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The Status of Lawyer Advertising In Virginia: What is Good Taste?

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THE STATUS OF LAWYER ADVERTISING IN VIRGINIA: WHAT IS GOOD TASTE?

When Abraham Lincoln wanted to attract clients to his law practice in 1837, he ran a simple advertisement announcing his services in an Illinois newspaper.[1] Despite the precedent set by "Honest Abe,"[2] fifty years later the American Bar Association banned legal advertising and solicitation.[3] Today, there is no absolute ban on legal advertising. A need exists for information regarding legal assistance,[4] and in today's commercially-oriented society, it is not surprising that members of the legal profession want to advertise the availability of their services.[5]

The rules governing lawyer advertising in Virginia have been revised recently to reflect these public and professional concerns.[6] This comment will analyze the changes made to the Virginia Code of Professional Responsibility that affect lawyer advertising. The comment will also evaluate the views of both the public and the legal profession with respect to such advertising, and attempt to guide attorneys in determining what

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1. A. BEVERIDGE, ABRAHAM LINCOLN 1809-1858, at 209 (1928).

2. B. WILEY, ABRAHAM LINCOLN—A NEW PORTRAIT 21 (H. Kranz ed. 1959).

3. In 1908, the American Bar Association adopted Canon 27 of the ABA Canons of Professional Ethics. This Canon read as follows:

> The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling and are intolerable.

CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). This canon was amended several times. *See* H. DRINKER, LEGAL ETHICS 316-18 (1953).

4. *See* Bates v. State Bar, 433 U.S. 350, 386 (1977) (Burger, C.J., concurring in part and dissenting in part); Reaves, *Ignorance of Law*, A.B.A. J., Mar. 1984, at 47 (a recent survey showed that 50% of the public believes that an accused must prove his innocence); Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1204 (1972).

5. *See infra* note 74.

6. *See infra* text accompanying notes 46-48.

forms of advertising are not only permissible under the new code, but also reflect professional good taste.

I. Legal Advertising and the Supreme Court

Only recently have lawyers been permitted to advertise. In fact, the "commercialism"[7] of the legal profession has not yet seen its first decade of existence. In a 1977 landmark decision, *Bates v. State Bar of Arizona*,[8] the United States Supreme Court held that a blanket suppression of truthful price advertising by attorneys imposed by the ABA violated the first amendment.[9]

In *Bates*, two attorneys had advertised their "legal clinic" in a local newspaper, listing the fees to be charged for several routine services.[10] Stating that the rules prohibiting attorney advertising served to "inhibit the free flow of commercial information and to keep the public in ignorance,"[11] the Court held that routine legal services could be advertised.[12] However, state bar associations could regulate false, deceptive, or misleading advertising,[13] and could place reasonable regulations on the time, place, and manner of advertising.[14] Thus, while limiting its decision, the Court clearly brought attorney advertising within the protection accorded commercial speech under the first amendment.

Although *Bates* was a landmark decision, its outcome was predictable in light of a prior case, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[15] Until *Virginia Pharmacy*, "commercial speech" was not constitutionally protected.[16] In striking down a Virginia statute that prevented pharmacists from advertising drug prices, the United States Supreme Court reasoned that the interests of advertisers and consumers outweighed the interests of the state.[17]

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7. *See infra* notes 74-82 and accompanying text.
8. 433 U.S. 350 (1977).
9. *Id.* at 383-84.
10. *Id.* at 354.
11. *Id.* at 365.
12. *Id.* at 372.
13. *Id.* at 383.
14. *Id.* at 384.
15. 425 U.S. 748 (1976).
16. *See* Valentine v. Chrestensen, 316 U.S. 52 (1942). The groundwork was laid for the doctrine of commercial speech to be recognized by the Supreme Court in Bigelow v. Virginia, 421 U.S. 809 (1975). This case held that a Virginia statute which regulated the advertising of abortion availability was unconstitutional. The Court based its decision on "pure," rather than "commercial," free speech. Commercial speech has never been defined by the Supreme Court, but has been described as a communication that does "no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973).
17. *Virginia Pharmacy*, 425 U.S. at 762-63. Restrictions were approved for untruthful ad-

As the Supreme Court recognized in *Bates*, precise standards are needed for attorney advertising.[18] The Court attempted to set these standards in *Ohralik v. Ohio State Bar Association*[19] and *In re Primus*.[20] In *Primus*, the Court upheld not-for-profit "informational" advertising, stating that a lawyer could inform the public of his willingness to advise members of the community.[21] Conversely, in *Ohralik*, the Court banned in-person solicitation, finding that the direct pressure and one-sidedness of in-person solicitation went beyond the constitutional protection afforded by *Bates*.[22]

From the two extremes of lawyer advertising presented in *Ohralik* and *In re Primus*, it was difficult to articulate a clear standard for lawyer advertising. The uncertainty was resolved two years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[23] where the Court announced a four-pronged test for evaluating restrictions on commercial speech. This test considers: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the state has advanced a substantial interest in the regulation; (3) whether the regulation directly promotes that interest; and (4) whether the regulation exceeds the bounds of necessity to serve such interest.[24] Since the Court did not confine the applicability of the test to commercial utilities,[25] the long-awaited standard for ascertaining the constitutionality of restrictions on attorney advertising appeared to have finally emerged.

Five years after *Bates*, the Court attempted to consolidate the line of cases dealing with professional advertising. In *In re R.M.J.*,[26] the Court focused on the difficult task of balancing the state's interest in protecting the public against the lawyer's interest in disseminating the availability of his services to that public. The Court held that truthful, non-misleading advertising is constitutionally protected by the first amendment. However, inherently misleading advertising can be regulated by the states, as long as restrictions are no broader than necessary to protect the state's substantial interest.[27]

The response of state bar organizations to the Supreme Court's new

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vertising. *Id.* at 770-71.

18. *Bates*, 433 U.S. at 366-67.

19. 436 U.S. 447 (1978).

20. 436 U.S. 412 (1978).

21. *Id.* at 427.

22. *Ohralik*, 436 U.S. at 466.

23. 447 U.S. 557 (1980).

24. *Id.* at 566.

25. *Id.*

26. 455 U.S. 191 (1982).

27. *Id.* at 207. The Court stated that "although the states may regulate commercial speech, the First and Fourteenth Amendments require that they do so with care and in a manner no more extensive than reasonably necessary to further substantial interests." *Id.*

guidelines for regulating attorney advertising is unclear. In fact, the very issue is now before the Supreme Court. *Zauderer v. Disciplinary Counsel*,[28] argued in January, 1985, is an appeal from a decision by the Ohio Supreme Court affirming an attorney's suspension by the Ohio Office of Disciplinary Counsel.[29] The advertisement at issue asked, "Did you use this IUD?" and depicted a picture of the Dalkon shield; the advertisement invited readers to telephone the attorney.[30] The Ohio Disciplinary Counsel maintained that the advertisement included improper information, contained an improper illustration, failed to disclose the contingent fee arrangements, and was an improper solicitation.[31] The attorney claimed that the advertisement was within the guidelines set by *In re R.M.J.*, and that Ohio's restrictions on advertising were an unconstitutional violation of the first amendment.[32] The Ohio Supreme Court held that the Ohio advertising rules, as applied, were not unconstitutional.[33] It remains to be seen how the Supreme Court will resolve this case, and whether even more detailed guidelines will be given to the states regarding lawyer advertising.

