Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients

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Consider the following description of an advertisement appearing in the October 1995 issue of the *New York Mortgage Press*:

> A big-engined blonde is uncomfortably sprawled atop a curvaceous motorcycle. On one side of the photo, her legs shoot out of a black leather miniskirt barely ample enough to hide thong underwear. On the other, her cleavage bulges out of a low-cut jacket. Her lips are slightly parted; her sunglasses reflect a photographer's flash.[1]

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The views set forth herein are the personal views of the Authors and do not necessarily reflect the views of the law firm with which they are associated.

[1] Mike France, *How to Get Business Quickly Advertise!*, NAT'L L.J., Dec. 11, 1995, at A10. Some readers of the *National Law Journal*, however, took issue with its reporter's description of Osias's October 1995 advertisement. In a letter to the editor, one reader complained:

> I was offended by your article on Rosalie Osias and her unorthodox advertising campaign – not by Ms. Osias or her advertising, but by the unfair and incorrect mischaracterization of the ads by your reporter. The description in the lead paragraph made me wonder about the extent of your reporter's bias; in fact, I found that description more lurid, offensive and demeaning to Ms. Osias than the ad itself.
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> Your reporter measured the ads against "pornography-industry standards" and compared them to ads for "a massage parlor, a lap dance bar" or a "smutty" 1-900 chat line. The photograph you ran with the article, however, seems no more suggestive than numerous ads in mainstream publications.
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> The description of Ms. Osias as a "big-engined" woman whose "cleavage bulges out of a low-cut jacket," "sprawled atop" a motorcycle is not borne out by the ad, which shows barely a hint of Ms. Osias's figure beneath a jacket no more low-cut than some I have seen on

One would imagine that this advertisement was promoting beer, or sports cars, or even a Harley Davidson motorcycle, for that matter. And yet, the *New York Mortgage Press*, a popular monthly journal among bankers and mortgage brokers in southern New York,[2] boasts a sophisticated readership. It is hardly a forum for bike and beer ads.

Indeed, the October 1995 advertisement is not marketing Harleys. Rather, the ad is promoting legal services, and the woman depicted is Rosalie Osias, a real estate and banking attorney from Long Island, New York.[3] Astonishingly, Osias's advertisement is targeted at mortgage brokers and mortgage companies as part of her mortgage closing practice.[4] Her suggestive photograph is accompanied by a provocative caption, comprising "an odd combination of sexual double-entendre and mortgage-industry shop talk," that proclaimed: "WE WILL RIDE ANYTHING . . . TO GET TO YOUR CLOSING ON TIME."[5]

The October 1995 advertisement, however, was not the first time that the New York banking lawyer from Cardozo Law School employed sexual allure to flush out new clients. Osias's first advertisement appeared in the May 1995 issue of the *New York Mortgage Press* and sported a golf motif to coincide with the traditional golf tournaments that the real estate industry holds during the spring. The ad features Osias lying on a putting green, in black leather pants and matching tuxedo, fondling the head of a golf club, with an accompanying caption, "We Don't Play Golf . . . We're Too Busy Closing Your Loans."[6]

> female attorneys in business suits. And although one of her legs is tucked beneath her, she appears to be standing on the ground, not sprawling atop the machine.

Jeffrey F. Fisher, *Osias Article Was More Lascivious Than Her Ads*, NAT'L L.J., Jan. 15, 1996, at A18. As a means of using sex to sell, Osias's ad is obviously timid by mainstream standards. One need only view an evening of prime-time network programming to appreciate the difference. By the legal profession's standards, however, such a practice is unheard of, as Osias herself claims. *See* Melissa Tennen, *Should Lawyers Sell Their Bodies or Their Minds?*, N.J. LAW.: WKLY. NEWSPAPER, Aug. 4, 1997, at 8 ("Osias believes she may be the first attorney — male or female — in the country to do such advertising.").

[2] *See* France, *supra* note 1, at A10.

[3] *See Blond Ambition: Leggy Lawyers Poses, Profits*, A.B.A. J., Jan. 1996, at 12 [hereinafter *Leggy Lawyers*].

[4] *See* Daniel Wise, *Woman Lawyer's Suggestive Ads Stir Ire of Nassau County Bar*, N.Y. L.J., Oct. 23, 1995, at 1.

[5] France, *supra* note 1, at A10. Interestingly, Osias claims that she has worn to the office the leather shorts shown in her motorcycle ad. *See* Evelyn Nieves, *Using Feminine Edge to Open a Man's World*, N.Y. TIMES, Nov. 28, 1995, at B6.

[6] France, *supra* note 1, at A10.

Bolstered by the success of her May ad, Osias ran a full-page ad in the July issue of the *New York Mortgage Press* to lure additional clients. The July advertisement, as one commentator described it, is predominated by a photograph of Osias in which she was

> draped across her desk, with a pencil suggestively held up to a mouth that is slightly parted, as it would be in a Playboy centerfold. Her long, blonde hair is draped over her shoulders, and her legs are bent and crossed behind her to show off her black, very high-heeled shoes. There is just enough cleavage showing to suggest there is much more where that came from.[7]

The caption above the photograph this time reads, "DOES THIS FIRM HAVE A REPUTATION?" with the answer below, "YOU BET IT DOES!!!"[8]

Osias's desk has also seen other action. In another ad, Osias is shown sprawled on her desk, wearing a miniskirt, with a caption asking readers to "Try this nonconforming law firm."[9] In fact, since 1995, Osias has run several additional trade publication advertisements featuring her scantily clad, in strikingly seductive poses, and accompanied by still more captions containing sexual double entendres.[10] In one such ad, as described in the *New Jersey Law Journal*, Osias is "dressed in a miniskirt and spiked heels, one leg propped up high by a stack of law books" with a caption declaring: "Anywhere . . . Anytime . . . Anyhow . . . Anybody . . . ANY POSITION . . . We are Ready . . . [in a smaller text font] to close your loan."[11] Another ad contains a caption reading: "You could have me . . . wherever you want me . . . whenever you want me . . . [again in a smaller font] to close your loans."[12] Finally, in perhaps her most scandalous advertisement of all, Osias is shown "wearing lingerie and using a rope to round up men dressed in underwear."[13]

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[7] Jay M. Jaffe, *Bold Ads Help Firms Position Themselves*, NAT'L L.J., Mar. 18, 1996, at B15.

[8] Wise, *supra* note 4, at 1; France, *supra* note 1, at A10.

[9] *Legal Ethics and Professional Responsibility: Advertising & Solicitation: County Bar Won't File Grievance Against Mortgage Attorney Who Ran Provocative Ads*, WEST'S LEGAL NEWS, Nov. 2, 1995, available in 1995 WL 910971 [hereinafter *Legal Ethics*].

[10] Osias points out that she plans on running her sexy ads "forever." Her ambition is to build her mortgage closing law firm into the largest in the country. *See Try This for Marketing Mortgage Services*, NAT'L MORTGAGE NEWS, Oct. 23, 1995, at 78.

[11] *Inadmissible*, 149 N.J. L.J. at 439 (Aug. 4, 1997), [hereinafter *Inadmissible*].

