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LETTING THE MARKET CONTROL ADVERTISING BY LAWYERS: A SUGGESTED REMEDY FOR THE MISLED CLIENT

JAMES R. DEVINE*

INTRODUCTION

Much has been written about lawyer advertising since the landmark decision in *Bates v. State Bar of Arizona*, which recognized that paid commercial advertising by lawyers to solicit clients enjoyed some first amendment protection and could not therefore be totally banned.¹ Unfortunately, post-*Bates* writing focused on regulation, as evidenced by ABA Proposal A, which limited lawyer advertising within specified guidelines in response to *Bates*.² In 1982 the United States Supreme Court decided *In re R.M.J.*, which rejected this regulatory approach, and held that while false or misleading advertising can be prohibited, potentially false or misleading advertising can only be controlled through the least restrictive means, and truthful advertising can be regulated only if the state has a substantial interest.³

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1. 433 U.S. 350, *reh'g denied*, 434 U.S. 881 (1977). The two lawyers involved, Bates and O'Steen, were former legal services attorneys who left legal services to start their own legal clinic to provide routine legal services to individuals of moderate incomes. *Id.* at 353-54. Their advertisement was placed in one newspaper of general circulation in the Phoenix, Arizona area, and read, "Do You Need A Lawyer? Legal Services at Very Reasonable Fees." *Id.* at 385 app. The advertisement indicated the specific fees that Bates and O'Steen would charge for uncontested divorces or separations, uncontested adoptions, uncontested personal bankruptcy, and change of name, and noted that information about other available services would be furnished upon request. *Id.*

2. For a discussion of Proposal A (currently MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980)), see *infra* note 70.

3. 451 U.S. 191 (1982). Missouri, following *Bates*, had adopted a regulatory approach to lawyer advertising along the lines of Proposal A, but somewhat less restrictive. See *id.* at 193-96 & 192-93 nn.2-4. Respondent violated the Missouri rules by sending announcements of the opening of his office to selected persons, by including information in newspaper and yellow page advertising not permitted by the rules, and by failing to include a disclaimer, as required by the rules. See *id.* at 196-98. The unpermitted information which respondent advertised included the fact that he was licensed to practice in Illinois, Missouri, and before the United States Supreme Court. Additionally, his listing of fields of practice deviated

While there have been some disciplinary actions against lawyers for advertising, such actions have displayed more an absence of regulation than effective discipline. Between the *Bates* decision in 1977 and the middle of 1982, there were thirteen published decisions involving the discipline of lawyers for advertising and solicitation violations.⁴ The alleged violations included one advertisement on radio,⁵ one advertisement as part of a mailer,⁶ six letter

from those permitted (personal injury instead of tort law, real estate instead of property law) and included areas of practice which were not specifically permitted by the Missouri rules (contract, zoning and land use, communication, pension and profit sharing plans). *Id.* at 197. There was no suggestion that any of the information used by the respondent was in any way false or misleading. *See id.* at 197-98.

4. These do not include non-discipline actions which challenged the advertising regulations of a particular state. *See, e.g.*, Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980). (42 U.S.C. § 1983 (1976) suit against Virginia Supreme Court and Bar Association for failure to change advertising following *Bates*); *Foley v. Alabama State Bar*, 648 F.2d 355 (5th Cir. 1981) (antitrust and civil rights action to enjoin prosecution of ethics violation and to declare advertising rules unconstitutional); *Princeton Community Phone Book, Inc. v. Bate*, 582 F.2d 706 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978) (declaratory judgment challenging state bar advisory opinion restricting telephone book advertising); *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981) (declaratory judgment and injunctive action against order of Rhode Island Supreme Court involving same attorneys); *Bishop v. Committee on Professional Ethics & Conduct*, 521 F. Supp. 1219 (S.D. Iowa 1981) (§ 1983 action challenging advertising rules); *Durham v. Brock*, 498 F. Supp. 213 (M.D. Tenn. 1980) (declaratory judgment and injunctive action to challenge post-*Bates* amendments to advertising rules); *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489 (La. 1978) (action to enjoin solicitation rules regarding group legal service plans); *Reed v. Allison & Perrone*, 376 So. 2d 1067 (La. Ct. App. 1979) (trade practice suit by two attorneys against two other attorneys) (for further discussion of *Reed*, see *infra* notes 39-46 and accompanying text); *In re Oldtowne Legal Clinic*, 285 Md. 132, 400 A.2d 1111 (1979) (petition to use a trade name); *McLellan v. Mississippi State Bar Ass'n*, 413 So. 2d 705 (Miss. 1981) (declaring yellow page restrictions unconstitutional); *In re Mountain Bell Directory Advertising*, 604 P.2d 760 (Mont. 1979) (telephone company petition to include field of practice advertising in yellow pages); *In re Opinion 475*, 89 N.J. 74, 444 A.2d 1092 (1982) (petition challenging rule requiring all names on firm letterhead to be New Jersey admitted attorneys); *In re Utah State Bar Ass'n Petition for Approval of Changes in Disciplinary Rules on Advertising*, 647 P.2d 991 (Utah 1982) (changes in the advertising rules).

5. *See In re Carroll*, 124 Ariz. 80, 84-85, 602 P.2d 461, 465-66 (1979). Following the explosion of a tank car in 1973 in which many persons were injured, an investigator who had occasionally worked for respondent took out a radio advertisement offering free air transport to hospitals for injured persons and families and implying that the investigator was offering these benefits on behalf of "a Phoenix law firm" which was taken to be respondent. *See id.* at 82 & n.1, 602 P.2d at 462-63. The court doubted that the radio advertisement would be considered to comply with *Bates*, but because of the confusion over what was permitted, refused to discipline respondent for the advertisement. *Id.* at 85, 602 P.2d at 466.

6. *See Eaton v. Supreme Court of Ark.*, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981). Petitioner appealed a private reprimand for contracting with an advertising firm to place an advertisement for lawyers in a mailer designed to go to 10,000

solicitation matters,⁷ three telephone directory related advertisements,⁸ a claim of false advertising in violation of DR 1-102(A)(4)

targeted homes in the Little Rock area. *See id.* at 576, 607 S.W.2d at 56. Though agreeing that the advertisement resembled the one in *Bates*, the court found it deceptive in representing that the lawyers could be consulted without regard to subject area. *Id.* at 580, 607 S.W.2d at 59. The court found this representation too broad and therefore unhelpful in aiding a consumer. *Id.* Objecting also to the insertion of the advertisement in a mailer which consisted almost entirely of discount coupons, the court affirmed the reprimand. *Id.* at 580, 583, 607 S.W.2d at 59, 61.

7. *See* *The Florida Bar v. Schreiber*, 407 So. 2d 595 (Fla. 1981), *vacated and remanded*, 51 U.S.L.W. 2282 (Fla. Nov. 9, 1982) (dismissal of case involving letter solicitation to international trade concern soliciting immigration and naturalization cases vacated and remanded because solicitation involved monetary benefit to attorney rather than promotion of individual rights); *Kansas v. Moses*, 231 Kan. 243, 642 P.2d 1004 (1982) (letter to 150 people in the process of selling real estate warrants public censure as client solicitation); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978) (letter to real estate firms soliciting real estate business and setting forth fees is permissible and does not constitute direct solicitation); *In re Appert*, 315 N.W.2d 204 (Minn. 1981) (letters and brochures soliciting contingent fee clients for complex litigation involving birth control devices is constitutionally protected); *In re Greene*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 102 S. Ct. 1738 (1982) (letter to real estate brokers soliciting real estate business is protected); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981) (letter to approximately 7,500 property owners soliciting real estate business is constitutionally protected).

8. *See In re R.M.J.*, 609 S.W.2d 411 (Mo. 1981), *rev'd*, 455 U.S. 191 (1982); *Zimmerman v. Office of Grievance Comm.*, 79 A.D.2d 263, 438 N.Y.S.2d 400 (4th Dep't 1981); *Carter v. Lovett & Linder, Ltd.*, 425 A.2d 1244 (R.I. 1981).

The Missouri court opinion in *R.M.J.* gave no indication that the offending advertising was in the telephone book. *See* 609 S.W.2d at 411-12. The Supreme Court made clear, however, that a substantial portion of the case centered around telephone book advertising with the remainder concerning letters to non-clients as well as newspaper advertising. *See* 455 U.S. at 205-06. The private reprimand of respondent was reversed. *Id.* at 207.

For a more detailed discussion of *Zimmerman*, see *infra* notes 19-26 and accompanying text. The attorney in *Zimmerman* received a public reprimand. *See* 79 A.D.2d at 266, 438 N.Y.S.2d at 403.