II. Responses to the Supreme Court's Decisions

A. *The Federal Trade Commission*

A recent Federal Trade Commission staff report recommended that lawyers be permitted to advertise in any medium in order to increase consumer access to legal services and lower attorney fees.[34] The study found that legal fees are lowest in states which allow attorneys the most flexibility in advertising.[35] The study stated: "We found that for each of these five services [simple wills, wills with a trust provision, personal bankruptcies, uncontested divorces, and personal injury cases], the prices in [the most lenient] cities were significantly lower than in cities with restrictive advertising regulations."[36]

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28. Zauderer v. Disciplinary Counsel, No. 83-2166 (U.S. filed July 2, 1984).

29. *See* Stewart, *A Picture Costs Ten Thousand Words*, A.B.A. J., Jan. 1985, at 62-63.

30. *Id.*

31. *Id.* at 64. An "improper illustration" was one other than a picture of a lawyer or the scales of justice.

32. *Id.* at 66.

33. Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, ___, 461 N.E.2d 883, 886-87 (1984).

34. McDaniel, *Lawyer Ads—FTC Staff Says They Cut Fees*, 71 A.B.A. J. 35, 35 (1985). The staff study and recommendations were completed in December, 1984.

35. *Id.*

36. *Id.* For example, the study found that the average fee to prepare a will with a trust provision was $185 in Milwaukee (few advertising restrictions), while the average fee was $225 in Birmingham, Alabama (restrictions, including prohibition of television advertisements). About 20% of all lawyers advertised in Milwaukee while one-half of one percent advertised in Birmingham. *Id.*

The FTC staff report also proposed model rules for lawyer advertising. The essence of the FTC staff's model rules lies in the statement that "A lawyer shall not make a false or deceptive communication about the lawyer or the lawyer's services."[37] The staff study and recommendations have not yet been adopted as formal FTC policy, but they have been sent to state bar associations as a model to be considered in setting advertising rules.[38]

B. *The ABA*

While awaiting the *Bates* decision, the ABA Board of Governors established a Task Force on Lawyer Advertising.[39] In response to the task force's report, the ABA adopted Disciplinary Rule (DR) 2-101 in August, 1977, as part of its Model Code of Professional Responsibility.[40] In 1978, the ABA amended Ethical Consideration (EC) 2-8 and DR 2-102(D) of the Model Code.[41] The focus of these changes was to allow the public to obtain truthful, non-deceptive information regarding attorneys, their services, and their fees.[42] This was accomplished through the guidelines given to lawyers in the various ethical and disciplinary sections of Canon 2 of the Model Code.

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37. *Id.*

38. *Id.*

39. *See* AMERICAN BAR ASSOCIATION, 102 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 592 (1977). Note that the United States Supreme Court recognized the need for the ABA to become involved in formulating guidelines regarding lawyer advertising: "In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." Bates v. State Bar, 433 U.S. 350, 384 (1977).

40. AMERICAN BAR ASSOCIATION, 102 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 546 (1977) (report of House of Delegates proceedings). DR 2-101 addresses publicity and lawyer advertising. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979). The Model Code of Professional Responsibility has been replaced by the Model Rules of Professional Conduct. The rules applicable to advertising and solicitation are Rules 7.1 through 7.5. MODEL RULES OF PROFESSIONAL CONDUCT (1981).

41. AMERICAN BAR ASSOCIATION, 103 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 607-08 (1978) (report of House of Delegates Proceedings). These amendments were recommended by the ABA Commission on Advertising, which, together with the ABA Special Committee to Survey Legal Needs, was appointed in 1977. *Id.* at 381, 757-59.

42. "The community is concerned with the maintenance of professional standards which will insure not only competency in the individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to . . . alluring promises of . . . relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession. . . ." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 774-75 (Burger, C.J., concurring) (quoting Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935)).

III. The Revised Virginia Code and its Effects on Lawyer Advertising

A. *Advertising Versus Solicitation*

The United States Supreme Court has taken the position that advertising deserves first amendment protection while solicitation does not.[43] Distinguishing between advertising and solicitation may be viewed as arbitrary line drawing; nevertheless, a rather solid line has been drawn. Solicitation encompasses communications which involve coercion, duress, or harassment; advertisements allow the recipient to deliberate and inquire before choosing to engage an attorney.[44] The Virginia Code allows attorney advertising, but prohibits solicitation.[45]

B. *The Revised Virginia Code of Professional Responsibility*

In order to address recent developments in lawyer advertising, the president of the Virginia State Bar appointed a Special Committee to Study the Virginia Code of Professional Responsibility in September, 1979.[46] On October 1, 1983, a revised Virginia Code of Professional Responsibility became effective.[47] The revised Code deviated from the ABA Model Code in its standards for advertising, leaving Virginia attorneys with even more freedom than the ABA recommended.[48]

Canon 2 of the Virginia Code of Professional Responsibility mandates that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available," and is divided into Disciplinary Rules

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43. *See In re* R.M.J., 455 U.S. 191, 199, 202 (1982).

44. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978); *see also* Andrews, *The Selling of a Precedent*, Student Law., Mar. 1982, at 14, 48; *cf. Use Expert Help for Ads, Lawyers Told*, Advertising Age, Feb. 19, 1979, at 6, col. 1 (distinction between advertising and solicitation might become increasingly difficult to maintain in the future). *See generally* Murdock & Linenberger, *Legal Advertising and Solicitation*, 16 Land & Water L. Rev. 627 (1981); Thurman, *Direct Mail: Advertising or Solicitation? A Distinction Without a Difference*, 11 Stetson L. Rev. 403 (1982).

45. Virginia Code of Professional Responsibility Canon 2 (1983).

46. Virginia State Bar, Virginia State Bar Professional Handbook iii (1984); 29 Va. B. News, May 1981, at 1, col. 1. In response to *Bates*, DR 2-101 of the Virginia Code of Professional Responsibility was amended effective January 1, 1980. *Annual Disciplinary Report 1978-79*, 28 Va. B. News 94 (1979).

47. *Revised Virginia Code and LOTA Program are Dominant Topics at Fall Bar Conference*, 32 Va. B. News, Sept. 1983, at 1, col. 1. The chairman of the Special Committee to Study the Code of Professional Responsibility, Roderick B. Mathews, called the new Code "the most current professional responsibility document in the country. . . ." *Id.* at col. 2.

48. *Compare* Virginia Code of Professional Responsibility Canon 2 (1983) *with* Model Rules of Professional Conduct (1981). The Code adopted by Virginia, effective January, 1971, followed the 1969 ABA Model Code, with only slight deviations, none of which affected lawyer advertising. American Bar Association, 1 Nat'l Rep. Legal Ethics & Prof. Resp. V1:MCPR:223 (1982) (Report of the Virginia State Bar Special Committee to Study the Code of Professional Responsibility, delivered April 1, 1981).

and Ethical Considerations.[49]

1. Disciplinary Rules

A series of mandatory[50] rules govern attorney advertising and solicitation in Virginia. A lawyer is forbidden from using or participating in any form of public communication which contains a false, fraudulent, misleading, or deceptive statement or claim.[51] The revised Code defines public communication to mean all communication other than in-person communication.[52] In-person communications are forbidden if they are false or deceptive, or if they involve the use of, or the potential for, coercion, duress, compulsion, intimidation, threats, unwarranted promises or benefits, overpersuasion, overreaching, or vexatious or harassing conduct.[53]

An attorney may advertise through professional notices or devices, such as professional cards, office signs, and directory listings.[54] He is also per-

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49. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1983).

