis 165 (2d ed. 1987). For each t-test, a "t-value" is calculated and a significance level (p) is given. A calculated significance level of less than .05 indicates that the probability the result would occur by chance alone is less than 5%—thus we can conclude that differences are "real" differences and not due to chance. In this instance, the t-value for the data ($t=3.673$) was significant at $p < .001$ ($df=371$).

390. The t-value for the data ($t=3.080$) was significant at $p < .01$ ($df=372$).

391. The t-value for the data ($t=3.508$) was significant at $p < .01$ ($df=370$).

392. The t-value for the data ($t=2.155$) was significant at $p < .05$ ($df=370$).

393. The t-value for the data ($t=3.360$) was significant at $p < .01$ ($df=370$).

394.

	Iowa	*Wisconsin*
Have Viewed	139 (67%)	171 (96%)
Have Not Viewed	68 (33%)	8 (4%)
No Answer	1	0

A chi-square test was used to determine whether the frequency of viewing advertising differed significantly between states. The chi-square test determines whether frequency differences between discrete categories of nominal data vary on the basis of chance. Sprinthall, supra note 389, at 277. For each analysis, a chi-square statistic (χ^2) is calculated and its significance level

advertisement, more respondents from Wisconsin than Iowa had viewed those advertisements within their home state.[395] Interestingly, despite the relative lack of lawyer advertising in Iowa, the number of respondents from Iowa and Wisconsin who felt that they definitely or probably possess sufficient information to find a competent lawyer was approximately equivalent.[396]

Table 2 reveals that respondents from Iowa and Wisconsin did not differ in their evaluations of lawyers who advertise.

Table 2
Ratings of Lawyers Who Advertise
(low = 1, high = 7)

Attribute	Iowa	Wisconsin
Honesty[397]	3.68	3 .74
Competency[398]	3.89	3.84
Helpfulness[399]	4.08	4.03
Effectiveness[400]	4.00	3.94
Reliability[401]	3.79	3.73

Moreover, a comparison of the data in Table 1 with Table 2 shows that respondents from both Iowa and Wisconsin rated lawyers who advertise significantly lower than lawyers in general with respect to all five attributes

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(p) is determined. A calculated significance level of less than .05 indicates that the probability the result would occur by chance alone is less than 5%—thus we can conclude that differences are "real" differences and not due to chance. If the significance level of the calculated chi-square statistic for the age group size data is smaller than that expected by chance, then we conclude that there is a significant difference of lawyer advertising between the age groups. In this instance, the chi-square value for the data ($\chi^2 = 49.778$) was significant at $p < .001$ ($df = 2$).

395.

	Iowa	*Wisconsin*
Viewed Within State	97 (71%)	163 (95%)
Not Viewed Within State	39 (29%)	8 (5%)

Respondents who had never viewed a lawyer advertisement (68 in Iowa and 8 in Wisconsin) did not answer this question. The chi-square value for the Iowa/Wisconsin variation ($\chi^2 = 86.714$) was significant at $p < .001$ ($df = 2$).

396. *See* infra Appendix A, question 12.

397. The t-value for the data ($t = .467$) was not significant at $p = .641$ ($df = 292$).

398. The t-value for the data ($t = .250$) was not significant at $p = .803$ ($df = 289$).

399. The t-value for the data ($t = .276$) was not significant at $p = .783$ ($df = 287$).

400. The t-value for the data ($t = .348$) was not significant at $p = .728$ ($df = 289$).

401. The t-value for the data ($t = .244$) was not significant at $p = .807$ ($df = 287$).

surveyed: honesty,[402] competency,[403] helpfulness,[404] effectiveness,[405] and reliability.[406]

In a related series of questions, respondents were asked to rate the descriptive accuracy of several statements concerning lawyers and the legal profession.[407] The scale ranged from a low of one (1), strongly disagree, to a high of five (5), strongly agree.

Table 3
Agreement With Statements About Lawyers
(disagree = 1, agree = 5)

Statement	Iowa	Wisconsin
"sympathetic to their client's interests"[408]	3.64	3.38
"concerned with their own interests"[409]	3.31	3.69
"concerned with the interests of the legal profession"[410]	3.76	3.61
"dedicated to making the justice system work"[411]	3.17	2.93

As Table 3 illustrates, the Iowa public viewed each of the "positive" statements about lawyers as significantly more descriptive than did the Wisconsin public, with the exception of the statement that lawyers are "concerned with the interests of the legal profession." Both Iowa and Wisconsin respondents thought "concerned with their own interests" was more descriptive of lawyers than "dedicated to making the justice system work," although this difference was more pronounced among citizens of Wisconsin, who are more frequently exposed to lawyer advertisements.[412]

The hypothesis that Iowans would also rate the court system more favorably can be derived from the above findings that the Iowa public views lawyers more favorably than does the Wisconsin public. This prediction stems from the "nexus theory" relied upon by Justice Reynoldson in his concurring opinion in *Humphrey*,[413] a decision upholding Iowa's regulations

402. The t-value for the Wisconsin data ($t=3.885$) was significant at $p < .001$ ($df=161$) and for Iowa data ($t=7.241$) was significant at $p < .001$ ($df=128$).

403. The t-value for the Wisconsin data ($t=6.607$) was significant at $p < .001$ ($df=159$) and for the Iowa data ($t=9.566$) at $p < .001$ ($df=127$).

404. The t-value for the Wisconsin data ($t=2.319$) was significant at $p < .05$ ($df=157$) and for the Iowa data ($t=4.366$) at $p < .001$ ($df=126$).

405. The t-value for the Wisconsin data ($t=3.937$) was significant at $p < .001$ ($df=159$) and for the Iowa data ($t=4.655$) at $p < .001$ ($df=125$).

406. The t-value for the Wisconsin data ($t=3.734$) was significant at $p < .001$ ($df=157$) and for the Iowa data ($t=6.054$) at $p < .001$ ($df=126$).

407. *See* infra Appendix A, at question 13.

408. The t-value for the data ($t=2.662$) was significant at $p < .01$ ($df=380$).

409. The t-value for the data ($t=3.272$) was significant at $p < .01$ ($df=379$).

410. The t-value for the data ($t=1.539$) was not significant at $p = .125$ ($df=375$).

411. The t-value for the data ($t=2.023$) was significant at $p < .05$ ($df=378$).

412. The value of the F-Ratio ($F=11.210$) was significant at $p < .01$ ($df=1, 377$).

413. Committee on Prof. Ethics and Conduct v. Humphrey, 377 N.W.2d 643, 648 (Iowa 1985) (Reynoldson, J., concurring), *appeal dismissed*, 475 U.S. 1114 (1986). *See* supra notes

of lawyer advertising. This theory recognizes a compelling state interest in ensuring that the judicial system appears just. The theory also assumes that an inextricable link exists, in the mind of the public, between lawyers and the courts. It follows that the state has a compelling interest in regulating lawyer advertising to preserve the integrity of the justice system.

According to the nexus theory, the ratings of lawyers and of the court system should parallel each other. Because the general public in Iowa rated lawyers as a profession significantly higher on all attributes than did the Wisconsin public, Iowans should also rate the court system higher. However, notwithstanding the more negative perceptions of lawyers found among Wisconsin residents, citizens of the two states held substantially similar views of the court system. As is evident from Table 4, none of the differences are significant.

Table 4
Ratings of American Court System
(low = 1, high = 7)

Attribute	Iowa	Wisconsin
Honesty[414]	4.32	4 .35
Competency[415]	4.08	3.89
Helpfulness[416]	3.89	3.71
Effectiveness[417]	3.76	3.49
Reliability[418]	3.83	3.78

Interestingly, citizens of both states held more favorable views of lawyers than of courts. Iowa respondents rated lawyers in general more favorably than the court system on all five attributes, and Wisconsin

295-99 and accompanying text (discussing "nexus theory" in more detail).

414. The t-value for the data (t=.182) was not significant at p = .856 (df=366).

415. The t-value for the data (t=1.253) was not significant at p = .211 (df=371).

416. The t-value for the data (t=1.154) was not significant at p = .249 (df=369).

417. The t-value for the data (t=1.624) was not significant at p = .105 (df=367).

418. The t-value for the data (t=.325) was not significant at p = .745 (df=368).

respondents rated lawyers higher on all attributes except honesty.[419] Both the Iowa and Wisconsin samples rated lawyers who advertise significantly more helpful and effective than the court system, lawyers who advertise and the court system as equally competent and reliable, and the court system as more honest than lawyers who advertise.[420] Because the favorable ratings of lawyers given by Iowa respondents did not carry over to the ratings of the court system, the data does not support the nexus theory.

In addition to completing the above ratings of lawyers and courts, the subjects were asked to rate the content of advertisements in general and the content of attorney advertisements as either "truthful" or "misleading."[421] The scale ranged from one (1) to five (5), with 1 being the most truthful and 5 being the most misleading.

