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McGeorge Law Review

Volume 17 | Issue 4

Article 4

1-1-1986

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Al H. Ringleb
Texas A&M University

Alan J. Bush
Texas A&M University

William C. Moncrief
Texas Christian University

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*Al H. Ringleb
**Alan J. Bush
***William C. Moncrief

Lawyer advertising has been and will undoubtedly continue to be a subject of considerable debate and controversy both within and outside the legal profession.[1] Although lawyer advertisements were upheld as deserving first amendment protection by the United States Supreme Court in *Bates v. Arizona*,[2] and then expanded and defined in four subsequent advertising decisions,[3] considerable restraint still attaches to the lawyer's

* J.D., University of Kansas, 1981; Ph.D., Kansas State University, 1980. Assistant Professor, Texas A&M University, Department of Management—Business, Public policy, and the Law Group.

** Ph.D., Louisiana State University, 1982. Assistant Professor of Marketing, Texas A&M University.

*** Ph.D., Louisiana State University, 1983. Assistant Professor of Marketing, Texas Christian University.

1. For example, Supreme Court Justice Warren E. Burger is quoted by *The National Law Journal* as stating before an ABA commission on advertising "that many lawyers who advertise are engaging in 'shysterism,' that were he still in private practice he would 'dig ditches' before he would advertise, and that the public should be advised to 'never, never, never under any circumstances' hire a lawyer who advertises." *Terror, Legal Ads Top ABA Meeting*, The National Law Journal, July 22, 1985, at 3, 18. In the same article, ABA president William W. Falsgraf is quoted as stating "I don't think lawyers should be brought up for ridicule if they exercise a First Amendment right that a majority of the Supreme Court says they have. [Advertising, particularly for legal clinics,] lets the public know what the ballpark is as to legal rates." *Id.*

2. Bates v. Arizona, 433 U.S. 350 (1977) *See infra* notes 67-84 and accompanying text.

3. Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978); *In re* R.M.J., 455 U.S. 191 (1982); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985). *See infra* notes 86-115 and accompanying text.

right to advertise.[4] Although most state bar associations now allow lawyers to advertise,[5] those advertisements considered permissible usually are limited to "routine legal services," and subjected to restrictions on the information that may be conveyed and on the medium employed.[6] The legal profession, now relatively comfortable with some limited forms of advertising by its members,[7] still harbors major concerns about the potentially adverse effects unrestricted advertising would have on the profession in general.[8] Of particular concern is the potential use or misuse by lawyers of direct mail advertising and advertisements employing the electronic media, neither of which has been the subject of direct scrutiny by the Supreme Court.[9]

The principle concern of this article is lawyer direct mail advertisements.[10] In assessing the permissibility and acceptability of direct mail as a means through which the legal profession may communicate with prospective clients, this article examines the current regulatory environment, the economics, and consumer and lawyer perceptions regarding the use of direct mail advertisements. After a brief discussion of the early

4. A number of the constraints imposed by the states have been based on broad interpretations of the decision of the Court in *Ohralik*. *See, e.g.*, State of Kansas v. Moses, 231 Kan. 242, 642 P.2d 1004 (1981). *See infra* notes 86- 90 and accompanying text (for a discussion of the *Ohralik* decision).

5. By 1980, forty-eight states and the District of Columbia had amended their disciplinary rules in order to comply with *Bates*; only Hawaii and Montana had not. ANDREWS, BIRTH OF A SALESMEN: LAWYER ADVERTISING AND SOLICITATION, at 43 (1980).

6. *See Andrews, Lawyer Advertising and the First Amendment*, AM. B. FOUND. RESEARCH J. 967, 986-1020 (1981); Martineau, *The Supreme Court and State Regulation of the Legal Profession*, 8 HASTINGS CONST. L. Q. 199 (1981); Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation*, 30 BAYLOR L. R. 585, 600-04 (1978).

7. *See infra* notes 239-41 and accompanying text (discussing the results of a survey indicating that 80% of the profession answered in the affirmative to the question, "should lawyers be allowed to advertise under certain circumstances?").

8. For example, a Florida judge stated that with the *Bates* decision, the practice of law left "the era of professionalism." Florida Bar v. Schrieber, 420 So.2d 599 (Fla. 1982) (opinion of Judge Ehrlich). *See also supra* note 1 (statement of Chief Justice Burger).

9. The Court has denied certiorari in three previous direct mail advertisement cases. Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981); *In re* Koffler, 51 N.Y.2d 140, 412 N.E.2d 927 (1980), 872 *cert. denied*, 450 U.S. 1026 (1981); Greene v. Grievance Committee, Inc., 51 N.Y.2d 140, 429 N.E.2d 390 (1981), *cert. denied*, 102 S. Ct. 1738 (1982). However, in its next term, the Court will have the opportunity to consider a New York direct mail advertising case, *In re* Von Weigen, 101 App. Div.2d 627, 474 N.Y.S. 147, *modified*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984); and an Iowa case involving television advertisements, Committee on Professional Ethics and Conduct of the Iowa State Bar Assoc. v. Humprey, 355 N.W.2d 565 (1984). In the *Bates* decision the Court did note that advertisements on "electronic media warrant special consideration." 433 U.S. at 384.

10. "Direct Mail Advertising" involves the use of the mails to send advertisements to the homes and businesses of prospective clients. *See* American Medical Association v. Federal Trade Commission, 537 F.2d 443 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1744 (1982). *See also* Comment, *Attorney Direct Mail Communication: The Koffler Commercial Speech Approach*, 4 W. NEW ENGLAND L. REV. 397, 399 n.18 (1982).

history of lawyer advertising, the current regulatory environment controlling the use of direct mail advertisements will be examined. With no Supreme Court decision directly scrutinizing lawyer direct mail advertisements, and in light of the other lawyer advertising decisions of the Court,[11] numerous important questions remain unanswered regarding the regulatory environment surrounding direct mail advertisements. Although some of these questions have been or are being considered by state courts[12] considerable divergence exists in the regulatory constraints states currently impose on lawyer communications with potential clients through the mails.[13]

Next, the economic arguments for the abolition of prohibitions on lawyer advertising will be considered and developed. The Court in *Bates* noted the importance of the economic effects of advertising prohibitions, stating that "advertising...performs an indispensible role in the allocation of resources in a free enterprise system...," and that advertising restrictions "inhibit the free flow of commercial information, [thereby]...keep[ing] the public in ignorance."[14] Economic theory and supporting empirical evidence suggest that the consequences of the elimination of such restrictions would be reduced prices and increased competition, at least for routine legal services.

Despite the benefits flowing from the elimination of restrictions, however, some members of the profession remain opposed to lawyer direct mail advertising. Much of that opposition is grounded in beliefs about consumer perceptions and attitudes regarding lawyer direct mail advertising, and about the effect such advertising will have on professional credibility. In assessing the validity of those beliefs, this article will present the results of two surveys comparing and contrasting consumer and lawyer attitudes regarding direct mail advertising. The results indicate that lawyers and their consumers differ significantly in their attitudes toward and perceptions of direct mail advertising.

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11. *See supra* notes 2-3 and accompanying text.

12. *See infra* notes 119-74 and accompanying text. *See also* Comment, *supra* note 10; Note, *Advertising By Attorneys and the First Amendment,* 46 ALB. L. REV. 250 (1981); Comment, *The First Amendment,* In re *R.M.J., and State Regulation of Direct Mail Lawyer Advertising,* 34 BAYLOR L. REV. 411 (1982); Note, *Direct-Mail Solicitation By Attorneys: Bates to R.M.J.,* 33 SYRACUSE L. REV.999 (1982).

13. *Compare, e.g.,* the statute of Maine, ME. BAR R. 3.9(a) (specifically including direct mail as a permissible means of "public communication") with those of Massachusetts, MASS. DR 2-103 (explicitly proscribing direct mail advertisements), Kansas, KAN. STAT. ANN. ch. 7-125 app. DR 2-101(B) (Supp. 1979) ("[a] lawyer may publish . . . information, subject to DR 2-103, in print media regularly published"), and Georgia, GA. CODE ANN. tit. 9 app. DR 2-101(B) (Supp. 1982) ("[a] lawyer may publish [certain advertisements], subject to DR 2-103, in newspapers and periodicals of general circulation, distributed in the geographic area or areas in which the lawyer resides, maintains offices or in which a significant part of his clientele resides").

14. *Bates, supra* note 2, at 364.

EARLY HISTORY OF LAWYER ADVERTISING

A. *Early Regulation of Lawyer Advertising*[15]

In the early history of the United States Bar, lawyer advertising was not formally prohibited. Arguably, no need for formal prohibitions existed since "by common practice, by the high traditions of the profession, there was no lawyer advertising."[16] Although accounts of the actual origin of these informal no-advertising rules vary,[17] the prohibitions against such "unprofessional" solicitations were probably derived from a similar set of common practice rules then in existence in England.[18] The general rationale for the prohibitions grew out of the notion that since most lawyers were general practioners in small communities and most litigation was between family members, neighbors, close business associates, or other persons involved in such intimate associations, solicitations were thought to "stir up litigation" and adversely affect those relationships.[19]

Despite these early customs of practice, however, advertising became a common practice in the legal profession around the time of the Civil War, and continued through the early part of this century.[20] During that period, advertising came under increasing state scrutiny, with prohibitions on advertising implemented in the latter part of the period, no doubt in response to pressure from powerful members of the profession itself.[21]

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15. For a detailed analysis of the history of legal advertising, see Christensen, *Advertising By Lawyers,* 1978 UTAH L. REV. 619. *See also* Note, *Attorney Solicitation of Clients,* 7 HOFSTRA L. REV. 755 (1979).

16. Jeffers, *Institute on Advertising Within The Legal profession—Con,* 29 OKLA. L. REV. 620, 620 (1976).

17. Some commentators assert that soliciation restrictions date to Roman times. *See, e.g.,* ANDREWS, *supra* note 5.

18. *See In re* Cohn, 10 Ill. 2d 186, 201, 139 N.E.2d 301, 305 (1957). Drinker contends that students of the law in early English society were from wealthy families. DRINKER, LEGAL ETHICS, 210-11, n.3 (1953). They perceived themselves as professionals serving the interest of the public. *Id.* To advertise for pecuniary gain was perceived as contradicting that image. *See also* Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers,* 25 U. CHI. L. REV. 674 (1958).

19. DRINKER, *supra* note 18, at 23.

20. Jeffers, *supra* note 16, at 620.

21. In reviewing the history of regulation, a number of economists have convincingly argued that instead of being thrust on business, regulation is often being procured by the regulated businesses. *See* Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECONOMICS AND MANAGEMENT SCIENCE 6 (1971). The government is viewed as a supplier of such "regulatory services" as price fixing, restriction on entry, and subsidies. *Id.* In this regard, government regulation can be a less costly means for businesses to gain control over the market. *Id.* This view of regulation seems to have some merit. As Judge Posner has observed:

> The railroads supported the enactment of the first Interstate Commerce Act, which was designed to prevent railroads from price discrimination, because discrimination was undermining the railroad's cartel. American Telephone and Telegraph pressed for state regulation of telephone service because it wanted to end competition among

Assertedly, the prohibitions were "an attempt to prevent certain social evils.... In particular, advertising of divorce services was forbidden on the grounds that such ads would encourage dissolution of marriage and the breakdown of the family."[22]

However, prohibitions on advertising and the imposition of codes of professional ethics during that period were not unique to the legal profession; virtually all the professions imposed similar prohibitions on advertising.[23] With a few exceptions, the rationale for those prohibitions differed little from profession to profession.[24] To illustrate, the general rationale for the prohibitions on advertising in the dental profession were set forth explicitly in a 1935 Supreme Court case, *Semler v. Oregon Board of Dental Examiners*.[25] The state court observed that:

> [I]t could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods "to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them". . . .
>
> We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interests of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who

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telephone companies. Truckers and airlines supported extension of common carrier regulation to their industries because they considered unregulated competition excessive. Posner, *Theories of Regulation*, 5 BELL J. ECONOMICS AND MANAGEMENT SCIENCE 335 (1974).

22. ANDREWS, *supra* note 5.

23. *See generally* Bloom, *Advertising in the Professions: The Critical Issues*, J. OF MARKETING, 103, 103-10 (July 1977); TRUMAN, THE DOCTOR—HIS CAREER, HIS BUSINESS, HIS HUMAN RELATIONS, at 82-83, 117, and 136-46 (1957); BLASINGAME, DIGEST OF OFFICIAL ACTIONS OF THE AMERICAN MEDICAL ASSOCIATION, 669-75 (1939); HOLLINSHEAD, PRINCIPLES OF ETHICS OF THE AMERICAN DENTAL ASSOCIATION, SURVEY OF DENTISTRY (1958); Barclay, *Trade or Profession?*, J. AM. MED. ASSOC. 756 (Feb. 16, 1976); Darling, *Attitudes Toward Advertising By Accountants*, J. OF ACCT., 48-53 (Feb. 1977); Sprague, *The Advertising Dilemma*, CPA J., 27-30 (January 1977); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1972).

24. *See* Darling, *supra* note 23, at 50 (reporting the results of a broad survey of accountants, lawyers, dentists, and physicians). According to Professor Darling:

> The various professional groups in the U.S. have long banned advertising on several grounds. On the one hand, the professionals feel the public must be protected against fraudulent and unscrupulous promoters. In addition, it is felt that participation in advertising activities would lower the prestige of professionals in the public eye. Those favoring bans on advertising also maintain that such solicitation is an expense which must be covered, one that would not necessarily lower fees and would convey little information about the quality of service.

Id., at 28-29.