50. *Id.* at Preamble.

51. *Id.* at DR 2-101. This disciplinary rule states:

> Publicity and Advertising.
>
> (A) A lawyer shall not, on behalf of himself or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim.
>
> (B) A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. If such communication is disseminated to the public by use of electronic media, it shall be prerecorded and the prerecorded communication shall be approved by the lawyer before it is broadcast. A recording of the actual transmission shall be retained by the lawyer for a period of one year following the last broadcast date.

Public communication means all communication other than "in-person" communication as defined by DR 2-103. *Id.*

52. *See id.* Before 1983, the term "public communication" was used in the Code, but never defined.

53. DR 2-103 (A) provides:

> Recommendation or Solicitation of Professional Employment.
>
> (A) A lawyer shall not, by in-person communication, solicit employment as a private practitioner for himself, his partner, or associate or any other lawyer affiliated with him or his firm from a non-lawyer who has not sought his advice regarding employment of a lawyer if:
>
> (1) Such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or
>
> (2) Such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

Id. at DR 2-103(A).

54. DR 2-102(A) reads:

> Professional Notices, Letterheads, Offices, and Law Lists.

mitted to associate with qualified legal services plans and insurers, as well as nonprofit organizations.[55] Payment for public communications is permissible,[56] and a lawyer may hold himself out as limiting his practice to a particular area or field of law, within the guidelines contained in Canon 2.[57] Fees must be reasonable and adequately explained to the client, and

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(A) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive.

Id. at DR 2-102(A).

55. DR 2-103(B) and (C) provide:

(B) A lawyer shall not assist in, cooperate with, or offer any qualified legal services plan or assist in or cooperate with any insurer providing legal services insurance as authorized by law to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if his assistance, cooperation or offer, and the communications of the organization, are not in accordance with the standards of DR 2-101 or DR 2-103(A), as appropriate.

(C) A lawyer shall not assist a nonprofit organization which provides without charge legal services to others as a form of political or associational expression to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if:

(1) His assistance or the communications of the organization on his behalf are false, fraudulent, misleading, or deceptive; or

(2) His assistance or the communications of the organization on his behalf involve the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over-persuasion, overreaching, or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made .

Id. at DR 2-103(B)-(C).

56. DR 2-103(D) allows such payments:

(D) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communications permitted by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communication of the service or plan are in accordance with the standards of DR 2-101 or DR 2-103, as appropriate.

Id. at DR 2-103(D).

57. DR 2-104 states:

Specialists; Limitation of Practice.

(A) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist except in accordance with either DR 2-101, DR 2-102 or DR 2-103, or except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation Patents, Patent Attorney, or Patent Lawyer, or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation Trademarks, Trademark Attorney, or Trademark Lawyer, or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation Admiralty, Proctor in Admiralty, or Admiralty Lawyer, or any combination of those terms, on his letterhead and office sign.

must be put in writing prior to the rendering of substantial legal service.[58]

2. Ethical Considerations

Ethical Considerations are aspirational in character and represent the objectives toward which every lawyer should strive.[59] Most of the Ethical Considerations found in Canon 2 have remained unchanged from the prior Code.[60] The lawyer is reminded of his duty to assist members of the public in their recognition of legal problems,[61] and he is advised that any communications to members of the public should be motivated by his desire to educate them.[62] The Code also cautions attorneys not to convey

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(2) [Reserved, pending adoption of a specialization plan for lawyers.]

(B) A lawyer may state, announce or hold himself out as limiting his practice to a particular area or field of law so long as his communication of such limitation of practice is in accordance with the standards of DR 2-101, DR 2-102, or DR 2-103, as appropriate.

Id. at DR 2-104.

58. DR 2-105(A) provides that "[a] lawyer's fees shall be reasonable and adequately explained to the client." *Id.* at DR 2-105(A).

59. *Id.* at Preamble.

60. *Compare id.* at Canon 2 *with* Virginia Code of Professional Responsibility CANON 2 (1979).

61. EC 2-1 provides:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Virginia Code of Professional Responsibility EC 2-1 (1983).

62. EC 2-2 states:

> The legal profession should assist lay persons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concernings our legal system, with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications, participation in seminars, lectures, and civic programs, and other forms of permitted communications by lawyers to the public should be motivated by a desire to increase the public's awareness of legal needs and its ability to select the most appropriate counsel, rather than for the sole purpose of obtaining publicity for particular lawyers.

Id. at EC 2-2. EC 2-3 adds:

> Whether a lawyer acts properly in volunteering advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper whenever it is motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if the advice is false, fraudulent, deceptive, or misleading. It is also improper, if given in person, when the advice is offered under circumstances which present a substantial potential for coercion, duress, or overreaching, which hold out unwarranted promises

the idea that there is a general solution for all similar problems.[63]

The Code advises that advertising and public communications should benefit the public by providing information related to the availability of competent, independent legal counsel without resorting to false, fraudulent, misleading, or deceptive methods.[64] Guidelines are given to determine when a personal communication goes beyond that permitted by Virginia law.[65] The Code also stresses the importance of avoiding

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of benefits, taking into account the mental, physical, or emotional condition of the layperson and the circumstances surrounding the advice; or when the advice is given to a layperson who does not have a prior relationship to the lawyer, or who is relatively unsophisticated or inexperienced regarding legal services.

Id. at EC 2-3.

63. EC 2-4 states:

A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems and informing them of his availability to furnish legal services should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Id. at EC 2-4.

64. EC 2-8, under the heading "Advertising and Public Communications," states:

The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. To achieve these objectives, advertising must not be false, fraudulent, misleading or deceptive. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit.

Id. at EC 2-8.

65. EC 2-9, under the heading "Solicitation and Permitted Communication," states:

In-person communications between a lawyer and a layperson regarding legal problems and the selection of a lawyer should likewise be motivated by a desire to inform the layperson of the availability of competent, independent legal counsel. Since in-person communication provides the opportunity for a two-way exchange of information regarding legal problems and lawyers, the lawyer should encourage questions and respond willingly, candidly, and truthfully. Only personal communications which are not false, fraudulent, deceptive or misleading can provide useful information. However, the in-person character of such communications—in face-to-face settings and by telephone—can give rise to overreaching on the part of the lawyer or a feeling of being pressured for a response on the part of the layperson. Such communication is improper if it has the potential of involving coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct. In determining whether such a potential exists, a lawyer should be aware of whether the layperson's physical, mental or emotional state makes it possible for him to make a reasoned judgment regarding the selection of a lawyer. He should also take into account such other factors as the age, education, and experience of the layperson and any preexisting relationships (family, friendship, or business or other) between the lawyer and the layperson.

deceptiveness and enumerates factors to evaluate the potential for deception.[66]

IV. Public and Professional Views on Lawyer Advertising

Traditional abstention from lawyer advertising can be traced to both the conditions under which early English barristers practiced their profession,[67] and the fear of abuses such as barratry,[68] champerty,[69] and maintenance.[70] The abhorrence of advertising was brought to America by lawyers who had trained in England,[71] and continued to be the recognized

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In-person communications regarding legal problems and the selection of a lawyer are also improper if the recipient, by virtue of inexperience or lack of sophistication about legal services, is not capable of making an informed decision during the course of the conversation.