[12] *Id.*

[13] Tennen, *supra* note 1, at 8. The underwear ad prompted the New York Supreme Court's Grievance Committee for the Tenth Judicial District to send Osias a letter in April 1996 objecting that the ad "casts the legal profession in a negative light and invites both criticism and ridicule." *Inadmissible*, *supra* note 11, at 3. The

Not surprisingly, members of the bar lambasted Osias for adopting a marketing strategy that, they claim, degrades the legal profession.[14] The Nassau County Bar Association in New York even contemplated leveling disciplinary charges against her.[15] What is surprising, however, and even dumbfounding, in fact, is that the ads have been outrageously effective. According to Osias, her practice has enjoyed an 800% increase in business since she started running her sexually tantalizing ads.[16] Although Osias once handled just a few mortgage closings a week, her practice has swelled to more than fifty a week,[17] and Osias has had to hire several additional associates to handle the increased business.[18] As of August 1997, Osias's solo practice had burgeoned into a fifty-attorney practice spread over five locations.[19] One commentator remarked that Osias may have "devised the most successful advertising campaign in the entire history of the legal profession."[20] Perhaps the best proof of her success is an ad from a competing male lawyer appearing in the *New York Mortgage Report*, in which he poses topless behind a shower curtain while attempting to conceal himself, with a caption reading:

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committee claimed that the ad contains "extraneous content not designed to educate legal consumers to an awareness of legal needs or to provide information relative to the selection of appropriate counsel." *Id.* In July 1997, however, the grievance committee dropped its objections. *See id.* Immediately afterward, Osias issued a press release on the committee's decision, stating that her position was vindicated and "[l]awyers can now use plenty of cleavage and leg in advertising their law firms and their expertise." Greg Mitchell, *Bar Says Lawyer Focuses on Wrong Kind of Appeal*, THE RECORDER, Aug. 4, 1997, at 4.

[14] *See* Tennen, *supra* note 1, at 8 (noting attorneys' negative reaction to Osias's ads); *Legal Ethics*, *supra* note 9 (quoting the president of the Nassau County Bar Association who considered the ads to be "unseemly"); France, *supra* note 1, at A10 (reporting that Osias received mail from some people calling her a "whore" and a "prostitute," but also noting that "Osias clearly has won the hearts of the New York-area mortgage lending community").

[15] The president of the Nassau County Bar Association, William F. Levine, called Osias's ads "a disgrace that degrades the [legal] profession." Wise, *supra* note 4, at 1. Levine further asked, "Would it be appropriate for her to present herself in the nude? That's the next step, isn't it?" France, *supra* note 1, at A10. The Nassau County Bar, however, ultimately decided not to bring a grievance complaint against Osias, believing that it would be "fruitless." *See No Bar to the Sexy Ads*, DAILY NEWS (New York), Oct. 31, 1995, at 1. The bar was also concerned about bestowing further publicity upon Osias. *See* France, *supra* note 1, at A10.

[16] *See* Tennen, *supra* note 1, at 8.

[17] *See* France, *supra* note 1, at A10; *Legal Ethics*, *supra* note 9.

[18] *See* Wise, *supra* note 4, at 1. In October 1995, the *National Mortgage News* reported that Osias had hired seven new lawyers to meet increased demand for her services. *See Lawyer Raises Ire with "Suggestive" Marketing*, NAT'L MORTGAGE NEWS, Oct. 23, 1995, at 78. Ironically, all of the new lawyers were men. *See id.*

[19] *See Inadmissible*, *supra* note 11, at 3.

[20] France, *supra* note 1, at A10.

"I might not look as good in a bikini as other attorneys, but I do good loans."[21]

One may understandably wonder what prompted Osias to employ such sexually alluring advertisements to promote her real estate and mortgage-finance practice in the first place. Her choice of marketing strategy particularly is perplexing given that Osias, as a real estate and mortgage-banking lawyer, handles work for sophisticated clients who (presumably at least) would not be swayed, and, if anything, would be off-put by sexually alluring advertisements.[22] Yet, ironically, the conservative nature of the real estate industry was precisely what prompted Osias to resort to a sexually provocative message to generate business. Osias claims that she devised her advertising campaign as a means of breaking through the "glass ceiling"[23] of the "old boy's" network in the New York real estate market, an industry she describes as "completely male-dominated."[24] Osias retells of how, after spending several years relying on traditional networking strategies to generate business, including attending meetings and other real estate functions, she met with little success because, as she complains, the men form "cliques" and "they give each other the business."[25] To compound matters, some networking opportunities were not as available to Osias as they were to male

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[21] Tony Allen-Mills, *Trading on Her Assets*, SUNDAY TIMES (New York), Mar. 10, 1996, at 1.

[22] As one legal commentator explained: "For a corporate attorney, Ms. Osias has adopted a marketing strategy that has been, to say the least, adventurous. Conventional wisdom holds that business lawyers should surround themselves with imagery that suggests tradition, permanence and caution: portraits of the robed Lady Justice, say, or Greek Revival courthouses." France, *supra* note 1, at A10. Nevertheless, as the commentator noted, it appears "that bankers and mortgage brokers in the New York area may not be such a finicky group." *Id.* In any event, Osias knows that "her intended audience, bank executives, already were very well educated about legal services" and her ads are merely an attempt "to attract their attention." Judson Hand, *Sexually Suggestive Ads Worked for Woman Lawyer*, ASBURY PARK PRESS, Aug. 14, 1997, at A19.

[23] *See* France, *supra* note 1, at A10 (noting that Osias "portrays her advertising campaign as 'her way of punching through the glass ceiling'").

[24] *See* Wise, *supra* note 4, at 1.

[25] France, *supra* note 1, at A10 (reporting how Osias would attend real estate functions and meetings in order to generate business, but that it was all unsuccessful because, although she was familiar with members of the industry, she "didn't know the right people"); As Osias later explained on Cable News Network, "I was trying to represent banking institutions that are run by men and owned by men. I couldn't get through the door. They wouldn't hear my knock and to get their attention, I decided to attract what men like to look at and men like to look at beautiful, sexy women." *Lawyer Sells Sex Appeal* (Cable News Network Financial television broadcast, Dec. 23, 1997), available in WESTLAW, 1997 WL 2592047 [hereinafter *Lawyer Sells Sex*].

lawyers, such as golf outings, night club excursions, and even "table-dancing outings."[26] After years of frustration, and as a way to penetrate the "male-dominated industry," Osias decided to rely on her "assets as a woman and how I look to generate an interest and make men stop and talk about me."[27] Osias is unabashed in her belief that other women in the law also should use their "sexual weapons as assets" to "manipulate men"[28] to advance in their careers.[29]

Osias's sexy marketing strategy raises serious ethical questions regarding the limits of attorney advertising. The immediate question is whether Osias can be disciplined for her advertising campaign in light of the constitutional limits placed on the ability of states to regulate attorney marketing practices.[30] In addition to the ethical

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[26] *See* Wise, *supra* note 4, at 1. Indeed, the purpose behind Osias's May 1995 advertisement, which featured her in black leather pants, lying beside a hole on a putting green, holding the head of a golf club, and accompanied by the caption, "We Don't Play Golf . . . We're Too Busy Closing Your Loans," was to counteract a lost networking opportunity. France, *supra* note 1, at A10. The real estate industry's traditional golf tournaments are held in May, but Osias is not a golf enthusiast. *See id.* Rather than lose a valuable networking opportunity available to the male lawyers, Osias decided to go for the green by exploiting the golf theme of the men and combining it with a slightly seductive, slightly sexual theme of her own. *See id.*

[27] Wise, *supra* note 4, at 1. After she ran three or four of her ads, Osias claims that the "male bankers were falling over themselves to introduce themselves to her." *Sex No Object for Woman Lawyer; Provocative Ads Boosting Business*, THE RECORD (Hackensack, N.J.), Oct. 4, 1995, at A4. Osias is quick to point out, however, that to retain the clients she has attracted, she still has to provide quality legal services. *See id.* As Osias put it, "Maybe you can fool the consumer once, but you can't fool them twice . . . . If you don't perform, your reputation goes down very quickly. If you're good, word gets around." Hand, *supra* note 22, at A19.