419.

Iowa Ratings

	Attorneys	*Courts*	*t-value*	*p-level*	df
Honesty	4.601	4.321	2.075	< .05	191
Competence	4.910	4.076	7.469	< .001	193
Helpfulness	4.784	3.888	8.856	< .001	191
Effectiveness	4.721	3.759	8.755	< .001	191
Reliability	4.698	3.832	8.854	< .001	191

Wisconsin Ratings

	Attorneys	*Courts*	*t-value*	*p-level*	df
Honesty	4.114	4.349	2.15	< .05	171
Competence	4.459	8.886	6.358	< .001	174
Helpfulness	4.295	3.714	5.531	< .001	172
Effectiveness	4.429	3.494	7.513	< .001	173
Reliability	4.220	3.782	3.758	< .001	172

420.

Iowa Ratings

	Attorneys	*Courts*	*t-value*	*p-level*	df
Honesty	3.67	4.32	-4.315	< .001	130
Competence	3.88	4.08	-.478	= .633	129
Helpfulness	4.08	3.89	2.473	< .05	128
Effectiveness	4.00	3.76	2.883	< .01	127
Reliability	3.78	3.83	.188	= .851	129

Wisconsin Ratings

	Attorneys	*Courts*	*t-value*	*p-level*	df
Honesty	3.74	4.35	-4.358	< .001	158
Competence	3.84	3.89	.101	= .919	159
Helpfulness	4.03	3.71	2.867	< .01	158
Effectiveness	3.94	3.49	4.014	< .001	159
Reliability	3.74	3.78	0.49	= .961	157

421. *See* infra Appendix A, at questions 15, 16.

Table 5
Effect of Viewing Lawyer Advertisement

	Have viewed lawyer advertisements		Have not viewed lawyer advertisements	
	Iowa[422]	Wisconsin[423]	Iowa[424]	Wisconsin[425]
Advertisements in General	2.96	3.24	2.97	2.43
Lawyer Advertisements	2.82	3.11	2.96	2.14

As indicated by Table 5, neither Iowa nor Wisconsin respondents perceived a difference between advertisements in general and lawyer advertisements.[426] However, Iowa respondents who have seen a lawyer advertisement rated lawyer advertisements as significantly more truthful than advertisements in general.[427] This distinction does not exist for Iowans who have never seen a lawyer advertisement. The effect was similar, but not as pronounced, for the Wisconsin public. The finding that viewing lawyer advertisements does not negatively affect the perceived truthfulness of those advertisements suggests that the viewers remain open to the information contained in the advertisement.

2. *Comparison with the EMT Study*

The EMT portion of the Project addressed, in focus group setting, the perceptions of two sample groups: members of the public and law students. The two sample groups allow comparison of views of the general public with the professional bias which lawyers may develop in the process of legal education and through self identification. Members of the public participating in the EMT session[428] were significantly more accepting of lawyer advertising than were participating law students. When asked how they feel about lawyers and law firms that advertise, 60% of the public participating in the session thought that lawyer advertising was acceptable,[429] compared to only 41% of the participating law students.[430]

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422. The t-value for the data ($t=1.991$) was significant at $p < .05$ ($n=132$).

423. The t-value for the data ($t=1.812$) was not significant at $p = .072$ ($n=166$).

424. The t-value for the data ($t=0.000$) was not significant at $p = 1.000$ ($n=55$).

425. The t-value for the data ($t=.795$) was not significant for $p = .457$ ($n=7$).

426. For Iowa, the mean for advertisements in general was 2.96 and for lawyer advertisements was 2.86; the t-value for the data ($t=1.700$) was not significant at $p = .091$ ($df=187$). For Wisconsin, the mean for advertisements in general was 3.21 and for lawyer advertisements was 3.09; the t-value for the data ($t=1.958$) was not significant at $p = .052$ ($df=172$).

427. That is, the average rating by Iowans who had viewed lawyer advertisements was 2.82 while Iowans who had not viewed a lawyer advertisement gave an average rating of 2.96.

428. *See* supra notes 23-24 and accompanying text.

429. A total of 63 members of the public participated in the survey. Sixty percent (38) of the members thought lawyer advertising was acceptable. Eight percent (5) of the members of the public were ambivalent towards lawyer advertising. Sixteen percent (10) of members of the public thought that lawyers' advertising was unacceptable.

430. A total of 27 law students participated in the EMT session. Of the law students, forty-one percent (11) thought that lawyer advertising was acceptable. Thirty percent (8) of the

The viewing of lawyer advertisements had a negative effect on the perceptions of lawyer advertising by both sample groups. Before the EMT session, 76% of the members of the public agreed when asked whether it was proper for lawyers and law firms to advertise, while 56% of the law students thought that lawyer advertising was proper.[431]

A portion of the EMT session presented to the participants television and radio advertisements for legal services. Throughout the presentation, the participants were asked to continuously rate whether they liked each advertisement. For each advertisement, the mean rating was significantly higher for members of the public than for the law students.[432] For example, 67% of the members of the public who participated in the EMT session, compared to only 33% of the law students, indicated before the testing that they would use the services, if needed, of a lawyer who advertises. Following the testing session, a greater number of both members of the public (74%) and law students (38%) indicated that they would use the services, if needed, of lawyers who advertise.[433] These results are shown in Table 6:

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law students were ambivalent toward lawyer advertising. Thirty percent (8) of the law students thought that legal advertising was unacceptable.

431. *See* Rowan & Blewitt, supra note 23, at 23.

432. *See* id. at 45, 49, 55, 59, 64, 68, 72, 76, 80.

433. *See* id. at 25.

Table 6

	Pre-testing		*Post-testing*	
Question	*Public*	*Law Students*	*Public*	*Law Students*
Is it proper for law firms and lawyers to advertise?[434]	76% (proper)	56% (proper)	70%	48%
Advertising would help consumers make more intelligent choices between law firms and attorneys.[435]	59% (agree)	42% (agree)	54%	36%
I would use the services, if needed, of a lawyer who advertises.[436]	67% (agree)	33% (agree)	74%	38%
Advertising of fees would lower the public's image of law firms and attorneys.[437]	28% (agree)	49% (agree)	37%	59%
Advertising by law firms and attorneys would tend to lower the dignity of the profession.[438]	33% (agree)	62% (agree)	34%	71%
Advertising of services would lower the public's image of law firms and attorneys.[439]	16% (agree)	38% (agree)	20%	56%
Advertising by law firms and attorneys would tend to lower the credibility of their profession.[440]	23% (agree)	64% (agree)	35%	74%
How appropriate is it for law firms and attorneys to advertise their services on television?[441]	49% (O.K.)	15% (O.K.)	43%	18%

434. The data are reprinted from id. at 23.
435. The data are reprinted from id. at 24.
436. The data are reprinted from id. at 25.
437. The data are reprinted from id. at 26.
438. The data are reprinted from id. at 27.
439. The data are reprinted from id. at 28.
440. The data are reprinted from id. at 29.
441. The data are reprinted from id. at 31.

	Pre-testing		*Post-testing*	
Question	*Public*	*Law Students*	*Public*	*Law Students*
How appropriate is it for law firms and attorneys to advertise their services on the radio?[442]	49% (O.K.)	19% (O.K.)	64%	23%
How appropriate is it for law firms and attorneys to advertise their services in the newspaper?[443]	76% (O.K.)	30% (O.K.)	68%	38%
How appropriate is it for law firms and attorneys to advertise their services by mailing brochures to your home or office?[444]	16% (O.K.)	15% (O.K.)	10%	11%

The law students believed more strongly than did members of the public that advertising negatively affects the image, credibility, and dignity of both lawyers and the legal profession. The public perceived lawyer advertising as more adversely affecting the dignity of lawyers than the credibility or image of lawyers.

Following the presentation of lawyer advertisements, the participants were asked what they specifically liked and disliked about the legal commercials. Multiple responses were solicited. Members of the public identified the following specific "positive" images in the commercials: Offer of help, if needed (24%); areas of expertise or specialization (22%); explanation or protection of rights (19%); informative or factual presentation (19%); truthfulness or sincerity (17%); humor (16%); no hard-sell (13%); and production (13%). Members of the public identified the following specific "negative" images in the lawyer commercials: Hard-sell mentality (30%); greed or manipulation of the system (16%); cheap production quality (14%); insincerity or slickness (10%); and patronizing or manipulative tone (8%).[445]

As discussed above,[446] many states, including Iowa, require the use of disclaimers on lawyer advertisements. Participants in the EMT session were asked whether they believe that the public obtains useful information from such disclaimers.[447] Fifty-four percent of the public participants thought

442. The data are reprinted from id. at 32.

443. The data are reprinted from id. at 33.

444. The data are reprinted from id. at 34.

445. *See* id. at 83-84.