25. Semler v. Oregon Board of Dental Examiners, 294 U.S. 608, 611-12 (1935).

> would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.
>
> It is no answer to say, as regards appellant's claim of right to advertise his "professional superiority" or his "performance of professional services in a superior manner," that he is telling the truth.[26]

Similarly, the rationale for the prohibitions on advertising in the legal profession have centered on the negative effects advertising would have on the profession and the general public.[27] One rationale was that advertising would undermine the dignity of the profession as well as clients' confidence in lawyers and the legal system.[28] Another rationale asserted that potential clients knew the reputations of local, neighborhood lawyers and thus did not need advertising to make an informed, reasoned choice.[29] Due to the wide variance in content and quality of individual legal needs, many have asserted that any advertising would be misleading. The proposition was based on the assumption that members of the public are generally uninformed as to their actual legal needs, and thus do not know how to evaluate legal service advertisements adequately.[30] In that regard, many were concerned that the general public would be susceptible to misleading or deceptive advertisements—assuming, without supporting evidence, that consumers were simply not sophisticated enough to avoid

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26. *Id.*

27. *See generally* Note, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L. J. 1181, 1181-85 (1972); Bradway, *Publicity for lawyers*, 8 FED. B. J. 55-59 (1946).

28. Historically, bar associations have argued that the forms of advertising necessary to most other commercial enterprises would lesson the dignity of the legal profession. *See* Brandt and Waugh, *Recent Developments in Attorneys' Fees*, 29 VAND. L. REV. 698, 698 (1976).

29. In general support of this contention, studies have established that consumers rely heavily on personal information sources when selecting a lawyer. *See, e.g.*, Ladinsky, *The Traffic in Legal Services: Lawyer-Seeking Behavior and the Channeling of Clients*, in Brickman and Lempert, eds., *The Role of Research in the Delivery of Legal Services*, Washington, D.C.: The Research Center for Consumers of Legal Services, RANN Report, NSF/Ra-760089, at 61 (May 1976). In light of the prohibitions on advertising, however, prospective clients would expectedly utilize personal contacts which in the absence of advertising, would be the most effective means of gathering information on the price, quality, and availability of legal services. *Id.*

30. In a particularly extreme argument, one commentator has asserted that lawyer advertising might lead to "the domination of a society by the rich who would hire the best lawyers." Wynn, *Lawyer Advertising: Birth of a Salesmen or Death of a Profession*, 66 MASS. L. REV. 159, 159 (1981) (message of Thomas J. Wynn, President of the Massachusetts Bar Association).

being taken in by half-truths, omissions of important information, and other deceptive advertising.[31] Considerable criticism of the liberalization of advertising rules was directed at the potential for "stirring up litigation,"[32] and for increasing costs.[33] Finally, it was contended that advertisement of a certain service for a fixed price would encourage a lawyer to provide the advertised service whether or not the service actually fit the client's particular needs. The hypothetical asserted in support of this latter contention was of a lawyer tempted to "cut corners" when confronted with a client who is attracted by an advertisement stating a fixed fee for the resolution of a certain legal problem but who actually has a more complicated legal problem than that for which the fixed fee was advertised. In extending the hypothetical, the lawyer might induce the client to purchase more expensive legal assistance, thereby making himself vulnerable to accusations of "bait and switch" advertising.[34]

B. The Canons of Professional Ethics of the ABA and the Formalization of Advertising Prohibitions

In 1908[35] the American Bar Association codified ethical standards and created the Canons of Professional Ethics.[36] With exceptions made for certain communications with friends, relatives, and clients, and for listings in telephone directories, lawyer advertising was banned as an unaccep-

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31. A Harris poll taken in the late 1970's found that 46% of the more than 1,500 individuals polled, believed that all or most television advertisements were seriously misleading. *Business, Public Out of Sync,* 23 ADVERTISING AGE 102 (1977). Another study directed at television advertising by lawyers found that such advertising had a negative impact on the image of lawyers:

> [R]espondents felt that lawyers who advertise only on TV do not provide high quality service, do not represent themselves well, have not been in business a long time, are not trustworthy, are not well respected by other lawyers, and do not have a professional attitude.

Traylor and Mathias, *The Impact of TV Advertising Versus Word of Mouth on the Image of Lawyers: A Projective Experiment,* 12 J. ADVERTISING 42 (1983). However, consumers must be moved in some way by such advertisements since commercial enterprises would not advertise in that manner if, in fact, the advertisements were not effective.

32. *See* Christensen, *supra* note 27, at 142-46.

33. *See infra* note 220 and accompanying text.

34. In general support of the anecdote, consumers often do not realize they have a problem that legal assistance could help resolve. *See* Morrison, *Institute on Advertising Within the Legal Profession—Pro,* 29 OKLA. L. REV. 609, 610 (1976). A study by the American Bar Foundation found that over 26% of the research respondents never considered consulting a lawyer. CURRAN AND SPALDING, THE LEGAL NEEDS OF THE PUBLIC, at 69 (1974).

35. The first code of professional ethics in the United States was adopted by the Alabama Bar Association in 1887. *See* DRINKER, *supra* note 18, at 23.

36. Canon 27 provided that "solicitation of business by circular or advertisements, or by personal communications, or interviews, not warranted by personal relationships, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind." DRINKER, *supra* note 18 at 215. The principal motivation of the ABA in adding the Canon was a fear of a growth in commercialization throughout the country. *Id.*, at 25. Note that Canon 27 drew a distinction between so called direct and indirect forms of advertising

table form of solicitation.[37] According to the Canons, "The most worthy and effective advertisement possible...is the establishment of a well-merited reputation for professional capacity and fidelity to trust."[38] Subsequently, most states adopted the ABA Canons or something similar, all prohibiting lawyer advertising.

Between the 1908 Canons and the first major revision in 1969, ethics committees undoubtedly spent more time on the question of legal services advertising than on any other subject.[39] In Texas alone, more than eighty percent of the opinions on professionalism and ethics were related to the subjects of advertising and solicitation.[40] After determining that the old ABA Canons of Professional Ethics needed extensive revision, a Special Committee on Evaluation of Ethical Standards began in 1965 the task of preparing the new code. The Canons were replaced in 1970 by the ABA Code of Professional Responsibility (code).[41] Disciplinary Rule 2-101(A) of the Code provided:

> A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.[42]

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by lawyers. *See* Note, *State Statute Barring Solicitation of Legal Work Held to Violate Due Process as Applied to NAACP,* 63 COLUM. L. REV. 1502, 1504-07 (1963). Direct advertising consisted of "soliciting" professional employment "by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relation," while indirect advertising generally included the seeking of publicity and most forms of self-laudation. *See In re* Connelly, 18 A.D. 2d 466 (1963).

37. ABA CANON 27. In addition to Canon 27, there were six other Canons related to lawyer advertising, although not as specifically stated. Canon 28 was concerned with "stirring up litigation, directly or through agents;" seeking to prevent deception, Canon 33 set forth rules for the selection and use of firm names; subject to certain limitations on individual advice; Canon 40 allowed lawyers to write legal articles and to be identified by name; Canon 43 put limitations on law name lists; Canon 45 permitted certain legal specialists; Canon 46 allowed the announcement of certain associations between lawyers or between firms.

38. ABA CANON 27. Brosnahan and Andrews argue that reputation alone was considered sufficient "advertising" due to the historically parochial nature of legal practice. Brosnahan and Andrews, *Regulation of Lawyer Advertising: In the Public Interest?,* 46 BROOKLYN L. REV. 423 (1980). For a general discussion of the parameters of permissible conduct under these early restraints imposed by the ABA, see Comment, *Bar Restrictions on Dissemination of Information About Legal Services,* 22 U.C.L.A. L. REV. 483, 488 (1974).

39. Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code,* 37 GEO. WASH. L. REV. 244, 255-56 (1968).

40. Smith, *The Texas Canons of Ethics Revisited,* 18 BAYLOR L. REV. 183, 192-93 (1966).

41. *See generally* Sutton, *The American Bar Association, Code of Professional Responsibility: An Introduction,* 48 TEXAS L. REV. 255 (1970); Note, *supra* note 27.

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (A) (1970).

THE REGULATORY ENVIRONMENT AFFECTING DIRECT ADVERTISEMENTS

A. The Supreme Court and Advertising as Protected Speech

The economics of prohibitions on advertising and other such solicitations arguably provided sufficient incentive for their continued existence, regardless of whether that was in the public interest.[43] Public ratification of the prohibitions, however, was provided by the legal system which rationalized their existence as necessary to the protection of the profession and the general public.[44] Early decisions by the Court established the "commercial speech doctrine," which held advertising to be undeserving of first amendment protection. For example, in *Valentine v. Christensen*, the Court upheld a ban on street distribution of advertising notices, observing that "the Constitution imposes no...restraint on government as respects purely commercial advertising."[45] In effect, advertising that was inspired primarily by economic—"purely commercial"—as opposed to political motives, could be regulated and/or prohibited.[46] Part of the motivation of the Court in developing this doctrine was to protect credulous consumers against unscrupulous advertising tactics. The court was apparently assuming that the general public lacked adequate sophistication to make judgments in its own interest regarding advertised claims.

1. The Supreme Court and Commercial Speech

In the mid-seventies, the Court first explicitly recognized the negative effects on consumers from prohibitions on advertising and other forms of commercial communications by the professions, imposed through their state governments. In *Bigelow v. Virginia*, the Court first noted that some commercial information is important to the efficient exchange of resources in a free market, and consequently should be afforded first amendment protection.[47] The Court reasoned, "[the] relationship of speech to the marketplace of products or services does not make it valueless in the marketplace of ideas."[48] In *Bigelow*, the Court ques-

43. An economist would argue that such rules are generally implemented to restrict competition, allowing for higher prices than would prevail in the absence of such restrictions. *See infra* notes 191-92 and accompanying text. *See also* FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, 114-15 (1975); Schuchman, *supra* note 39 at 259.

44. *See, e.g., supra* note 26 and accompanying text.

45. Valentine v. Christensen, 316 U.S. 52, 54 (1942).

46. *See, e.g.*, Ginzburg v. U.S., 383 U.S. 463 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Thomas v. Collins, 323 U.S. 516 (1945).

47. Bigelow v. Virginia, 421 U.S. 809, 826 (1975).

48. *Id.* at 826.

tioned the validity of *Valentine*, explaining that the *Valentine* decision related only to "a reasonable regulation of the *manner* in which commercial speech could be distributed,"[49] and not the content.

A year later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court held that the right of society to commercial information was superior to the strong interest of the state of Virginia in upholding a high level of professionalism among pharmicists.[50] The Court noted that even a speaker delivering a "purely economic" message is eligible for some degree of first amendment protection.[51] Concentrating on the economic benefits to consumers, the Court stated that consumers have a keen interest in receiving commercial information with which to make informed economic decisions.[52] In a similar vein, the Court noted that the freedom to advertise played an essential role in a free market by promoting competition.[53] Nevertheless, the Court, in a carefully worded footnote, attempted to tailor the decision to the facts of the case. The Court specifically mentioned that advertising may be problematic in both the legal and medical professions, since neither dispense "standardized products."[54]

After *Virginia Board of Pharmacy*, the analysis by the Court of commercial speech has become considerably more structured. In 1980, the Court enunciated a test for evaluating commercial speech in *Central Hudson and Electric Corp. v. Public Service Commission.*[55] In that case, the New York Public Service Commission had ordered the cessation of all promotional advertising by electric utilities, except informational advertisements designed to reduce consumption during peak usage periods. In invalidating the regulation, the Court enunciated a four-pronged test for evaluating such restrictions:

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49. *Id.* at 819 (emphasis added).

50. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765-73 (1976).

51. *Id.* at 761-63.

52. *Id.* at 757, 763-64.

53. *Id.* at 764-65.

54. *See id.* at 773 n. 25. According to the Court:

> We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require considerations of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of an almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

Id.

55. Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

(1) Does the speech concern lawful activity and is it not misleading;
(2) Has the state advanced a substantial interest in the regulation;
(3) Does the state's regulation directly promote that interest;
(4) Does the state's regulation exceed the bounds of necessity to serve such interest.[56]

Although subject to some criticism,[57] the *Central Hudson* four-part test is still the state-of-the-art in the legal analysis of commercial speech.[58]

2. *The Supreme Court and Lawyer Advertising*

Prior to 1977, state prohibitions on lawyer advertising were rarely questioned by members of the profession, its clients, or the federal government. Indeed, as the cases prior to *Bigelow* illustrate, the Supreme Court viewed regulation of commercial speech as tantamount to the regulation of a business activity, that is, wholly permissible and without the protection of the first amendment.[59]

In the mid-seventies, however, in response to the position of the Court regarding commercial speech and the imposition of prohibitions and restrictions on publicly disseminated information by the professions, a number of significant changes occurred in the manner in which other organizations and the federal government viewed such prohibitions and restrictions. For example, the Federal Trade Commission took action to remove prohibitions placed on advertising by the professional organizations for doctors,[60] pharmacists,[61] and opthamologists, optometrists, and opticians.[62] The antitrust division of the Justice Department filed suits against the American Pharmaceutical Association[63] and the American Bar Association[64] to force them to allow advertising among their members. In addition, the professions came under close scrutiny in the popular press regarding their advertising prohibitions.[65] Perhaps

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56. *Id.* at 566.
57. *See, e.g., In re* R.M.J., 609 S.W.2d 411, 412 (Mo. 1981).
58. *See, e.g., In re* R.M.J., 102 S. Ct. 929, 937- 38 (1982).
59. *See generally supra* note 45 and accompanying text.
60. *In re* American Medical Association, BNA ATRR No. 744, at AA-1 (Dec. 23, 1975).
61. *Trade Regulation Rule to Prohibit State Bans on Price Advertising of Prescription Drugs,* BNA ATRR No. 716, at A-2 (June 3, 1975).
62. *Trade Regulation Rule To Remove State Bans on Price Advertising of Eyeglasses,* BNA ATRR No. 745, at A-8 and E-1 (Jan. 6, 1976).
63. U.S. v. American Pharmaceutical Association, No. G75- 558-CA5 (W.D. Mich. 1975).
64. U.S. v. American Bar Association, No. Civ. 76-1182 (D.C. 1976).
65. *See Legal Profession Is Considering Code Amendments to Permit Restricted Advertising by Lawyers,* 62 A.B.A. J. 53-4 (Jan. 1976); Code Amendments Broaden Information Lawyers May Provide in Law Directories, and Yellow Pages, 62 A.B.A. J. 309-10 (March 1976); House Broadens Code's "Publicity In General" Rules at Midyear Meeting in Philadelphia, 62 A.B.A. J. 470-72 (Apr. 1976).

motivated by all this activity, the American Bar Association voted in 1976 to liberalize the nature of information lawyers could include in directories, yellow page telephone listings and general lists of lawyers.[66] With the recognition of commercial free speech by the Supreme Court in the mid- seventies, the right was quickly considered for application to lawyers and lawyer advertising.