Carter is perhaps the most fascinating of the telephone book cases. Following *Bates*, the Rhode Island Supreme Court issued an order permitting advertising in the yellow pages. *See* 425 A.2d at 1245. Relying on the manager of the local telephone company, who indicated that the telephone company considered the inside of each cover of the telephone directory as part of the yellow pages, even though white in color, the attorneys placed their advertising on the inside back cover. *Id.* The court refused to permit continued advertising in this manner, indicating that *Bates* did not permit a competitive struggle among attorneys to place advertising on the inside back cover: "Hereafter, any advertisement placed in the telephone directory by an attorney shall be in those pages that are colored yellow and within that section of the yellow pages which carries the designation 'Lawyers.'" *Id.* The attorneys also used field of practice advertising which was not permitted because potential clients could be misled. *Id.* at 1245-46. Though finding a violation, the court imposed no discipline. *Id.* In *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981), the federal district court sustained the Supreme Court of Rhode Island's finding of field of practice advertising, but invalidated the provision of the state court's order limiting advertising only to the "yel-

of the Code of Professional Responsibility,⁹ and one advertisement offering a discount.¹⁰ The matters were brought to the courts of Arizona, Arkansas, Florida, Kansas, Kentucky, Minnesota, Missouri, New York and Rhode Island and thus represent a fair cross-section of views within the United States.

As a result of these disciplinary matters, one lawyer was suspended, but not for the advertising violation,¹¹ one lawyer received a private reprimand,¹² three lawyers received public reprimands,¹³ one case has been remanded,¹⁴ one case found a violation but imposed no discipline,¹⁵ and five cases were dismissed.¹⁶ In addition to these reported cases, the National Center for Professional Responsibility has published statistics for lawyer discipline, including the number of advertising complaints filed against lawyers which resulted either in no discipline or private discipline.¹⁷ In 1980, of

low pages.”

9. See *Kentucky Bar Ass'n v. Gangwish*, 618 S.W.2d 176 (Ky. 1981). In *Gangwish*, an attorney placed an advertisement in a newspaper under the name of a corporation he allegedly created offering to find real parents for adopted children. See *id.* at 176. When persons responded, he wrote to them on his own letterhead indicating he was attorney for the corporation empowered to enter into contracts. *Id.* Though he “created” the corporation, its documents were never filed and thus did not have any legal existence. *Id.* The court found the conduct in violation of DR 1-102(A)(4) and publicly reprimanded him. *Id.* at 176-77.

10. *Kentucky Bar Ass'n v. Gangwish*, 630 S.W.2d 66 (Ky. 1982). The attorney, the same one as in *Gangwish*, 618 S.W.2d 176 (Ky. 1981), advertised in a church bulletin and a brochure of the Chamber of Commerce offering discounts, e.g., “twenty-percent (20%) discount to members of the Chamber on the cost of legal services.” See 630 S.W.2d at 66. The court found this advertising beyond the scope of advertising of fees for “routine services” and publicly reprimanded the attorney. *Id.* at 67.

11. See *In re Carroll*, 124 Ariz. at 86, 602 P.2d at 467. The attorney was disciplined for violations relating to contingent fee contracts and advancement of monies to clients.

12. See *Eaton*, 607 S.W.2d at 56, 61.

13. See *Moses*, 231 Kan. at —, 642 P.2d at 1007; *Gangwish*, 630 S.W.2d at 67; *Gangwish*, 618 S.W.2d at 177; *Zimmerman*, 79 A.D. at 266, 438 N.Y.S.2d at 403.

14. See *Schreiber*, 407 So. 2d at 599-600. The original reversal was vacated because of the decision in *R.M.J. See Schreiber*, 51 U.S.L.W. 2282, *vacating and remanding* 407 So. 2d 595 (Fla. 1981).

15. See *Carter v. Lovett & Linder, Ltd.*, 425 A.2d at 1246.

16. See *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978); *In re Appert*, 315 N.W.2d 204 (Minn. 1981); *In re R.M.J.*, 609 S.W.2d 411 (Mo. 1981), *rev'd*, 451 U.S. 191 (1982); *In re Greene*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 102 S. Ct. 1738 (1982); *Koffler v. Joint Bar Ass'n*, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981).

17. See NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, ABA, *Statistical Report Re: Expense, Case Volume, and Staffing of Lawyer Disciplinary Enforcement in State Jurisdictions During 1980*, in DISCIPLINARY LAW AND PROCEDURE RESEARCH SYSTEM chart VIII (1980).

the twenty-four jurisdictions which reported, there were 226 advertising complaints filed against lawyers which did not result in discipline and 110 complaints which resulted in private discipline.¹⁸ It is evident that, although lawyer advertising has been the subject of much discussion, very little has actually been done by the bar to assure legal consumers that when lawyer advertising is presented to them, it will indeed aid in the process of informed selection of a lawyer.

A recent New York disciplinary decision reflects the difficulty in using the regulatory system as a mechanism for enforcing advertising standards. In *Zimmerman v. Office of Grievance Committee*, the attorney-respondent was a 1977 law school graduate who published his name in the 1980-1981 telephone directory under twenty-five separate practice areas.¹⁹ These subject areas covered legal fields including "Administrative and Government Law," "Admiralty Law," "Consumer Law," "Criminal Law," "Debt Collections," "Insurance Law," "Labor Law," "Taxation," and "Workmen's Compensation," among others.²⁰ At the top of the page listing the areas of practice in the telephone directory, there was a general disclaimer indicating that a lawyer's listing under a particular practice area did not "necessarily" mean that the lawyer had "been certified by any state or federal authority as having any

18. *Id.*

19. 79 A.D.2d 263, 263-64, 438 N.Y.S.2d 400, 401 (4th Dep't 1981).

20. *See id.* at 263, 264, 267 app. A, 438 N.Y.S.2d at 401, 404 app. A. The listing was titled "LAWYERS Grouped by Practice" and listed the following areas:

Accidents—Personal Injury/Property Damage	Immigration & Naturalization
Administrative & Governmental Law	Insurance Law
Admiralty Law	Juvenile Law
Anti-Trust & Trade Regulations	Labor Law
Appellate Practice	Landlord & Tenant
Bankruptcy	Marital & Family Law
Consumer Law	Real Property Law
Corporation, Partnership & Business Law	Securities Law
Criminal Law	Taxation
Debt Collection	Trial Practice
Environmental Law	Wills, Trusts & Probate Estates
Estate Planning & Administration	Workmen's Compensation
General Practice	

Id. at 267 app. A, 438 N.Y.S.2d at 404 app. A. Zimmerman was the only lawyer or firm whose name was listed under each area. *See id.* In fact, Zimmerman was the only lawyer listed under the practice areas of Admiralty, Anti-Trust & Trade Regulations, Consumer Law, Insurance Law, Juvenile Law, Labor Law, Securities Law and Taxation. *Id.*

more competence in these areas than any other lawyers."²¹ Despite this statement, the New York court found that if the purpose of such a listing was to facilitate consumer selection of an appropriate attorney, "this expectation may not be attained by retaining respondent, who candidly admits to his lack of experience in many of the identified areas of law in which his name is listed."²²

As a result of this lack of experience, the court held that the advertising by the respondent was both deceptive and misleading within the meaning of DR 2-101(A).²³ The effect of the Zimmerman listing was such that potential legal consumers could be "beguiled."²⁴

However, because of his inexperience, his reliance on the disclaimer, and an apparent lack of intent to deceive, Zimmerman was only censured by the court.²⁵ While the inexperience of a lawyer is a perfectly permissible factor to mitigate a disciplinary violation, its use in this case presented a curiously incongruous result. The very same evidence used to show that the advertising was deceptive—inexperience and undue reliance on the disclaimer—was also used to enable Zimmerman to avoid more severe discipline.

It is not difficult to imagine the public's perception of the bar as a result of a case like *Zimmerman*. While the legal profession has indeed provided some regulation for the "beguiled" client who sought the lawyer out because of the advertisement, the client must feel unsatisfied.

You can't get any redress for your grievances either, from anybody, because I tried. I still tried, I went through the grievance process and they said, "Yeah, yeah, he ripped you off," and I'm still in the same spot as when I started. The

21. *Id.*

22. *Id.* at 265, 438 N.Y.S.2d at 402. Zimmerman claimed that, in any area in which he did not have appropriate experience, he was associated with a law firm that could aid him. *Id.* at 264, 438 N.Y.S.2d at 401-02. Rejecting such a defense, the court noted that such a claim only added to the potential deception. *Id.* at 265, 438 N.Y.S.2d at 402.

23. *See id.* at 266, 438 N.Y.S.2d at 402-03.

24. The court found that the purpose of advertising is to permit truthful information to be passed along to potential consumers. *Id.* at 265, 438 N.Y.S.2d at 402.

No detailed guideline or signpost other than an innate sense of right or wrong should be necessary to achieve this goal. A lawyer, particularly, should have an awareness of the moral quality of his own conduct and the ability to make the obvious judgment that the design of [this] advertisement is to gain clients by guile and delusion.