446. *See* supra notes 132-37 and accompanying text.

447. An example of a disclaimer is as follows: "The choice of a lawyer is an extremely important decision and should not be based solely upon advertisements or self-proclaimed

that disclaimers were useful, but 30% of these respondents qualified their answers by stating that disclaimers were likely to be ineffective or that they invalidated the advertisement. Moreover, 46% of the public participants felt that the disclaimers do not provide useful information to the public, commenting that such statements are self-evident, redundant, and patronizing.[448]

B. Lawyer Survey

In this section, we examine the attitudes of lawyers toward lawyer advertising in light of data collected from the lawyer mail survey. The data from the lawyer survey reveal several interesting relationships between the demographics of legal practice and lawyer advertising.[449] We also examine data from the lawyer mail survey concerning the advertising behavior of lawyers and the effects of advertising on the delivery of legal services.[450]

1. Lawyer Advertising and the Nature of Legal Practice

For purposes of analysis of the attorney questionnaire, we define "lawyer advertising" as any affirmative activity by a lawyer (firm) directed to promote that lawyer's (firm's) services that either: (1) lists more than name(s), address, and telephone number in the current Yellow Pages of any telephone book local to the lawyer's (firm's) practice;[451] or (2) conveys any specific information about that lawyer (firm) through other common public media, such as television, direct mail, newspaper, or radio.[452] Of the sample of lawyers who completed surveys in connection with the Project (425), 36% (153) indicated that they advertise.

a. Demographic Characteristics of Lawyers Who Advertise

Data from the lawyer survey shed light on several demographic characteristics of lawyers who advertise. First, we consider how age affects a lawyer's propensity to advertise. Because *Bates* and its progeny have occurred within the last fifteen years,[453] lawyer advertising is a relatively new phenomenon within the American legal profession. Accordingly, we might expect younger lawyers—those who attended law school and started practice with a group of peers who may advertise, and who may wish to establish their own clientele—to advertise more than older lawyers.

Data from the Project confirm that in fact, younger lawyers do advertise more than older lawyers. Table 8 divides the distribution into age

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expertise." *See* supra notes 132-37 and accompanying text (discussing disclosure generally); supra note 177 and accompanying text (discussing Iowa's disclosure requirement).

448. *See* Rowan & Blewitt, supra note 23, at 167- 74.

449. *See* infra notes 453-68 and accompanying text.

450. *See* infra notes 469-93, 494-537 and accompanying text.

451. *See* infra Appendix B, at question 4.

452. *See* infra Appendix B, at question 8.

453. *See* supra notes 54-169 and accompanying text.

quartiles. A systematic relationship is evident: younger lawyers are more likely to advertise.

Table 8[454]
Lawyer Advertising by Age

Age	*Advertise*	*Do Not Advertise*
< 37 (111)	44% (49)	56% (62)
37-42 (118)	42% (50)	58% (68)
43-51 (97)	36% (35)	64% (62)
> 55 (93)	20% (19)	78% (73)
Total: (425)[455]	36% (153)	64% (272)

Second, the data also show that smaller law firms and sole practitioners might be expected to advertise more frequently than large law firms. This may be true for two reasons. First, smaller firms are not as likely to have the reputation that larger, perhaps more established firms might. Second, large firms are unlikely to advertise because the nature of disagreement among lawyers in general concerning the propriety of lawyer advertising suggests that agreement on the issue will become less likely within larger, more diverse groups of lawyers. A greater percentage of lawyers surveyed who are either sole practitioners or who practice in firms with less than twenty-five lawyers advertise than do lawyers in larger firms.[456]

Finally, because of the high concentration of lawyers in urban areas, it might be expected that advertising is more effective and less costly—and therefore used more often—in urban areas than in rural areas. The results of the lawyer survey, however, indicate no significant difference in advertising between lawyers who serve clients from primarily metropolitan areas and lawyers who serve clients from primarily rural areas.[457] Similarly, the lawyer survey results indicate no significant difference in advertising between lawyers who characterize their practice as "generalized" and

454. To determine whether the frequency of lawyer advertising differed significantly between age groups, a chi-square test was employed. The chi-square test determines whether frequency differences data between discrete categories of nominal data vary on the basis of chance. Sprinthall, supra note 394, at 277. In this instance, the chi-square value for the data ($\chi^2 = 15.210$) was significant at $p < .01$ ($df = 3$).

455. Because of missing data values, the totals on this and other tables may not add up to the exact number of surveys in the sample ($n = 425$).

456. Of sole practitioners, 45% (61/135) advertise. Thirty-eight percent of lawyers who practice in firms with 2 to 25 lawyers advertise. Only 14% of the surveyed lawyers who practice in firms of 25 or more lawyers advertise. The chi-square value for the data ($\chi^2 = 16.336$) was significant at $p < .05$ ($df = 3$).

457. Of the lawyers surveyed, the percentage of those who serve primarily metropolitan clients and who advertise (38%) is greater than the percentage of those who serve primarily rural clients and who advertise (33%). The chi-square value for the data ($\chi^2 = 1.211$) was not significant at $p = .05$ ($df = 1$). For purposes of the lawyer survey, "metropolitan area" was defined as an area with a population greater than 20,000. *See* infra Appendix B, at question 34.

lawyers who characterize their practice as "specialized."[458]

b. *The Effects of Regulation on Lawyer Advertising*

In designing the Project, we chose the states of Iowa and Wisconsin as comparative forums for sampling because of their geographic proximity and demographic similarity.[459] However, Iowa has taken a more restrictive approach in regulating lawyer advertising than Wisconsin.[460] In particular, Iowa has taken an extremely restrictive approach in regulating lawyer advertising in certain media, specifically television, newspaper, radio, and direct mail.[461] It might be expected that lawyers in Iowa advertise less than lawyers in Wisconsin. Data from the Project confirms this conclusion. Of the lawyers surveyed, only 22% (51/235) of Iowa lawyers advertise, while 54% (102/190) of Wisconsin lawyers advertise.[462] Also, 35% (66/190) of Wisconsin lawyers advertise in media in addition to Yellow Pages, compared to 12% (25/208) of Iowa lawyers.[463] Of the Iowa lawyers who completed surveys, less than 1% advertise on television (1/235) or radio (1/235), 5.5% (13/235) advertise in newspapers, and none advertise by direct mail. Of the Wisconsin lawyers, however, 3.7% (7/190) advertise on television,[464] 4.7% (9/190) advertise on radio,[465] 26% (39/151) advertise in newspapers,[466] and 3.7% (7/190) advertise by direct mail.[467]

The effects of each state's regulatory approach operated independently of the characteristics of lawyers or law firms. That is, advertisements were used more in Wisconsin than Iowa without regard to whether the area was metropolitan or rural, whether the firm was specialized or generalized, and also without regard to a lawyer's age or the size of lawyer's firm. Thus, it appears that none of these other factors can account for the differences in the advertising practices of Wisconsin versus Iowa lawyers.[468] Accordingly, it appears that Iowa's restrictive approach in regulating media

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458. While 34% (79/232) of lawyers who characterize their practice as "generalized" advertise, 39% (73/184) of lawyers who characterize their practice as "specialized" advertise. The chi-square value for the data ($\chi^2 = 1.399$) was not significant at $p = .05$ ($df = 1$).

459. *See* supra note 15 and accompanying text. Of the 495 surveys sent to lawyers in Iowa, 235 (47.5%) were completed and returned. Of the 483 surveys sent to lawyers in Wisconsin, 190 (39%) were completed and returned. The chi-square value for the data ($\chi^2 = 4.76$) was significant at $p < .01$ ($df = 1$).

460. *Compare* supra notes 170-226 and accompanying text *with* notes 108, 133, 161.

461. *See* supra notes 170-226 and accompanying text.

462. The chi-square value for the data ($\chi^2 = 46.641$) was significant at $p < .05$ ($df = 1$).

463. The chi-square value for the data ($\chi^2 = 36.276$) was significant at $p < .05$ ($df = 1$).

464. The chi-square value for the data ($\chi^2 = 6.040$) was significant at $p < .05$ ($df = 1$).

465. The chi-square value for the data ($\chi^2 = 11.372$) was significant at $p < .05$ ($df = 1$).

466. The chi-square value for the data ($\chi^2 = 21.997$) was significant at $p < .05$ ($df = 1$).

467. The chi-square value for the data ($\chi^2 = 6.040$) was significant at $p < .05$ ($df = 1$).

468. For the main effect of a lawyer's state, the F-ratio ($F = 32.772$) was significant at $p < .001$ ($df = 1, 363$). For the main effect of a lawyer's age, the F-ratio ($F = 2.932$) was significant at $p < .05$ ($df = 3, 363$). For the main effect of a lawyer's firm size, the F-ratio ($F = 4.610$) was significant at $p < .01$ ($df = 3, 363$). The F-ratio ($F = 0.838$) for the interactive effect between a lawyer's state, a lawyer's age, and a lawyer's firm size was not significant at $p = 0.581$ ($df = 9, 363$).

advertising indeed has had a chilling effect on media advertising by lawyers in Iowa.