(a). Bates v. Arizona.

Just one short year after *Virginia Board of Pharmacy*, the right of commercial free speech with regard to lawyer advertising was first considered by the Supreme Court in *Bates v. State of Arizona*.[67] The Court held that lawyer advertising was a form of commercial speech, protected by the first amendment, and as a consequence the states could no longer absolutely prohibit advertising by the legal professional.[68]

In *Bates*, the appellants had been disciplined for placing an advertisement for their legal clinic in a newspaper.[69] The advertisement included information regarding fees charged for various routine legal matters, including uncontested divorces, uncontested adoptions, simple personal bankruptcies, and name changes.[70] Borrowing heavily from the decision of *Virginia Board of Pharmacy*,[71] the Court reasoned that the "[s]tate may [not] prevent the publication in a newspaper of appellants' truthful

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66. *See, e.g., FTC Claims Ban on Doctors' Advertising Violates Anti-trust Laws, Stabilizes Fees*, Wall Street Journal, ___ (Dec. 23, 1975); *When Two Lawyers Ran Afoul of Advertising Rules*, U.S. NEWS AND WORLD REPORT, 62 (Jan. 26, 1976); *Closing in on the Professions*, BUSINESS WEEK, 106 (Oct. 27, 1975); *Doctors' Dilemma*, NEWSWEEK, 63-4 (Jan. 5, 1976); *Clamor Grows*, U.S. NEWS AND WORLD REPORT, 61 (Jan. 26, 1976).

67. *Bates*, 433 U.S. 350 (1977). The *Bates* decision has generated a considerable amount of literature on lawyer advertising. *See infra* note 235 and accompanying text. *See also* Note, *The Traditional Ban on Advertising by Attorneys and the Expanding Scope of the First Amendment*, 38 LA. L. REV. 259 (1977); Note, *The First Amendment Protects Attorneys' Rights to Advertise Fixed Prices for Routine Legal Services*, 9 TEX. TECH. L. REV. 295 (1978); Comment, *Lawyer Advertising: The Practical Effects of Bates*, 1 W. NEW ENG. L. REV. 349 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 198-208 (1977).

68. The Court relied exclusively on the appellants first amendment arguments. *See Bates*, 433 U.S. at 384. The Court rejected the appellant's claim that the prohibition on lawyer advertising by the state of Arizona was a restraint of trade in violation of the Sherman Act. The Court ruled that state regulation of the profession falls within the "state action" exception to the Act. *Id.*, at 359-64. The appellants claim had been based on earlier Supreme Court decisions involving restraints on the legal profession. *See* Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773 (1975). *See generally* Note, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation by Attorneys*, 62 VA. L. REV. 1135 (1976); Martineau, *The Supreme Court and State Regulation of the Legal Profession*, 8 HASTINGS CONST. L.Q. 199 (1981).

69. *Bates*, 433 U.S. at 353-56.

70. A copy of the advertisement appears in the appendix to the *Bates* opinion. *Id.* at 385.

71. The Court explained:"We have set out this detailed summary of the *Pharmacy* opinion because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow *a fortiori* from it."*Id.* at 365.

advertisement concerning the availability and terms of routine legal services."[72] In addition, the Court rejected the state interests advanced in support of the continuation of the prohibition on lawyer advertising.[73] In particular, the Court noted that the effect of the advertising ban of the state bar was "to inhibit the free flow of commercial information and to keep the public in ignorance."[74] According to the Court:

> The listener's interest is substantial: the consumer's concern for the free flow of commercial speech may often be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day....And commercial speech serves to inform the public of availability, nature, and prices of products and services and thus performs an indispensible role in the allocation of resources in a free enterprise system....In short, such speech serves individual and societal interests in assuring informed and reliable decision making.[75]

The Court, however, did limit the *Bates* holding in two important respects. First, as noted above, the Court did place emphasis on "advertisement[s] concerning the availability and terms of routine legal services."[76] Secondly, the Court emphasized that states were not to be considered precluded from regulating in the area of lawyer advertising. The decision specifically stated that the Court did not "hold that attorneys may not be regulated in any way."[77] The Court then went on to recommend some specific instances in which state regulation would be permissible. The Court first mentioned "[a]dvertising that is false, deceptive, or misleading...."[78] With specific regard to the legal profession, the Court mentioned that the bounds of truthfulness may vary from one profession to another, depending upon the sophistication of the particular audience:

> [B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For

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72. *Id.* at 384.

73. *Id.* at 379. In *Bates*, the respondents asserted that lawyer advertising would have "an adverse effect on professionalism," *id.* at 368; that such advertisements were of a "misleading nature," *id.* at 372; would adversely "affect the administration of justice," *id.* at 375; would have "undesirable economic effects," *id.* at 377; would adversely affect the "quality of service," *id.* at 378; and would pose "difficulties in enforcement." *id.* at 379. According to the Court: "[We] are not persuaded that any of the proferred justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys."*Id.*

74. *Id.* at 365.

75. *Id.* at 364.

76. *Id.* at 353-4.

77. *Id.* at 383.

78. *Id.*

> example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.[79]

The Court pointed out that similar state restrictions could be placed upon in-person solicitation[80] and illegal advertisements,[81] and that the advertisements on "electronic broadcast media [would] warrant special consideration."[82] In addition, the Court noted that states could impose reasonable restrictions on the "time, place, and manner of advertising."[83] Thus, the Court left many boundaries to be determined by the states as they set about attempting to interpret the *Bates* decision. Significantly, the Court said nothing about direct mail advertisements.

The *Bates* decision, however, did not completely dispel the interest of the state in regulating commercial speech by lawyers. In the immediate wake of the *Bates* decision, states attempted to construe the case as narrowly as possible.[84] To accomplish that goal, Codes of Professional Responsibility were rewritten to preserve as much of the old traditions as could be constitutionally rationalized.

(b). Lawyer Advertising in the Wake of Bates

In the year following *Bates*, the Court was faced with two cases on the same day pertaining to lawyer solicitations.[85] While both cases challenged state disciplinary rules prohibiting solicitation on first amendment grounds, they are difficult to compare in that they come from opposite ends of the solicitation spectrum.

In *Ohralik v. Ohio State Bar Association*,[86] the Court was confronted

79. *Id.* at 383-4.

80. *Id.* at 384.

81. *Id.* (citing Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973)).

82. *Id.* An important television advertising case that could serve to further define those special considerations was recently decided in Iowa. *See* Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Humphrey, 355 N.W.2d 565 (1984) (upholding an Iowa Bar Association rule prohibiting television advertisements that contain background sound, visual displays, more than a single nondramatic voice, or self-laudatory statements).

83. *Id.*

84. *See supra* note 5 and accompanying text.

85. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); *In re* Primus, 436 U.S. 412 (1978). *See Comment, Attorney Solicitation: The Scope of State Regulation After Primus and Ohralik,* 12 U. MICH. J. L. REF. 144 (1978); Note, *Solicitation By Attorneys: A Prediction and a Recommendation,* 16 HOUS. L. REV. 452 (1979); Comment, *Commercial Speech and The Limit of Legal Advertising,* 58 OR. L. REV. 193 (1979); Note, *Lawyer Solicitation: The Effect of Ohralik and Primus,* 13 SUFFOLK U. L. REV. 960 (1979); Note, *Benign Solicitation of Clients by Attorneys,* 54 WASH. L. REV. 671 (1979); Welch, *Bates, Ohralik, Primus—The First Amendment Challenge to State Regulation of Lawyer Advertising and Solicitation,* 30 BAYLOR L. REV. 585 (1978).

86. Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978).

with a case involving a lawyer who had solicited clients while they were still hospitalized.[87] The Ohio court had found the in-person solicitation a violation of the code of professional ethics of the Ohio state bar. The Court clearly differentiated between in-person solicitations and advertisements as information sources:

> [I]n-person solicitation serves much the same function as the advertisement in *Bates*. But there are significant differences as well. Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation exerts pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation to encourage speedy and perhaps uninformed decision making. There is no opportunity for intervention or counter-education by agencies of the bar, supervisory authorities, or persons close to the solicited individual....In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices of legal services;" it actually may disserve the individual and societal interest identified in *Bates,* in facilitating "informed and reliable decision making." [footnotes omitted][88]

The Court held that the state may constitutionally discipline a lawyer who solicits clients in-person "for pecuniary gain, under circumstances likely to pose dangers that the state has the right to prevent."[89] The *Ohralik* decision has maintained importance as states have attempted to define the reaches of the *Bates* holding. States have used the *Ohralik* decision to defend a variety of prohibitions on lawyer advertising.[90]

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87. *Ohralik* involved a lawyer who had obtained contingent fee agreements from two young women who had been injured in an automobile accident. *Id.* at 449-54. The lawyer had made an in-person solicitation, visiting one victim in the hospital and the other at her home on the day of her release from the hospital. *Id.* From the former woman he received a signed contingent-fee agreement, while the other agreed orally to such an arrangement. *Id.* Although both later attempted to discharge the lawyer, he still succeeded in getting a share of the insurance recovery of the women who had been driving the automobile—but only after suing her for breach of contract. *Id.* Both women filed complaints against the lawyer with the Greviance Committee of the Geauga County Bar Association. *Id.* The lawyer was suspended for violating the Ohio state code rules against in-person solicitation. *Id.* The Ohio Supreme Court upheld the suspension. *Id.*

88. *Id.* at 457-58.

89. *Id.* at 449. According to the Court (citing the brief for the Appellant):

> [T]he state has a legitimate and indeed "compelling" interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct."

Id. at 462. *But see* Pulaski, *In-Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided,* 1979 ARIZ. ST. L. J. 23 (for a contrary view of the *Ohralik* case).

90. *See* State of Kansas v. Moses, 231 Kan. 243, 642 P.2d 1004 (1981) (regard to a prohibition on direct mail advertising upheld on the basis of *Ohralik*).

The second case, *In re Primus*,[91] concerned a lawyer for the American Civil Liberties Union who wrote a letter to a woman inquiring whether she desired free legal representation offered by the ACLU. The Disciplinary Board of the South Carolina Supreme Court found that the letter constituted solicitation in violation of the Disciplinary Rules of the state.[92] The Supreme Court, seeing a clear distinction between this case and *Ohralik*, reversed. The Court noted that the letter imparted "information material to making an informed decision" and "was not facially misleading."[93] In contrast with in-person solicitation, the Court found that the letter did not involve an "appreciable invasion of privacy," and did not provide an "opportunity for overreaching or coercion."[94] With regard to the form of communication involved the Court noted:

> [T]he fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct.[95]

Perhaps the most important fact in the case, although not noted explicitly by the Court, was that the solicitation was not intended to result in direct pecuniary gain for the lawyer involved. The Court ruled that the letter did constitute solicitation, but nevertheless was entitled to first amendment protection as a form of political and associational speech.[96] As a consequence, the state was required to "regulate with significantly greater precision."[97]

Despite the decisions of *Bates, Ohralik*, and *Primus*, several important questions regarding lawyer advertising remained open. Clearly, however, the focus of the ongoing debate over lawyer advertising had shifted as a consequence of those decisions, from whether advertising

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91. *In re* Primus, 436 U.S. 412 (1978). In *Primus*, a lawyer—Edna Smith Primus, practicing in a "community law firm" and also in an association with the ACLU as an officer and as a cooperating lawyer—was invited to give an address to some women who had been sterilized as a condition for the continued receipt of medical assistance under the Medicaid program. *Id.* at 414. At the meeting, Primus advised those attending of their legal rights and suggested the possibility of a lawsuit. *Id.* Mary Etta Williams, who had been sterilized by Dr. Clovis H. Pierce, was in attendence at the meeting. *Id.* Later, after being advised that Williams wanted to bring suit against Pierce, Primus sent Williams a letter informing her of the ACLU's offer of free legal representation. *Id.* at 414-21. Although Williams elected not to pursue legal action, the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina determined that the letter constituted a solicitation for the ACLU in violation of the disciplinary rules. *Id.* The Supreme Court of South Carolina agreed. *Id.*

92. *Id.* at 414-21.

93. *Id.* at 435.

94. *Id.* at 436.

95. *Id.* at 436.

96. *Id.* at 422. *See also* NAACP v. Button, 371 U.S. 415 (1963) (association for the purposes of legal representation declared to be a basic first amendment right that may not be curtailed in the absence of a compelling state interest).