The experience and sophistication of the layperson regarding legal services and the employment of a lawyer has an important bearing on whether a lawyer should volunteer through personal contact advice that he should obtain the service of a lawyer. There is a greater danger of the lawyer's overreaching or the layperson's feeling pressured to employ the lawyer in cases of relatively inexperienced or unsophisticated persons than in other cases. For example, a young couple considering the purchase of their first home may not have the experience or sophistication to evaluate in a personal conversation the reasons they need a lawyer. On the other hand, a business executive may be quite familiar with and capable of evaluating in the same context his need and choice of a lawyer.

Also, close friends, relatives, clients and former clients, and other persons who have established personal business or professional relationships with a lawyer or his firm are deemed to be informed about the need and services of the lawyer. It is therefore proper for the lawyer to volunteer advice to such persons concerning the engagement of a lawyer and then accept employment. Of course, the advice should not be false or misleading, and should be given in circumstances which do not have the potential for overreaching.

Id. at EC 2-9.

66. *See id.* at EC 2-10 to 2-17. These ethical considerations come under the heading "Avoidance of Deceptiveness."

67. One author states that because English lawyers lived and trained together at the Inns of Court on a friendly basis, any advertising by them would have created friction among members of the profession. *See* H. Drinker, *supra* note 3, at 210. Due to this policy reason, the rules against lawyer advertising might better have been deemed rules of professional etiquette rather than of ethics. *Id.* at 211 n.3.

68. "Barratry" is defined as "[t]he offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise." Black's Law Dictionary 137 (5th ed. 1979).

69. "Champerty" refers to "[a] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." *Id.* at 209.

70. "Maintenance" is defined as "[a]n officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." *Id.* at 860.

71. Many members of the early American bar studied at the Inns of Court, returning to America with the English traditions of the profession. *See* H. Drinker, *supra* note 3, at 5, 210.

view of the profession until *Bates*.[72]

A. *The Profession's View of Lawyer Advertising*

Lawyer advertising has been characterized as the most controversial issue of the decade for the profession.[73] In light of the recent Supreme Court decisions, it is not surprising that lawyers have taken to various advertising mediums in resounding numbers.[74] As one commentator stated, "The idea of a professional as an individual dedicated to service above economic rewards is truly an anachronism."[75] Nonetheless, studies have shown that, for a variety of reasons, the majority of lawyers are hesitant to advertise.[76]

Many believe that advertising professional services carries with it different risks than does advertising standard products.[77] The major arguments against lawyer advertising are: (1) it will bring about commercialization and undermine the attorney's sense of dignity and self-worth; (2) since legal services are so individualized with regard to content and quality, advertising is inherently misleading; (3) advertising will stir up litigation; and (4) advertising will lower the quality of services provided.[78]

In his annual report to the American Bar Association, Chief Justice Burger stated: "The professional standards and traditions of the bar in the past served to restrain members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace. Historically, honorable lawyers . . . did not advertise [and] they

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72. In 1908, the ABA banned lawyer advertising. *See supra* note 3. While the Canons of Professional Ethics were amended from time to time, advertising remained forbidden until 1977.

73. Hobbs, *Lawyer Advertising: A Good Beginning but Not Enough*, 62 A.B.A. J. 735 (1976).

74. Although a 1978 ABA survey revealed that only three percent of all attorneys advertised, this figure is steadily increasing. *See The Case for Lawyer's Advertising: It Wins Clients*, Wash. Post, June 20, 1978, at A1, col. 2; *see also Ads Start to Take Hold in the Professions*, BUS. WEEK, July 24, 1978, at 122, 124 (predicting that in ten years advertising will be the way most people will find a lawyer); *Law Poll*, 69 A.B.A. J. 892 (1983) (only five percent of law firms of ten or more have advertised while twenty-three percent of firms of three or fewer have).

75. Whitman, *Advertising by Professionals*, 16 AM. BUS. L.J. 39, 64 (1978).

76. *See supra* note 74; *see also* Shimp & Dyer, *How the Legal Profession Views Legal Service Advertising*, 42 J. MARKETING 74 (1978).

77. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 774 (1976) (Burger, C.J., concurring).

78. Bates v. State Bar, 433 U.S. 350, 368-79 (1977); *see also* Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLIAMETTE L.J. 221 (1977); Whitman & Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of* In re R.M.J., 57 ST. JOHN'S L. REV. 445 (1983); Note, *The Solicitation Rule: Ethical Restrictions and Legal Fictions*, 22 CATH. U.L. REV. 218 (1972).

did not solicit. . . ."[79] In these views, the Chief Justice is not alone.[80] It is feared that, with advertising, the "public would be encouraged to choose an attorney on the basis of which had the better, more attractive advertising program rather than on his reputation for professional ability."[81] However, while this concern may be genuine, even the Chief Justice concedes that "not all of the developments in higher lawyer visibility and advertising are undesirable or unprofessional."[82]

The view that advertising is inherently misleading appears to result from the historical ban on advertising and the view that, since advertising was forbidden, only dishonest lawyers advertised.[83] However, now that advertising is permitted, it does not follow that only dishonest lawyers will advertise. Also, any abuses can be handled by direct regulation as set forth under the guidelines of *In re R.M.J.*[84]

The concern that attorney advertising may stir up litigation seems unfounded because lawyers are already forbidden from advancing frivolous suits.[85] An increased awareness of legal remedies does not necessitate their frivolous use.

The concern that advertising will adversely affect the quality of legal services also appears to be without merit. A recent survey shows that consumers believe advertising-oriented legal clinics provide a better quality of services than do traditional law firms.[86] Not all firms which advertise will provide better services, but, when advertising results in lower prices, there need not be a corresponding loss in quality.

B. *The Public's Need for Information*

"The traditional ban on attorney advertising has caused the public to

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79. Burger, *The State of Justice*, A.B.A. J., April 1984, at 62, 63.

80. *See* Carrico, *The Need to Restore Professionalism*, VA. B. NEWS, Aug. 1984, at 16, 17-19. In a 1981 survey, a majority of the lawyers polled believed that advertising had lowered the professionalism of lawyers.

81. State v. Nichols, 151 So. 2d 257, 268 (Fla. 1963) (O'Connell, J., concurring in part and dissenting in part); *see also* Abel, *President's Message—A "Fresh" Look at the State Bar*, 49 CAL. ST. B.J. 502 (1974).

82. Burger, *supra* note 79, at 64.

83. *See* Francis & Johnson, *supra* note 78, at 238.

84. *See In re* R.M.J., 455 U.S. 191, 201-03 (1982).

85. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1983).