Id. at 266, 438 N.Y.S.2d at 403.

25. *Id.*

Grievance Board didn't care about my rights, they cared about their lawyer they had in front of them.²⁶

This Article is not intended to be critical of lawyer discipline;^o indeed it is believed that the legal profession stands above all others in weeding out the incompetent.²⁷ The problem is not in discipline; rather it is in the very essence of advertising regulation, a subject called by Henry Drinker more a matter of etiquette than of legal ethics.²⁸ It is crucial to professional regulation that the bar control the kind of false, fraudulent or misleading advertising which can be prohibited as a result of cases such as *In re R.M.J.*,²⁹ given the rather fluid notions of lawyer-advertisers' first amendment rights as well as the after-the-fact nature of advertising regulation.³⁰ Yet it seems clear, as the post-*Bates* cases show, that the relatively mild discipline imposed as a result of false advertising will not deter other lawyers from engaging in similar conduct. As a result, the proper purpose of advertising, to provide legal consumers with meaningful selection alternatives, will not be met and dissatisfaction with the profession will remain high.

As advertising by lawyers continues to increase, following *R.M.J.* and the possible enactment of rules such as the Kutak Model Rule 7.1,³¹ perhaps the best deterrent to false advertising by

26. See Transcript of John Smith (from videotape *Professional Misconduct: Conversations with Victims*, L. Dubin producer) reprinted in *TEACHING PROFESSIONAL RESPONSIBILITY* 187, 212 (P. Keenan ed. 1979).

27. See Devine, *Lawyer Discipline in Missouri: Is a New Ethics Code Necessary*, 46 *Mo. L. REV.* 709, 737-40, 763 (1981).

28. See H. DRINKER, *LEGAL ETHICS* 211 n.3 (1953). This same statement was noted by the Supreme Court in *Bates*. See 433 U.S. at 371.

29. 455 U.S. 191 (1982).

30. See *A.B.A. Approves Lawyer Advertising Rules*, 63 *A.B.A.J.* 1177, 1234 (1977) (discussing both Proposal A and Proposal B of the ABA).

31. See *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 7.1 (Final Draft 1981). The rule provides:

Rule 7.1 *Communications Concerning a Lawyer's Services*

A lawyer shall not make any false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

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

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Id. The original comment to the rule rejects the "laundry list" approach on the theory that

lawyers is a combination of enforcement plus free market control. While disciplinary agencies must continue to press for compliance with the profession's rules, the consumers of legal services must also be encouraged to file civil suits against lawyers when there are legitimate civil wrongs. Such suits would recognize that "the common law may be more attentive to client needs than is the grievance process."³²

This Article suggests one alternative: the civil suit against a lawyer who has engaged in false advertising on the theory that such advertising violates existing state-enacted deceptive trade practice statutes. In order to evaluate this suggested client remedy, Part I of this Article will consider the basis of liability under such statutes, and Part II will apply that basis to the procedure used under the acts to determine the effectiveness of deceptive trade practice liability as a deterrent to false advertising.

I. LIABILITY UNDER DECEPTIVE TRADE PRACTICES ACTS

A. *The Legal Basis*

It would be the rare advocate who would think of applying the provisions of deceptive trade practice or consumer fraud statutes to the services of a lawyer. Generally, such acts are thought of as applying more to the door-to-door salesperson and the automobile dealer than to the professional. A recent Texas case should serve to make lawyers rethink that position.

In April 1977, Marilyn and Donny Staggs hired Douglas DeBakey, Esq., for the purpose of changing the name of Marilyn Staggs' daughter by a previous marriage.³³ Though he filed the complaint, numerous deficiencies in the proceedings caused the Staggs to tire of DeBakey's representation and change attorneys. Following successful completion of the name change proceeding with other counsel, Mr. and Mrs. Staggs filed suit against attorney

the bar cannot "identify information that the public might think relevant." See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 comment Proposed Final Draft (1981).

The Supreme Court referred to the Model Rule, but did not specifically approve it in *R.M.J.* See 451 U.S. at 201 n.14.

32. Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 733 (1981).

33. See *DeBakey v. Staggs*, 605 S.W.2d 631, 632 (Tex. Civ. App. 1980), *aff'd per curiam*, 612 S.W.2d 924 (Tex. 1981). At the time DeBakey was hired, he was paid \$120.00 toward an estimated fee of \$250.00. See 605 S.W.2d at 632.

DeBakey alleging that DeBakey's failures unnecessarily caused them to hire another attorney and suffer needless mental anguish.³⁴ The suit was filed, not as a malpractice action, but as a consumer fraud action, under the Texas Deceptive Trade Practices Act.³⁵ Ruling that the Act covered legal services, the Texas trial court agreed that an action could be maintained against DeBakey for consumer fraud.³⁶ As a result, damages were awarded to the Staggs in the amount of \$420.³⁷ In accordance with the provisions of the Deceptive Trade Practices Act, those damages were trebled and attorney fees of \$1,000 were also awarded against attorney DeBakey.³⁸

While there appear to be no reported decisions imposing trade practice liability upon attorneys for deceptive advertising, at least one court has discussed the applicability of such statutes to lawyer advertising. In *Reed v. Allison & Perrone*,³⁹ two lawyers were sued by other lawyers seeking an injunction against the defendants' alleged false advertising.⁴⁰ The action was brought under the Louisiana Unfair Trade Practices and Consumer Protection Law,⁴¹ which grants to private individuals who suffer irreparable injury, that is, injury not adequately compensable by monetary damages, the right to seek an injunction against deceptive advertising as regulated by the Act.⁴² Even though the defendants admitted that their

34. *Id.* Damages alleged and awarded to plaintiff by the trial court were the \$120.00 initially paid to DeBakey, together with \$300.00 to the new attorney. *Id.* The appellate court reduced this award by \$250.00, the amount the plaintiff originally agreed to pay DeBakey. *Id.* at 633.

35. See TEX. BUS. & COM. CODE ANN. § 17.41-.63 (Vernon Supp. 1981-82).

36. See 605 S.W.2d at 633.

37. See *supra* note 34.

38. See 605 S.W.2d at 632-33.

39. 376 So. 2d 1067 (La. Ct. App. 1979). The firm of Allison & Perrone had previously been involved in a solicitation controversy. In 1977, they had formed a plan designed to provide pre-paid legal services for employee groups and had sought to enjoin enforcement of any disciplinary rules against them. The Louisiana Supreme Court denied their petition. See *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489 (La. 1978).

40. See 376 So. 2d at 1068. The advertising was in the form of an advertisement concerning the Legal Clinic of Allison & Perrone. See *id.* For a reprint of the complete advertisement, see *id.* at 1070 app. Part of the advertisement indicated that defendants had "pioneered" the legal clinic concept in Louisiana. *Id.* Plaintiffs sought to compel, as part of their requested relief, a new advertisement indicating that plaintiffs had operated a legal clinic for many years. *Id.* at 1068.

41. LA. REV. STAT. ANN. § 51:1401-:1418 (West Supp. 1982).

42. See 376 So. 2d at 1069. The Act itself has been interpreted as not granting a private plaintiff an injunctive remedy. See *Michaelson v. Motwani*, 372 So. 2d 726 (La. Ct. App.

advertised claim of resolving sixty percent of client problems at the initial conference was misleading,⁴³ the trial court denied relief to the plaintiffs on the theory that regulation of lawyer advertising was to be accomplished exclusively through the disciplinary machinery of the bar.⁴⁴

On appeal by the plaintiffs, the Louisiana Court of Appeals disagreed, holding that "[a]dvertising of legal services is clearly a 'trade' or 'commerce' as defined by [statute]. It is, therefore, subject to the provisions of the [Act]."⁴⁵ Plaintiffs were denied relief, however, for failure to meet the burden of proof of irreparable injury necessary for injunctive relief. Plaintiffs' claims that defendants' advertising caused irreparable injury to plaintiffs' livelihood and professional reputation were deemed simply unsubstantiated.⁴⁶

What should be clear from the decisions in both *DeBakey* and *Reed* is that an "attorney sells legal services and the client purchases them."⁴⁷ Consequently, attorneys should be subject to the provisions of consumer fraud acts. In order, however, to fully understand the special applicability of consumer fraud statutes to lawyer advertising, it is necessary to understand the close nexus between legal advertising and the advent of consumerism which produced deceptive trade practice acts like the one in Texas.

B. *The Rise of Consumer Legislation*

As late as 1961, the American Bar Association (ABA), in Formal Opinion 302, demonstrated the then anti-consumer nature of the practice of law by holding it unethical for a lawyer to habitually charge less than a bar association's minimum fee schedule for the performance of a particular legal service.⁴⁸ Ruling that the pro-

1979). Although the court in *Reed* held that the Louisiana Unfair Trade Practices and Consumer Protection Law applied to advertisements of legal services, because the injunctive relief provided by the statute was granted only to the Attorney General, the plaintiffs had to meet the burden of proof required in a traditional civil suit. See 376 So. 2d at 1069.