[28] *Leggy Lawyers*, *supra* note 3, at 12.

[29] *See Inadmissible*, *supra* note 11, at 3 ("As a woman, you have to use your sexual weapons as assets. That is what is going to set you apart."); *see also License to Leer? Lawyer Will Continue Racy Ads*, A.B.A. J., Oct. 1997, at 14 (quoting Osias as saying, "I think female attorneys should market themselves visually . . . . They're not going to make money just being smart and having a J.D. in hand. It's OK as long as they deliver serious and good legal work"); James Bernstein, *Inside Stories: Lawyer's Upfront Views Not Popular in Business*, NEWSDAY, May 5, 1997, at C3 (quoting Osias's observation that, "The whole world revolves around sex. Sex sells. It always has . . . . It can be used, very effectively"); Allen-Mills, *supra* note 21, at 12 (quoting Osias as stating that, "To those who say they won't use their sex to get ahead, I say 'Why not? Why not?'"). Appearing on ABC's Good Morning America, Osias explained that while "men . . . control the world . . . [t]hey're vulnerable, they have a weakness. It's their sexuality. Play to it, use it, manipulate it to your advantage. There's nothing wrong with looking like a woman." *Sexy Dressing at Work*, on ABC GOOD MORNING AMERICA (ABC television broadcast, Apr. 15, 1998), available in WESTLAW, 1998 WL 4726213.

[30] The Nassau County Bar's decision to abstain from pursuing disciplinary actions against Osias highlights the difficulty of promoting standards in attorney advertising practices. *See supra* note 13.

considerations of her actions, however, Osias's ads also intensify the debate over whether the practice of law is a time-honored, venerable profession that demands certain professional conduct of its members, or whether it is simply a commercial pursuit — a business that is subject only to the constraints of business morality — or, perhaps, whether the practice of law is both.

This Article analyzes the ethical propriety of using sex to attract clients and explores the implications that such an advertising tactic may have for the practice of law, particularly as it respects the public's view of lawyers. Part I of the Article recounts the Supreme Court's creation, and subsequent expansion, of attorney advertising rights as part of its broader commercial speech jurisprudence. In light of the Supreme Court's recent decision in *Florida Bar v. Went For It, Inc.*,[31] Part II analyzes whether the Court is signaling a new, more restrictive approach toward attorney advertising rights. Part II also explores whether Osias can be disciplined for employing sexual themes to promote her law practice. Finally, Part III examines the central issue raised by Osias's ads, namely, whether law is a profession, merely a business, or a combination of both.

I. THE CREATION AND EXPANSION OF ATTORNEY ADVERTISING RIGHTS

Proscriptions against attorney advertising can be traced back to Medieval English rules of professional etiquette, which, although unwritten, were designed to protect the dignity of the legal profession.[32] The first statutory proscriptions, however, emerged in 1908, when the American Bar Association (ABA) adopted its Canons of Professional Ethics.[33] Canon 27 prohibited all forms of attorney advertising, save for customary professional cards.[34] The Model Code of Professional Responsibility superseded the Canons in 1970. The Model Code also provided for a blanket prohibition of attorney advertising on the ground that such advertising would commercialize the legal practice and undermine public confidence in the justice system.[35] One pertinent rule, Disciplinary Rule 2-101, banned advertising in any "public communications" media.[36]

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[31] 515 U.S. 618 (1995).

[32] *See* HENRY S. DRINKER, LEGAL ETHICS 23-24 (1953).

[33] *See* John Ratino, Note, *In re* R.M.J.*: Reassessing the Extension of First Amendment Protection to Attorney Advertising*, 32 CATH. U. L. REV. 729, 732 n.27 (1983).

[34] *See* A.B.A. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

[35] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9 (1976) (amended 1980).

[36] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1976).

The blanket suppression of attorney advertising soon came under attack by the Supreme Court. The traditional justifications advanced by the bar, which were rooted in a desire to protect the public from being misled,[37] gave way to First Amendment considerations.[38] In the mid-1970s, the Supreme Court carved out a sphere of constitutional protection for commercial speech beginning with its landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[39] the wellspring of the Court's modern commercial speech jurisprudence. In that case, consumers of prescription drugs brought suit to challenge the constitutional validity of a Virginia statute that deemed it unprofessional conduct for a licensed pharmacist to advertise or promote the price of any prescription drugs.[40] The Supreme Court expressly held, for the first time, that speech that merely proposes a commercial transaction is not so removed from any "exposition of ideas" and from "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," that it lacks all constitutional protection.[41]

In support of the advertising ban, the State of Virginia advanced a series of justifications. As the Court observed, these State interests were concerned principally with "maintaining a high degree of professionalism on the part of licensed pharmacists."[42] The State argued, for example, that aggressive price competition due to limitless advertising would make it impossible for pharmacists to

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[37] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-9 (1976) (amended 1980).

[38] The First Amendment provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

[39] 425 U.S. 748, 761 (1976). The Court's modern commercial speech jurisprudence runs contrary to its earlier statements regarding First Amendment protections for commercial speech. In *Valentine v. Chrestensen*, the Court proclaimed that pure commercial advertising is not protected by the First Amendment. *See* 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes . . . no restraint on government [when it comes to] purely commercial advertising.").

[40] *See Virginia State Bd. of Pharmacy*, 425 U.S. at 749-50. The consumers sought to enjoin the Virginia State Board of Pharmacy, as well as its individual members, from enforcing the statute, which provided, in part, that a licensed pharmacist in the state of Virginia is guilty of unprofessional conduct if he "'publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.'" *Id.* (quoting VA. CODE ANN. § 54-524.35 (Michie 1974)).