97. *Primus*, 436 U.S. at 438.

should be allowed in any form, to how and to what extent lawyer advertising should be regulated. With regard to the extent of regulatory control, the issue of first amendment protection for direct mail communications and electronic media advertisements for the purpose of gaining clientele had not been addressed in any meaningful way.[98] In *Central Hudson*,[99] decided in 1980, the Court did resolve the question of the appropriate standard of review for the reach of regulations imposed on advertising.[100] The Court denied certiorari, however, in three cases involving lawyer direct mail advertising with prospective clients for pecuniary gain, thereby avoiding the opportunity to clarify that issue.[101]

(c). Recent Supreme Court Decisions on Lawyer Advertising

In 1982, the Court, in light of *Central Hudson*, took the opportunity to scrutinize regulations on lawyer advertising in *In re R.M.J.*[102] Some believed that the disposition of *R.M.J.* by the Court would resolve the direct mail issue.[103] The case involved a lawyer who had advertised the opening of his new firm in several newspapers and in the yellow pages, and had mailed professional announcement cards to a selected list of addresses. The lawyer was found to be in violation of the Missouri Code of Professional Responsibility and was issued a private reprimand. The Missouri Supreme Court, in upholding the constitutionality of the advertising restrictions of the state, did not apply the *Central Hudson* test. The Supreme Court reversed the decision.

In reaching that decision, the Court emphasized the *Bates* holding that lawyer advertising was a form of commercial speech, protected by the first amendment, and that advertising by lawyers may not be subjected to blanket suppression. The Court found that the information published by the lawyer was not misleading and that the state presented no substantial interest in need of protection.[104] In an attempt to clarify the

98. *See, e.g.*, Comment, *supra* note 10, at 399-400 (absence of a Supreme Court decision providing specific guidelines in the area of direct mail communictions has placed the resolution of this issue upon the states).

99. 447 U.S. 557 (1980). *See supra* notes 55-58 and accompanying text.

100. *See* Canby, *Commercial Speech of Lawyers: The Court's Unsteady Course*, 46 BROOKLYN L. REV. 401, 403 (1979).

101. Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981); *In re* Koffler, 51 N.Y.2d 140, 412 N.E.2d 927 (1980), *cert. denied*, 450 U.S. 1026 (1981); Greene v. Grievance Committee, Inc., 51 N.Y.2d 140, 429 N.E.2d 390 (1981), *cert. denied*, 102 S. Ct. 1738 (1982).

102. *In re* R.M.J., 455 U.S. 191 (1982).

103. *See, e.g.*, Note, *High Court to Rule on Lawyer Ad Controls*, 67 A.B.A. J. 1108, 1108 (1981).

104. *See R.M.J.*. 455 U.S. at 206.

extent to which states may regulate lawyer advertising, the Court divided lawyer advertising into three basic categories:

> [1.] [R]egulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive.
>
> [2.] Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a list of areas of practice, if the information also may be presented in a way that is not deceptive.
>
> [3.] Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served....Restrictions must be narrowly drawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest.[105]

Although the Court did not explicitly apply this categorization to direct mail advertisements, the Court did address the issue of whether such advertising could be subject to a blanket suppression:

> Mailings and handbills may be more difficult to supervise than newspapers....There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings.[106]

In an accompanying footnote the Court stated further that to avoid "frightening" a public unaccustomed to receiving letters from law offices, the lawyer could be required to stamp "This is an Advertisement" on the envelope.[107] However, despite the offerings on the subject in *R.M.J.*, numerous concerns regarding the permissible limits of direct mail advertisement regulation remain.

In a more recent case, *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*,[108] the Court struck down restrictions on lawyer advertising that prohibited advertisements from targeting a specific group. In this case, an attorney placed newspaper advertisements, first offering to defend drunk drivers, and later, offering to represent women

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105. *Id.* at 202-03.
106. *Id.* at 206.
107. *Id.* at 206 n.20.
108. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 105 S. Ct. 2265 (1985). *See Less Dignity, More Hustle,* TIME, at 66-67 (June 10, 1985).

who had suffered injuries resulting from their use of the Dalkon Shield Intrauterine Device. The former advertisement provided that the client's "full legal fee [would be] refunded if [he were] convicted of drunk driving," while the latter advertisement included a line drawing of the device in question.[109] The Ohio Supreme Court, upholding the Board of Commissioners on Grievances and Discipline, found the advertisements to be false and deceptive principally because they did not include statements sufficiently qualifying the claims being made.

The Court found that to resolve the appeal, three separate regulations imposed by Ohio needed consideration:

> (1) prohibitions on soliciting legal business through advertisements containing specific legal problems;
>
> (2) restrictions on the use of illustrations in advertising by lawyers; and,
>
> (3) disclosure requirements relating to the terms of contingent fees.[110]

In considering the validity of the lawyer advertising regulations of the state, the Court stated that "[a]n attorney may not be disciplined for soliciting legal business and advice through printed advertisements containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."[111] The Court found that the advertisements constituted commercial speech, were not false, and the state could not demonstrate that the regulations advanced a substantial government interest.[112] With regard to the use of illustrations, the Court noted:

> The use of illustrations or pictures in advertisements serves important communicative functions: it attracts the attention of the audience to the advertiser's message, and it may also serve to import information directly. Accordingly, commercial illustrations are entitled to the First Amendment protection afforded verbal commercial speech.[113]

As to the disclosure requirements, the Court found that the state had "attempted only to prescribe what shall be orthodox in commercial advertising."[114] The Court, however, did state that unjustified or unduly burdensome disclosure requirements might offend the first amendment rights by chilling protected commercial speech.[115]

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109. *Zauderer,* 105 S. Ct. at 2271.
110. *Id.* at 2272.
111. *Id.* at 2281.
112. *Id.*
113. *Id.* at 2280.
114. *Id.* at 2282.
115. *Id.* The decision of the Ohio Supreme Court to discipline Zauderer was based, in part, on his failure to include a disclaimer setting forth the fact that clients might be liable for substantial litigation costs even if their lawsuits were unsuccessful. *Id.* at 2283.

(d). The Supreme Court and the Unanswered Questions Regarding Direct Mail Advertisements.

As the foregoing cases illustrate, the Supreme Court has encouraged the use of advertising by the legal profession. As commercial speech, lawyer advertising has the same first amendment protection provided other commercial speech. The Supreme Court, however, has set aside as a special category, advertising that is misleading or that experience has proven to be inherently misleading. Commercial speech in this category can be appropriately regulated and restricted by the states. Aside from this exception, lawyer advertising can be regulated only if the state can first demonstrate a compelling interest. Any such restriction, however, must be narrowly drawn, and the state can regulate only to the extent that the regulation furthers substantial state interests. Finally, commercial speech challenges to advertising regulations are to be reviewed under the *Central Hudson* four-prong test.[116]

The Court has recognized that direct mail advertisements may be more difficult to supervise than other forms of lawyer advertising.[117] Since the states have means to undertake such supervision,[118] however, direct mail advertisements cannot be subject to a blanket suppression. Clearly state regulations based on general assertions regarding enforcement difficulties or overcommercialization will not withstand scrutiny. Numerous questions, however, remain about the extent to which direct mail advertisements may be regulated.

First, at what point will a direct mail advertisement constitute an impermissable solicitation? May lawyers using such an advertisement discuss their practice generally, or must the advertisement contain information specific to the legal problem of the respondent, thereby providing the respondent with information useful in reaching an "informed and reliable decision" with regard to legal services? Second, may proper state regulations be concerned with the response of the recipient? For example, may states regulate with the intent of protecting those recipients who potentially may receive such an advertisement after a death in the family, during a time of marital discord or deep indebtedness, or after involvement in a police matter? Third, should direct mail advertisements generally be prohibited in those situations in which they raise the potential for conflicts of interest? For example, suppose the letter is intended to provide information to one party who is then expected to act as an indirect solicitor

116. *See supra* notes 55-58 and accompanying text.
117. *R.M.J.*, 455 U.S. at 206.
118. *Id.* at 206 n.20.

for the lawyer in presenting that information to a third party with whom the lawyer potentially may be in conflict? Finally, to what extent should lawyers be allowed to get a list of prospective clients from third parties (doctors, insurance agents, etc.) for the purpose of mailing that person an advertisement?

B. State Decisions on Lawyer Direct Mail Advertisements

With no Supreme Court decisions dealing directly with the subject of direct mail advertising, and thus with no specific guidelines in the area,[119] the resolution of the issue has been placed upon the states. In their efforts to resolve the issue, however, no clear majority position on the use of direct mail advertisements by lawyers to communicate with prospective clients has developed. Significant differences exist among the states in the case and statutory law on the subject.[120]

1. Decisions Favoring Direct Mail Advertisements

The first major post-*Bates* state decision upholding lawyer direct mail advertising was *Kentucky Bar Association v. Stuart*.[121] In *Stuart*, two lawyers had been reprimanded for mailing letters to several real estate brokers; the letters stated their fees for certain routine legal matters regarding real estate transactions.[122] On appeal, the Supreme Court of Kentucky held that the letters were "a form of advertisement" and, therefore, were protected by the first amendment.[123] The court was not persuaded that the letters induced the "evils" associated with in-person advertising such as over-reaching and deceptive practices by unscrupulous lawyers.[124] The court also rejected the contention of the state that direct mail advertisements posed problems in the enforcement of ethical standards because such letters are not open to scrutiny:[125]

> [T]his very case demonstrates that enforcement of ethical standards will not be impossible or overly difficult because it is allowed to take the form of a letter. Ample protection may be assured the public by promulgation of a rule which requires the attorney to mail a copy of such

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119. The Supreme Court has denied certiorari in three cases involving direct mail advertisements. *See supra* note 9 and accompanying text.
120. *See supra* note 13.
121. Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978).
122. *Id.* at 933.
123. *Id.* at 934.
124. *Id.*
125. *Id.*

> advertisements to the association simultaneously with the mailing of one or more of them to members of the public.[126]

In *In re Koffler*,[127] the New York Court of Appeals reversed a lower court, holding that "[d]irect mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed."[128] Koffler had mailed over 7,500 letters to individual real property owners and real estate brokers offering to perform real estate closings for a stated fee. Although the lower court had held that the direct mail campaign constituted impermissible solicitation,[129] the court found only semantic differences between advertising and the direct mail "solicitations" in which Koffler had engaged.[130] The court concluded that direct mail advertising could not be subject to prophylactic regulation by the state.[131] In considering the arguments against direct mail advertising, the court stated:

> Invasion of privacy and the possibility of overbearing persuasion...are not sufficiently possible in mail solicitation to justify banning it. As the Supreme Court put it...a recipient of a lawyer's letter "may escape exposure to objectionable material simply by transferring ...[it] from envelope to wastebasket." It is not enough to justify a ban that in some situations (marital discord, a death in the family) a solicitation letter may be offensive to the recipient, or that some people may fear receiving a lawyer's letter, or to suggest that there may be some who by reason of frequent receipt of lawyers' solicitation letters may discard without opening a mailed summons. [footnotes ommitted][132]

Relying heavily upon the *Stuart* and *Koffler* decisions, a federal district court struck down an Iowa disciplinary rule prohibiting direct mail advertising.[133] In *Bishop v. Committee on Professional Ethics*, a lawyer challenged several rules imposed by the state of Iowa that limited lawyer advertising.[134] Although the majority of the rules were found to be constitutional, the court held that the rule banning direct mail advertising

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126. *Id. See also* Foley v. Alabama State Bar Association, 481 F. Supp. 1308 (N.D. Ala. 1979) (upholding a disciplinary rule requiring lawyers to file publicly copies of their direct mail advertisements).

127. *In re* Koffler, 70 A.D.2d 252, 420 N.Y.S.2d 560 (2d Dep't 1979), *rev'd sub nom.*, Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, *cert. denied*, 450 U.S. 1026 (1980). The case has generated a significant degree of comment. *See, e.g.*, Comment, *supra* note 10; Comment, *Recent Developments: Advertising*, 4 AM. J. TRIAL ADVOCACY 119, 119-22 (1980); Note, *supra* note 12.

128. Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, at 143, 412 N.E.2d 927, at 929 (1980).

129. *In re* Koffler, 70 A.D.2d 252, at 272, 420 N.Y.S.2d 560, at 573 (1979).

130. Koffler v. Joint Bar Ass'n, 51 N.Y.2d at 146, 412 N.E.2d at 931 (1980).

131. *Id.* at 143, 412 N.E.2d at 929.

132. *Id.*

133. Bishop v. Committee on Professional Ethics, 521 F. Supp. 1219 (S.D. Iowa 1981).

134. *Id.* at 1233 (the challenged rules are presented in the appendix to the opinion).

violated first amendment rights.[135] Emphasizing the importance to both consumers and lawyers of the free flow of commercial information in making informed decisions, the court rejected the interests advanced by the state—the increased potential for conflict of interest, over-commercialization, deceptive practices, and invasion of privacy.[136]

The Supreme Court of Minnesota upheld the use of direct mail advertising in *In re Appert*.[137] Appert was charged with violating a Minnesota rule proscribing direct mail solicitation after he mailed 250 copies of a brochure warning of the dangers associated with "Dalkon Shield" intrauterine devices.[138] The court held that the rule amounted to an unconstitutional restriction on lawyers' right of free speech and the public's right to receive commercial information.[139]

2. *Decisions Opposing Direct Mail Advertisements*

In the 1978 case of *Allison v. State Bar Ass'n*, the Supreme Court of Louisiana found little difference between lawyer direct mail advertising and in-person solicitation, holding that the state may prohibit such activity.[140] In *Allison*, two lawyers had mailed information to local companies discussing their prepaid group services plan.[141] In ruling against the practice, the court placed special emphasis on the enforcement difficulties associated with such private communications.[142]

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135. *Id.* at 1232. Only four of fourteen rules were found to be unconstitutional:
(1) Characterizations of the attorney's rates or fees by verifiable truthful use of restrained adjectives such as "reasonable," "very reasonable," and "moderate."
(2) Identification by words of race.
(3) Advertising in publications other than newspapers and periodicals of general circulation.
(4) Direct mailing of permissible advertising material.
Id. at 1232.

136. *Id.* at 1231-32.