86. McChesney & Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 A.B.A. J. 1503, 1505 (1979); *see also* AMERICAN BAR ASSOCIATION, TRANSCRIPT OF PROCEEDINGS—NATIONAL CONFERENCE ON THE FUTURE OF PREPAID LEGAL SERVICES 156-60 (1974) (address by Hon. Earl Warren, Jr.); Shimp & Dyer, *supra* note 76, at 76; *Say Lawyer Ads Cut Fees, Improve Service Quality*, 65 A.B.A. J. 332 (1979) (clear evidence that prices for routine services drop when some lawyers advertise while the quality or services in those geographical areas concurrently improves); *Legal Upheaval—Lawyers Are Facing Surge in Competition as Courts Drop Curbs*, Wall St. J., Oct. 18, 1978, at 1, col. 1.

believe that our legal system is a mystery."[87] Most consumers cannot get the right lawyer for their particular problem and cannot find a lawyer they can afford.[88] The small community practice, so prevalent when the ABA first banned advertising, is virtually non-existent today.[89] Society and its legal problems have become myriad and complex, decreasing the layman's ability to amass and assess the information needed to select an attorney.[90]

Before a layman even attempts to select an attorney, he must first recognize that he has a legal problem and that an attorney's services can help him.[91] Yet, without advertising, many consumers may never even discover that a lawyer's services are available.[92] Without this basic knowledge on the part of the public, many lawyers would be hard pressed for clients.[93]

To make an informed decision when selecting an attorney, a consumer can rely on personal knowledge, reputation, or advertisements.[94] Personal knowledge is probably the best source of consumer information, but it is unlikely that a layman knows a particular lawyer who can deal effectively

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87. Note, *Mail Advertising by Attorneys and the First Amendment*, 46 ALB. L. REV. 250, 269 (1981); *see also* Morrison, *Institute on Advertising Within the Legal Profession—Pro*, 29 OKLA. L. REV. 609 (1976).

88. Morrison, *supra* note 87, at 610; *see* Hobbs, *supra* note 73, at 736; Middleton, *The Right Way to Advertise on TV*, 69 A.B.A. J. 893, 894 (1983); Note, *Attorney Solicitation of Clients: Proposed Solutions*, 7 HOFSTRA L. REV. 755, 755 (1979) (seventy percent of the American people lack effective access to our legal system) (citing ABA SPECIAL COMMITTEE ON PREPAID LEGAL SERVICES, A PRIMER OF PREPAID LEGAL SERVICES 7 (P. Murphy ed. 1974)).

89. *See, e.g.*, VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-5, 2-6 (1983); Francis & Johnson, *supra* note 78, at 237.

90. *See* Francis & Johnson, *supra* note 78, at 237. *See generally* Avichai, *Trends in the Incidence of Legal Problems and in the Use of Lawyers*, 1978 AM. B. FOUND. RESEARCH J. 289 (citing reasons for the growth in legal problems).

91. At the 1973 ABA National Conference on the Future of Prepaid Legal Services, one commentator stated: "[T]he profession has a big educational problem [in] teaching the public enough about legal-type problems and how lawyers can help them, to enable people to make effective judgments about what kind of problems can best be solved by hiring a lawyer at reasonable cost." AMERICAN BAR ASSOCIATION, *supra* note 86, at 174; *see also* AMERICAN BAR ASSOCIATION, *Final Report, Study on Institutional Advertising* 27 (submitted to ABA Commission on Advertising in December, 1980) (laymen are often uncertain when or in what situations to consult an attorney).

92. *See* Francis & Johnson, *supra* note 78, at 237; Whitman & Stoltenberg, *supra* note 78, at 480-81; Comment, *The First Amendment*, In re R.M.J., *And State Regulation of Direct Mail Lawyer Advertising*, 34 BAYLOR L. REV. 411, 430 (1982).

93. *See* Williams, Johnson, & Johnstone, *Lawyer Advertising: How Much Do We Know?*, 33 VA. B. NEWS Aug. 1984, at 20-21 (there are currently over 600,000 lawyers in America, with 35,000 law school graduates added each year).

94. *See* Hazard, Pearce, & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1094-1100 (1983); *see also* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-7 (1983); *cf.* Meyer & Smith, *Attorney Advertising*: Bates *and a Beginning*, 20 ARIZ. L. REV. 427, 481-82 (1978) (consumers use methods of attorney selection which attorneys themselves consider of little importance).

with a specific problem.[95] Reputation provides the consumer with personal knowledge as it has been accumulated and analyzed by others. This source of information, however, is not equally accessible to all consumers.[96]

Advertising enables consumers to obtain information about lawyers and their services at little personal cost. If used properly, advertising allows consumers to evaluate and compare before selecting the attorney best suited to their needs.

V. WHAT IS GOOD TASTE?—GUIDANCE FOR LAWYER ADVERTISING IN VIRGINIA

A. *The Advertising Plan*

Only minimally restrained by professional advertising rules,[97] the individual attorney, firm, or clinic may now begin to advertise. One starting point is to review the "how-to" books prepared by the ABA Commission on Advertising,[98] although the commission acknowledges that its materials do not supplant professional advertising agencies.[99] In addition, lawyers should educate themselves in basic marketing and advertising techniques.

An overall advertising plan will assist an attorney in his decision-making. At a minimum, a basic plan should consist of the following steps: "(1) Identifying and analyzing the target market; (2) Defining advertising objectives; (3) Creating an advertising platform; (4) Determining the advertising budget; (5) Developing the media plan; (6) Creating the advertising message; and (7) Evaluating the effectiveness of the advertising."[100]

1. The Target Market

The target market should be identified and analyzed by assessing both

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95. A recent American Bar Foundation study showed that the average adult uses a lawyer only once or twice during his lifetime. Hazard, Pearce, & Stempel, *supra* note 94, at 1095 (citing B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 185-86, 190 (1977)).

96. *See* Hazard, Pearce, & Stempel, *supra* note 94, at 1096.

97. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1983).

98. Murdock & Linenberger, *supra* note 44, at 680.

99. *See Use Expert Help for Ads, Lawyers Told*, *supra* note 44, at 6, col. 1; *Ads Start to Take Hold in the Professions*, *supra* note 74, at 122, 124 (the Chairman of the ABA Commission on Advertising stated: "Advertising is a specialized field that calls for specialists. Lawyers who do their own advertising will probably waste their time and money because they won't adequately determine what they're trying to inform the public of, and they can't define the market.").

100. Murdock & Linenberger, *supra* note 44, at 680. *See generally* T. BECKMAN, W. DAVIDSON, & W. TALARZYK, MARKETING (9th ed. 1973); W. STANTON, FUNDAMENTALS OF MARKETING (5th ed. 1978).

the individual or group to be served and the resources and capabilities of the lawyer.[101] The target market should then be described both demographically and behaviorally.[102] The lawyer should also decide if he desires to reach the entire market or only a segment of it.[103]

2. Advertising Objectives

Advertising objectives should be consistent with the lawyer's objectives and should be stated in specific and measurable terms.[104] The use of a benchmark representing the attorney's current situation is desirable so that an evaluation can be made of how far, and in what direction, the attorney desires to move from that benchmark.[105]

3. The Advertising Platform

The advertising platform states the basic issues or selling points that the attorney hopes to communicate through his advertising campaign.[106] A single advertisement may focus on one or all of these selling points.

4. The Budget

An advertising budget can be in one of several forms. For established offices, the ABA recommends selecting a percentage of the prior year's gross profit as an initial budget.[107] An all-you-can-afford approach is straightforward and simple, but can easily lead to overspending. [108] The competitive parity budget expends the same proportion on advertising as

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101. Murdock & Linenberger, *supra* note 44, at 680; *see also* AMERICAN BAR ASSOCIATION LAWYER ADVERTISING KIT, *Advertising, Publicity, Promotion Primer* 2 (1978) [hereinafter cited as *ABA Lawyer Advertising Kit*]; L. ANDREWS, BIRTH OF A SALESMAN - LAWYER ADVERTISING AND SOLICITATION 30-31 (1981).