[41] *Id.* at 762 (citations omitted). Justice Blackmun, writing for the majority in *Virginia State Board of Pharmacy*, stated that simply because an advertiser's interest in a commercial advertisement is a "purely economic one" does not disqualify him from protection under the First Amendment. *See id.*

[42] *Id.* at 766.

provide professional services because of the resulting pressure to economize services, which would, in turn, adversely affect consumers' health.[43] The State also argued that advertising would tarnish the professional image of the pharmacist and reduce his status "to that of a mere retailer."[44]

The Supreme Court, however, rejected the State's paternalistic approach toward preserving professionalism among pharmacists.[45] Specifically, the Court found that the State's interest in protecting its citizens rested "in large measure on the advantages of their being kept in ignorance."[46] Although the prohibition on advertising did not affect professional standards "one way or the other," the Court found that the prohibition did promote public ignorance and insulate the pharmacist from price competition. Therefore, the prohibition allowed the pharmacist to profit excessively, even while providing inferior services.[47] Rather than sanction the State's "highly paternalistic approach," the Court found it more useful to assume that the information contained in advertisements "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."[48] While recognizing that the State has extremely wide latitude in demanding that pharmacists fulfill certain professional standards, the Court also made clear that a state may not suppress truthful drug-price information and thereby "[keep] the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[49] Thus, the Court declared the Virginia statute unconstitutional.[50]

As a more general matter, the Court emphasized that, in a largely free enterprise economy in which the allocation of resources is made primarily through private economic decisions, "the free flow of commercial information is indispensable."[51] Consumer decisions,

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[43] *See id.* at 767-68. The State also claimed that advertising would not necessarily lower the price of pharmaceutical drugs because the expense of advertising would actually inflate the cost of drugs. *See id.* at 768.

[44] *Id.* at 768. The State argued that by denigrating the professional image of the pharmacist, not only would there be a dearth of talented individuals attracted to the profession, but the "better habits" of those within the profession would no longer be reinforced. *See id.*

[45] *See id.* at 769 (rejecting the State's "highly paternalistic approach").

[46] *Virginia State Bd. of Pharmacy*, 425 U.S. at 769.

[47] *See id.* at 769-70.

[48] *Id.* at 770.

[49] *Id.*

[50] *See id.* at 773.

[51] *Id.* at 765.

the Court explained, must "be intelligent and well informed," and advertising, "however tasteless and excessive it sometimes may seem," contributes to the formation of those intelligent consumer decisions affecting resource allocation.[52] In fact, the Court noted that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[53]

Although *Virginia State Board of Pharmacy* was pivotal in creating a new sphere of First Amendment protection for commercial speech, the Court did not afford such speech full constitutional protection, and states retained significant authority to regulate fraudulent, deceptive, or misleading advertisements.[54] Furthermore, the Court specifically limited its holding to commercial advertising by pharmacists because other professions, particularly the legal profession, may involve distinctions, both historical and functional, that invoke different considerations.[55] Nevertheless, while limited in scope, *Virginia State Board of Pharmacy* did contain the Court's articulation of a new commercial speech jurisprudence under the First Amendment, a significant announcement considering that the Court had created a new species of free speech rights.

Although *Virginia State Board of Pharmacy* is the seminal case in the sphere of constitutional protection for commercial speech generally, the landmark case that extended limited First Amendment protection to attorney advertising is *Bates v. State Bar of Arizona*.[56] In *Bates*, two members of the Arizona Bar contravened the State's disciplinary rules, which prohibited advertising in newspapers and other media, when they advertised their fees for routine legal services

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[52] *Virginia State Bd. of Pharmacy*, 425 U.S. at 765.

[53] *Id.* at 763.

[54] *See id.* at 771-72. The First Amendment, the Court noted, does not prohibit states "from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 772. Thus, false or misleading speech could be regulated. *See id.* at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."). Following *Virginia State Board of Pharmacy*, states also retained the right to impose time, place, and manner restrictions on commercial speech, provided that the regulation (1) is content-neutral, (2) advances a significant governmental interest, and (3) leaves open alternative channels for communication of information. *See id.*

[55] *See id.* at 773 n.25. The Court noted that distinctions between the professions "may require consideration of quite different factors." *Id.* Doctors and lawyers, for example, "do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." *Id.*

[56] 433 U.S. 350 (1977).

in a local newspaper.[57] The attorneys had turned to advertising after they realized that their practice could not survive without public awareness of the availability of their services and their low-cost fees.[58] The issue in *Bates* was whether a state may prohibit attorneys from truthfully advertising the availability and terms of routine legal services.[59] The Supreme Court, in sustaining the attorneys' First Amendment challenge, rejected several justifications advanced by the Arizona State Bar in support of its ban. The State had argued, first, that advertising adversely affects professionalism because advertising commercializes the legal profession and tarnishes its public image.[60]

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[57] *See id.* at 354. The advertisement appeared in Phoenix's daily newspaper, the *Arizona Republic.* In the ad, the attorneys explain that they are offering "legal services at very reasonable fees," and they list their fees for certain legal services. *Id.*

[58] As the Court explained, the attorneys had just recently opened a law firm with the aim of providing low-cost legal services to persons of modest incomes. *See id.* Given their low prices, however, the attorneys had a low rate of return for each case handled, and consequently, in order to turn a profit, they depended on a relatively high volume of clients. *See id.* After practicing for two years, the attorneys eventually realized that if they did not advertise the availability of their services, including the specific fees they charged, they would not generate the volume necessary for their law firm to survive. *See id.* Thus, basic economic considerations were the primary impetus behind the decision to advertise legal services. In fact, the Court even speculated that the attorneys' law firm benefited from the advertising. *See id.* at 354 n.4. The precise value of the advertising, however, was uncertain because part of the increase in business was due also to increased publicity surrounding the decision to advertise. *See id.* As noted earlier, basic economic considerations were also the impetus behind Osias's decision to employ her sexually appealing marketing campaign. *See supra* notes 25-29 and accompanying text. As in *Bates*, however, it is also unclear how much of the increase in Oasis's business should be attributed to the increased publicity surrounding her decision to use sexual material to sell legal services.

[59] *See Bates*, 433 U.S. at 384. The attorneys conceded that their advertisement violated Disciplinary Rule 2-101(b), incorporated in Rule 29(a) of the Supreme Court of Arizona. *See id.* at 355. The disciplinary rule provided in pertinent part:

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

Id. at 355 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(b) (1976)).

[60] *See id.* at 368-72. As the Court recounted, several arguments were marshaled to support the State's claim that advertising would adversely affect the legal profession:

> The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need

Although recognizing and commending "the spirit of public service with which the profession of law is practiced and to which it is dedicated," the Court rejected the State's first argument because it "presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."[61] The Court also challenged the State's empirical basis for its argument on the grounds that it is not self-evident that advertising diminishes an attorney's reputation within the community.[62] Finally, the Court questioned the historical justification for a ban on advertising because the original prohibition grew up as a rule of etiquette, not a rule of ethics.[63] In any event, the Court observed that today, "the belief that lawyers are somehow 'above' trade has become an anachronism [and thus] the historical foundation for the advertising restraint has crumbled."[64]

The Supreme Court, in *Bates*, summarily rejected several other justifications proffered by the Arizona Bar, including claims that

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> to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

Id. at 368. Despite the reference to a lawyer's "need to earn," the State's arguments were grounded obviously on the supposition that the practice of law is indeed a profession and not merely some commercial endeavor akin to encyclopedia peddling. The public image of lawyers was a central concern of the State.

[61] *Id.* at 368. The Court's rationale in *Bates* clearly reflects the commercial nature of the attorney-client relationship. In fact, the Court also pointed out that the American Bar Association (ABA) itself advises an attorney to reach "a clear agreement with his client as to the basis of the fee charges to be made" and that this is to be done "[a]s soon as feasible after a lawyer has been employed." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1976). The Court found that the bar's own canon cuts against the argument in support of a ban on price advertising. *See Bates*, 433 U.S. at 368. The Court remarked that "[i]f the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office." *Id.* at 369.