2. *Attitudes of Lawyers Concerning Advertising and Professionalism*

The lawyer survey[469] solicited the attitudes of lawyers with regard to several issues related to lawyer advertising. First, lawyers were asked to rate the effectiveness of the various methods of "advertising" they use to obtain clients.[470] Second, lawyers were asked to rate the descriptive accuracy of a series of statements regarding the image of lawyers and of the legal profession.[471] Finally, lawyers were asked a series of attitudinal questions concerning lawyer advertising.[472]

a. *Lawyer Perceptions of the Effectiveness of Lawyer Advertising*

Lawyers utilize many different methods to obtain clients, including media advertising, goodwill promotion, referrals by past and present clients, referrals by families and friends, and lawyer referral services. The lawyers surveyed ranked lawyer advertising as a less effective method for obtaining clients than either goodwill promotion or family, friend, and client referrals.[473] Lawyers who advertise more than name, address, and telephone number in area Yellow Pages or who advertise in other media ranked media advertising as a significantly more effective means for obtaining clients than lawyers who do not advertise.[474]

Interestingly, Wisconsin lawyers who completed the survey view advertising in media as a more effective means for obtaining clients than do lawyers in Iowa.[475] This implicates two alternative hypotheses. On the one hand, Iowa lawyers may not view advertising as effective or appropriate and

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469. *See* infra Appendix B.

470. *See* infra Appendix B, at question 3.

471. *See* infra Appendix B, at question 50.

472. *See* infra Appendix B, at questions 51-54

473. Lawyers were asked to rate from 1 (least effective) to 10 (most effective) the effectiveness of various methods they use to obtain clients. *See* infra Appendix B, at question 3. The mean values for the various methods are as follows:

Method for obtaining clients 1 (least effective), 10 (most effective)	Mean effectiveness
—Advertising in Media	3.715
—Specifically Directed Good will Promotion	4.261
—Referrals by Past and Present Clients	8.661
—Referrals by Families and Friends	7.015
—Lawyer Referral Services	3.145

474. The mean value for advertising in media of lawyers who advertise was 5.403, while the mean value for lawyers who do not advertise was 2.839. The t-test value for the data ($t=8.681$) was significant at $p < .05$ ($df=258.7$). There is no significant difference in the mean value for the effectiveness of alternative methods for obtaining clients between lawyers who advertise and lawyers who do not.

475. The mean value for the effectiveness of advertising in media for Wisconsin lawyers was 4.662, while lawyers in Iowa reported a mean value of 3.715. The t-test value for the data ($t=-2.845$) was significant at $p < .05$ ($df=260.9$).

thus encourage its suppression through regulation by the bar. Alternatively, the Iowa Bar Association's regulation of lawyer advertising may have suppressed any of its positive value in the eyes of Iowa lawyers.

Are any variables other than state connected to ratings of the effectiveness of media advertising? A lawyer's state has no significant main effect in explaining the variance between the mean values for media advertising effectiveness between lawyers who advertise and lawyers who do not advertise.[476] A lawyer's firm size is the only other factor from the data that significantly explains the variance across groups of lawyers in rating the effectiveness of lawyer advertising.[477]

b. Lawyer Perceptions of the Legal Profession

The survey asked lawyers to rate the descriptive accuracy of several statements concerning lawyers and the legal profession.[478] As demonstrated in Table 9, the statement that lawyers rated as most descriptive of lawyers was "sympathetic to their clients' interests." The statement that lawyers rated as least descriptive of lawyers was "concerned with the interests of the legal profession." The lawyers surveyed rated "concerned with their own interests" as more descriptive of lawyers than "dedicated to making the justice system work."

Of the lawyers surveyed, there is no significant difference between Iowa (6.670) and Wisconsin (6.683) lawyers in rating whether the statement "concerned with their own interests" is descriptive of lawyers. Similarly, there is no significant difference in the rating of the statement "concerned with their own interests" between lawyers who advertise (6.662) and lawyers who do not advertise (6.683).[479]

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476. The dependent variable in the model was the mean effectiveness rating for advertising in media, while the independent variables were a lawyer's state and whether a lawyer advertised. For the lawyer's state, the value of the F-ratio ($F=.006$) was not significant at $p = .941$ ($df=1, 259$). For whether a lawyer advertised, the F-ratio ($F=53.447$) was significant at $p < .05$ ($df=1, 259$). The F-ratio for the interactive effectiveness of a lawyer's state and advertising ($F=1.767$) was not significant at $p = 0.185$ ($df=1, 259$).

477. The dependent variable in the model was the mean effectiveness rating for advertising in media, while the independent variables were whether a lawyer advertised and a lawyer's firm size. For a lawyer's firm size, the value of the F- ratio ($F=2.881$) was not significant at $p < .05$ ($df=3, 238$). For whether a lawyer advertised, the F-ratio ($F=24.877$) was significant at $p < .05$ ($df=3, 238$). The F-ratio for the interactive effectiveness of a lawyer's firm size and advertising ($F=.411$) was not significant at $p = 0.745$ ($df=3, 238$).

478. *See* infra Appendix B, at question 50.

479. The t-value for the data ($t=.081$) was not significant at $p = 0.936$ ($df=3$).

Table 9
Agreement With Statements About Lawyers

(1 = least descriptive of lawyers, 10 = most descriptive of lawyers)

Statement	*Iowa Rating*	*Wisconsin Rating*
1. "sympathetic to their client's interests"	7.784	7.277[480]
2. "concerned with their own interests"	6.670	6.683[481]
3. "concerned with the interests of the legal profession"	6.498	5.390[482]
4. "dedicated to making the justice system work"	6.372	5.589[483]

As Table 9 illustrates, Iowa lawyers viewed each of the "positive" statements about lawyers as significantly more descriptive of lawyers than do Wisconsin lawyers. Most interestingly, the Iowa lawyers surveyed indicated a significantly stronger belief than Wisconsin lawyers that lawyers were "concerned with the interests of the legal profession." There were no significant differences in the descriptive rating of the "positive" statements about lawyers between lawyers who advertise and lawyers who do not advertise.

c. Lawyer Perceptions of the Value of Lawyer Advertising

A section of the lawyer survey solicited lawyers' general attitudes towards advertising in the legal profession. As Table 10 and Table 11 indicate, Wisconsin lawyers believed more strongly than did Iowa lawyers that lawyer advertising serves the interests of both the public and of the legal profession. Similarly, lawyers who advertise reacted significantly more favorably than lawyers who do not advertise to arguments that lawyer advertising is in the interest of both the public and of the legal profession.

Table 10
"Do you think that advertising by attorneys benefits the public?"

Response	*All*	*Iowa*	*Wisconsin*[484]	*Advertise*	*Do Not Advertise*[485]
Definitely	6.6%	5.6%	8%	14.4%	2.2%
Generally	25.4%	19.3%	33%	43.8%	14.9%
No Effect	24.5%	23.2%	26.1%	19.6%	27.2%
Generally Not	26.7%	33.9%	24.5%	19.6%	35.5%
Definitely Not	13.8%	18%	8.5%	2.6%	20.2%

480. The t-value for the data ($t=2.209$) was significant at $p < .05$ ($df=378.7$).
481. The t-value for the data ($t=-.052$) was not significant at $p = 0.958$ ($df=389.8$).
482. The t-value for the data ($t=4.810$) was significant at $p < .05$ ($df=372.4$).
483. The t-value for the data ($t=3.216$) was significant at $p < .05$ ($df=382$).
484. The chi-square value for the data ($\chi^2=18.859$) was significant at $p < .05$ ($df=4$).
485. The chi-square value for the data ($\chi^2=85.80$) was significant at $p < .05$ ($df=4$).

Table 11
"Do you think that allowing attorneys to advertise is in the best interests of the legal profession?"

Response	*All*	*Iowa*	*Wisconsin*[486]	*Advertise*	*Do Not Advertise*[487]
Definitely	8.3%	5.6%	11.7%	15.1%	4.5%
Generally	19%	14.2%	25%	31.6%	11.9%
No Effect	17.9%	15.5%	20.7%	21%	16%
Generally Not	34.3%	37.9%	29.8%	24.3%	39.9%
Definitely Not	20.5%	26.7%	12.8%	7.9%	27.6%

Table 12 suggests that Iowa lawyers are significantly less receptive than Wisconsin lawyers to the notion of lawyer advertising as a means to increase a lawyer's profitability. Table 12 further demonstrates that lawyers who do not advertise are significantly less in favor of lawyer advertising than lawyers who do advertise.

Table 12
"If you were convinced that advertising in any print or broadcast medium would increase the volume of your legal business, would you advertise?"