137. *In re* Appert, 315 N.W.2d 204 (Minn. 1981).

138. *Id.* at 205-07.

139. *Id.* at 209. The court also dealt with the assertion that the situation in the case was different from that in *Bates* in that the instant case involved "complex litigation," which has a greater potential for "abuse by lawyers not qualified to pursue such litigation." *Id.* The court rejected the assertion, stating:

> A careful consideration of this justification reveals that it is not sufficient to tip the balance of interests in the Board's favor. Even if it can be assumed that there is greater potential for abuse when complex cases are solicited, there are alternative forms of regulation that can be imposed that would be less restrictive of the attorney's right to advertise and the public's right to receive commercial information. That alternative is to require lawyers who advertise for cases requiring some specialization to be certified in the area of specialization.

Id.

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

141. *Id.* at 489.

142. *Id.* at 496.

In *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, the Supreme Court of Pennsylvania also rejected direct mail advertising.[143] In *Epstein*, the lawyers in a new law firm wrote letters to their former clients asking if they would like to be represented by the new firm.[144] The clients were cleints of law firms with which the lawyers previously had been associated. Stating that direct mail advertising could be proscribed,[145] the court held that the conduct of the lawyers in this case constituted impermissible solicitation.[146]

In *Eaton v. Supreme Court of Arkansas*, the Supreme Court of Arkansas ruled against direct mail advertising.[147] In *Eaton*, a lawyer arranged to participate in a mass mailing sent to approximately 10,000 residents.[148] His advertisement was included in a packet along with other advertisements and discount offers. Although the court did consider the communication an advertisement, the Court ruled that the advertisement was not protected commercial speech. The Court reasoned that the presence of the advertisement alongside the other offers in the packet was likely to be misunderstood as a discount offer, and therefore, the advertisement was misleading.[149] In addition, the court noted that the advertisement appeared to be "merely a lure to get customers into the advertiser's place of business."[150]

In *The Florida Bar v. Schrieber*,[151] the Supreme Court of Florida, noting that "there is no controlling law concerning the present problem,"[152] ruled that the actions of a lawyer who had sent a letter to a single business recommending himself for employment, constituted illegal solicitation.[153] Applying *Ohralik*, the court concluded that the actions of the lawyer were primarily designed to attract business and not to provide information on the accessability of the courts. Noting the same information could have been communicated to the public in other ways, the court stated that the social benefit from direct mail advertisements was "extremely marginal particularly when cast against possible harms

143. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1175 (1978).
144. *Id.* at 1177-78.
145. *Id.* at 1179-80.
146. *But see Advertising Referendum*, 43 TEX. B. J. 324 (1980) (decision of the Court in *Epstein* frustrated goal of informed decision-making by clients).
147. Eaton v. Supreme Court of Arkansas, 607 S.W.2d 55 (1980).
148. *Id.* at 56.
149. *Id.* at 59.
150. *Id.* at 60.
151. The Florida Bar Association v. Schreiber, 407 So.2d 595 (Fla. 1981).
152. *Id.* at 598.
153. *Id.*

to the recipient."[154] As in *Allison*, the court also noted the difficulties in policing direct mail advertisements.[155]

In *State of Kansas v. Moses*,[156] the Supreme Court of Kansas convicted a lawyer of "direct mail solicitation of a stranger for employment of a particular legal matter."[157] Essentially, the court reasoned that since direct mail advertisements are actually solicitations and not advertising, direct mail advertisements can be prohibited.[158] Moses had sent approximatly 150 persons selling homes a letter stating that he could provide services in that regard for a set fee. According to the court:

> The solicitation in the instant case, while not being of the nature of ambulance chasing and hospital room solicitation, nevertheless is directed to a segment of the public which, under present economic conditions, is extremely vulnerable to a suggestion of employment that may not be advantageous to the individual homeowner....We believe that the prohibitions and restrictions [on direct mail advertisements] are reasonable and necessary for the protection of the public.[159]

Despite the *Koffler* ruling recognizing the right of a lawyer to utilize direct mail advertisements, the New York Court of Appeals has upheld bans on such advertisements in at least three cases.[160] In *Greene v. Grievance Committee, Inc.*, an attorney had mailed flyers to real estate brokers asking to be recommended to their clients.[161] Although the flyers were in fact truthful and not misleading, the court, citing *Ohralik*, held that such a situation constituted an "indirect" in-person solicitation,[162] and raised the potential for a conflict of interest.[163] In considering the extent of the prohibition, the court stated that "there was no adequately protective less restrictive alternative."[164]

In *In re Alessi*, the New York Court of Appeals was faced with nearly the same fact situation as in *Greene*. In *Alessi*, two lawyers in a legal

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154. *Id.* at 597.
155. *Id.* at 598-99.
156. State of Kansas v. Moses, 231 Kan. 243, 642 P.2d 1004 (1981).
157. *Id.* at 1007.
158. *Id.* at 1006.
159. *Id.* at 1007.
160. *Greene*, 429 N.E.2d 390 (1981); *In re* Alessi, 60 N.Y.2d 229, 457 N.E.2d 682 (1983); *In re* Von Wiegen, 101 App. Div.2d 627, 474 N.Y.S.2d 147, *modified*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. pending*, No. 84-1120.
161. *Greene*, 429 N.E.2d at 390-94.
162. *Id.* The court reasoned that the broker would recommend the lawyer to the client in an in-person setting, thereby constituting in-person solicitation. *Id.* at 394.
163. *Id.* at 396. According to the court:

> The possibility that the lawyer's view of marketability of title may be colored. . . . The probability that the lawyer will not examine with the same degree of independence that he otherwise would . . . are examples of the conflict potential. . . .

Id.
164. *Id.*

clinic had sent a letter to approximately 1,000 real estate agents setting forth fees for listed real estate transactions.[165] The U.S. Supreme Court had vacated the initial dismissal of the appeal and remanded the case in light of the decision in *In re R.M.J.*[166] The court, however, upheld the prohibition citing the *Greene* decision.[167] The court reasoned that in cases with the potential for conflicts of interest in attorney-client relationships, ample justification exists for a prohibition on direct mail advertisements.[168]

More recently, the Court of Appeals of New York considered the question of direct mail advertising in *In re Von Wiegen*.[169] In *Von Wiegen*, a lawyer had sent a letter to the victims of the Kansas City Hyatt Regency Hotel skywalk collapse and their families.[170] Although the lower court had concluded that direct mail advertisements directed toward accident victims was similar to in-person solicitation and posed a significant threat to the ability of the victims to reach a reasoned and informed decision regarding their need for legal services, the Court of Appeals held that a blanket prohibition on direct mail advertisements to accident victims violated the lawyer's right of free expression under the first amendment.[171] The court, however, did find that the letter contained deceptive statements and, therefore, justified the sanctions imposed.[172] The letter discussed the formation of a "litigation coordination committee" to assist the Hyatt Regency disaster victims, and stated that many victims had requested representation by the lawyer.[173] The statements regarding the committee were found to be misleading because the committee was comprised of just the lawyer and his secretary.[174] The statement to the effect that many victims were requesting his representation was found to be deceptive because some, not many, of the victims had contacted him and none had requested representation.[175]

3. *Assessing the Permissibility of Direct Mail Advertising*

The cases clearly indicate that direct mail advertising can be a permissible form of lawyer communication. In those cases in which the adver-

165. *In re* Alessi, 60 N.Y.2d 229, 457 N.E.2d 682 (1983).
166. *In re* Alessi, 460 U.S. 1077 (1983).
167. *In re* Alessi, 457 N.E.2d at 687.
168. *Id.*
169. *In re* Von Wiegen, 474 N.Y.S.2d 147, *modified*, 470 N.E.2d 838 (1984), *cert. pending*, No. 84-1120.
170. *Von Wiegen*, 470 N.E.2d at 839.
171. *Id.* at 841.
172. *Id.* at 843.
173. *Id.* at 846.
174. *Id.* at 845.
175. *Id.*

tisement has been rejected, (1) the lawyer overstepped the permissible bounds with regard to truthful and informative advertising;[176] (2) the potential for a serious conflict of interest was present;[177] (3) an indirect in-person solicitation would be involved;[178] or, (4) the advertisement used tended to "entice not to inform."[179] The only case not receptive to such categorization is *Moses*, a case involving what appears to be a blanket prohibition of direct mail advertising on the rationale that direct mail advertising is solicitation not dissimiliar from that in *Ohralik*.[180]

Clearly, direct mail advertising has become a popular method of lawyer communication in the promotion of a lawyer's practice. As discussed in the following section, the societal benefits of such advertisements warrant its authorization subject to proper restraints on the practices outlined above. Considerable differences in opinion exist, however, both within the profession and between consumers and the profession as to the acceptability of and the impact upon credibility from the use of direct mail advertising.[181]

The Economics of Lawyer Advertising

The subject of advertising and the effects of advertising on market outcomes has received considerable attention in the economic literature.[182] In general, emphasis has been placed on advertising as a means through which a seller differentiates his product from other sellers. Other means of differentiation are location, better service, actual physical differences in the product, and other nonprice differences among products.[183] Advertising is generally considered beneficial to society when the advertisement is informative,[184] facilitates production

176. *See In re* Von Wiegen, 101 App. Div.2d 627, 474 N.Y.S.2d 147; *Eaton*, 270 Ark. 573, 607 S.W.2d 55 (1980).

177. *See Greene*, 51 N.Y.2d 140, 429 N.E.2d 390 (1981).

178. *Id.*

179. *See Epstein*, 393 A2d 1175 (1978); *Schreiber*, 407 So.2d 595 (Fla. 1981); *Eaton*, 270 Ark. 573, 607 S.W.2d 55 (1980). Shortly after the resolution of the *Eaton* decision, Eaton's partner applied for admission to the Supreme Court Bar. In a strong dissent, Chief Justice Burger discussed the *Eaton* decision, referring to the advertisement as "designed to entice, not to inform," and concluded that Eaton's partner should be denied admission for having engaged in "pure solicitation . . . wholly out of keeping with minimum proposed standards." *In Re* Admission of Benton, 50 U.S.L.W. 3713, 3713-14 (U.S. Mar. 8, 1982) (C.J. Burger, dissenting).

180. *Moses*, 231 Kan. 242, 642 P.2d 1004 (1981).

181. *See infra* notes 231-52 and accompanying text.

182. *See, e.g.*, Scherer, Industrial Market Structure and Economic Peformance, ch. 15 (2d edition (1980)); Greer, Industrial Organization and Public Policy, ch. 4 and 171-77 (2d edition (1984)).

183. *See generally* Backman, Advertising and Competition, 23-27 (1967); Scherer, *supra* note 182, at 375-76.

184. *See, e.g.*, Stigler, *The Economics of Information*, 69 Journal of Political Economy

scale economies,[185] or motivates producers to maintain adequate quality standards[186] because each facilitates competition in the marketplace. Advertising is considered detrimental to society when the advertisement serves to diminish competition by conferring monopoly power upon those firms using advertising.[187] Whether advertising will serve to benefit or detriment society depends upon the economic circumstances of the industry in question—such as market structure,[188] the nature of the product,[189] and the regulatory environment.[190]

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213 (1961); Nelson, *Information and Consumer Behavior,* 78 JOURNAL OF POLITICAL ECONOMY 311 (1970); Nelson, *Advertising as Information,* 82 JOURNAL OF POLITICAL ECONOMY 729 (1974). Nelson argues that heavily advertised brands are informing the public that they are the best buys. *Id.* Businesses will advertise the most when their product is good enough that the product will be repetitively purchased after the consumer has been induced to initially buy it through advertising.

185. Production scale economies—the characteristic of being able to reduce costs at higher levels of production—can be achieved if advertising increases consumer knowledge of the product, thereby broadening market appeal and increasing sales. *See* Benham, *The Effect of Advertising on the Price of Eyeglasses,* 15 JOURNAL OF LAW & ECONOMICS 337 (1972) (in those states where advertising was prohibited, thereby restricting high-volume, low-price retailers capable of significant production economies, prices were 25 to 30% higher than in states without such restrictions).

186. Trademarks and brand names allow consumers to reward producers with quality products through repeat purchases. *See* Goldman, *Product Differentiation and Advertising: Some Lessons from the Soviet Union,* 68 JOURNAL OF POLITICAL ECONOMY 346 (1960) (discussing how in the Soviet Union manufacturers are required to put their production mark on consumer products to guard against deterioration in quality).

187. Many commentators have argued that advertising may impose significant entry barriers upon new firms entering the market. *See, e.g.,* COMANOR & WILSON, ADVERTISING AND MARKET POWER, at ch. 4 (1974); Comanor & Wilson, *Advertising and Competition: A Survey,* 17 JOURNAL OF ECONOMIC LITERATURE 453 (1979). Those barriers are attributed to the cummulative nature of past advertisements, economies of scale in advertising itself, and the fact that advertisement outlay requirements increase the capital costs of new entrants beyond that required for the purchase of plant and equipment. *Id.*

188. *See generally* COMANOR AND WILSON, ADVERTISING AND MARKET POWER, *supra* note 187; Miller, *Market Structure and Industrial Performance: Relation of Profit Rates to Concentration, Advertising Intensity, and Diversity,* 17 J. INDUSTRIAL ECONOMICS 104 (1969); Comanor & Wilson, *Advertising, Market Structure, and Performance,* 51 REV. ECONOMICS AND STATISTICS 423 (1969); Mann, Henning, & Meehan, *Advertising and Concentration: an Empirical Investigation,* 15 J. INDUSTRIAL ECONOMICS 34 (1967); Tlser, *Advertising and Competition,* 72 J. POLITICAL ECONOMY 540 (1964).