[62] *See Bates*, 433 U.S. at 369. To the contrary, the Court observed that other professions, including banking, engineering, and possibly even medicine, do not regard advertising as inherently undignified. *See id.* at 370 & n.20. The Court suggested that, if anything, public disillusionment with lawyers is directly attributable to the *absence* of advertising in the legal profession. *See id.* at 370. The Court observed that "cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients." *Id.* at 370-71.

[63] *See id.* at 371.

[64] *Id.* at 371-72.

attorney advertising is inherently misleading,[65] that it adversely touches upon the administration of justice,[66] that it produces undesirable economic effects,[67] that it affects quality of service,[68] and that only a wholesale restriction could be effectively enforced.[69] Essentially, the Court rejected the paternalistic justification advanced by the Bar that the public needs protection from unscrupulous attorney practices. Rather, the Court determined that the public's need for access to legal information outweighs any of the reasons for suppressing attorney advertising. Indeed, in many ways, the Court's

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[65] *Id.* at 372-75. The State argued that attorney advertising is inherently misleading because (1) legal services are "so individualized with regard to content and quality" that informed comparisons are not possible in the context of an advertisement, (2) consumers of legal services cannot determine beforehand specifically what services they require, and (3) advertising is a medium that favors and highlights irrelevant factors to the exclusion of other, more important, information about the skills and quality of a particular attorney. *Id.* at 372. The Court's rejection of the State's arguments is consistent with the antipaternalism concerns of it earlier decisions, particularly *Virginia State Board of Pharmacy.* For example, the Court in *Bates* agreed that advertising has the potential to highlight irrelevant factors for consumers of legal services. *See Bates,* 433 U.S. at 372. Nevertheless, the Court found it "peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." *Id.* at 374. In other words, as in *Virginia State Board of Pharmacy,* the Court's decision in *Bates* exhibits a trust in the ability of consumers to evaluate information independently and to make informed decisions when selecting legal services.

[66] *See Bates,* 433 U.S. at 375-77. Specifically, the State argued that legal advertising would stir up undesirable litigation. *See id.* at 375. The Court accepted that advertising may increase litigation, yet at the same time could not accept the proposition that "it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 376.

[67] *See id.* at 377-78. The State argued that legal advertising would increase the overhead costs of attorneys, who, in turn, would pass those costs on to legal consumers in the form of higher legal fees. *See id.* at 377. The Court found this argument "dubious at best" and actually suggested that "advertising will service to reduce, not advance, the cost of legal services to the consumer." *Id.* The Court cited evidence suggesting that price advertising may have the effect of dramatically lowering prices. *See id.* at 377 n.35.

[68] *See id.* at 378-79. Although the Court recognized the need for quality legal services, it held that prohibitions "are an ineffective way of deterring shoddy work." *Id.* at 378.

[69] *See id.* at 379. The State had argued that only a wholesale restriction on legal advertising could be enforced. *See id.* In making this argument, the State noted that the public lacks sophistication with respect to legal matters, and thus the public would be highly susceptible to misleading or deceptive advertising. *See id.* The Court, however, rejected this argument, finding it incongruous "to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Id.* A wholesale ban on advertising, therefore, was not justified simply because a few attorneys might overreach the bounds of ethics in order to mislead the public. *See id.*

bias against paternalism in *Bates* simply reflects its reasoning in *Virginia State Board of Pharmacy*, in which the Court found that consumers' right to receive pricing information on pharmaceutical drugs overrides the State's interest in preserving the professionalism of pharmacists.[70]

As in *Virginia State Board of Pharmacy*, the Court's rhetoric in *Bates* seems to reflect an inherent trust that the consumer will make an informed choice when presented with commercial information. The Court stated that assumptions about consumers' lack of sophistication rest on an "underestimation of the public."[71] In an apparently conflicting statement later in its opinion, however, the *Bates* Court noted that "the public lacks sophistication concerning legal services."[72] Perhaps, then, for this reason, the Court emphasized the narrowness of its holding.[73] The Court did not imply that attorney advertising may never be regulated. On the contrary, pursuant to the Court's decision, states retained significant regulatory authority to restrict false, deceptive, or misleading advertising.[74] Beyond that, however, the scope of permissible state regulation of attorney advertising was left uncertain. In particular, the *Bates* Court expressly declined to address certain issues, including claims about the quality of legal services and in-person solicitation of clients.[75]

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[70] *See Virginia State Bd. of Pharmacy*, 425 U.S. at 765-67.

[71] *See Bates*, 433 U.S. at 375.

[72] *Id.* at 383. In seeming opposition to its earlier observation, the Court stated that "because 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." *Id.*

[73] *See id.* (emphasizing that the Court was not holding that attorneys could not be regulated in any way).

[74] *See id.* (citing *Virginia State Bd. of Pharmacy*, 425 U.S. at 771-72 & n.24). Then-Justice Rehnquist, however, completely disagreed with the majority's holding in *Bates* regarding First Amendment issues. *See id.* at 404 (Rehnquist, J., dissenting). In a sharp dissent, Justice Rehnquist wrote that the First Amendment's speech provision, "long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services." *Id.* Justice Rehnquist adhered to his view that "appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect." *Id.*

[75] *See id.* at 366. The former question, quality of legal services, was explored in *In re R.M.J.*, 455 U.S. 191 (1982), while the latter question, in-person solicitation, was addressed in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In the wake of *Bates*, an ABA task force promulgated two proposed amendments to DR 2-101 of the Code to bring ethical regulations governing lawyers in line with the Court's constitutional standards. The first proposal, Proposal A, was a "regulatory" approach, also known as the "laundry list" approach, that specifically provided a catalogue of information that an attorney could permissibly place in an advertisement. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (Proposal A Discussion Draft 1977). Among

The mid-1970s was the critical First Amendment wellspring for both commercial speech in general and attorney advertising in particular. *Bates*, of course, was only the beginning of this line of case law. Within a year of *Bates*, the Court decided *In re Primus*,[76] in which the Court held that an attorney with the American Civil Liberties Union (ACLU), who had previously met with potentially aggrieved individuals to advise them of their legal rights, could not be disciplined for writing a subsequent follow-up letter to such individuals informing them that the ACLU offered free legal services.[77]

Subsequently, in 1980, the Supreme Court continued to refine its new commercial speech jurisprudence in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[78] a nonlawyer advertising case

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the designated items were name, field of practice, birth date, date of admission to the bar, and so forth. *See id.* Conversely, Proposal B was a "directive" approach, which only prohibited "false, fraudulent, misleading, or deceptive" advertising. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (Proposal B Discussion Draft 1977). While the meaning of these terms was not definitively set forth, Proposal B did provide, for example, that an advertisement would be misleading if it appealed "primarily to a layperson's fear, greed, desire for revenge, or similar emotion." *Id.* As such, Proposal B was a more liberal approach to attorney advertising. In the end, however, the ABA adopted Proposal A. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1983). Thus, *Bates*, as well as its progeny, brought substantial changes to the bar's approach to its disciplinary rules.

[76] 436 U.S. 412 (1978).