Response	*All*	*Iowa*	*Wisconsin*[488]	*Advertise*	*Do Not Advertise*[489]
Definitely	13.7%	9%	19.7%	30.7%	4.1%
Probably	13.7%	12%	16%	20.3%	10.0%
Possibly	28.2%	28.6%	27.7%	28.8%	27.9%
Probably Not	27.7%	30.3%	25.5%	16.3%	34.2%
Definitely Not	16.6%	20.1%	12.2%	3.9%	23.8%

In Iowa and in many other states, lawyer advertisements must contain a disclosure about the value of the advertisement.[490] A question in the survey asked lawyers whether they believe that the public obtains useful information from such disclosures.[491] Of the lawyers surveyed, 39.6% stated that they believe the disclosure does not convey useful information to the public, while 12.2% of the lawyers were uncertain. Approximately half (51.8%) thought the disclosure was useful. Lawyers from Iowa and Wisconsin did not differ in their views of whether disclosures convey useful

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486. The chi-square value for the data ($\chi^2 = 24.445$) was significant at $p < .05$ ($df = 4$).

487. The chi-square value for the data ($\chi^2 = 59.496$) was significant at $p < .05$ ($df = 4$).

488. The chi-square value for the data ($\chi^2 = 15.109$) was significant at $p < .05$ ($df = 4$).

489. The chi-square value for the data ($\chi^2 = 92.201$) was significant at $p < .05$ ($df = 4$).

490. In Iowa, the disclosure, which is required to appear on telephone directory, television, and newpaper advertisements, must indicate that the choice of a lawyer is an extremely important decision and should not be based solely upon advertisements or self-proclaimed expertise. *See* supra note 177 and accompanying text.

491. *See* infra Appendix B, at question 54.

information to the public.[492] There were also no significant differences between lawyers who advertise and lawyers who do not advertise.[493]

3. The Effects of Lawyer Advertising on the Delivery of Legal Services

Several studies have reported the effects of lawyer advertising on the price and quality of legal services. In general, these studies have suggested that lawyer advertising is inversely related to the price a lawyer charges for routine legal services.[494] Studies also suggest that the relationship between lawyer advertising and the quality of legal service delivered is ambiguous.[495] Several questions on the attorney questionnaire solicited information about the fees lawyers charge for specific services and the average number of hours they spend in preparing these services.[496]

As Table 13 indicates, there are no significant differences in the mean fees charged for any specific services between lawyers who advertise and lawyers who do not advertise.[497] Similarly, there are no significant differences between lawyers who advertise and lawyers who do not advertise in the average hourly rates that they charge for their time.

The number of hours that a lawyer spends performing a specific service may serve as a proxy for the quality of that lawyer's service.[498] As Table 13 suggests, data from the Project indicate no significant difference in the amount of time that lawyers spend performing specific services

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492. "Do you believe that the public obtains useful information from the following disclosure accompanying attorney advertisements: 'The choice of a lawyer is an extremely important decision and should not be based solely upon advertisements or self-proclaimed expertise.'?"

Response	*All*	*Iowa*	*Wisconsin*	*Advertise*	*Do Not Advertise*
Always	16.2%	13.7%	9.5%	16.8%	15.2%
Often	11.2%	12.4%	9.7%	11.2%	11.3%
Sometimes	20.8%	21.4%	20%	20.9%	20.5%
Uncertain	12.2%	9. 8%	15.1%	10.8%	14.6%
No	39.6%	42.7%	35.7%	40.3%	38.4%

The chi-square value for the Iowa/Wisconsin variation ($\chi^2 = 6.566$) was not significant at $p = 0.161$ ($df = 4$).

493. The chi-square value ($\chi^2 = 1.353$) was not significant at $p = 0.852$ ($df = 4$).

494. *See* supra notes 373-77 and accompanying text.

495. *See* supra notes 378-82 and accompanying text.

496. The specific services include a simple will with and without a trust provision, an uncontested bankruptcy, and an uncontested dissolution of marriage. *See* infra Appendix B, at questions 14-32.

497. In the attorney questionnaire, lawyers were asked to report the flat fees and the hourly fees they charge for specific services. We created surrogate flat and hourly variables to supplement the available data by multiplying hourly fees by the number of hours a lawyer expected to spend performing a service and dividing flat fees by the same number of hours. For each service, therefore, two fee variables—an hourly fee and a flat fee—were available for final analysis.

498. The mean time spent in performing a routine service has been employed as a proxy for service quality in several studies of advertising. *See* Cox, supra note 344, at 151-53.

between lawyers who advertise and lawyers who do not advertise. Accordingly, whether a lawyer advertises does not appear to affect the quality of legal services delivered.

By increasing competition among lawyers, lawyer advertising may decrease the fees charged by and affect the quality of service provided by not only lawyers who advertise, but also by non-advertising lawyers who practice in the same legal market as lawyers who advertise.[499] As noted above, the intensity of advertising among Wisconsin lawyers is significantly higher than the intensity of advertising among Iowa lawyers.[500] Therefore, it might be expected that Iowa lawyers charge higher fees than lawyers in Wisconsin. The data, however, do not support this expectation.

The data presented in Table 13 indicate that the fees charged by Iowa lawyers for simple wills with or without trust provisions differ significantly from the fees charged by Wisconsin lawyers. The Iowa hourly and flat fees for simple wills without a trust provision are significantly lower than Wisconsin hourly and flat fees. For simple wills with a trust provision, Iowa hourly fees are significantly lower than Wisconsin hourly fees, while Iowa flat fees are significantly higher. With the exception of flat fees for uncontested dissolutions of marriage, there are no other significant differences in fees between Iowa and Wisconsin lawyers. In fact, as Table 13 indicates, the fees charged by Iowa lawyers generally are less than the fees charged by Wisconsin lawyers. This seems to contradict the hypothesis that a greater incidence of lawyer advertising would lead to lower fees for legal services.

Without further analysis, however, it is unclear whether the lower fees charged by Iowa lawyers can be attributed to a lower incidence of advertising by Iowa lawyers. Indeed, this hypothesis would directly contradict the findings of a more sophisticated study by the FTC of the relationship between lawyer advertising and fees.[501] An alternative explanation may be the higher concentration of lawyers in Wisconsin serving clients in urban areas. Table 15 confirms that lawyers serving clients from primarily metropolitan areas generally charge fees that differ significantly from lawyers serving primarily rural clients. The mean values of the fees charged by lawyer serving metropolitan clients are greater for each service, with the exception of an uncontested bankruptcy, than the mean values of the fees charged by lawyers serving rural clients. Thus, the data are ambiguous as to lawyer advertising and its effect on the fees lawyers charge for their services. Because the FTC study focused solely on advertising in metropolitan areas,[502] further research is needed to determine the effects of advertising of fees in mixed urban/rural populations, such as Iowa and Wisconsin.

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499. *See* supra notes 347-49 and accompanying text.

500. *See* supra notes 462-68 and accompanying text.

501. *See* FTC Report, supra note 19.

502. *See* supra note 376.

Table 13
Mean Fees Charged by Lawyers Across Advertising and State

Service	*Advertise*		*No Advertise*		*Iowa*		*Wisconsin*	
	Hour Fee	*Flat Fee*	*H*	*F*	*H*	*F*	*H*	*F*
Simple will without trust provision	$76.7	124	71[503]	125[504]	68	110	80[505]	145.7[506]
Simple will with trust provision	$ 86	198	77[507]	198[508]	73	160	91[509]	130.6[510]
Uncontested bankruptcy	$101	588	106[511]	589[512]	102	576	106[513]	603[514]
Uncontested dissolution of marriage	$ 91	749	104[515]	836[516]	93	575	109[517]	1146[518]

503. The t-value for the data (t=-1.447) was not significant at p = .149 (df=299).
504. The t-value for the data (t=.118) was not significant at p = .906 (df=295).
505. The t-value for the data (t=-3.172) was significant at p < .05 (df=300).
506. The t-value for the data (t=-3.447) was significant at p < .05 (df=296).
507. The t-value for the data (t=-1.580) was not significant at p = .116 (df=290).
508. The t-value for the data (t=-1.104) was not significant at p = .271 (df=289).
509. The t-value for the data (t=-3.4861) was significant at p < .05 (df=291).
510. The t-value for the data (t=-4.078) was significant at p < .05 (df=288).
511. The t-value for the data (t=.377) was not significant at p = .707 (df=133).
512. The t-value for the data (t=.012) was not significant at p = .99 (df=134).
513. The t-value for the data (t=-.220) was not significant at p = .826 (df=133).
514. The t-value for the data (t=-.515) was not significant at p = .607 (df=134).
515. The t-value for the data (t=1.060) was not significant at p = .29 (df=228).
516. The t-value for the data (t=.565) was not significant at p = .573 (df=222).
517. The t-value for the data (t=-1.154) was not significant at p = .25 (df=229).
518. The t-value for the data (t=-2.702) was significant at p < .05 (df=223).