189. As a general rule, advertising by manufacturers raises prices and profits for the manufacturers as the advertising builds brand loyalties and market power; on the other hand, advertising by retailers lowers prices and profits for retailers because the advertising tends to be more informative and procompetitive. *See generally* Nelson, *The Economic Consequences of Advertising,* 48 J. BUSINESS 213 (1975); Porter, *Consumer Behavior, Retailer Power, and Market Performance in Consumer Goods Industries,* 56 REV. ECONOMICS AND STATISTICS 419 (1974); Arterburn & Woodbury, *Advertising, Price Competition, and Market Structure,* SOUTHERN ECON. J. 763 (1981). The Court has noted that the impact of advertising will be effected by the product being sold:

> [E]conomic considerations suggest that advertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets than in the marketing of unique products or services.

Bates, 433 U.S., at 372 n.25.

190. *See* Benham, *supra* note 185; CADY, RESTRICTED ADVERTISING AND COMPETITION: THE

The circumstances in the legal profession are such that extensive controls have been exercised over legal services, the individuals selling those services, and the type and amount of information public disseminated regarding those services.[191] In contrast to the circumstances in most other commercial activities, the mechanisms for control and choice are principally the prerogative of the profession rather than of the consumer.[192] Under similar circumstances, such control leads to decreases in competition and results in higher prices.[193] That is, the regulatory environment of the legal profession is such that consumers are denied the benefit of competition, competition that could be fostered by advertising.[194] Thus, in contrast to the typical study undertaken regarding the economic effects of advertising, the circumstances are such in the legal profession that the concern is directed more toward the effects on market outcomes resulting from those information constraints[195] rather than on barriers to entry erected by advertising outlays.[196] In fact, the Court in *Bates* noted that the prohibition on the public dissemination of information imposed by the profession erected a significant entry barrier, a situation considerably different from the typical economic inquiry regarding the effects of advertising:

> In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban [on advertising] in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.[197]

A. Information and Advertising in a Competitive Market

The conventional idea of economic theory is perfect competition. Based upon the fundamental belief that the consumer is sovereign—that individual preferences are what count in the ledger of social values[198]—a perfectly competitive market will bring about the optimal

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CASE OF RETAIL DRUGS (1976); Benham & Benham, *Regulating Through the Professions: A Perspective on Information Control,* 18 J. LAW & ECONOMICS 421 (1975).

191. *See supra* notes 35-42 and accompanying text.

192. In contrast, in the competitive market, consumers are provided freedom of opportunity. *See infra* note 199 and accompanying text.

193. *See, e.g.,* Benham, *supra* note 185.

194. *See* Cox, DeSerpa, & Canby, *Consumer Information and the Pricing of Legal Services,* 30 J. INDUSTRIAL ECONOMICS 305 (1982). *See infra* notes 213-22 and accompanying text.

195. *See, e.g.,* Benham, *supra* note 185 and accompanying text.

196. *See supra* notes 35-42 and accompanying text.

197. *Bates,* 433 U.S. at 378.

198. *See generally* Scitovsky, *On the Principle of Consumers' Sovereignty,* 52 AMER. ECON. REV. 756 (1973); SCITOVSKY, THE JOYLESS ECONOMY (1976).

allocation of the scarce resources of society.[199] That is, the market leads to an allocation of resources that is efficient in the sense of satisfying consumer wants with maximum effectiveness.[200]

A perfectly competitive market is generally defined by four main structural conditions: (1) many buyers and sellers;[201] (2) the product being marketed is homogeneous;[202] (3) an absence of patents, economies of scale, and the like;[203] and (4) all participants have sufficient information to make an informed decision about the product or service.[204] This latter condition is significant, particularly as the condition might relate to buyers of legal services in a competitive marketplace.

This information requirement assumes that buyers possess considerable knowledge about each of their many purchases. Furthermore, the requirement implies that buyers:

(1) are readily able to appraise product quality objectively;
(2) have a well-defined set of purchase requirements;
(3) are aware of alternatives and the terms offered by other sellers; and,
(4) are able to choose that combination of goods yielding the highest possible benefit for any given level of expenditure.[205]

If all buyers met this description, sellers would find difficulty in selling products and services consumers did not want, exaggerating the quality of their product or service over another, or charging outrageous prices

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199. In addition to the economist's efficient resource alloction argument for competitive markets, Professor Scherer suggests there are important political arguments favoring competitive markets:

(1) the requirement of numerous buyers and sellers in a competitive market decentralizes and disperses power;
(2) the resource allocation issues are solved impersonally, not through the control of businessmen or bureaucrats;
(3) competitive markets provide freedom of opportunity, in that since there are no barriers to entry individuals are free to choose their preferred trade or profession.

SCHERER, *supra* note 182, at 12-13.

200. *See* GALBRAITH, THE NEW INDUSTRIAL STATE, 222- 23 (1968); REICH, THE GREENING OF AMERICA, 110 (1971); Schwartzman, *Competition and Efficiency,* 81 J. POLITICAL ECONOMY 756 (1973) (for a more skeptical view).

201. Each buyer and seller must be so small relative to the total market that none of them individually can affect product price by altering their volume of purchases if they are buyers, or their level of production if they are sellers.

202. The product of any one seller must be a perfect substitute for the product of any other seller.

203. Productive factors must be freely mobile into and out of markets. In addition, there must be no barriers to entry of new firms.

204. This condition is often referred to, somewhat unrealistically, as requiring "perfect knowledge." Perhaps more realistic is the requirement that buyers be aware of the price and product offerings of sellers. Sellers, on the other hand, will be aware of product prices, wage rates, material costs, and interest rates.

205. *See generally* Scitovsky, *Some Consequences of the Habit of Judging Quality by Price,* 12 REV. ECON. STUDIES 477 (1944-45).

when alternatives are more cheaply available elsewhere.[206] Unless the market is centralized, however, most consumers will not know all the prices for a particular good or service. In order to ascertain those prices a consumer must investigate or "search" the market, collecting price information in some orderly fashion. In any given market, the degree of price dispersion will reflect the degree of consumer price ignorance. According to Stigler, "[p]rice dispersion is a manifestation—indeed a measure—of ignorance in the market."[207] This consumer price ignorance improves the profitability of seller exhortation, image building, functionless style variation, rumors, and related gimmicks that play on the subjective passions and preferences of such consumers.[208] In addition, Stigler argues that consumers will undertake "the optimum amount of search"[209] in order to determine the dispersion of price quotations by sellers. The larger the dispersion of prices, the more advantageous investigating several sellers will be.[210] However, if public or private regulations prohibit advertising, this search will become costly and difficult to conduct, and consequently, the price dispersion among sellers will necessarily increase.[211]

B. The Nature of Advertising

As the Court noted in *Bates*, "advertising is the traditional mechanism in a free market economy for a supplier to inform a potential purchaser

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206. As the text suggests, it would be impossible to *artifically* affect markets in the ways suggested if the consumer actually possessed such information. However, note that sellers could still differentiate themselves—and thus charge higher prices—if they could demonstrate that their product was superior because of genuine, objective, nonprice differences among the products or services offered (involving quality, durability, service, convenient location, or the like).

207. Stigler, *supra* note 184, at 214.

208. In general, the typical consumer is relatively uninformed and therefore relatively unskilled at differentiating between differences in product quality from differences in seller exhortation. *See generally* COX, THE SORTING RULE MODEL OF THE CONSUMER PRODUCT EVALUATION PROCESS, RISK AND INFORMATION HANDLING IN CONSUMER BEHAVIOR, 324-68 (1967); Bedian, *Consumer Perception of Price as an Indicator of Product Quality,* MSU BUSINESS TOPICS, 59-65 (Summer 1971); Woodside, *Relation of a Price To Perception of Quality of New Products,* J. APPLIED PSYCHOLOGY, 116-18 (Feb. 1972); Olshavsky & Miller, *Consumer Expectations, Product Performance, and Perceived Product Quality,* J. OF MARKETING RESEARCH, 19-21 (Feb. 1972); Cornell, *Price as a Quality Signal,* ECONOMIC INQUIRY, 302-09 (April 1978). As a consequence, in measuring product quality, consumers will tend to rely on such inaccurate signals as appearance, touch, scent, sound, exaggerated advertising claims, and price. *Id.* With regard to services, consumers tend to rely on reputation as established through the experiences of others, rumors, and anecdotes, as well as on price and other advertising claims. *Id.*

209. Stigler, *supra* note 184, at 217.

210. *Id.* at 173.

211. This basic notion was noted by the *Bates* Court:

> The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from

of the availability and terms of exchange."[212] That is, advertising is a method for providing potential buyers with important market information. Through advertising, the attributes, availability, and prices of a good or service are thereby more widely and cheaply known. The greater consumers are aware of alternatives, their availabilities, prices, and characteristics, the less they are bound to any one seller. In that regard, advertising will have a significant impact on the dispersion of prices, in most instances bringing about a reduction in the costs of search for those consumers wishing to obtain some product or service at the lowest possible cost.

Although advertising can call attention to the availability of some product and induce the consumer to try the product by making claims about quality, profitability rests on subsequent, continued consumer acceptance—at least for products that continue to be available for any length of time under the same name. Sellers of inferior products will be less able to retain customers, and will not survive long, for their firm name will be worthless and their advertising will cease. In this regard, information about goods or services is far more likely to provide competitive forces in the marketplace.

C. *Economic Evidence or the Effects of Advertising Prohibitions*

Several authors have examined the relationship between restrictions on advertising by the professions and the prices of the goods or services provided. Benham compared retail prices of eyeglasses among states with varying restrictions on eyeglass price advertisements.[213] He found that advertising prohibitions significantly raised the average retail price of eyeglasses relative to those states in which advertising was permitted.[214] Cady conducted a similar study of drug advertising regulation and found

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competition, and the incentive to price competitively is reduced. *Bates*, 433 U.S. at 377.

212. *Bates*, 433 U.S. at 376.

213. Benham, supra note 185.

214. *Id.* Comparing the extreme cases of Washington, D.C., (which had virtually no restrictions) and North Carolina, (which had severe restrictions) it was estimated that the elimination of all restrictions on advertising in North Carolina would reduce the average price paid for eyeglasses by nearly nineteen dollars. *Id.* A similar study by the Federal Trade Commission found that in those states where advertising for prices and services in optometry were restricted, the average eye examination and pair of glasses cost $94.58 as compared with $71.91 in places with no such restrictions. Interestingly, the study also found that in those areas where there were no restrictions, the examination and glasses were $10 cheaper when purchased from a optometrist who did advertise than from one that did not. FEDERAL TRADE COMMISSION, THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICES IN THE PROFESSIONS: THE CASE OF OPTOMETRY, (April 1980).

that prescription prices were 5.2% higher in states restricting advertising.[215]

Of particular interest in this article is a study conducted on legal service pricing and advertising in the Phoenix, Arizona area.[216] The study reports the results of two surveys of lawyers in private practice conducted in 1978, one involving an in-person interview and the other involving a mail sample.[217] With the exception of a question involving a plaintiff personal injury claim, the survey questionnaire dealt with "routine legal services," including:[218]

(1) reciprocal simple wills for husband and wife;
(2) reciprocal simple wills with an educational trust provision;
(3) an uncontested nonbusiness bankruptcy for husband and wife; and,
(4) an uncontested dissolution of marriage without a property settlement agreement. [219]

For each service, the lawyers were asked whether they would do the service, their fee structures, and the amount of time required to perform the service. The lawyers were instructed to assume that they had not been employed by the client before nor were they to assume that they would serve the client in the future. According to the authors, "[t]he empirical results...show that the Phoenix market for routine legal services in 1978 was characterized by *astonishing* variation in fees charged for four relatively routine services, suggesting a high degree of consumer ignorance in the market."[220]

According to all three of these studies, the principal motivation in restricting advertising was to maintain a high degree of profes-

215. Cady, *supra* note 190.
216. Cox, DeRerpa, & Canby, *supra* note 194.
217. Both surveys excluded lawyers not in private practice. One-hundred and thirty-seven lawyers were included in the in-person survey while 134 lawyers were included in the mail sample. The response rates, 96% and 84% respectively, were more than sufficient to produce statistically reliable data. The same questions were asked in both surveys. *Id.* at 311.
218. According to the authors:

> One source of attorneys' market power is their informational advantage vis-a-vis their clients. Another is service heterogeneity. Every attorney is an individual possessing some unique set of skills. Any given service he renders, therefore, differs theoretically from that rendered by another attorney. In one segment of the legal services market, however, service quality is not subject to variation, either across attorneys or across cases. Such services will be referred to as "routine" legal services.

Id. at 306.
219. *Id.* at 311.
220. *Id.* at 317. The economics of advertising offer rival hypotheses concerning the potential impact on legal service prices. Prices should decline if:

> (a) economies of scale are achieved due to increased demand for legal services, thereby reducing per-unit costs; and
> (b) lawyers attempt to create a competitive advantage by promoting prices lower than their competitors.

sionalism.[221] The effect of the advertising restriction, while superficially intended to benefit consumers by protecting them from over-commercialization and professionals motivated by profit, reduced competition and increased prices. With the profession in control of the marketplace rather than the consumer, resources of society are seriously misallocated because the profession is allowed to constrain the behavior of both members and consumers in the desired direction. Clearly, with regard to those resources, the "alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[222]

D. Concerns About Deceptive Advertising

The benefits to society from the abolition of advertising prohibitions and restrictions imposed by professional organizations on their members are clear.[223] The emphasis, however, is on replacing those prohibitions with truthful, informative advertisements. Unfortunately, the market system has no fully satisfactory mechanism for separating truthful and abusive advertising in order to encourage the former and discourage the latter. Thus, in those situations in which the problems associated with abusive advertisements are considered by the profession to be grievous enough to warrant corrective action, much of the burden of assuring truthful advertising will likely be placed upon the government, or the relevant professional organization. The government, through the Federal Trade Commission, is already charged, as a backstop to private action

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On the other hand, advertising could lead to higher prices if the costs are not offset by additional revenue. In a survey of 2,700 *Harvard Business Review* subscribers, 82% of them business managers, 49 indicated that they believed that advertising led to higher prices, while 35% believed it led to lower prices. Greyser & Reece, *Businessmen Look Hard at Advertising,* 49 HARVARD BUSINESS REVIEW 26 (1971). Lawyers would have to either adsorb the increased costs or pass them on to the clients in the form of higher prices. Considerable economic literature exists on this controversy. *See, e.g.,* CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION, (6th ed.) ch. 7 (1950); Demsetz, *The Nature of Equilibrium in Monopolistic Competition,* 67 JOURNAL OF POLITICAL ECONOMY 21 (1950); Steiner, *Marketing Productivity in Consumer Goods Industries,* 42 JOURNAL OF MARKETING 60 (1978). The Court in *Bates* noted the potential impact on the cost of legal services:

> Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to consumer. [footnotes omitted]

Bates, 433 U.S. at 377.