[77] *See id.* at 414-17, 439. In *Ohralik v. Ohio State Bar Ass'n*, however, the companion case to *Primus*, the Court held that a state could constitutionally discipline an attorney for in-person solicitation of clients for pecuniary gain, in this case, the in-person solicitation of accident victims. *See* 436 U.S. 447, 467 (1978). Although stating that in-person solicitation serves a function similar to newspaper advertising, the Court was able to distinguish this situation from *Bates*. *See id.* at 455. The Court explained that, while in-person solicitation informs consumers about the availability and terms of an attorney's proposed legal services, unlike newspaper advertising, it "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection." *Id.* at 457. Indeed, "the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person." *Id.* at 465. In-person solicitation may actually disserve potential consumers of legal services, thus running counter to the interest identified by the Court in *Bates* of "facilitating 'informed and reliable decisionmaking.'" *Id.* at 458 (quoting *Bates*, 433 U.S. at 364). Thus, the Court held that states have "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. The Court also recognized the states' broader responsibility to maintain standards among members of licensed professions. *See id.* at 460. This is especially true of lawyers who, while "self-employed businessmen," also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes." *Id.* (citing Cohen v. Hurley, 366 U.S. 117, 124 (1961)).

[78] 447 U.S. 557 (1980).

in which the Court formulated a four-prong test for evaluating governmental restrictions on commercial speech:

> (1) The speech must not be misleading and it must concern lawful activity;
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> (2) the asserted state interest promoted by the restriction must be substantial;
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> (3) the restriction must directly advance the asserted state interest; and
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> (4) the restriction must not be more extensive than necessary to serve the asserted state interest.[79]

A few years later, in *In re R.M.J.*,[80] the Court had its first opportunity to apply the *Central Hudson* test in the attorney-advertising context. The Committee on Professional Ethics and Responsibility of the Supreme Court of Missouri, as did many states in response to *Bates*, amended its attorney-advertising regulations to permit limited lawyer advertising to satisfy constitutional standards under the First Amendment.[81] The Missouri rule, however, was still restrictive in that it only permitted lawyer advertising in three limited print forums: newspapers, periodicals, and the yellow pages of telephone directories.[82] Moreover, advertising was restricted to certain categories of information and, possibly, certain specified language.[83]

In a unanimous opinion written by Justice Powell, the Supreme Court applied the *Central Hudson* test and ruled that the Missouri advertising restrictions, as applied to the attorney's advertisements in

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[79] *See id.* at 566. Later, in *Board of Trustees of the State University of New York v. Fox*, the Court modified the fourth prong of the *Central Hudson v. Public Service Commission* test to require only a "reasonable fit" between the asserted state interest and the restriction on commercial speech, rather than the least restrictive means available. *See* 492 U.S. 469, 480 (1989). This, in effect, adopted an intermediate scrutiny standard for evaluating commercial speech regulations.

[80] 455 U.S. 191 (1982).

[81] *See id.* at 193.

[82] *See id.* at 194 (citing MO. REV. STAT., Sup. Ct. Rule 4, DR 2-101(B) (1978)).

[83] *See id.* (citing MO. REV. STAT., Sup. Ct. Rule 4, DR 2-101(B) (1978)). The categories of information to which advertising was limited included: "name; address and telephone number; areas of practice; date and place of birth; schools attended; foreign language ability; office hours; fee for initial consultation; availability of a schedule of fees; credit arrangements; and the fixed fee to be charged for certain specified 'routine' legal services." *Id.* In addition, if a lawyer intended to list his areas of practice in an advertisement, he was required to use either general descriptive terms (specified in the Missouri rule), such as "General Civil Practice" or "General Criminal Practice," or choose from a list of twenty-three areas of practice provided, such as "Tort Law" or "Family Law." *See id.* at 194-95.

this case, were unconstitutional.[84] Justice Powell explained that Missouri had failed to show that the attorney's listing of practice areas was in any way misleading and had also failed to identify any substantial governmental interest justifying the restriction upon attorney speech.[85] While states may prohibit misleading advertising altogether, the Court found no evidence in the record demonstrating that Missouri's absolute ban on advertising was necessary to protect against potentially misleading information, such as listing legal practice areas, when such information can be presented in a nondeceptive manner.[86]

The Court, however, did find "[s]omewhat more troubling" that portion of the attorney's advertisements that indicated, in large capital letters, that he was a member of the Bar of the Supreme Court of the United States.[87] As Justice Powell stated, such a statement potentially could mislead members of the general public who are unfamiliar with the requirements for admission to the Supreme Court.[88] At the very least, "[t]he emphasis of this relatively uninformative fact is . . . in bad taste."[89] Nevertheless, the Court sustained the attorney's argument because there was no evidence in the record demonstrating that such information actually was misleading.[90] Thus, despite some concern over potentially distasteful attorney advertisements, the Court's *In re R.M.J.* decision further expanded the scope of First Amendment rights for attorneys.

Just three years after *In re R.M.J.*, the Court again examined, and again expanded, attorney advertising rights. In *Zauderer v. Office of Disciplinary Counsel*,[91] the Court addressed whether a state could

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[84] *See id.* at 205. The attorney's advertisements appeared in several local newspapers and in the yellow pages of the local telephone directory. *See id.* at 196. The advertisements included information concerning the states in which the attorney was licensed to practice. *See id.* at 197. The advertisements also contained a statement, presented in large capital letters, that the attorney was "Admitted to Practice Before THE UNITED STATES SUPREME COURT." *Id.* In addition, the attorney's advertisements listed practice areas in a manner that was in contravention of Missouri's restrictions on lawyer advertising. *See id.* For example, the advertisements included language such as "personal injury" and "real estate" rather than "tort law" or "property law." *See id.* Finally, as the Court observed, the attorney's advertisements failed to include a disclaimer of certification of expertise that was required after the list of practice areas. *See id.*

[85] *See id.* at 205.

[86] *See In re R.M.J.*, 455 U.S. at 203.

[87] *See id.* at 205.

[88] *See id.*

[89] *Id.*

[90] *See id.* at 205-06.

[91] 471 U.S. 626 (1985).

discipline attorneys for running a newspaper advertisement featuring nondeceptive illustrations and legal advice.[92] In that case, an Ohio attorney ran a small ad in a Columbus newspaper offering legal representation to defendants in drunk-driving cases, as well as the return of "legal fees" if the client was convicted.[93] To attract additional clients a year later, the attorney placed advertisements in several Ohio newspapers containing a line-drawing of the Dalkon Shield and offering legal services to women injured as a result of using the birth control device.[94]

The Ohio Office of Disciplinary Counsel brought charges against the attorney alleging that his drunk-driving ad was false and misleading because it offered representation to criminal defendants on a contingent-fee basis — a violation of Ohio disciplinary rules.[95] The complaint also alleged that the Dalkon Shield ads violated several Ohio disciplinary rules, including (1) the rule prohibiting the use of illustrations in attorney advertisements, requiring advertisements to present information in a "dignified manner," and limiting the information permissible in an advertisement to twenty enumerated items;[96] (2) the rule against self-recommendation;[97] and (3) the rule against accepting employment resulting from unsolicited legal advice.[98] The Dalkon Shield ads also were alleged to be

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[92] *See id.* at 629. The Court also addressed the question of whether a state may require attorneys to disclose in their advertisements certain information regarding fee arrangements in order to prevent potential deception of the public. *See id.*

[93] *See id.* at 629-30.