43. *Id.* at 1069 n.4.

44. *Id.* at 1068. According to the appellate court, the trial court interpreted pronouncements by the United States Supreme Court to the effect that false advertising is subject to restraint by the states only through disciplinary regulation. *Id.*

45. *Id.* at 1068-69.

46. *Id.* at 1069.

47. See 605 S.W.2d at 633.

48. ABA Comm. on Professional Ethics, Formal Op. 302 (1961). "The establishment of suggested or recommended fee schedules by bar associations is a thoroughly laudable activity." *Id.*

mulgation of such minimum fees was "a thoroughly laudable activity," the organized bar indicated that "no lawyer should be put in the position of bidding competitively for clients."⁴⁹ The result of such a practice, according to consumer activist Ralph Nader, was that "millions of consumers had . . . been overcharged throughout the country."⁵⁰ Though the minimum fee was outlawed by the Supreme Court in 1975,⁵¹ this non-competitive and hence anti-consumer philosophy was evident throughout the decades of the 1960s and 1970s.

Consumerism came to the bar first through solicitation, then through advertising. In 1963, the Supreme Court in *NAACP v. Button*⁵² held that the associational freedoms contained in the first amendment protected solicitation by branches of the NAACP of cases designed to eliminate racial segregation.⁵³ In 1964, the Court extended such protection to union solicitation of members to advance their rights to compensation from employers,⁵⁴ and by 1971, the solicitation of persons by organized groups for the protection of rights, both civil and financial, became a virtual fact of life.⁵⁵

The real push toward lawyer advertising started in 1965, when the law came to the poor through the first formal federal funding of organized legal services.⁵⁶ Followed in 1966 by direct congres-

49. *Id.*

50. See R. NADER & M. GREEN, *VERDICTS ON LAWYERS* xii (1976).

51. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Supreme Court held that minimum fee schedules violated the antitrust laws.

52. 371 U.S. 415 (1963).

53. *Id.* at 429-32. The Court recognized the NAACP as protecting the important "lawful objectives of equality of treatment." *Id.* at 429.

54. See *Brotherhood of Ry. Trainmen v. Virginia*, 377 U.S. 1 (1964).

55. See generally *United Trans. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

Though an apparent fact of life, it was not universally accepted. The Court in *United Mine Workers* approved the solicitation by a union of its members encouraging the members and families to consult a union retained lawyer before settling cases with the union. See 389 U.S. at 219-21. Yet, following that opinion, New Jersey prohibited a lawyer from representing a trade association member as part of the lawyer's regular duties for the association, even though all fees paid by the members went to the association. See N.J. Sup. Ct. Advisory Comm. of Professional Responsibility, Formal Op. 143, 92 N.J.L.J. 53 (1969). See also *id.* at Formal Op. 172, 93 N.J.L.J. 81 (1970) (corporate lawyer paid by corporation to draw wills for employees prohibited); Formal Op. 256, 96 N.J.L.J. 745 (1973) (labor union lawyer paid by union drawing wills for members prohibited); Formal Op. 284, 97 N.J.L.J. 363 (1974) (attorney hired by profit corporation for tenants cannot be paid by corporation to represent members of tenants' organization).

56. See Ventantonio, "Equal Justice Under the Law": *The Evolution of a National*

sional funding of neighborhood legal services projects,⁵⁷ the inception of such programs was seen by Nader as the birth of the activist-lawyer.⁵⁸ Though generally accepting the legal services concept, not all members of the bar favored the activist approach.⁵⁹

The resistance of the bar to the solicitation cases, and the reluctance by some to wholeheartedly support legal services for the poor, among other factors, led the bar to question its consumer orientation. A 1971 report by a special ABA committee designed to survey legal needs indicated: "There are some persons in the legal profession, for example, who believe the general public, with income above the poverty line, has many unsatisfied needs for legal services. Others believe to the contrary."⁶⁰

The dichotomy of such feelings was stated by Nader in 1976 as the difference between the profession's "duty of service to all [and] its monopolistic status under the law."⁶¹ That status caused external pressures to be applied to the profession as well. A 1973 Senate subcommittee "provided substantial evidence that because of the high cost of lawyers, Americans are deterred from obtaining needed legal counsel."⁶²

Though other studies had been conducted, the result of all of this discussion was the first national survey of the legal needs of the public, conducted through the support of the ABA.⁶³ In the end, the final report really failed to answer the question of whether

Commitment to Legal Services for the Poor and a Study of its Impact on New Jersey Landlord-Tenant Law, 7 SETON HALL L. REV. 233, 235 & n.6 (1976).

57. See *id.* at 237.

58. See R. NADER & M. GREEN, *supra* note 50, at viii.

59. See generally Ventantonio, *supra* note 56, at 245.

As adopted in 1969 by the American Bar Association, Ethical Consideration 2-25 provided in part: "[L]egal aid offices, lawyer referral services and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services." *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 729, 740-41 (footnotes omitted). The ethical consideration was adopted as part of the Code of Professional Responsibility. *Id.* at 392.

60. See *Report of the Special Committee to Consider the Feasibility of Undertaking a Comprehensive Survey of the Legal Profession*, 96 A.B.A. REP. 311, 312 (1971).

61. R. NADER & M. GREEN, *supra* note 50, at vii.

62. Tunney & Frank, *Epilogue: A Congressional Role in Lawyer Reform*, in R. NADER & M. GREEN, *supra* note 50, at 295, 297-98.

63. See B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC 1* (1974). For a discussion of the prior surveys and their results, see *id.* at 2-9.

the legal needs of the public at large were going unmet.⁶⁴ It is clear, however, that such surveys and the discussions surrounding them awakened the consciousness of the bar and the public to the duties of the legal profession to meet consumer needs.⁶⁵

It is also clear that those discussions led to the conclusion by activist lawyers that the way to meet the legal needs of the vast middle class was advertising. Bates and O'Steen, who brought advertising to the Supreme Court, were former legal services lawyers who subscribed to the view that the middle class had unmet legal needs.⁶⁶ Sensing that the way to make those legal needs known was through advertising, Bates and O'Steen deliberately violated the no advertising rules of DR 2-101.⁶⁷ They were, of course, not the only ones who believed that advertising was consistent with the obligation of the lawyer to make legal services available. At the time of the Supreme Court's landmark pronouncement on the subject, actions by both Consumer's Union⁶⁸ and the Department of Justice⁶⁹ were pending, designed to open the advertising market to lawyers.

Bates, though a landmark, was not the final chapter. Though the ABA changed DR 2-101⁷⁰ in a purported attempt to meet the

64. See A.B.A., FINAL REPORT OF THE SPECIAL COMMITTEE TO SURVEY LEGAL NEEDS 5 (1978). The Committee found no real way of determining how to measure "unmet legal needs." *Id.*

65. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-33 (1980). This EC was added in 1974. *Id.*

66. See *Bates*, 433 U.S. at 354 (1977). The aim of their clinic "was to provide legal services at modest fees to persons of moderate income who did not qualify for government legal aid." *Id.* Both Bates and O'Steen had been attorneys for the Maricopa County Legal Aid Society. *Id.*

67. According to one author, the decision by Bates and O'Steen to violate DR 2-101 was one which had to be made. The financial success of the clinic was based on a need to accomplish work on a volume basis. Accordingly, unless they attracted a substantial amount of one-time business through advertising, the clinic simply could not work. See L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 3 (1980).

68. See Supreme Court of Va. v. Consumer's Union, 446 U.S. 719, 724-26 (1980). Consumer's Union had begun, in 1974, to attempt to publish a legal directory but was unable to do so because of the provisions of the code.

69. On June 25, 1976, the Justice Department filed suit against the ABA charging that the ethics rules relating to advertising illegally restrained trade. See *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A.J. 979 (1976). The suit was eventually dropped following the post-*Bates* rule amendments. See *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A.J. 1538 (1978).