221. *See, e.g., Bates,* 433 U.S., at 368-372.

222. *Virginia Pharmacy,* 425 U.S., at 770.

223. *See supra* notes 213-15 and accompanying text.

by the professional organization, with detecting and enjoining misleading and deceptive advertising practices.[224]

However, the job of accurately defining a misleading and deceptive advertisement *a priori* will not be an easy one.[225] The line between advertisments that are misleading and those that are merely persuasive is fuzzy and gray.[226] As such, the imposition of controls establishing *a priori* what is and what is not misleading based on less than objective criteria may be too restrictive, thereby suppressing desirable initiative and creativity. In addition, considerable difficulties in determining acceptability are likely to exist when differences in advertising media are considered. Consequently, all such policies intending to curb abuses run the risk of evoking undesirable side effects in the form of market outcomes detrimental to consumers.

On a more cynical note, it is difficult to be sanguine about the ability of the government or a professional organization charged with policy enforcement to "outwit" their business counterparts and ensure that after individuals and firms have undertaken adaptive steps with regard to that policy, the situation will be much improved.[227] As a consequence, the best "policeman" may well be the consumer, particularly if the consumer is able to appeal through the courts for compensation if the service purchased is not performed as advertised.[228] Although consumer policing will not curb all advertising abuses, nor will a formal agency or organization. To their credit, in contrast to the consumers of decades past upon

224. *See generally* TREBILCOCK, DUGGAN, ROBINSON, WILTON-SIEGEL, & MASSEE, A STUDY OF CONSUMER MISLEADING AND UNFAIR TRADE PRACTICES, Vol. 1, Chapter III (1976); U.S. HOUSE OF REPRESENTATIVES, OVERSIGHT HEARINGS INTO THE FEDERAL TRADE COMMISSION—BUREAU OF CONSUMER PROTECTION BEFORE THE COMM. ON GOVERNMENT OPERATIONS, 94th Cong., 2d Sess. (1976); Udell & Fischer, *The FTC Improvement Act,* 41 J. MARKETING 81 (1977); *Developments in the Law—Deceptive Advertising,* 80 HARV. L. REV. 1005, 1019-27, 1058-65 (1967).

225. *See generally* Brandt & Preston, *The Federal Trade Commission's Use of Evidence to Determine Deception,* 41 J. MARKETING 54 (1977); Millstein, *The Federal Trade Commission and False Advertising,* 64 COL. L. REV. 437 (1964).

226. *See generally* KINTER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES (1971); ALEXANDER, HONESTY AND COMPETITION (1967).

227. Dissatisfaction with government intervention in the marketplace has increased in recent years. *See generally* Wilson & Rachal, *Can the Government Regulate Itself,* 46 THE PUBLIC INTEREST 3 (1977); Stigler, *Public Regulation of the Securities Market,* 37 J. BUSINESS 117 (1964); Peltzman, *The Effects of Automobile Safety Regulation,* 83 J. POLITICAL ECONOMY 677 (1975); Pustay, *Regulatory Reform of Motor Freight Carriage in the United States,* 10 INT. J. TRANS. ECON. 259 (1983); PUSTAY, DEREGULATING AIR TRANSPORTATION: THE U.S. EXPERIENCE, IN REASSESSING THE ROLE OF GOVERNMENT IN THE MIXED ECONOMY, 265-86 (Giersch, ed. 1982); Ringleb, *The Natural Gas Regulatory Dilemma: A Market Solution, Another Complex Compromise, or The Staus Quo?,* 6 J. ENERGY LAW & POLICY 107 (1985). That dissatisfaction is, in large part, attributed to disagreements with the economic justifications for regulation put forth by those calling for regulation, and with the implementation of regulation by state and federal agencies.

228. *See* POSNER, ECONOMIC ANALYSIS OF LAW, 2d, 271-2 (1977).

whom advertising prohibitions were initially based, considerable evidence exists that consumers today are much more sophisticated in their perceptions of product and service advertising.[229] This sophistication, rather than the efforts of government agencies and professional organizations, ultimately will cause individuals and firms making exaggerated claims to lose their credibility and be unable to retain their customers. In this sense, "[t]he most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation for professional capacity and fidelity to trust."[230]

MEASURING THE ACCEPTABILITY AND THE CREDIBILITY OF LAWYER DIRECT MAIL ADVERTISEMENTS

Despite heavy regulation through the first half of this century[231] along with the strong negative disposition toward advertising that regulation created and fostered, advertising by the professions has become a reality in the 1980's with more advertising appearing on a regular basis in virtually all the media. Still, despite recognition by the courts of the societal benefits flowing from the information provided,[232] advertising is still believed to be damaging to the professions by many of their members.[233] Intricately tied up in that belief are lingering questions regarding consumer and professional attitudes toward advertising. A foremost concern among those most opposed to advertising is the effect advertising will have on professional credibility.[234]

In that regard, the marketing profession has undertaken a number of studies examining the use of advertising by professionals.[235] The principle research methodology employed in those studies was surveys of the professional group and potential consumers. Here, two such major surveys were undertaken. The first survey measured current lawyer and consumer perceptions and attitudes with regard to advertising generally

229. *See supra* note 31 and accompany text.
230. *See supra* note 38 and accompanying text.
231. *See supra* notes 35-42 and accompanying text.
232. *See Bates*, 433 U.S. 350; *Virginia Pharmacy*, 425 U.S. 748.
233. *See supra* note 1 and accompanying text.
234. *See* Comment, *supra* note 10, at 399.
235. *See* Bloom, *Advertising in the Professions: The Critical Issues*, 41 J. MARKETING 103 (1977); Kotler & Connor, *Marketing Professional Services*, 41 J. MARKETING 71 (1977); Shapiro & Majewski, *Should Dentists Advertise?*, 23 J. ADVERTISING RES. 33 (1983); Shimp & Dyer, *How the Legal Profession Views Legal Services Advertising*, 42 J. MARKETING 74 (1978); Smith & Meyers, *Attorney Attitudes Toward Professional Advertising*, 1978 AMER. MAR. ASSO. EDUCTORS CONFERENCE, AMER. MAR. ASSO., CHICAGO, ILL., 288-291 (1978); Dyer & Shimp, *Reactions to Legal Advertising*, 20 J. ADVERTISING RESEARCH 314 (1980); Darden, Darden, & Kiser, *The Marketing of Legal Services*, 45 J. MARKETING 123 (1981); Patterson & Swerdlow, *Should Lawyers Advertise? A Study of Consumer Attitudes*, 10 J. ACAD. MARKETING SCIENCE 314 (1982).

and to direct mail advertisements specifically. The second survey measured the effect of lawyer direct mail advertisements on credibility.[236]

A. A Survey of Consumer and Lawyer Attitudes Toward Direct Mail Advertising

The first survey allowed for the measurement of lawyer and consumer attitudes toward lawyer advertising. Specifically, the intent of the survey was to determine if significant differences in attitudes exist between lawyers and consumers regarding lawyer direct mail advertisements. The lawyer survey began with two general questions regarding lawyer advertising, and then both the consumer and lawyer surveys asked for responses to a series of "media" and "attitudinal" statements. Both series required a response according to a seven-point Likert scale[237] ranging from "strongly agree" to "strongly disagree." The media statements were concerned with seven forms of advertising media available for use by the legal profession, and were intended to provide an indication of how direct mail advertising compared with the other media available. The attitudinal statements focused solely on attitudes toward advertising by professionals. The statements principally addressed the issues of the benefits consumers derive from such advertising.

1. The Sample

A total of 282 respondents participated in the survey to determine consumer and lawyer attitudes toward lawyer direct mail advertising. Of the 282 respondents, 170 were consumers and 112 were practicing lawyers. The consumer respondents were selected by mailing questionnaires to a probability sample of 750 households from two major metropolitan areas, with approximately twenty-three percent or 170 responding.

The lawyer sample was derived from the membership of two bar associations and a young lawyers association from the same two major metropolitan areas. Under the belief that younger lawyers may have a different attitude toward advertising,[238] these organizations were chosen

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236. The survey results presented here are part of an ongoing research effort on the subject of lawyer advertising. The results presented do not include the statistical analysis undertaken to establish their validity. For a more complete presentation in that regard, interested parties are invited to correspond with the authors directly.

237. *See* SCHONER & UHL, MARKETING RESEARCH: INFORMATION SYSTEMS AND DECISION MAKING, 270-71 (1975) (for a more thorough discussion of the Likert method of summated ratings).

238. In 1980, Dyer and Shimp reported that the results of their study indicated that those lawyers who intended to advertise were younger and typically in an individual or very small practice. *See* Dyer & Shimp, *supra* note 235. Johansson, Merrill, & Wilson reported a similar

in an attempt to ensure that a sufficient number of lawyers working for both new and well established law firms would be sampled. From the memberships provided by those organizations, a self-administered questionnaire was distributed to a sample of 152 lawyers, with 112 ultimately being completed and returned for a response rate of approximately seventy-four percent. The lawyer sample had the following "years in practice" distribution, practices as indicated by the following sample make-up:

5 years	18%
6-10 years	16%
11-15 years	11%
16-20 years	4%
20 years	51%

2. *Lawyer Attitudes Toward Advertising In General*

Aside from two specific questions aimed only at the lawyers, and with the exception of some general classification questions,[239] the consumer and lawyer questionnaires were identical. The questionnaire sent to the lawyers began with the general question, should lawyers be "allowed to advertise under certain circumstances?" The vast majority of lawyers, nearly eighty percent, responded in the affirmative. This result contrasted dramatically with a major study undertaken just five years ago that had reported the opposite finding.[240]Lawyers were then asked the more specific question, whether they would consider using direct mail advertisements, to which eighty percent responded that they would not.[241]

3. *Consumer and Lawyer Attitudes Regarding Advertising Media*

As Table 1 indicates, consumer and lawyer attitudes toward the use of a variety of media for lawyer advertising produced significantly dif-

finding with regard to architects. *See* Johansson, Merrill, & Wilson, *Professionals and Advertising: A Case Study of Architects' Attitudes,* 1979 CURRENT ISSUES AND RESEARCH IN ADVERTISING 93.

239. Consumers were asked basic demographic questions while lawyers were questioned about their law practice. An elaborate statistical analysis, called analysis of variance, was employed to determine if any of the classification variables had affected the responses. There were no statistically significant differences in responses to the media and attitudinal statements among lawyers when the sample was classified by areas of specialization, age of the lawyer, or the number of years in practice. However, differences did arise when the lawyers were subdivided into those who had advertised in the past and those who had not. No differences of any statistical consequence were discovered when the consumer sample was reclassified on the basis of age, education, or income.

240. Shimp & Dyer, *supra* note 235.

241. Note that although 80% did not intend to use direct mail advertisements in the future, 20% did. This 20% figure, interestingly, is very similar to the percent of lawyers found by Shimp and Dyer to be in favor of advertising during the late 70's. *See* Shimp & Dyer, *supra* note 235.

ferent results. For all advertising media considered, lawyers gave significantly lower approval scores than the consumers. Clearly, lawyers are much more critical than consumers in their perceptions of advertising and of advertising media.

Table 1

Comparison of Consumer and Lawyer Attitudes
Toward the Use of Various Advertising Media

Media	Mean Approval Scores*	
	Consumers	Lawyers
Yellow Pages	5.15	4.23
Newspaper	3.84	2.62
Magazines	3.30	2.19
Direct Mail	2.62	1.20
Radio	2.43	1.35
Television	2.31	1.20
Billboards	1.79	0.87

*The higher the mean number, the more the respondent approves of the use of that particular advertising media by lawyers.

Note, however, that while consumer and attorney attitudes toward the use of various advertising media differed, the relative rankings of those media alternatives did not differ greatly. Both groups most approved of advertising in the yellow pages, followed by newspapers and then magazines. The greatest diversity of opinion between the two groups was in the perception of direct mail advertising. The lawyers ranked direct mail advertising near the bottom, while consumers were more receptive to direct mail advertisements, ranking the category above both radio and television.

4. *Consumer and Lawyer Attitudes Regarding Advertising and the Use of Direct Mail Advertisements*

A summary of the responses to attitudinal statements regarding advertising and the use of direct mail advertisements is presented in Table 2. Statements 1, 3, 5, and 7 focus on lawyer advertising in general and the effects advertisement may have on the consumer and the marketplace for legal services. Those statements were included in an attempt to deter-

mine how overall attitudes of the lawyer and the consumer sample may differ regarding advertising in general. As indicated in the table, consumers gave significantly more favorable responses to each of those questions than did lawyers. In response to statements 1, 3, and 5, consumers perceived lawyer advertising as both *more informative* and *more professional* than did lawyers. In addition, the consumers expressed more agreement than did lawyers with the statement (number 7), "If I need legal help, I would use advertisements to select a lawyer."