[94] *See id.* at 631. As the Court noted, the attorney's ambitious advertisement did its job: it attracted numerous clients. *See id.* The attorney received over 200 inquiries because of the advertisements, and over 100 of those inquiries resulted in lawsuits on behalf of injured women. *See id.* Of course, the advertisements also attracted the attention of the Office of Disciplinary Counsel, which brought disciplinary action against the attorney. *See id.*

[95] *See id.* Specifically, the complaint alleged that because the attorney's ad offered representation to criminal defendants on a contingent fee basis, an offer that is prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility, it therefore violated DR 2-101(A) as "false, fraudulent, misleading, and deceptive to the public." *Id.*

[96] *See id.* at 632 (noting that complaint alleged a violation of Ohio Disciplinary Rule 2-101(B)).

[97] *See Zauderer*, 471 U.S. at 633. Specifically, the complaint charged the attorney with violating DR 2-103(A), which prohibited an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." *Id.*

[98] *See id.* at 633. The attorney was charged with violating DR 2-104(A), which prohibited "[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action [from] accept[ing] employment resulting from that advice." *Id.*

deceptive for failing to inform clients that they still could be liable for "costs," as opposed to "legal fees."[99]

Applying the *Central Hudson* test, the Court first addressed whether the attorney could be disciplined for contravening Ohio's rules against self-recommendation and solicitation. The Court noted that, because the Office of Disciplinary Counsel had stipulated that information about the Dalkon Shield contained in the advertisement was neither false nor misleading, Ohio's power to prohibit inherently misleading attorney advertisements did not extend to this case.[100] Given the accuracy of the attorney's advertisement, the Court held that Ohio could not demonstrate that its prohibition directly advanced a substantial governmental interest.[101] The Court rejected the State's argument that its restrictions on attorney advertising advanced the same governmental interests that were found sufficient to uphold the prophylactic rule on in-person solicitation by lawyers in *Ohralik v. Ohio State Bar Ass'n.*[102] Unlike the practice of in-person solicitation for pecuniary gain, which the Court in *Ohralik* found to be "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,"[103] the Court explained that print advertising poses much less of a risk of overreaching because it generally "lack[s] the coercive force of the personal presence of a trained advocate."[104] Although the Court admitted that "some sensitive souls may have found [the attorney's advertising] in poor taste," that fact was not sufficient to implicate the concerns motivating the Court's decision in *Ohralik.*[105]

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[99] *See id.* Importantly, however, the complaint never alleged that the Dalkon Shield drawing itself was false or misleading. In fact, the Office of Disciplinary Counsel stipulated that the drawing was an accurate representation of the birth control device. *See id.* at 634.

[100] *See id.* at 639-40 (noting that the attorney's advertisement merely "reported the indisputable fact that the Dalkon Shield has spawned an impressive number of lawsuits and advised readers that [the attorney] was currently handling such lawsuits and was willing to represent other women asserting such claims").

[101] *See id.* at 641.

[102] *See id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).

[103] *Zauderer*, 471 U.S. at 641 (citing *Ohralik*, 436 U.S. at 464-65).

[104] *Id.* at 642. Indeed, the Court observed that "a printed advertisement is a means of conveying information about legal services that is more conducive to reflection and the exercise of choice on the part of the consumer than is personal solicitation by an attorney." *Id.*

[105] *Id.* The Court also rejected "the traditional justification for restraints on solicitation, the fear that lawyers will 'stir up litigation,'" as sufficient to impose discipline on the attorney in this case. *Id.* The State further argued that a prophylactic rule against legal advice and information in attorney advertisements was necessary given the "regulatory difficulties" associated with such advertising. *See id.* at 643. The Court, however, argued that such a prophylactic rule is not narrowly

The Court similarly rejected Ohio's justification for prohibiting the use of illustrations and pictures in attorney advertising.[106] It was unclear to the Court how application of this rule to attorney advertising directly advanced the State's interest in preserving the dignity of attorneys given the absence of any claim that the Dalkon Shield advertisements were somehow undignified.[107] Although acknowledging that the State possesses significant regulatory authority to ensure that dignity and decorum are preserved among attorneys in the courtroom, the Court expressly questioned whether the State's interest in ensuring that attorneys maintain dignity in their communications with the public is substantial enough to justify curtailing attorneys' First Amendment rights.[108]

Ohio argued that its restrictions on illustrations were necessary because "[a]buses associated with the visual content of advertising are particularly difficult to police, because the advertiser is skilled in subtle uses of illustrations to play on the emotions of his audience and convey false impressions."[109] The Court rejected, however, the State's arguments as completely unproven.[110] If anything, the Court

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crafted to serve the State's purpose, as required by *Central Hudson*. *See id.* at 644. The Court noted that a state may not absolutely prohibit certain attorney advertisements simply because they have the potential to be misleading. *See id.*

Justice O'Connor, however, dissented from the Court's holding, which struck down Ohio's rule against accepting employment resulting from unsolicited legal advice. *See id.* at 673-80 (O'Connor, J., dissenting). For Justice O'Connor, Ohio's rule was justified due to the risk of overreaching and undue influence from the use of unsolicited legal advice to attract clients. *See id.* at 673. Justice O'Connor noted that professional services are "complex and diverse" and that, prior to hiring an attorney, members of the general public often lack the information needed to assess the quality of legal services. *See id.* at 674. Moreover, the Justice opined, attorneys themselves are not disinterested and may often attempt to present information in an incomplete or prejudiced fashion. *See id.*

[106] *See id.* at 647.

[107] *See id.* ("There is, of course, no suggestion that the illustration actually used by appellant was undignified.").

[108] *See id.* at 647-48. At the very least, a prophylactic rule could not be justified in the absence of any evidence showing that undignified behavior was prevalent among attorneys in their communications with the public. *See id.* at 648. The Court added that "the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it." *Id.* Moreover, the Court concluded, "The same must hold true for advertising that some members of the bar might find beneath their dignity." *Id.*

[109] *Zauderer*, 471 U.S. at 648. The State added that because "illustrations may produce their effects by operating on a subconscious level, . . . it will be difficult for the State to point to any particular illustration and prove that it is misleading or manipulative." *Id.* Thus, the State claimed that a prophylactic rule was necessary to advance the State's interest in ensuring that the public was not misled, manipulated, or confused. *See id.*

[110] *See id.* ("[N]owhere does the State cite any evidence or authority of any kind

suggested, illustrations in attorney advertisements are *less* likely to lead to deception or misrepresentation than are illustrations in other types of advertisements given that "decisions regarding consumption of legal services are [rarely] based on a consumer's assumptions about qualities of the product that can be represented visually."[111] Thus, the Supreme Court concluded that Ohio could not discipline the attorney for his accurate and nondeceptive Dalkon Shield illustration.[112]

Notably, the Court's *Zauderer* decision drew an important dissent by Justice O'Connor, who staunchly maintained that "state regulation of professional advice in advertisements is qualitatively different from regulation of claims concerning commercial goods and merchandise, and is entitled to greater deference than the majority's analysis would permit."[113] To Justice O'Connor, because there was a clear difference between lawyers, who provide professional services to individual clients, and commercial vendors, who simply supply standardized consumer products to the general public, states could "understandably require more" of the former than the latter.[114] Justice O'Connor noted that "[t]he legal profession has in the past been distinguished and well served by a code of ethics which imposes certain standards beyond those prevailing in the marketplace and by a duty to place professional responsibility above pecuniary gain."[115] Although acknowledging the view of some that professionalism has been abandoned in the practice of law, Justice O'Connor nevertheless maintained that states could demonstrate a substantial

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for its contention that the potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban.").