70. See A.B.A. Approves Lawyer Advertising Rules, 63 A.B.A.J. 1177, 1234 (1977). The new rule first prohibited "false, fraudulent, misleading, deceptive, self-laudatory or unfair"

mandate of the Court, and although some 29 states adopted the

advertising, then provided the "laundry list" of statements which may be advertised:

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

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

3) Date and place of birth;

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

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

6) Public or quasi-public offices;

7) Military service;

8) Legal authorships;

9) Legal teaching position;

10) Memberships, offices, and committee assignments in bar association;

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

12) Technical and professional licenses;

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

14) Foreign language ability;

15) Names and addresses of bank references;

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

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

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

19) Office and telephone answering service hours;

20) Fee for an initial consultation;

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

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

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

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

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

Id. at 1235.

regulatory "laundry list" approach of that new rule,⁷¹ only three of those states, by 1980, would have permitted the advertisement sanctioned in *Bates*.⁷²

The result, in *In re R.M.J.*,⁷³ was a new mandate to the states. The strictly regulatory approach was no longer viable. That approach, manifested in Missouri through an addendum to DR 2-101, permitted certain areas of practice to be advertised by name, but forbade any deviation from the exact wording mentioned and any mention of a limitation of practice.⁷⁴ The Court classified lawyer advertising in three categories: First, advertising which is false, or which proves in fact to be false, can be banned. Second, advertising which may be false, such as field of practice advertising, cannot be banned if it can be presented in a truthful way. Third, advertising which is truthful can be controlled, but only upon a showing of a substantial state interest.⁷⁵ Additionally, whenever the state attempts to regulate either advertising that tends to deceive, or advertising which is truthful over which the state asserts a substantial state interest, the regulation of that advertising must meet the

The rule originally permitted this advertising only in the print media. See *id.* In 1978, however, the rule was amended to include television and radio advertisements. See *TV Advertising by Wide Margin*, 64 A.B.A.J. 1341 (1978).

Although it seemed new, the provisions of DR 2-101 had been in existence for some time. An amended version of Canon 27, the pre-code version of the ethics rule, was enacted in 1937 to permit publication in approved law lists of information such as:

a statement of the lawyer's name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and of admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, bar and other association memberships and, with their consent, the names of clients regularly represented.

Report of the Committee on Professional Ethics and Grievances, 62 A.B.A. REP. 350, 351-52, 763 (1937). It thus appears that the new rule was no more than a reenactment of the old rule with permission for further publication.

71. See L. ANDREWS, *supra* note 67, at 135 app. III.

72. See *id.* In fact, the ABA has surmised that *R.M.J.* voids the rules in 42 states. See *Supreme Court Report*, 68 A.B.A.J. 342 (1982).

73. 455 U.S. 191 (1982).

74. The court made clear "that the [s]tates retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice." *Id.* at 207.

75. See *id.* at 203. "[T]he [s]tates 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." *Id.*

The Kutak Commission drafters indicate that such information may be highly relevant to the potential consumer. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 legal background (Final Draft 1981). See also *supra* note 30.

four-pronged test of *Central Hudson Gas Co. v. Public Service Commission*:

At the outset, we must determine [1] 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. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.⁷⁶

R.M.J. evidences a pro-consumer orientation on the issue of lawyer advertising, an orientation previously noted in *Bates*, which indicates that commercial advertising does carry an important message about the availability, scope and price of services. Advertising performs an essential service by aiding the consumer in "informed and reliable decisionmaking."⁷⁷ Both *Bates* and *R.M.J.* reflect the influx of consumerism into the practice of law, and thus follow a developing trend of the 1960s and 1970s toward protection of the consumer. Running parallel to the increasingly-held view of advertising as a consumer benefit was the growth of statutes designed to prevent consumer fraud. "Since 1960, state consumer protection legislation has been enacted at a rapid, even a dizzy pace."⁷⁸

In an attempt to unify this "dizzy" growth, the National Conference on Uniform State Laws, together with the ABA, adopted the Uniform Consumer Sales Practices Act in 1970.⁷⁹ As indicated by the drafters: "Consumers are entitled to protection from deceptive and unconscionable sales practices no matter where they live, and businessmen are entitled to predictable standards of conduct no matter where they sell."⁸⁰ The Uniform Act is thus intended to simplify and clarify the law, encourage consumer protection, and further the development of fair practices.⁸¹

76. 447 U.S. 557, 566 (1980). *R.M.J.* adopted this test for lawyers. See 455 U.S. at 203 n.15.

77. 433 U.S. at 364 (citations omitted).

78. UNIFORM CONSUMER SALES PRACTICES ACT, Commissioners' Prefatory Note, 7A U.L.A. 1 (1970) [hereinafter cited as Uniform Act].

79. *Id.* at 1-2.

80. *Id.* at 1.

81. *Id.* at § 1.

C. *The Acts Themselves*

Though the purpose of the Uniform Act was salutary, its adoption did not prevent a proliferation of differing state legislation also designed to prevent consumer fraud. Thus, the statutory scheme used in the *DeBakey* case in Texas is different from that of the Uniform Act. By way of example rather than limitation, the Uniform Law and various state consumer protection statutes are reviewed here.

The purpose of these laws is "to protect consumers from suppliers who commit deceptive and unconscionable sales practices."⁸² As at least one state has interpreted such statutes, they are to be construed as widely as possible to benefit the consumer,⁸³ and as a result are designed to cover not only the fast-talking salesperson, but the non-soliciting seller as well.⁸⁴

While not identical, the statutes contain several common features:

1) "services" are included within the definition of consumer transaction,⁸⁵ merchandise,⁸⁶ or deceptive acts;⁸⁷

2) the acts forbid either deceptive advertising,⁸⁸ misrepresentation about the quality of services,⁸⁹ or deception in furnishing

82. *Id.*

83. See, e.g., *Martin v. American Appliance*, 174 N.J. Super. 382, 384, 416 A.2d 933, 934 (Law Div. 1980) (act is remedial and thus should be "liberally construed"); *State v. Hudson Furniture Co.*, 165 N.J. Super. 516, 520, 398 A.2d 900, 902 (App. Div. 1979) (act to be interpreted to protect consumers).

84. See, e.g., *Hyland v. Zubeck*, 146 N.J. Super. 407, 413, 370 A.2d 20, 23 (App. Div. 1976) (consumer fraud statute applicable even where fraud is not widespread and can be used against nonsoliciting business persons).

85. See Uniform Act, *supra* note 78, at § 2(l). See also OHIO REV. CODE ANN. § 1345.01(A) (Page 1979).

86. See Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 121 ½, § 261(1)(b) (Smith-Hurd Supp. 1982-83); MO. ANN. STAT. § 407.010(4) (Vernon 1979); N.J. STAT. ANN. § 56:8-1(c) (West Supp. 1981-82).

87. See N.Y. GEN. BUS. LAW § 349(a) (McKinney Supp. 1981-82). California specifically includes "services" within the definitional portion of its act. See CAL. CIV. CODE § 1761(b) (West 1973).

88. See Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 121 ½, § 262 (Smith-Hurd Supp. 1982-83); MO. ANN. STAT. § 407.020 (Vernon 1979); N.J. STAT. ANN. § 56:8-2 (West Supp. 1981-82).

89. See Uniform Act, *supra* note 78, at § 3(b)(2). See also CAL. CIV. CODE § 1770(g) (West Supp. 1982); OHIO REV. CODE ANN. § 1345.02(B)(2) (Page 1979).

It must be noted that Ohio specifically exempts actions between attorney and client from the operation of its deceptive trade practice act. See OHIO REV. CODE ANN. § 1345.01(A) (Page 1979). See also N.C. GEN. STAT. § 75-1.1(b) (1981) (North Carolina also exempts law-

services;⁹⁰

3) the acts provide a private cause of action to individuals who are victimized by prohibited practices.⁹¹ Furthermore, many of the acts permit the court hearing such a case to increase the damages award,⁹² and allow the awarding of attorney's fees.⁹³

yers); TEX. REV. CIV. STAT. ANN. art. 4590, § 12.01(a) (Vernon Supp. 1980) (Texas exempts doctors).

90. See N.Y. GEN. BUS. LAW § 349(a) (McKinney Supp. 1981-82).

91. See Uniform Act, *supra* note 78, at § 11. See also CAL. CIV. CODE § 1780 (West 1973); Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 121 ½, § 270(a) (Smith-Hurd Supp. 1982-83); MO. ANN. STAT. § 407.025 (Vernon 1979); N.J. STAT. ANN. § 56:8-19 (West Supp. 1982-83); N.Y. GEN. BUS. LAW § 350-d (McKinney Supp. 1981-82); OHIO REV. CODE ANN. § 1345.09 (Page 1979). It is the provision for a private cause of action which separates state provisions from federal trade practice acts. Cf. Federal Trade Commission Act, 15 U.S.C. §§ 45-58 (1976 & Supp. IV 1980) (detailing powers of the Federal Trade Commission to prevent unfair trade practices). For further discussion of the federal act and related cases, see *infra* notes 97-102 and accompanying text. Generally, the federal act does not permit a private cause of action. See, e.g., *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973). The federal act, however, does not forbid a state from enacting a provision which grants a cause of action to wronged consumers. See, e.g., *Holiday Magic, Inc. v. Warren*, 357 F. Supp. 20, 28 (E.D. Wis. 1973), *vacated on other grounds*, 497 F.2d 687 (7th Cir. 1974).