Statements 2, 4, 6, and 8 were intended to elicit consumer and lawyer attitudes toward direct mail advertising by lawyers. As indicated in Table 2, the attitudes toward such advertising differed significantly. As in the case of advertising in general, consumers were again much more in favor of direct mail advertising. Statement 2 specifically addresses the question of the approval of advertising by lawyers through the mail. The mean approval values for the statement indicate that consumers perceive direct mail advertisements in a much more favorable light than do lawyers.

Question 4 asks the respondents whether they would be influenced in their choice for a lawyer by a direct mail advertisement. Although the response is not particularly strong, consumers still responded much more favorably than did lawyers. Question 6 asked whether the respondent felt that lawyers lose credibility when they advertise through the mail. The mean value responses, 3.36 for consumers and 4.05 for lawyers, indicate that lawyers as a group tend to be much more critical of direct mail advertising and the impact the advertising will have on their profession than are the prospective customers. Similarly, in response to question 8, which inquired whether lawyers should be allowed to advertise through the mail "since [they already] advertise through newspapers and television," consumers were nearly twice as favorable as were the lawyers sampled.

Yet, despite the fact that the two groups differed on fundamental advertising issues, they agreed upon the use of prospective client lists for advertising purposes. Question 9 asked respondents whether "lawyers should be allowed to get a list of prospective clients from third parties (i.e., doctors, insurance agents, etc.) for the purpose of mailing that person an advertisement." Not only was the use of such lists viewed very unfavorably by both groups, the question drew the most unfavorable response of all the questions in the survey.

5. *Implications of the Attitudinal Survey*

Several key implications are suggested by the survey. First, clear significant differences exist between consumers and lawyers in how each group

Table 2

Comparison of Consumer and Lawyer Attitudes Toward The Use of Direct Mail and Other Forms of Advertising

Statement	Extent of Agreement With Statement (mean)*	
	Consumers	Lawyers
1. Advertising by lawyers is beneficial to consumers.	3.52	2.66
2. I approve of advertising by lawyers through the mail.	2.47	1.33
3. I find advertising of lawyers services informative.	3.06	2.19
4. A direct mail advertisement would influence my choice of a lawyer.	1.88	1.37
5. Lawyers who advertise are unprofessional and hurt the image of the legal profession.	2.79	3.32
6. Lawyers lose credibility when they advertise through the mail.	3.36	4.05
7. If I need legal help, I would use advertisements to select a lawyer.	1.70	1.17
8. Since lawyers advertise through newspapers and telelvision, they should also be allowed to advertise through the mail.	3.12	1.68
9. Lawyers should be allowed to get a list of prospective clients from third parties (e.g., doctors, insurance agents, etc.) for the purpose of mailing that person an advertisement.	1.19	0.79

*The higher the mean number, the more approval the respondent gives to that particular statement.

views lawyer advertising. Consumers were much more favorable toward lawyer advertising than were lawyers. In one particular area, the use by lawyers of the mailing lists of others such as doctors or insurance agents in generating new clients through the mail, consumers and lawyers were in agreement as to offensiveness of that advertising practice.

Second, the survey demonstrates that although lawyers have a somewhat negative view of lawyer advertising in general, they will accept the more traditional forms of lawyer advertising such as the yellow pages, newspapers, and magazines. The traditional forms of advertising would not offend the integrity of the legal profession. Consumers, on the other hand, responded favorably to advertising from all media.

Third, the most significant difference of opinion between the two groups as to advertising media occurred with regard to direct mail advertising. Most consumers felt that lawyers should be allowed to use the mail, while the lawyers felt that direct mail advertising should not be used by the profession. Emphasizing the consumer viewpoint,[242] the need for information to make an informed, reliable decision,[243] the survey indicates that direct mail advertising should not be ruled out as an advertising medium for lawyers.

B. The Use of Direct Mail Advertisements and the Effect on Lawyer Credibility

As a matter of tradition, a number of lawyers have been and continue to be reluctant to advertise because they perceive advertising as beneath the ethical standards of the profession.[244] A growing number of lawyers, however, are interested in advertising, but are concerned that advertising will diminish the image and credibility of their practice and profession as perceived by the general public.[245] The intent of the second survey was to measure the effect of lawyer direct mail advertising on the credibility of the profession in order to determine the validity behind this concern.

The basis for the survey was the reaction of respondents to five different direct mail advertisements. Each respondent was randomly assigned

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242. *See supra* note 198 and accompanying text.
243. *Bates*, 433 U.S. at 364.
244. *See supra* note 18 and accompanying text.
245. In addition, many lawyers have concerns about the cost-effectiveness of advertising. *See generally* Comment, *supra* note 10, at 402 (citing examples of several law firms that experienced financial difficulties as a result of large advertising expenditures). However, the law firm in *Koffler* experienced a twenty-five dollar return in legal fees for every dollar spent on direct mail advertising. *In re* Koffler, 70 A.D.2d 252, 420 N.Y.S.2d 560 (1979).

one of the advertisements to evaluate. Each advertisement was essentially a letter from a lawyer, including an appropriate letterhead professionally produced and patterned after the advertisement of issue in *Koffler*.[246] The five advertisements had in common the letterhead, some general introductory legal information, and information on how to reach the law firm. The remaining information presented in each letter, and the basis of the survey, differed as follows:

(1) emphasized general legal services and where to go if such services were ever needed by the consumer.

(2) similar to letter (1) except that this letter also offered specific information on prices.

(3) similar to letter (1) except that this letter also offered information on the lawyer's professional experience.

(4) similar to letter (1) except that this letter also offered information on the lawyer's area of specialization.

(5) gave the appearance of having been taken from a third party mailing list. It began with the sentence, "We have been informed of your job related accident and feel you may need legal advice ...."

The credibility evaluations of these direct mail advertisements were measured according to eight specific characteristics: trustworthy or untrustworthy; competent or incompetent; dignified or undignified; reliable or unreliable; qualified or unqualified; likeable or unlikeable; respectable or unrespectable; and successful or unsuccessful. Each item or characteristic was evaluated according to a seven-point scale, with 7 representing a high perception of credibility and 1 representing a low level. Credibility of the particular advertisement was measured by summing the individual evaluations attached to each of eight items or characteristics. Thus, the maximum possible level of measured credibility was a 56 and the lowest, 8.[247]

1. The Sample

The respondents participating in the survey were derived from the same sources as in the attitudinal survey.[248] A total of 260 respondents, 148 consumers (out of 750) and 112 lawyers (out of 152), ultimately participated. Each respondent was randomly assigned one of the five direct mail advertisements to evaluate.

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

247. This approach was primarily based on a study by Wilding & Bauer. It has been shown to be reliable and valid in measuring credibility. Wilding & Bauer, *Consumer Goals and Reactions to a Communication Source,* 5 J. MARKETING 73 (1968).

248. *See supra* note 238 and accompanying text.

2. *Consumer and Lawyer Perceptions of Credibility*

As illustrated in Table 3, consumers and lawyers differ considerably in their perceptions on credibility. As indicated by the results of the survey, consumers are not significantly influenced by the information presented in lawyer direct mail advertisements; the credibility means do not differ much among the five sample advertisements.[249]

Table 3

Comparison of Consumer and Lawyer Preceived Credibility Ratings of Five Direct Mail Advertisements

Advertisement Related the Following Information:	Credibility Mean*	
	Consumers	Lawyers
(1) General Legal Services	28.8	14.9
(2) Price of Legal Services	28.6	16.5
(3) Lawyer's Experience	28.3	21.7
(4) Lawyer's Specialization	26.5	15.4
(5) Third-Party Mailing Solicitation	26.8	12.3

*The higher the credibility mean, the higher the perceived credibility of the direct mail advertisements.

Lawyers, however, perceived differences in the credibility of the five advertisements.[250] As Table-3 illustrates, among the lawyers sampled, a significantly higher credibility rating was attached to the advertisement outlining the lawyer's experience.[251] On the other hand, the advertisement indicating that the origin of the advertisement was from a third-party list was perceived as the least credible among lawyers. As perceived by lawyers and reflected in their responses, no statistical difference in credibility was perceived among the other three advertisements. Clear-

249. A one-way analysis of covariance, used to determine if any statistical differences in credibility amoung the five advertisements, found no such statistical difference.

250. The same one-way analysis of variance test applied to the lawyer sample demonstrated statistical differences in credibility perceptions.

251. A Duncan's multiple range post hoc test was run to determine statistically where the difference in credibility occurred.

ly, the informational content of a lawyer's direct mail advertisement does have an effect on how lawyers view the credibility of the advertisement.[252]

3. *Implications of the Survey*

Several key implications are suggested by this survey. First, as in the first survey on attitudes, consumers and lawyers differ significantly in their perceptions of the credibility of lawyer advertising. Consumers were more accepting of direct mail advertisements, and considerably more neutral with regard to the informational content of those advertisements. Clearly, consumers are much less critical of direct mail advertising by lawyers than are lawyers themselves.

Second, although lawyers did find the advertisements much less credible than did consumers, they did highly rate the advertisement setting forth the lawyer's experience. Apparently, lawyers found such an advertisement to be much more professional relative to the other four. On the other hand, the lawyers were most critical of the letter addressed to a consumer whose name was derived from a third party.

SUMMARY AND CONCLUSION

In 1977, after nearly eighty years of formal prohibitions on lawyer advertising, the Supreme Court in *Bates v. Arizona* ruled that such prohibitions violate the lawyer's right of free expression under the first amendment. In response, most states amended their codes of professional responsibility to comply with the dictates of that decision. Although the states did attempt to interpret *Bates* very narrowly, particularly with regard to the information being conveyed and the media being employed, lawyer communications with prospective clients moved quickly beyond the fact situation presented in *Bates* in many jurisdictions. The legal profession in general, however, has remained concerned about the potentially adverse consequences that the trend toward unrestricted advertising would have on the profession, particularly as those interested in advertising consider the marketing potentials of the electronic media and direct mail advertising.

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252. These results tend to support Sheriff's theory of social judgment. SHERIFF & HOVLAND, SOCIAL JUDGMENT (1964). As extended and applied in the marketing profession, the theory of social judgment would propose that if two groups of respondents with different levels of involvement toward a given subject are exposed to the same message, their perceptions will differ based on their selective perception processes. *Id.* The group that is highly involved and opinionated on the given subject, will accept very few positions and will reject most positions. *Id.* The groups with a low level of involvement would conversely, accept more new positions. *Id.* Here, since lawyers are considerably more involved than consumers in the issues surrounding lawyer advertising, they will exhibit a much lower willingness to accept new positions.

Both the economics of and consumer attitudes (as measured by the surveys presented herein) toward lawyer advertising, however, suggest that such concerns are unwarranted. The empirical economic evidence strongly suggests that the effect of restrictions on the public dissemination of information by the professions leads to increased prices and reduced competition, hardly market outcomes in the interest of society. Furthermore, the absence of such information enhances the market power of established lawyers in a profession in which contacts in the community are a lawyer's principal source for generating business in the absence of advertising.

With regard to consumer perceptions of lawyer direct mail advertising, the surveys indicate that significant differences exist between consumers and lawyers in how each group views lawyer advertising. Consumers were found to be much less critical and much more accepting of lawyer advertising than were lawyers. The most significant disagreement between the two groups involved their perceptions of direct mail advertising. While consumers clearly felt that lawyers should be allowed to use the mails, lawyers were generally opposed. Both groups, however, were opposed to the use by lawyers of mailing lists obtained from doctors, insurance agents, and other similar parties. Finally, although consumers found the advertising of legal services by lawyers to be informative, approved of direct mail advertisements, and found advertising by lawyers to be beneficial, consumers also stated that direct mail advertisements would not influence their choice of a lawyer nor would they select a lawyer merely on the basis of an advertisement.

In assessing the impact of using direct mail advertisements on the credibility of a lawyer, the survey results suggest that consumer perceptions of a lawyer's credibility are not affected in any meaningful fashion by the information conveyed in that advertisement. Consumer perceptions of the lawyer's credibility differed little between a direct mail advertisement providing general legal services information and another amounting to little more than a direct solicitation. Clearly, as long as consumers are not going to be influenced in their choice of a lawyer by an advertisement, they are not likely to be appreciably moved by the contents of the advertisement. Interestingly, lawyers, while finding a lawyer's use of direct mail advertisements much less credible than did consumers regardless of the information conveyed, did rate highly a direct mail advertisement conveying the lawyer's professional experience.

Thus, in considering the permissibility of direct mail advertising, the Court undoubtedly will not uphold a state regulation imposing a blanket

prohibition.[253] On the other hand, the Court is not likely to strike down a state law prohibiting direct mail advertisements that raise the potential for a conflict of interest—a restraint on direct mail advertisements (currently upheld by the state courts) that arguably is well grounded.[254] That exception aside, little rationale appears to exist, at least from the perspective of consumers, for the Court to uphold a prohibition against other uses of direct mail advertising by lawyers. As our survey suggests, consumers find lawyer advertising beneficial, would not be influenced in their choice of a lawyer by such an advertisement, and, in that regard, are indifferent as to the informational content of the advertisement. The available evidence indicates that consumers as a group are much more sophisticated in their receptivity to advertisements, and as such, are better able to separate those that are informative from those that are abusive.[255] The Court has noted the importance of the free flow of commercial information in the efficient allocation of resources of society.[256] Thus, to the extent the use of direct mail advertising by lawyers is dictated by consumer preferences and not by those of the profession, the Court will find that subject to the restraint noted above, direct mail advertising is an acceptable means by which lawyers may communicate with their potential clients.

253. *See supra* note 106 and accompanying text.
254. *See, e.g., supra* notes 161-67 and accompanying text.
255. *See supra* note 31 and accompanying text.
256. *See supra* note 75 and accompanying text.