102. Murdock & Linenberger, *supra* note 44, at 680. Demographic terms include age, sex, income, geographic location, and occupation. Behavioral terms encompass lifestyle, attitudes, interests, opinions, and benefits sought.

103. *Id.* at 680-81.

104. *Id.* at 681. "Possible objectives include expanding service to existing clients, cultivating high profit clients, widening and deepening personal referral sources, generating awareness, specialization, replacing client image building or modification, and client education." *Id.*

105. *Id.*

106. *Id.* For example, a legal clinic's original platform might be to position the clinic as a "respectable law firm specializing in serving the middle class at reasonable cost." *Id.*

107. *ABA Lawyer Advertising Kit*, *supra* note 101, at 6. Patience is important, since this approach can lead to reduced advertising expenditures at the very time that advertising should be maintained or increased.

108. Murdock & Linenberger, *supra* note 44, at 682; *see ABA Lawyer Advertising Kit*, *supra* note 101, at 6. Overspending can occur once the point of diminishing returns has been encountered, so spending should be monitored.

does the competition.[109] The objective/task method determines the expenditures necessary to achieve realistic advertising objectives.[110] Other more sophisticated budgeting methods are available,[111] and a lawyer must determine which method, or which combination, is best for him and his advertising plan.

5. The Media Plan and Forms of Advertising

The media plan should be carefully chosen and designed to reach the maximum number of persons in the target market in the most effective and efficient manner possible.[112] Various types of media are available for advertising, with the primary modes being print and broadcast.[113]

Print media, which include newspapers, magazines, the *Yellow Pages* and direct mail, are particularly appropriate for transmitting price information.[114] The opportunity for a reader to clip, save, and later refer to an advertisement is probably the biggest asset of print media.[115] Daily newspapers offer flexibility, intense coverage, specific subject placement, and community prestige, but are limited by short life, hasty reading, and poor reproduction.[116] Local newspapers address a confined geographic area, making demographic information about the readers easy to obtain.[117] Other possibilities, such as religious, ethnic, and special interest periodicals and newsletters, should also be considered.[118]

Magazines offer quality reproduction, long life, and selectivity, but they are limited in area and time. Long lead times for submission of an advertisement make it virtually impossible to make a last minute change.[119]

An advertisement box placed in the *Yellow Pages* telephone directory attracts the attention of a reader; however, it must be remembered that such a reader has probably already decided that he needs a lawyer, and now simply needs to choose one.[120] Therefore, an additional form of ad-

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109. Murdock & Linenberger, *supra* note 44, at 682. This approach assumes one has the same objectives as the competition and tends to attract followers rather than leaders.

110. *Id.* at 682-83. This method emphasizes setting objectives and measuring advertising results, which are desirable tasks.

111. *Id.* at 683 (more complex approaches include mathematical and economic models designed to optimize advertising expenditures).

112. *Id.* at 686.

113. *Id.* at 683.

114. *Id*; *see also ABA Lawyer Advertising Kit*, *supra* note 101, at 3-5; L. ANDREWS, *supra* note 101, at 34-38.

115. L. ANDREWS, *supra* note 101, at 37.

116. W. DUNN & A. BARBAN, ADVERTISING: ITS ROLE IN MODERN MARKETING 515-17 (5th ed. 1982).

117. *ABA Lawyer Advertising Kit*, *supra* note 101, at 4.

118. *Id.* at 4-5.

119. W. DUNN & A. BARBAN, *supra* note 116, at 529-31.

120. Murdock & Linenberger, *supra* note 44, at 683; *see also ABA Lawyer Advertising*

vertisement is strongly recommended to complement the *Yellow Pages*.[121] Other directories should also be investigated, as they can be excellent means of reaching select target markets.[122]

Direct mail can be used to retain existing clients and encourage new client contact.[123] Direct mail can also be used to inform the general public of prices for certain routine services offered, to announce the relocation of an attorney to the area, or to address a specific demographic audience to inform them of an attorney's ability to aid in a particular manner.[124] Other advantages of direct mail include personalization of information, intensive coverage, speed, and selectivity.[125] Limitations include consumer resistance, high cost per reader, and the difficulty of obtaining quality mailing lists.[126]

Broadcast media, especially radio and television, are also widely used by advertisers.[127] Radio is an excellent method of increasing the public's awareness and can be effectively used to reach a particular segment of the market.[128] Other advantages are timeliness, flexibility, and low cost. Radio messages are an effective complement to printed advertisements and are most effective when they run for at least sixty seconds.[129]

Commercial messages on television have greater impact than advertisements in any other media form.[130] Advantages include mass coverage, repetition, flexibility, and audience selection through proper placement.[131] Limitations are fleeting messages, high cost, and the absolute need for professional advertising assistance.[132] For television, thirty-second commercials are preferable.[133]

While newspapers, magazines, television, and radio are the most com-

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Kit, *supra* note 101, at 4.

121. *See* Murdock & Linenberger, *supra* note 44, at 684.

122. *Id.* at 683.

123. *Id.* at 685. Direct mail includes letters, postcards, leaflets, and booklets. W. DUNN & A. BARBAN, *supra* note 116, at 535-38.

124. Comment, *supra* note 92, at 425.

125. W. DUNN & A. BARBAN, *supra* note 116, at 538-39.

126. *Id.* at 539.

127. *See* L. ANDREWS, *supra* note 101, at 37-38; Murdock & Linenberger, *supra* note 44, at 686. It has been found that the poor tend to rely on the broadcast media to obtain information far more than they use printed sources. Brosnahan & Andrews, *Regulation of Lawyer Advertising: In the Public Interest?*, 46 BROOKLYN L. REV. 423, 429 (1980).

128. W. DUNN & A. BARBAN, *supra* note 116, at 567. Like local newspapers, radio stations will furnish audience demographics (broken down by time periods). This allows an advertiser to reach workers during commuting hours, housewives during the day, and males during sports programs. L. ANDREWS, *supra* note 101, at 37.

129. L. ANDREWS, *supra* note 101, at 37.

130. *Id.* at 37-38.

131. W. DUNN & A. BARBAN, *supra* note 116, at 550-51.

132. *Id.* at 551-52; Murdock & Linenberger, *supra* note 44, at 685-86.

133. L. ANDREWS, *supra* note 101, at 38.

monly used media for lawyer advertising, other advertising media should be considered. Attorneys have successfully advertised on mass transit networks, on street and park benches, and through coupons.[134] If done in a professional manner, these alternatives can be effective and relatively inexpensive ways of creatively disseminating general information to the public.

6. Developing a Message

Creating a message that will convey information beneficial to both the attorney and the public is an extremely important part of a basic advertising plan. The message should reach the target audience in the most effective way possible, and must be compatible with the plan's objectives, platform, and media.[135] Research has found that the public favors advertisements containing a greater degree of information.[136] However, the content of a lawyer's message should focus on one objective at a time, so as not to overwhelm or confuse the recipient.[137] Clear, uncluttered messages are favored. Lawyer advertising should utilize language which the average consumer can understand.[138] A lawyer's message can benefit from specificity—explaining to members of the public what they should do as well as how they should do it. Therefore, the message should ask the public to respond in a specific fashion—for example, to obtain a half-hour consultation for a nominal fee.[139]

A unified advertising campaign is a recommended tactic for the lawyer.[140] This can be accomplished through the use of such devices as a theme or a logo.[141] Such a campaign will keep the attorney's name before

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134. *Id.* at 38. Publicity should also be considered by lawyers. Newspaper articles, interviews, talk-show appearances, and seminars are excellent methods to make the public more aware of the need for legal services. *ABA Lawyer Advertising Kit*, *supra* note 101, at 5-6.