At least one state has refused to grant a wronged client a private cause of action against an attorney under a state statute. In *Lightfoot v. MacDonald*, 86 Wash. 2d 331, 544 P.2d 88 (1976), the client alleged that the attorney had been hired to defend him against a threatened real estate foreclosure. The complaint, sounding in both malpractice and deceptive trade practice, alleged that the attorney had failed to take any action, resulting in the foreclosure of the property. See *id.* at 331, 544 P.2d at 89. The attorney denied the charges. The facts of the case perhaps reveal a classic example of how lawyers find themselves in trouble without even knowing it:

The respondent admitted that he was retained by the appellant but denied that he was retained to handle her delinquent account with the mortgage bank. The appellant alleged that when, in October 1970, she received the summons and complaint in the foreclosure action, she took it in an envelope to the respondent's office. He was out of town at the time, and she left it with the receptionist. The respondent said that it did not come to his attention until he reviewed the appellant's file on December 29 or 30, 1970 at which time he discovered the unopened envelope.

Id. at 332 n.1, 544 P.2d at 89 n.1.

In Washington, however, the courts were directed to follow the decision under the federal act and consequently were obligated to deny private relief. See *id.* at 333, 544 P.2d at 89.

The malpractice portion of the complaint was also dismissed because the statute of limitations had run. See *id.* at 332, 544 P.2d at 89.

92. See Uniform Act, *supra* note 78, at § 11(b) (actual damages or \$100, whichever is greater). See also CAL. CIV. CODE § 1780(a)(3) (West 1973) (punitive damages); MO. ANN. STAT. § 407.025(1) (Vernon 1979) (discretionary punitive damages); N.J. STAT. ANN. § 56:8-19 (West Supp. 1982-83) (treble damages); N.Y. GEN. BUS. LAW § 350-d(3) (McKinney Supp. 1981-82) (actual damages or \$50, whichever is greater, plus the court in its discretion

As has been shown, deceptive trade practice acts arose to protect consumers from shady marketplace techniques, and they apply to services as well as products. Lawyer advertising arose in part to educate unsophisticated consumers about the availability of services. The Supreme Court has recognized that states may regulate lawyer advertising to prevent deception. Logically, it follows that a deceptive trade practice act should be a way of protecting consumers from the deceptive marketing of lawyer services.

II. PRACTICE UNDER DECEPTIVE TRADE PRACTICE ACTS

A. *The Components of a Cause of Action*

Deceptive trade practice acts supplement common law actions for fraud.⁹⁴ To be successful in a suit alleging deceptive advertising by a lawyer, a consumer must prove: 1) that the advertising was deceptive; 2) that the consumer was damaged; and 3) that the damage was caused by the deceptive advertising.⁹⁵

Thus, under the statutes governing the Federal Trade Commission's powers to regulate false advertising, there is no requirement that a "random sample" of consumer perceptions be taken to determine the falsity of the advertising.⁹⁶ Advertising must be judged in its entirety,⁹⁷ and may be false both as a result of statements which are made as well as statements which the advertising

may increase the award up to treble damages but not exceeding \$1,000); OHIO REV. CODE ANN. § 1345.09(B) (Page 1979) (treble damages or \$200, whichever is greater).

93. See Uniform Act, *supra* note 78, at § 11(e). See also Consumer Fraud and Deceptive Business Practices Act, ILL. ANN. STAT. ch. 121 ½, § 270(a) (Smith-Hurd Supp. 1982-83); MO. ANN. STAT. § 407.025(1) (Vernon 1979); N.J. STAT. ANN. § 56:8-19 (West Supp. 1982-83); N.Y. GEN. BUS. LAW § 350-d(3) (McKinney Supp. 1981-82); OHIO REV. CODE ANN. § 1345.09(F) (Page 1979).

94. See *State ex rel Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. Ct. App. 1973). As a result, an "overly meticulous definition" that might be applicable in a common law fraud action is avoided in favor of a judicial case-by-case determination of the fairness of a transaction. *Id.*

95. See Comment, *Applicability of the Texas Deceptive Trade Practices Act to Attorneys*, 30 BAYLOR L. REV. 65, 67 (1978). Once these elements are proved, liability attaches, because, under these types of legislation, "fault" on the part of the advertiser is not a relevant criterion. See, e.g., *id.*

96. See, e.g., *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967) (in determining if consumers were misled by Geritol advertising, FTC not required to sample consumer perceptions of the advertising claims).

97. See, e.g., *FTC v. Simeon Management Corp.*, 391 F. Supp. 697, 704 (N.D. Cal. 1975), *aff'd*, 532 F.2d 708 (9th Cir. 1976).

fails to make.⁹⁸ The issue, quite simply, is the overall impact of the advertising upon the consumers it is designed to attract.⁹⁹ As a result, there is no requirement that the advertiser intend that the advertising be false,¹⁰⁰ nor is it material that the advertiser acted in "good" or "bad" faith.¹⁰¹

Under the federal act, deception is established by a subjective standard: Is the advertising, taken in its entirety, likely to deceive a potential consumer? To answer that question requires viewing advertising from the consumer perspective. Traditionally, in dealing with claims against lawyers, an objective standard is used: Did the lawyer "exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances?"¹⁰² Such a standard obviously includes notions of fault.¹⁰³ Transposed into a standard of care for the lawyer-advertiser, the objective standard would read: Did the attorney exercise ordinary care to prevent potential deception to the consumer?

As is evident, imposition of the subjective standard on lawyer-advertisers would impose a higher duty of care than the objective standard. It would also change the focus of the trial. The objective standard focuses on the reasonable attorney, and in the malpractice context expert testimony is usually necessary to determine what the reasonable attorney would do.¹⁰⁴ The subjective standard would focus on the perceptions of the consumer, without regard to the reasonableness of the attorney, and thus expert testimony would not aid a jury,¹⁰⁵ all of whom are consumers.

98. See 391 F. Supp. at 702.

99. See, e.g., *FTC v. National Health Aids, Inc.*, 1088 F. Supp. 340, 347 (D. Md. 1952).

100. See, e.g., *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 309 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980) (mental state not an element of such an offense).

101. See, e.g., *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921, 925 (6th Cir. 1968). In certain state legislation, however, good faith may provide an exemption from all or a portion of liability. See, e.g., CAL. CIV. CODE § 1784 (West 1973).

102. See R. MALLEN & V. LEVITT, *LEGAL MALPRACTICE* § 112 (1977) (emphasis omitted).

103. See Comment, *supra* note 96, at 71.

104. See R. MALLEN & V. LEVITT, *supra* note 102, at § 422.

105. To justify the use of expert testimony, the subject matter of the testimony must generally be so related to some profession, science or business "as to be beyond the ken of the average layman." C. MCCORMICK, *LAW OF EVIDENCE* § 13 (2d ed. 1972). In the legal malpractice context, if the error of the attorney "is within the common knowledge of laymen," no expert is needed. See R. MALLEN & V. LEVITT, *supra* note 102, at § 423.

In looking at the perceptions of a consumer, whether a particular advertisement is deceptive does not require the kind of "scientific, technical, or other specialized knowledge" which bespeaks of expert testimony. Cf. *FED. R. EVID. 702* (standard for deciding if expert

B. *Justifying the Subjective Standard*

In considering whether the consumer's view of advertising should determine the civil liability of attorney-advertisers, it must be recalled that one of the reasons justifying any regulation of the commercial speech of lawyer-advertisers is the relative lack of sophistication about legal services of the legal consumer. To permit the lawyer-advertiser to play on that lack of sophistication and not subject him to a higher standard of care is to permit the lawyer who chooses to advertise to have all of the benefits of advertising without any of the responsibilities.

Viewing the telephone book listings in *Zimmerman* as an example, Zimmerman was the only lawyer listed under the designation "Insurance Law."¹⁰⁶ It must be considered likely that a legal consumer with an insurance problem would call Zimmerman as opposed to some of the other lawyers listed under the heading "General Practice."¹⁰⁷ To be sure, many general practice lawyers handle insurance problems. In fact, most routine insurance problems can probably be handled by a general practice lawyer. From a lawyer's point of view, there is thus probably little difference between the reasonable competence of the lawyer advertising insurance and the lawyer advertising a general practice. There is no deception in either listing. To judge Zimmerman, however, by the same standard as the general practice lawyer is to apply a professional's view of insurance law. From the consumer's point of view, the consumer in *Zimmerman* had an insurance problem and saw only one name under "Insurance Law." Would any consumer be aware that a general practice lawyer could probably handle the matter? Even if he were, would he not expect more of a lawyer who is listed under the heading than he would of the remaining general practitioners? If Zimmerman wishes to list himself under "Insurance Law," is it unfair that the legal system evaluate him from the point of view of those consumers he is trying to attract?

testimony required). In a series of cases, the Supreme Court has indicated that expert testimony is not required to determine whether a piece of writing or movie is pornographic. See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974); *Kaplan v. California*, 413 U.S. 115 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). Surely if a jury is capable of determining pornography, it is capable, without expert aid, of determining if a particular advertisement is deceptive.