Table 14
Mean Hours Spent By Lawyers on Services

Service	*Advertise*	*No Advertise*	*Iowa*	*Wisconsin*	*Metropolitan*	*Rural*
Simple will without trust provision	1.77	1.84[519]	1.92	1.73	1.97	1.55[520]
Simple will with trust provision	2.46	1.32[521]	2.28	2.62[522]	2.61	2.13[523]
Uncontested bankruptcy	6.73	4.10[524]	7.1	6.39[525]	6.11	8.16[526]
Uncontested dissolution of marriage	8.3	7.79[527]	6.73	9.85[528]	8.26	7.43[529]

Table 15
Mean Fees Charged by Lawyers Serving Metropolitan and Rural Clients

	Metropolitan		*Rural*	
Service	*Hour Fee*	*Flat Fee*	*H*	*F*
Simple will without trust provision	$ 80	147	64[530]	93[531]
Simple will with trust provision	$ 89	219	70[532]	142[533]
Uncontested bankruptcy	$107	565	99[534]	640[535]
Uncontested dissolution of marriage	$108	956	87[536]	575[537]

519. The t-value for the data (t=.620) was not significant at p = .535 (df=301).
520. The t-value for the data (t=-3.739) was significant at p < .001 (df=297).
521. The t-value for the data (t=-.419) was not significant at p = .676 (df=289).
522. The t-value for the data (t=-2.322) was significant at p < .05 (df=289).
523. The t-value for the data (t=-3.199) was significant at p < .01 (df=285).
524. The t-value for the data (t=.129) was not significant at p = .898 (df=132).
525. The t-value for the data (t=1.24) was not significant at p = .217 (df=132).
526. The t-value for the data (t=3.394) was significant at p < .01 (df=130).
527. The t-value for the data (t=-1.020) was not significant at p = .309 (df=225).
528. The t-value for the data (t=-7.126) was significant at p < .001 (df=225).
529. The t-value for the data (t=-1.710) was not significant at p < .10 (df=224).
530. The t-value for the data (t=-3.959) was significant at p < .01 (df=294).
531. The t-value for the data (t=-5.319) was significant at p < .01 (df=291).
532. The t-value for the data (t=-3.762) was significant at p < .01 (df=286).
533. The t-value for the data (t=-4.671) was significant at p < .01 (df=283).
534. The t-value for the data (t=-.529) was not significant at p = 0.598 (df=131).
535. The t-value for the data (t=1.349) was not significant at p = 0.180 (df=131).
536. The t-value for the data (t=-1.592) was not significant at p = 0.113 (df=227).
537. The t-value for the data (t=-2.101) was significant at p < .05 (n=220).

V. Conclusion

This Contemporary Studies Project has attempted to examine the nature and effects of lawyer advertising and present new data relevant for understanding the arguments for and against restricting advertising by lawyers. The Project has focused on empirical data obtained through surveys mailed to the general population[538] and to lawyers[539] in Iowa and Wisconsin, and through an EMT focus group session.[540]

With respect to the public, Iowa respondents, who are less frequently exposed to lawyer advertising than Wisconsin respondents,[541] rated lawyers more favorably than Wisconsin respondents for every attribute tested: honesty, competency, helpfulness, effectiveness, and reliability.[542] Moreover, the members of the public sampled in both states rated lawyers as a profession more favorably on all of these attributes than lawyers who advertise.[543] While on the surface these results might provide ammunition for those who contend that lawyer advertising harms the dignity of the profession, upon closer scrutiny it is clear that the results of the Project do not justify strict regulation of advertising by the bar.

In addition to Iowa's concern with regulating the potential abuses of electronic media advertising, the nexus theory outlined in Iowa Supreme Court Justice Reynoldson's concurrence to *Humphrey* provides a possible justification for Iowa's current regulation of lawyer advertising.[544] This theory suggests that Iowa has a substantial state interest in regulating lawyer advertising because the reputation of courts— the foundation of our legal system—is inextricably connected to the public's perception of lawyers. Justice Reynoldson argues that, because lawyer advertising degrades lawyers, the courts will also be degraded by advertising, which in turn will weaken the legitimacy of our justice system in the eyes of the public.[545] This theory finds some support in the data, at least to the extent that lawyer advertising negatively affects the public perception of lawyers. However, our data also suggests that the public's negative perception of lawyers does not carry over to the public's perception of the court system.[546] This raises the question of whether the Iowa Bar's interest in maintaining a positive image of lawyers, absent any negative effect on public perceptions of our court system, is a sufficiently weighty interest to justify strict regulation of lawyer advertising. Although the Supreme Court has not directly addressed this question, *Ohralik* suggests that maintaining the image of the profession

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538. *See* supra notes 388-427 and accompanying text.

539. *See* supra notes 449-538 and accompanying text.

540. *See* supra notes 428-48 and accompanying text.

541. *See* supra note 394 and accompanying text.

542. *See* supra notes 389-93 and accompanying text.

543. *Compare* Table 1 accompanying notes 389-93 *with* Table 2 accompanying notes 397-401.

544. 355 N.W.2d 565 (1984), *on remand,* 377 N.W.2d 643 (1985), *appeal dismissed* 475 U.S. 1114 (1986).

545. *See* supra notes 295-99 and accompanying text.

546. *See* supra notes 413-20 and accompanying text.

simpliciter is not a sufficient interest to justify regulation of lawyer advertising.[547]

Predictably, restrictive approaches towards the regulation of lawyer advertising like Iowa's may have the effect of chilling advertising by lawyers. Our results show that, even when urbanization, firm size, and the age of lawyers are controlled, Iowa lawyers tend to advertise significantly less than Wisconsin lawyers in all media.[548] Moreover, Wisconsin lawyers tend to react more favorably to arguments in favor of lawyer advertising,[549] although it is not clear whether their attitudes have been influenced by Wisconsin's less restrictive advertising environment. As a whole, the data concerning the frequency of attorney advertising lead to the inference that Iowa's restrictive regulation of lawyer advertising has chilled advertising by Iowa lawyers.[550]

With regard to the economic effects of lawyer advertising, the data do not conclusively establish a positive or negative relationship between lawyer advertising and the fees charged by lawyers for specific legal services.[551] Similarly, the data do not confirm a significant positive or negative relationship between lawyer advertising and "objective" measures of quality.[552] Data from other studies, however, suggest that lawyer advertising is inversely related to legal fees. Data from these same studies suggest an ambiguous relationship between advertising and "objective" measures of the quality of legal services.[553] We suggest that further studies of the effects of lawyer advertising on fees and quality of legal services in mixed urban/rural areas are needed.

Many states have expressed an interest in following the lead of Iowa in regulating lawyer advertising. Our study suggests several reasons why these states should identify carefully the state interests to be protected by such regulations.

First, the "nexus" theory articulated by Judge Reynoldson's concurrence to *Humphrey* lacks any empirical support. Thus, Iowa's interest in protecting the "professionalism" of lawyers by requiring advertisements to be "dignified" remains unarticulated. Certainly, dignified lawyer advertisements are not necessary to protect the public from false and misleading information. The Supreme Court has held that protecting the image of the legal system by itself does not justify regulation of lawyer advertisments. An alternative interest, protecting the image of the courts from the harsh imagery of lawyer advertising because lawyers are agents of the justice system, is not supported by our data. Second, the EMT portion of the project suggests that the public does not necessarily perceive electronic media advertising more negatively than other media. In fact, participants in

547. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460- 61 (1978) (holding interest in the image of the profession is insufficient to justify regulation).

548. *See* supra notes 462-68 and accompanying text.

549. *See* supra notes 475, 484, 486, 488 and accompanying text.

550. *See* supra notes 460-68 and accompanying text.

551. *See* supra notes 501-18 and accompanying text.

552. *See* supra notes 498, 519-29 and accompanying text.

553. *See* supra notes 365-77 and accompanying text.

the EMT responded more favorably to lawyer advertising after they had participated in a session evaluating lawyer advertisements. Because electronic media may be the most effective method of communicating information about lawyers to those who otherwise have no information, especially in areas that are not concentrated and metropolitan, states should consider the countervailing interest in access to legal services. Third, members of the public who participated in the EMT study view disclaimer requirements as patronizing, and many lawyers also believe that they serve no purpose. Finally, approaches like Iowa's regulatory scheme may have the effect of chilling lawyer advertising.

We do not suggest that there are no valid state interests to justify the regulation of attorney advertising. We simply note that in following the Iowa Bar's articulated concern of "professionalism" in regulating lawyer advertising, bar associations should be careful not to equivocate "dignity," "image," or "reputation" with "professionalism." Professionalism involves much more than protecting the romantic imagery of lawyers; it also involves fundamental questions of what justice requires of lawyers.