135. Murdock & Linenberger, *supra* note 44, at 687.

136. L. ANDREWS, *supra* note 101, at 30-31.

137. *Id.* at 31-32. A former advertising consultant to the ABA Commission on Advertising advises: "If you try to . . . accomplish too many purposes, offer too many services, respond to too many things, . . . your advertising is liable to end up accomplishing nothing. Your advertisements may be perceived, but they will tend to cause confusion and so not be understood, much less believed or acted upon." *Id.*

138. *Id.* at 33.

139. *Id.* at 32. The importance of specificity was displayed in a study of the Illinois State Bar Association pilot advertising program. Advertisements encouraging the public to consult a lawyer for specific services, such as wills, were more influential than advertisements advocating the general enlistment of a family lawyer. *Id.*

140. *Id.* at 33.

141. *See id.* at 34. A Harvard study revealed that the average American receives approximately 1,000 advertising messages per day. Therefore, the more distinguishable the attorney's advertisement is from the other 999 processed each day, the better the chance that the consumer will comprehend and remember it. *Id.* Some lawyer advertising themes include: "Represent yourself . . . and you may have selected a poor attorney"; "Because your lawyer

the public and increase the impact of each additional advertisement.

7. Evaluating Effectiveness

Perhaps the most important aspect of an advertising campaign is the evaluation of its effectiveness. This evaluation includes pre-testing alternate advertisements, studying the various strengths and weaknesses of different media plans, and determining if the campaign has accomplished its objectives.[142] Based on these evaluations, decisions to continue or cancel a communication should be made. Two factors should be taken into account as part of the evaluation. First, advertising has a threshold of use which must be reached before results will be substantial. Second, the effect of advertising can be difficult to detect due to time lags, subconcious impressions, and complex communication networks.[143]

An advertising plan requires both philosophical and monetary commitments, but, if developed and used properly, the results can be outstanding.[144] A plan which recognizes the public's desire for information as well as the lawyer's duty to inform and educate within the bounds of his professional capacity should achieve such results.

B. *Some Advertising Suggestions*

The following suggestions may guide an attorney in formulating an advertising plan that reflects good taste. Since one goal of lawyer advertising is to inform the public, information about the background and practice of the attorney is helpful.[145] A lawyer may state in an advertisement that his "practice includes," and then list specific areas and fields of law in which he practices.[146] Information about the lawyer's experience and service can be helpful, but care must be taken to avoid intentional or unintentional deception.[147] The use of past and present client names can

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should be professional, available, and affordable"; and "Be sure. Work with your lawyer." *Id.*

142. Murdock & Linenberger, *supra* note 44, at 687.

143. *Id.* at 688.

144. One successful advertising message used by an attorney in Roanoke, Virginia, contained the telephone number of a "fee information line." By the fifth time the newspaper advertisement had run, he had received five times the cost of the advertisements in new client fees. L. ANDREWS, *supra* note 101, at 30.

145. *See Guidelines for Individual Lawyer Advertising*, 71 ILL. B. J. 404, 406 (1983) [hereinafter cited as *Guidelines*]; *see also* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-7 (1983).

146. Va. State Bar Council, Formal Op. 427 (1983).

147. *Guidelines*, *supra* note 145, at 407. An example of a tasteful lawyer advertisement which lists experience credentials can be found in a local Virginia community newspaper. *See* The County Line, Oct. 18, 1984, at 4 (copies available from The County Line, 6328 Rigsby Road, Richmond, Virginia 23226).

convey to a reader that others have been satisfied with services rendered; however, consent must be obtained before publishing these names.[148]

Price advertising, including amounts and methods of payment, is a concern to consumers.[149] The basis for fees and any other expenses should be stated in clear language which does not mislead the reader.[150] Certain words, such as "initial consultation," "discounts," and "from" should only be used with adequate explanation.[151] Participation in a credit card plan is ethically permissible in Virginia[152] and is a convenience which may attract clients.

An announcement of a new practice, or the relocation of an established practice, is an unobtrusive method of increasing consumer awareness of the availability of a lawyer's services.[153] Methods of retaining contact with past clients increase awareness. For example, newsletters[154] and letters, which remind the client that certain documents, such as a will, should be reviewed and updated, effectively maintain contact.[155] While direct mail can be used by attorneys in Virginia, it is advisable to mark such materials as "advertising materials" in order to avoid misleading the recipient.[156]

A successful advertising technique used by legal clinics has been the promotion of self-help kits and packets.[157] The publication of a toll-free telephone number also encourages reader response;[158] however, such a device requires manpower and not all calls will lead to client relationships. The distribution of informational pamphlets is also a favorable advertising technique.[159]

Civic organizations are an excellent sounding board for lawyers. Virginia allows attorneys' names to be used in the public endorsements of organizations,[160] and patent attorneys are permitted to join inventors

148. Va. State Bar Council, Formal Op. 397 (1983).

149. *See Guidelines*, *supra* note 145, at 406.

150. *Id.*

151. *Id.* These words, without additional explanation, can be misleading to the consumer.

152. Va. State Bar Council, Formal Op. 186-A (1981).

153. Announcements are also ethically permissible in Virginia. Va. State Bar Council, Formal Op. 362 (1983). Some attorneys believe that a new lawyer must advertise in order to survive in the profession. *See The Case for Lawyer's Advertising: It Wins Clients*, *supra* note 74.

154. Va. State Bar Council, Formal Op. 448 (1983).

155. Va. State Bar Council, Formal Op. 298 (1983).

156. Va. State Bar Council, Formal Op. 447 (1983); *see also Guidelines*, *supra* note 145, at 408.

157. *See Legal Upheaval—Lawyers Are Facing Surge in Competition as Courts Drop Curbs*, *supra* note 86; *The Case for Lawyer's Advertising: It Wins Clients*, *supra* note 74.

158. *See supra* note 145.

159. *See ABA Lawyer Advertising Kit*, *supra* note 101. This kit contains examples of several informational pamphlets.

160. Va. State Bar Council, Formal Op. 434 (1983).

clubs and to accept employment flowing from them.[161] Similarly, criminal lawyers are allowed to place their names and addresses on direct dial telephones located in a police or sheriff's office.[162]

Television is an effective advertising medium, but it is costly and requires the help of professionals.[163] A dignified image should be portrayed, and "cute" commercials, such as a lawyer emerging from a pool saying, "call me if you are in over your head"[164] or "suits finely pressed"[165] are not recommended.

Other forms of advertising which are permitted, but not recommended, are the use of trinkets and gifts.[166] These tend to amuse the public, but rarely do they provide relevant or useful information.[167] A lawyer must never forget that his primary goal should be to inform and educate the public through his advertising.

VI. Conclusion

Lawyer advertising has come full circle since the days of Abraham Lincoln's practice. Not only are advertisements now permitted, they are slowly becoming an accepted practice within the legal profession. Attorneys are realizing that successful advertising can improve their practice while educating and informing the public.