106. See 79 A.D.2d at 267 app. A., 438 N.Y.S.2d at 404 app. A.

107. There are seven listings under "General Practice," including Zimmerman. *Id.*

In *Bates*, the Supreme Court indicated that "advertising claims as to the *quality* of legal services . . . probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."¹⁰⁸ While the Court did not define "quality" advertising, it can generally be seen in two contexts: subjective quality, that the services of one lawyer are better than those of another, and objective quality, that the services of a lawyer are the "best" or "finest" available. In *R.M.J.* the Court indicated that listings of areas of practice cannot be banned.¹⁰⁹ When a consumer looks at a listing of lawyers by fields of practice, the listing itself, under a particular field, is an implied statement of both subjective and objective quality. It implies that the listed lawyer is better than those lawyers not listed and further implies a factual representation of experience. When a doctor's listing in the telephone yellow pages indicates, "practice limited to the eye," the doctor is held to a specialist's degree of care.¹¹⁰ While it is true that a higher standard of care has not gained wide popularity in decisions dealing with legal malpractice,¹¹¹ part of the recalcitrance toward adopting such a

108. See 433 U.S. at 383-84.

109. See 455 U.S. at 203.

110. See generally Annot., 21 A.L.R.3d 953 (1968).

In a survey of a membership of over 42,000, the ABA's Committee on Advertising and Specialization of the Section of Corporation Banking and Business Law expressed concern about lawyers using similar types of advertising:

Our members are uncomfortable with field-of-practice advertising without minimum standards imposed by the states through the regulation of those entitled to engage in such advertising.

In part the discomfort stems from a belief that the public cannot reasonably be expected to appreciate that a lawyer advertising as:

John J. Jones, Esq.

Corporate Finance and Securities

or

John J. Jones, Esq.

Practice Limited to

Corporate Finance and Securities

may have no significant background, special training, or specific education in the area.

Discussion Draft: Advertising, Specialization and the Business Lawyer, 35 BUS. LAW. 303, 306-07 (1979) [hereinafter cited as *Advertising and Specialization*]. The final draft of the Model Rules of Professional Conduct indicates that the phrase "practice limited to" would imply specialization and would not be permitted. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 comment (Proposed Final Draft 1981).

111. See R. MALLIN & V. LEVITT, *supra* note 102, at § 114. The opportunity for an increased standard of care has presented itself. New York cases decided in the early 1900s

standard has been the legal profession's prohibition against advertising. In medicine, if a doctor holds himself out as having a higher degree of skill, then a higher standard is applied. The same should

provided the backdrop for imposing a stricter standard of care on attorneys who claim a specialized knowledge in a particular area of the law. In the 1902 New York case of *Childs v. Comstock*, 69 A.D. 160, 74 N.Y.S. 643 (1st Dep't 1902), the court considered the specialized nature of the legal practice in holding the attorney liable for a failure to timely appeal from a decision made by the U.S. Board of Appraisers imposing importation duties on the client's imports into New York. *Id.* at 164-65, 74 N.Y.S. at 646. The attorney defended on the ground of the Board's unique system of giving notice of its decisions. *Id.* at 165, 74 N.Y.S. at 646-47. The court, finding negligence, wrote:

The defendants were experts in that line of business, and aside from these protests they represented a very large percentage of all protests filed against the imposition of tariff duties that were heard before the board of general appraisers. They were familiar with the practice of the government officials and aware of the risk in relying on the irregular practice in the transmission of notices of their decisions by the board of general appraisers.

Id. at 165, 74 N.Y.S. at 646. See also *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205 (1919). In *Trimboli*, the attorney failed to find error in a land title, certifying it instead as marketable when it was not. *Id.* at 149-50, 123 N.E. at 205. Justice Cardozo wrote in the opinion, "It is negligence to fail to apply the settled rules of law that should be known to all conveyancers." *Id.* at 150, 123 N.E. at 206.

In 1934, however, a radical departure from the line of reasoning developing in the New York courts occurred in the Illinois case of *Olson v. North*, 276 Ill. App. 457 (1934). In *Olson*, the attorney was sued by his client for an alleged failure to use reasonable care and skill in his defense of the client under an indictment for murder. *Id.* at 460. Although the attorney held himself out as "especially qualified in the defense of criminal cases, including murder cases," the court did not impose a stricter standard of care in the case, holding the attorney instead to "a reasonable degree of care and skill." *Id.* at 461, 473.

Following *Olson*, however, commentators indicated that a change in the reasonable care rule was necessary. Writing in 1953, one author noted that a tax expert should be held to a higher standard than other lawyers doing tax work. Such a rule would make lawyers cautious about holding themselves out as experts in particular fields. Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233, 256 (1953). Other commentators have echoed this sentiment. See, e.g., Comment, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1303-04 (1963); Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 786-88 (1968) [hereinafter cited as *Standard in Legal Malpractice*]. Today, the *Restatement* adopts this same approach, indicating that a professional will be held to the traditional standard of care "[u]nless he represents that he has greater or less skill or knowledge." RESTATEMENT (SECOND) OF TORTS § 299A (1965).

This specialist standard received judicial recognition in 1975. In *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975), plaintiffs were referred by a general practitioner to the defendant, a specialist in maritime law, regarding acquisition of clear title to a sea-going vessel. *Id.* at 805, 121 Cal. Rptr. at 196. Although holding for the defendant lawyer because of an absence of expert testimony, the court nevertheless held "that a lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by the other specialists of ordinary skill and capacity specializing in the same field." *Id.* at 810, 121 Cal. Rptr. at 199. One other court has since adopted a similar standard. See *Rodriguez v. Horton*, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980).

be true of lawyers particularly since "the 'holding out' exists independently of a formal recognition of legal specialization."¹¹² Thus, when lawyers choose to follow the course of their medical brethren, the public will assume that the advertisement carries the same qualitative implication.¹¹³ To permit the consumer's perception of what is meant by the implied statements of quality in field of practice advertising simply supports the Supreme Court's view that such advertising "might well be deceptive or misleading to the public."¹¹⁴

C. *The Effect of a Disclaimer*

In its advertising rulings, the Supreme Court indicated that in order to prevent confusion, a supplement by way of warning or disclaimer could be required in advertisements.¹¹⁵ Such a disclaimer was required in Missouri prior to *R.M.J.*,¹¹⁶ and its constitutionality was not challenged.¹¹⁷ Prior to *R.M.J.*, whenever a practice area was listed in Missouri, it had to be followed by the statement: "Listing of the above areas of practice does not indicate any certification of expertise therein."¹¹⁸ Because the decision as to whether advertising is deceptive will be judged from a consumer rather than legal perspective, it is important to determine the reasonableness of using such a disclaimer from the consumer's view.

In *Lovett and Linder Ltd. v. Carter*, a Rhode Island case in which the attorneys used a non-required disclaimer,¹¹⁹ a survey

112. See *Standard in Legal Malpractice*, *supra* note 111, at 787.

113. See *Advertising and Specialization*, *supra* note 110, at 307. *But see Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903 (D.R.I. 1981). In *Lovett & Linder*, a marketing professor's survey of 33 people indicated that all but one of those people believed that the *Lovett & Linder* advertisement listing 17 areas of practice only meant that the lawyers were generalists. *Id.* at 911. The one exception was a management scientist who used similar advertising. *Id.* Several of the people commented, however, "that the 'lawyer is spreading himself too thin.'" The *Lovett & Linder* court discounted this survey. *Id.*

114. See *Bates*, 433 U.S. at 366.

115. See *id.* at 384; *R.M.J.*, 455 U.S. at 201.

116. *Id.* at 195 n.6.

117. *Id.* at 204 & n.18.

118. *Id.* at 195 n.6 (quoting from Advisory Comm., Missouri Bar Administration, *Addendum* to DR 2-101(B)(2), 34 J. Mo. BAR 51 (1978)).