Population Questionnaire

FOR THE FIRST TWO QUESTIONS, PLEASE CIRCLE THE NUMBER ON THE SCALE CORRESPONDING TO YOUR VIEW.

1. How do you perceive attorneys as a professional group?

Honesty:	Extremely Dishonest	1 2 3 4 5 6 7	Extremely Honest
Competence:	Extremely Incompetent	1 2 3 4 5 6 7	Extremely Competent
Helpfulness:	Extremely Unhelpful	1 2 3 4 5 6 7	Extremely Helpful
Effectiveness:	Extremely Ineffective	1 2 3 4 5 6 7	Extremely Effective
Reliability:	Extremely Unreliable	1 2 3 4 5 6 7	Extremely Reliable

2. How do you perceive the American court system?

Honesty:	Extremely Dishonest	1 2 3 4 5 6 7	Extremely Honest
Competence:	Extremely Incompetent	1 2 3 4 5 6 7	Extremely Competent
Helpfulness:	Extremely Unhelpful	1 2 3 4 5 6 7	Extremely Helpful
Effectiveness:	Extremely Ineffective	1 2 3 4 5 6 7	Extremely Effective
Reliability:	Extremely Unreliable	1 2 3 4 5 6 7	Extremely Reliable

3. Are you related to a lawyer?

_____ YES _____ NO (GO TO QUESTION 5)

4. How are you related to that lawyer? _____

5. Have you ever used or do you use the services of a lawyer?

_____ YES _____ NO (GO TO QUESTION 8)

6. How often have you used or do you use the services of a lawyer?

_____ Once _____ Occasionally _____ Regularly

7. Are you satisfied with the service you received?

_____ YES _____ NO _____ UNCERTAIN

8. Have you ever seen an advertisement by a lawyer?

_____ YES _____ NO (GO TO QUESTION 12)

9. How do you perceive attorneys who advertise? (please circle the number on the scale corresponding to your view)

Honesty:	Extremely Dishonest	1 2 3 4 5 6 7	Extremely Honest
Competence:	Extremely Incompetent	1 2 3 4 5 6 7	Extremely Competent
Helpfulness:	Extremely Unhelpful	1 2 3 4 5 6 7	Extremely Helpful
Effectiveness:	Extremely Ineffective	1 2 3 4 5 6 7	Extremely Effective
Reliability:	Extremely Unreliable	1 2 3 4 5 6 7	Extremely Reliable

10. Have you ever seen an advertisement by a lawyer who practices in your home state?

_____ YES _____ NO (GO TO QUESTION 12)

11. Where did you see such advertising (check one or more):

_____ Yellow Pages _____ Television
_____ Newspaper _____ Mail
_____ Radio _____ Other _____

12. Do you feel secure that you have sufficient information to choose a competent lawyer?

_____ Yes, definitely _____ Probably not
_____ Yes, probably _____ Definitely not
_____ Maybe _____ Do not know

13. Please circle your level of agreement with each of the following statements:

	Strongly Disagree	Somewhat Disagree	Neither Disagree /Agree	Somewhat Agree	Strongly Agree
Lawyers are sympathetic to their client's interests.	1	2	3	4	5
Lawyers are mainly concerned about their own interests.	1	2	3	4	5
Lawyers are concerned with the interests of the legal profession.	1	2	3	4	5
Lawyers are dedicated to making the justice system work.	1	2	3	4	5

14. Would you ever use advertising as the sole basis of choosing a lawyer?

_____ YES _____ NO _____ UNCERTAIN

15. Is the content of ads, in general, truthful or misleading?

_____ Ads, in general, are always truthful
_____ Ads, in general, are usually truthful
_____ I am uncertain
_____ Ads, in general, are usually misleading
_____ Ads, in general, are always misleading

16. Is the content of attorney ads truthful or misleading?

_____ Attorney ads are always truthful
_____ Attorney ads are usually truthful
_____ I am uncertain
_____ Attorney ads are usually misleading
_____ Attorney ads are always misleading

17. Sex: _____ Male _____ Female

18. Age: _____ Years

19. Education Level of Head of Household:

_____ Grade school
_____ Some high school
_____ High school graduate
_____ Some college
_____ College graduate
_____ Graduate school

20. Household Annual Income:

_____ Under 10,000
_____ 10,000 - 20,000
_____ 20,000 - 30,000
_____ 30,000 - 40,000
_____ 40,000 - 50,000
_____ Over 50,000

21. What is the size of your community?

_____ Under 5,000 (including rural)
_____ 5,000 - 20,000
_____ Over 20,000

22. Which Wisconsin/Iowa newspaper(s) do you regularly read? _____

23. Which Wisconsin/Iowa television station(s) do you regularly watch? _____

24. Which Wisconsin/Iowa radio station(s) do you regularly listen to? _____

Code Number _____

Attorney Questionnaire

All of your answers will remain strictly confidential.

1. Are you currently in private law practice?

   _____ No (THERE IS NO NEED TO COMPLETE THE QUESTIONNAIRE. PLEASE RETURN IT IN THE ENCLOSED SELF-ADDRESSED, STAMPED ENVELOPE.)

   _____ Yes

2. What is the name of the firm with which you are associated?

   _____

3. Of the methods below which you use to obtain clients, please rate, from 1 to 10, their effectiveness (1= least effective, 10= most effective). If you do not use a method, please do not rate it.

   _____ Advertising in media (Yellow Pages, newspapers, television, radio, direct mail, etc.)
   _____ Specifically directed goodwill promotion (e.g., attending conventions, dinners, etc.)
   _____ Referrals by past and present clients
   _____ Referrals by family/ friends
   _____ Lawyer referral service (e.g. ABA)
   _____ Other
   (Please specify:_____)

4. Does your firm list anything other than name(s), address, and telephone number in the current Yellow Pages of any telephone book in your area?

   _____ NO (SKIP TO QUESTION 7) _____ Yes

5. Does your firm specify any of the following services in that listing? (please check those specified)

   _____ Simple wills
   _____ Uncontested divorces
   _____ Uncontested Bankruptcy
   _____ Other services
   (Please specify: _____)
   _____ No specific services

6. Which of the following information does that listing contain?

_____ Office or telephone answering service hours
_____ Names of clients regularly represented
_____ Fields of practice/ areas of concentration or specialization
(Please specify:_____)
_____ Educational background
_____ Initial consultation information
_____ Other
(Please specify: _____)
_____ None of the above

7. Does your firm plan to list anything more than name(s), address, and telephone number in next year's Yellow Pages?

_____ Yes _____ No _____ Uncertain

8. Apart from the Yellow Pages, has your firm done any advertising during the past six months?

_____ No (SKIP TO QUESTION 12) _____ Yes

9. Which media were used?

_____ Television
_____ Newspaper
_____ Direct Mail
_____ Radio
_____ Other (Please specify_____)

10. Does your firm specify any of the following services in those listings? (please check those specified)

_____ Simple wills
_____ Uncontested divorces
_____ Uncontested bankruptcies
_____ Other services
(Please specify:_____)
_____ No specific services

11. Which of the following information did your firm advertise in those media (other than the Yellow Pages)?

_____ Office or telephone answering service hours
_____ Names of clients regularly represented
_____ Fields of practice/ areas of concentration or specialization
(Please specify: _____)
_____ Education
_____ Fees for specific services
_____ Initial consultation information
_____ A disclaimer stating that advertisements should not be the sole basis for choosing an attorney
_____ Other information
(Please specify: _____)
_____ None of the above

12. Does your firm plan to do any advertising in the next six months other than in the Yellow Pages?

_____ No (SKIP TO QUESTION 14)
_____ Yes
_____ Uncertain at this time (SKIP TO QUESTION 14)

13. Which media do you expect to use?

_____ Television
_____ Radio
_____ Newspaper
_____ Direct mail
_____ Other (please specify: _____)

NEXT WE WILL SKETCH SOME SITUATIONS OF COMMONLY ADVERTISED TYPES OF LEGAL SERVICES AND ASK YOU A FEW QUESTIONS ABOUT EACH SITUATION.

The first situation is a reciprocal "simple" will

==========

Client Situation

-Husband is 35 years old.
-Wife is 33 years old.
-They have 2 children: a 12-year-old and a 14-year-old.
-They have modest estates that are not subject to the payment of death taxes.
-You have determined that the testamentary objectives will be properly served by reciprocal wills.

Provisions of Will:
-All personal effects to spouse if he or she survives testatrix/testator; otherwise to children in equal shares.
-All other property to spouse if he or she survives testatrix/testator by four (4) months; otherwise equally to children or issue of deceased children by representation.
-If distribution is required to a minor -- personal representative may retain and administer as trustee until minor reaches majority.
-Representative named to serve without bond.
-Powers of representative set forth.
-Guardian of persons of minor children named.