In Virginia, attorneys are guided in their advertising decisions by the provisions of Canon 2 of the Virginia Code of Professional Responsibility. These guidelines encompass, in a general framework, what is and is not permissible. Notwithstanding this Canon, a lawyer has many decisions to make in his quest for an advertising campaign which is informative, tasteful, and successful.

These decisions should always be made on the basis of a lawyer's professional duty to inform and educate the public about legal matters. Nonetheless, as one author has stated, "In the last analysis, only individual concern for appropriateness provides the final answer to how a lawyer should advertise."[168]

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161. Va. State Bar Council, Formal Op. 342 (1983).
162. Va. State Bar Council, Formal Op. 380 (1983).
163. *See supra* note 132 and accompanying text.
164. *See* Middleton, *supra* note 88, at 893.
165. Walker, *Advertising by Lawyers: Some Pros and Cons*, 55 Chi.-Kent L. Rev. 407, 422 (1979).
166. *See Guidelines*, *supra* note 145, at 408.
167. *Id.*
168. *Id.* at 404.

ADDENDUM

LEGAL ADVERTISING AFTER *ZAUDERER V. DISCIPLINARY COUNSEL*

On May 28, 1985, the United States Supreme Court handed down its opinion in *Zauderer v. Disciplinary Counsel*.[1] The Court's opinion further clarified the scope of first amendment protections afforded the "commercial speech" of attorneys who engage in advertising and solicitation.

The factual posture of the case pitted an Ohio attorney's two newspaper advertisements against Ohio's Disciplinary Rules regulating attorney advertising and soliciting.[2] The first advertisement informed readers that his firm would represent individuals charged with drunken driving offenses. The proffered terms of the representation stated that the "[f]ull legal fee [would be] refunded if [the client was] convicted of DRUNK DRIVING."[3]

The second advertisement featured an illustration of a Dalkon Shield Intrauterine Device followed by a caption asking, "Did You Use This IUD?" In addition, the advertisement stated that the IUD had generated a large number of lawsuits, that the attorney handled such cases, and did so on a contingent fee basis with the proviso that "[i]f there is no recovery, no legal fees are owed by our clients."[4]

A panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that the advertisements in question violated a number of disciplinary rules.[5] The Board of Commissioners and the Supreme Court of Ohio adopted the findings of the panel.[6]

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1. Zauderer v. Office of Disciplinary Counsel, 53 U.S.L.W. 4587 (U.S. May 28, 1985).

2. The drunk driving ad was said to violate Ohio Disciplinary Rule 2-101(A), which prohibited public communications which are "false, misleading, and deceptive to the public." *Id.* at 4589. The ad was determined to be false because it professed to offer representation on a contingent fee basis in a criminal case in violation of Ohio Disciplinary Rule 2-106(C). *Id.*

The Dalkon Shield ad was said to violate the following disciplinary rules: DR 2-101(B), which prohibits the use of illustrations in advertisements run by attorneys, requires attorney ads to be "dignified," and limits the information which may appear in such ads; DR 2-103(A), which prohibits an attorney from recommending employment of a lawyer to someone who has not sought advice concerning employment of a lawyer; DR 2-104(A), which provides that, with certain exceptions, a lawyer who gives unsolicited legal advice to a layman shall not accept employment resulting from that advice; DR 2-101(B)(15), which provides that advertisements concerning contingent fees must disclose information regarding the method of calculating the contingent fee; and DR 2-101(A), which prohibits deceptive advertising. *Id.*

3. *Id.* at 4588.

4. *Id.*

5. *See supra* note 2.

6. *Zauderer*, 53 U.S.L.W. at 4590.

On appeal, the attorney challenged the Supreme Court of Ohio's findings that the advertisements violated three separate aspects of Ohio's regulation of attorney advertising: prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems; restrictions on the use of illustrations in advertising by lawyers; and disclosure requirements relating to the terms of contingent fees.[7] The major ground of the appeal was that Ohio's regulation of lawyer advertising violated first amendment protections afforded commercial speech.

The United States Supreme Court upheld the reprimand to the extent it was based upon the aspects of the lawyer's advertisement involving "terms of representation in drunk driving cases and on the omission of information regarding his contingent fee arrangements in his Dalkon Shield advertisement."[8] However, the Court overturned the portion of the reprimand that was based upon the lawyer's use of an illustration and his proferred legal advice because these regulations violated his first amendment rights.[9]

With respect to the finding that the advertisement ran afoul of Ohio's self-recommendation and solicitation rules, the Supreme Court held that since the attorney's statements regarding the IUD were not false or deceptive, the State of Ohio must carry the burden of proving that a prohibition on statements which solicit legal business directly advances a substantial government interest.[10] The Court ruled that the state had not met its burden under the compelling state interest test.[11] The Court further reiterated the distinction between printed advertising and in-person solicitation by stressing that "thoughtful advertising about the availability and terms of routine legal services" is constitutionally permissible.[12]

The Court held that the illustration accompanying the advertisement served important communicative functions and was an accurate representation of the Dalkon Shield with no features likely to deceive, mislead, or

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7. *Id.* at 4591.

8. *Id.* at 4595. The Supreme Court validated the portion of the reprimand which was based upon the prohibitions found in DR 2-101(A) against false, fraudulent, misleading, or deceptive statements. *Id.* at 4590-91, 4594-95. Since the Ohio and Virginia versions of DR 2-101(A) are substantially identical, the outcome of a similar case in Virginia would be the same. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(1983).

9. *Zauderer*, 53 U.S.L.W. at 4595. The Supreme Court invalidated the portion of the reprimand which was based upon the Ohio Code of Professional Responsibility DR 2-101(B). *Id.* at 4591-94. However, since, unlike the Ohio Disciplinary Rule, Virginia Code of Professional Responsibility DR 2-101(B) does not list restrictions on the type and manner of lawyer advertising, the Virginia Code would not run afoul of first amendment protections. *See* VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1983).

10. *Id.* at 4591.

11. *Id.*

12. *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455 (1978)).

confuse the reader. Since the illustration was not deceptive, the state was required to identify a substantial governmental interest which justified its restriction.[13] Ohio's desire to ensure that its attorneys maintained dignity in their communications with the public was not a sufficiently compelling interest to justify an abridgment of first amendment rights through the use of a prophylactic rule.[14]

The Supreme Court upheld Ohio's decision that the attorney failed to disclose the fact that a client stood the chance of incurring liability for the costs of litigation even if the suit was ultimately unsuccessful.[15] The failure of the advertisement to distinguish beween "legal fees" and "costs" created a self-evident possibility of deception of consumers.[16] Ohio's interest in requiring fee disclosure, therefore, did not violate the first amendment protections. "The State's requirement that the advertising include purely factual and uncontroversial information about the terms under which the services will be available is justified by its value to consumers."[17]

In its evaluation of the constitutionality of each of these regulations, the Supreme Court used the same standard: the state carries the burden of establishing that its regulation directly advances a substantial government interest and that it constitutes the least restrictive means of doing so. In promoting this standard, the Court seems to believe that it has designed a test which can be uniformly applied by states in formulating rules for lawyer advertising. Whether such a test will, in fact, be applied by the states with relative ease remains to be seen.

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13. *Id.* at 4593.
14. *Id.*
15. *Id.* at 4594.
16. *Id.*
17. *Id.*