119. 523 F. Supp. 903 (D.R.I. 1981). *Lovett & Linder* was an action seeking declaratory and injunctive relief to prevent enforcement of a state supreme court order arising out of a finding of unethical conduct by the attorneys but imposing no discipline. See *Carter v. Lovett & Linder, Inc.*, 425 A.2d 1244 (R.I. 1981) (for state supreme court decision). The advertisement, while listing specific areas of practice, made no claims that attorneys listed

conducted by a University of Rhode Island marketing professor revealed that seven of the ten people who commented on the disclaimer indicated that they did not like its use.¹²⁰ As noted by the court, "[T]he disclaimer type of ad is even more pernicious in that it deliberately states an untruth, *i.e.*, lack of expertise in areas in which the lawyer believes that he or she is a qualified expert."¹²¹

In *Zimmerman*, the advertisements by areas of practice are on one page. At the top of that page is the indication that the listing of the lawyer under an area does not indicate any more expertise than that possessed by any other lawyer.¹²² The court found, however, that the purpose of the advertising was "to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed,"¹²³ thereby discounting the disclaimer as "ambiguous."¹²⁴

In short, as to deceptive trade practice cases, the use of a disclaimer appears to add very little towards preventing deception. In fact the disclaimer may add to the deception. As a result, in a deceptive trade practice case, while a disclaimer may be used as a factor in judging the advertising in its entirety, it should not be permitted as a defense to the action.

D. *The Deterrent Effect of Deceptive Trade Practice Liability*

For the lawyer, advertising is a means of attracting clients. Even assuming that the vast majority of lawyers will advertise within the bounds of ethical propriety,¹²⁵ the very competitive nature of advertising encourages lawyers to develop a message, to tailor an advertising campaign to a particular audience,¹²⁶ in short, to work close to the ethics barrier, without going beyond it. Because a

under a certain area were experts or specialists in that field. See 523 F. Supp. at 906, 911.

120. *Id.*

121. *Id.*

122. See 79 A.D.2d at 267 app. A., 438 N.Y.S.2d at 404 app. A.

123. *Id.* at 265, 438 N.Y.S.2d at 402.

124. *Id.* Reading the advertising as the *Zimmerman* court does, it would also be unethical within the meaning of DR 6-102(A). See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A) (1981). This rule provides: "a lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." *Id.* If a lawyer holds himself out by listing areas of practice, thereby enticing clients with problems in those practice areas, such a disclaimer would, from the consumer's point of view, appear to be a limitation of liability.

125. See 433 U.S. at 379.

126. See L. ANDREWS, *supra* note 67, at 27-42.

lawyer earns a living practicing in the profession,¹²⁷ because of the nature of advertising, and because discipline has been negligible in dealing with the lawyer whose advertising slides over the line of propriety, the current system is not a deterrent. The potential financial reward from an effective advertising scheme may be deemed to outweigh the potential risks.

This is particularly so in light of current malpractice standards. The potential client who is attracted to lawyer Zimmerman by his listing under a particular area and pays a \$500 advance fee, but is forced to discharge the attorney because of his inexperience, and have the legal problem resolved by another attorney, is not likely to sue Zimmerman for malpractice. Even assuming that a higher standard of care is applicable because Zimmerman advertised,¹²⁸ the costs of suit, including the costs of hiring a lawyer to sue a lawyer and an expert to establish Zimmerman's absence of care, would quickly consume a \$500 recovery.

Yet, for the vast majority of middle-income Americans, for whose benefit advertising can be said to exist, that \$500 is a substantial sum. If the same suit were filed under a deceptive trade practice act, the successful client could recover the costs of suit and attorney's fees. In addition, no expert testimony would be needed. The result is that the middle-income victim of false or deceptive advertising is able to recoup relatively small amounts of actual damages without expending additional sums that the consumer may be unable to afford.

The major deterrent of using trade practice acts for deceptive lawyer advertising lies in the provisions for increasing the damages award, in some statutes a trebling of the damages, as well as the awarding of attorney's fees for successful suits. These additional damages provisions must be considered essentially as punitive damages.¹²⁹ As such, there is little likelihood that such awards are covered by malpractice insurance. Some malpractice policies specifically exclude exemplary or punitive damages.¹³⁰ All policies ex-

127. See *Bates*, 433 U.S. at 368.

128. Cf. *supra* note 111 (stricter standard of care for attorneys claiming specialized knowledge).

129. See *Neveroski v. Blair*, 141 N.J. Super. 365, 382, 358 A.2d 473, 482 (App. Div. 1976). "[T]he treble damages provision of the act was intended both to compensate a victim for his loss and in addition provide a punitive recovery." *Id.*

130. In their book on malpractice, Mallen and Levitt have included as an appendix, portions of the liability policies of American Bankers Insurance Company of Florida, Ameri-

clude fraud.¹³¹ Even where there is no specific exclusion, there may be an implied exclusion based on the very nature of punitive damages: "[T]he purpose of assessing punitive damages is not to recognize any special merit of the victim's claim but to punish the wrongdoer; allowing the wrongdoer to shift the responsibility for punitive damages to an insurer would thwart this public policy favoring punishment."¹³²

The same rationale should exist for the payment by a deceptive trade practice defendant of plaintiff's attorney's fees. The insurance policies obligate the malpractice carrier to cover "damages" which the insured is obligated to pay.¹³³ It is certainly arguable that, under the American view, the award of counsel fees is punitive rather than compensatory.¹³⁴

As has been seen, the current method of imposing discipline on lawyers who engage in deceptive advertising has resulted in rather mild sanctions. As a result, the benefits of advertising, even if deceptive, may, to some lawyers, outweigh the risks associated with professional discipline. When, however, the lawyer who seeks to engage in advertising knows that personal financial liability can result from deceptive advertising techniques, through the imposition of punitive damage liability, attorney's fees, neither of which would be covered by malpractice insurance, and costs of suit, the

can Home Assurance Company, The St. Paul Property Liability Insurance Company, and the Travelers Insurance Company. See L. MALLEN & V. LEVITT, *supra* note 102, at 565-613 app.

The policies of the American Home Assurance Company and the St. Paul Property Liability Insurance Company specifically exclude punitive damage awards. See *id.* at 595 app., 605 app.

131. See Schnidman & Salzer, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist*, 9 Sw. L.J. 613, 635 (1977). The American Bankers Insurance Company of Florida policy excludes "any act, error, or omission which is dishonest, fraudulent, criminal or malicious." See L. MALLEN & V. LEVITT, *supra* note 102, at 568 app. The American Home Assurance Company policy excludes any claim arising out of any active or deliberate, dishonest or fraudulent acts or omissions of any insured." *Id.* at 595 app. The St. Paul Property Liability Insurance Company policy excludes actions arising "out of or in connection with any dishonest, fraudulent, criminal or malicious act or omission of any Insured." *Id.* at 605 app. The Travelers Insurance Company policy is not applicable "to any dishonest, fraudulent, criminal or malicious act or omission of any insured." *Id.* at 612 app.

132. R. KEETON, *INSURANCE LAW, BASIC TEXT* § 5.3(f) (1971).

133. See policies referred to *supra* note 130.

134. Cf. C. McCORMICK, *DAMAGES* § 85 (1935) (some courts, including the United States Supreme Court, have disapproved of gauging punitive damages by referring to the plaintiff's costs of litigation—including attorney's fees).

lawyer will be deterred from false or fraudulent advertising. Those lawyers who are truly qualified in special areas will have little to fear, while those who are not so qualified will become cautious about overestimating their market and their abilities.¹³⁵ The result will thus be consistent with the policies enunciated by the Supreme Court in its advertising decisions: to aid the consumer in the process of selecting competent counsel while at the same time controlling advertising which is false, fraudulent or misleading.

CONCLUSION

In 1970, the Clark Committee, designed to evaluate lawyer discipline,¹³⁶ wrote: "It is imperative that bar associations establish a procedure to enable laymen to find counsel to represent them in legitimate [civil] claims against attorneys."¹³⁷ Other authors have suggested a free market regulation of the profession through use of civil suits.¹³⁸ Deregulation of the legal profession is not an acceptable substitute for what currently exists. Such writings focus on the process of regulation rather than on the real issue; providing effective quality control of the profession so that legal consumers can be given what they deserve: competent legal services.

Both regulation and free market controls are necessary because the purpose of discipline is different from the purpose of free market control. Discipline exists to protect the public in the future, by weeding out those who have shown themselves to be unworthy of public trust based on past conduct. The free market civil suit is designed to offer recompense to those individuals who suffer financial loss as a consequence of present legal misconduct by a lawyer.

At present, only the disciplinary model is being used in attempting to regulate deceptive lawyer advertising. In light of *R.M.J.*, the status of such regulation appears in substantial doubt. As a result, the unsophisticated consumer is left without adequate protection. It is thus time to grant official sanction to the use of civil remedies as an aid to clients who have been wronged by law-

135. See Blaustein, *supra* note 111, at 256.

136. See *Report of the Special Committee on Evaluation of Disciplinary Enforcement*, 95 A.B.A. REP. 783 (1970). Retired Supreme Court Justice Tom C. Clark was chairman of this special committee. *Id.*

137. *Id.* at 984.

138. See Martyn, *supra* note 32, at 732.

yers.¹³⁹ The deceptive trade practice suit is just such a remedy for clients beguiled by deceptive advertising. As an additional component of bar regulation of advertising, it should prove an effective adjunct.

139. *Id.* at 742.