==========

Assume that you have never served these clients before, and have no expectation that you or your firm will serve them (or their personal representatives) in the future.

14. Would you, personally, perform this service?

_____ No (SKIP TO QUESTION 17) _____ Yes

15. How many hours of your time typically would be required to perform this service, including any initial client interview?

_____ Hours

16. Would you usually charge an hourly rate OR a flat fee for this service? What amount?

_____ Hourly rate (Amount: $_____)
_____ Flat fee (Amount: $_____)

The second situation is a variation of the previous will.

==========

All of the facts are the same as in the preceding situation, except that the testator and testatrix desire the following disposition of the estate:
-If the spouse fails to survive testatrix/testator by four (4) months, then all property other than personal effects shall be placed in trust to provide for the children's support and education through four years of college (understanding that the expenses of each child may not be equal).
-At the end of the trust term, distribution shall be made equally to the children or issue of deceased children by representation.
-The amount of the estate justifies such a provision, but is still not large enough to give rise to estate tax liability.

==========

Again, assume that you have never served these clients before, and you have no expectation that you or your firm will ever serve them (or their trustees or personal representative) in the future.

17. Would <u>you</u>, personally, perform this service?

_____ No (SKIP TO QUESTION 20) _____ Yes

18. How many hours of your time typically would be required to perform this service, including any initial client interview?

_____ Hours

19. Would you usually charge an hourly rate OR a flat fee for for this service? What amount?

_____ Hourly rate (Amount: $_____)
_____ Flat fee (Amount: $_____)

The third situation is an "Uncontested" Non-Business Bankruptcy of Husband and Wife.

==========

<u>Client Situation</u>:
-Client is married and has two children.
-Husband earns $16,000 per year.
-Wife does not work.
-Husband has recently incurred hospital and medical bills of more than $15,000 as a result of severe illness.
-He also owes about $1,800 to various creditors.
-He owns a four-year-old automobile (fully paid for) and virtually no other non-exempt assets.

<u>Client Intent</u>:
-He is prepared to repay the $1,800 in incidental liabilities.
-He feels that $15,000 in medical and hospital bills is an impossible burden.
-He wishes to go through bankruptcy and wants to engage you for this purpose.

<u>Legal Services</u>:
-Prepare petitions, schedules, and other appropriate papers.
-Attend the first meeting of creditors and subsequent proceedings to the extent customary in such cases.
-Perform any other services routinely provided in connection with this type of "consumer bankruptcy."

==========

Assume that you have never served either husband or wife before, and you have no expectation that you or your firm

will ever serve either of them in the future.

20. Would <u>you</u>, personally, perform this service?

_____ No (SKIP TO QUESTION 25) _____ Yes

21. How many hours of your time typically would be required to perform this service, including any initial client interview?

_____ Hours

22. Would you usually charge an hourly rate OR a flat fee for for this service? What amount?

_____ Hourly rate (Amount: $_____)
_____ Flat fee (Amount: $_____)

23. Would you usually attend the first meeting of creditors in cases such as this one?

_____ No _____ Yes

24. How many court appearances would you typically make in this type of case (not counting the first meeting of creditors as a court appearance)?

_____ Court appearances

The final situation is an uncontested dissolution of marriage.

==========

<u>Client Situation</u>

-Spouses jointly own their own home ($25,000 equity), furnishings, and two cars.
-Both work.
-Husband earns $17,000 annually; wife earns $8,500 annually.
-Only the husband has pension rights or life insurance.
-The couple has no children.
-Spouses have agreed that wife will retain counsel to represent her and that husband will proceed without counsel.

<u>Terms of Dissolution (Fact Situation Continued On Next Page)</u>

-Wife is to receive title to and all equity in the family home.
-Wife is to give up all claims to husband's pension fund (a death benefit of $5,000) and give up all claims to proceeds of his life insurance.
-Wife will receive all personal property in the house except husband's clothes, tools, and guns.
-Each spouse will receive one car.
-They will divide equally an expected tax refund and a modest savings account.
-Husband will assume all indebtedness (including payment

of the mortgage on the house, which will be fully amortized in five years).
-The only exception to assuming indebtedness is the outstanding balance of a car loan on wife's car. Wife will assume this.
-Wife is to receive no maintenance.
-Husband will pay wife's attorney fees in connection with the divorce proceedings.

Service to be performed:
-Initial and subsequent consultation with wife.
-Drafting of the appropriate documents.
-Attend all appropriate court proceedings.
-Perform any other services customarily performed in connection with a routine "uncontested" divorce or dissolution.

==========

Assume that you have never served either husband or wife before, and you have no expectation that you or your firm will ever serve either of them in the future.

25. Would you, personally, perform this service?

_____ No (SKIP TO QUESTION 30) _____ Yes

26. How many hours of your time typically would be required to perform this service, including any initial client interview?

_____ Hours

27. Would you usually charge an hourly rate OR a flat fee for for this service? What amount?

_____ Hourly rate (Amount: $_____)
_____ Flat fee (Amount: $_____)

28. How many court appearances would you typically make in this type of routine uncontested dissolution or divorce?

_____ Court appearances

29. How much time typically would be spent counseling your client?

_____ Hours

30. Lawyers often charge an hourly rate where it is not possible to charge a flat fee for the services they offer. What is the typical hourly rate you charge for your time?

$_____ Typical per hour

31. What is the minimum hourly rate you may charge for your time?

$_____ Minimum per hour

32. What is the maximum hourly rate you may charge for your time?

$_____ Maximum per hour

33. Please estimate the number of clients (count husband and wife as one) you billed in the past three months for:

	Number of Clients
Simple wills (with or without a trust provision)	_____
Uncontested bankruptcies	_____
Uncontested divorces	_____
All other matters	_____

34. Are your clients from primarily metropolitan (i.e., an area with a population greater than 20,000) or primarily rural areas?

_____ Primarily metropolitan _____ Primarily rural

35. Is your own practice of law a general one, or is most of the work you do specialized in one or more areas of the law?

_____ General practice (Skip to Question 37)
_____ Specialized practice

36. Which of the following areas of law are areas in which your practice is specialized?

_____ Bankruptcy
_____ Domestic relations / family
_____ Probate / Trust / Estate planning
_____ Other
(Please specify: _____)

37. What is your position within the firm with which you are associated?

_____ In individual practice
_____ Partner
_____ Associate
_____ Other (Please specify: _____)

38. Do you work full-time or part-time for this law firm?

_____ Full-time _____ Part-time

39. How many full-time equivalent attorneys are there in your law firm (including you)?

_____

40. How many full-time equivalent personnel does your firm have doing paralegal work?

_____

41. Does your firm use word processing machines?

_____ No _____ Yes

42. How many different office locations does your firm have serving clients?

_____ One (SKIP TO QUESTION 44)
_____ Two
_____ Three
_____ Four or more (Please specify how many: _____)

43. Are all offices located within the same state?

_____ No _____ Yes

The next few questions will ask you certain personal information so that we can compare answers of attorneys with different backgrounds.

44. How old are you? _____

45. What is your sex? _____ Female _____ Male

46. In what year was your law degree granted? _____

47. From which school was it granted? _____

48. Have you earned any other graduate degrees?

_____ No
_____ Yes (Please specify degree: _____)

49. Have you received any other professional certifications? (e.g., CPA)

_____ No
_____ Yes (Please specify: _____)

Finally, we will ask a few questions to obtain your views on attorney advertising in the legal profession.

50. On a scale of 1 to 10, rate each statement below as to how well it describes attorneys (1 = does not describe attorneys, 10 = best describes attorneys).

_____ sympathetic to their clients's interests
_____ concerned with their own interests
_____ concerned with the interests of the legal profession
_____ dedicated to making the justice system work

51. Do you think that advertising by attorneys benefits the public, or that it is not in the public's best interest?

_____ Definitely in the public's interest
_____ Generally in the public's interest
_____ Not likely to make a difference
_____ Generally not in the public's interest
_____ Definitely not in the public's interest

52. Do you think that allowing attorneys to advertise is in the best interest of the legal profession, or do you think that it is not in the legal profession's best interests?

_____ Definitely in the legal profession's interest
_____ Generally in the legal profession's interest
_____ Not likely to make a difference
_____ Generally not in the legal profession's interest
_____ Definitely not in the legal profession's interest

53. Assuming that you were convinced that advertising in any print or broadcast medium would increase the volume of your legal business, would you advertise?

_____ Yes, definitely
_____ Yes, probably
_____ Possibly
_____ No, probably not
_____ No, definitely not

54. Do you believe that the public obtains useful information from the following disclosure accompanying attorney advertisements: "The choice of a lawyer is an extremely important decision and should not be based solely upon advertisements or self-reported expertise."

_____ Yes, always
_____ Yes, often
_____ Yes, sometimes
_____ Uncertain
_____ No

Thank you for your help.