[111] *Id.* at 649.

[112] *See id.* The Court, however, did uphold Ohio's rule requiring attorneys who advertise their services on a contingent fee basis to disclose in their ads that clients may still be liable for costs even if their lawsuits are ultimately unsuccessful. *See id.* at 652. The attorney's advertisement in *Zauderer* informed potential clients that they would not be liable for legal fees if their cases were not successful. *See id.* The ad, however, did not distinguish between "legal fees" and "costs." *See id.* The Court found this problematic because the public is generally unaware of the distinction between "legal fees" and "costs," and consumers reading the attorney's advertisement might believe that if they employed the attorney they would not incur any charges whatsoever, which, of course, is not entirely true. *See id.* Given the potential for deception from such incomplete advertising, the Court upheld Ohio's requirement that attorneys must disclose information regarding a client's responsibility for costs. *See id.* at 653.

[113] *Id.* at 676 (O'Connor, J., dissenting).

[114] *See id.* (noting that "[l]awyers are professionals, and as such they have greater obligations").

[115] *Zauderer*, 471 U.S. at 677 (O'Connor, J., dissenting).

governmental interest in preserving stringent disciplinary rules with respect to attorneys.[116] Despite Justice O'Connor's dissent, however, the majority significantly expanded attorney advertising rights in *Zauderer*, an expansion that afforded little weight to Justice O'Connor's concerns about maintaining professionalism in the legal profession.

Just three years after *Zauderer*, the Supreme Court once again broadened attorney solicitation rights, and once again Justice O'Connor dissented. In *Shapero v. Kentucky Bar Ass'n*,[117] the Court held that states could not categorically prohibit lawyers from sending, for pecuniary gain, direct-mail solicitations to potential clients facing particular legal problems when the targeted letters were neither false nor deceptive.[118] The Court distinguished this case from *Ohralik* by rejecting the suggestion that targeted, direct-mail solicitations pose the same risk of overreaching and undue influence as does in-person solicitation by lawyers.[119] Rather, the Court found targeted letters more analogous to print advertisements that easily can be ignored, discarded, or considered at a later time.[120] The Court found, therefore, that a complete ban on targeted, direct-mail solicitations could not be justified, despite the fact that less restrictive means of regulation afforded greater opportunity for abuse by some lawyers.[121]

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[116] *See id.*

[117] 486 U.S. 466 (1988).

[118] *See id.* at 479-80. *Shapero* involved a Kentucky attorney who applied to the Kentucky Attorneys Advertising Commission for approval of a letter he wanted to send to persons against whom a foreclosure suit had been filed. *See id.* at 469. The letter warned potential clients that, because they could lose their homes, they should call the attorney for help against creditors. *See id.* The attorney added in the letter that "[i]t may surprise you what I may be able to do for you. Just call and tell me that you got this letter." *Id.* The Kentucky Attorneys Advertising Commission, however, refused to approve the letter. *See id.* Although it did not find the letter false or misleading, the Commission denied approval because the letter ran afoul of the then-existing Kentucky Supreme Court Rule prohibiting the mailing of written advertisements "'precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.'" *Id.* at 469-70 (quoting KY. SUP. CT. R. 3.135(5)(b)(i)).

[119] *See id.* at 475 (stating that the "suggestion that this case is merely '*Ohralik* in writing' misses the mark"). The Court, however, did express greater hesitancy toward letters that are personalized to particular individuals, as opposed to those that are merely targeted. *See id.* at 476. The Court stated that personalized letters "present[ ] an increased risk of deception . . . . [and] could, in certain circumstances, lead the recipient to overestimate the lawyer's familiarity with the case or could implicitly suggest that the recipient's legal problem is more dire than it really is." *Id.*

[120] *See id.* at 475-76.

[121] *See id.* at 476. The Court also rejected the argument that the attorney's letter was overreaching and thus not protected by the First Amendment. *See id.* at 478. The Court observed that the attorney's letter contained certain devices to attract the

Justice O'Connor again dissented in *Shapero*, but this time in an even more assertive fashion.[122] The Justice severely criticized the Court's attorney-advertising jurisprudence, claiming that it rested on the defective analogy that professional legal services are no different from standardized consumer products.[123] Justice O'Connor observed that, in soliciting potential clients, an attorneys' professional judgment is prone to corruption if the attorney is motivated by pecuniary gain.[124] And yet, for Justice O'Connor, a distinguishing feature of membership in the legal "profession" is the "ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."[125]

Justice O'Connor explained that restrictions on advertising and solicitation serve as daily reminders to practicing attorneys that they should not treat their membership in the legal profession as merely some "trade or occupation like any other."[126] For Justice O'Connor, highly stringent disciplinary rules on attorney advertising "can continue to play an important role in preserving the legal profession as a genuine profession."[127] The Justice's dissent closed in prophetic fashion, predicting that time would most likely reveal the folly of a constitutional theory that is wholly insensitive to the concerns of professionalism among members of the bar.[128]

Justice O'Connor's prediction was realized in 1995, at least partially, when, in *Florida Bar v. Went For It, Inc.*,[129] the Supreme Court

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reader, including the "liberal use of underscored, uppercase letters" and the inclusion of subjective assertions. *Id.* Obviously, the Court noted, "The pitch or style of a letter's type and its inclusion of subjective predictions of client satisfaction might catch the recipient's attention more than would a bland statement of purely objective facts in small type." *Id.* at 479. The Court concluded, however, that the attorney's letter was truthful and nondeceptive, and thus the State could claim no substantial interest in prohibiting such solicitations outright. *See id.*

[122] *See id.* at 480-91 (O'Connor, J., dissenting).

[123] *See Shapero*, 486 U.S. at 487 (O'Connor, J., dissenting) ("The roots of error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations.").

[124] *See id.* at 486 (O'Connor, J., dissenting).

[125] *Id.* at 488-89 (O'Connor, J., dissenting). As Justice O'Connor explained, "Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service . . . ." *Id.* at 489 (O'Connor, J., dissenting).

[126] *Id.* at 490 (O'Connor, J., dissenting).

[127] *Id.* at 491 (O'Connor, J., dissenting).

[128] *See id.*

[129] 515 U.S. 618 (1995).

upheld a thirty-day ban on direct-mail solicitations during which, following an accident, attorneys could not solicit personal injury and wrongful death clients.[130] Florida had amended its lawyer advertising rules in late 1990 to institute the thirty-day ban based on the completion of a two-year study by the Florida Bar showing the effects of attorney advertising on public opinion.[131] A Florida attorney and his lawyer referral service, Went For It, Inc., intended to send targeted solicitations to accident victims or their survivors within thirty days of an accident and thus challenge Florida's regulation under the First Amendment.

Justice O'Connor, this time writing for a majority of the Court, upheld under *Central Hudson* the thirty-day ban.[132] Florida argued that it had a substantial interest in protecting the public against "intrusive" direct-mail solicitations, which disrupt "the privacy and tranquility" of accident victims during sensitive periods and commensurately tarnish the reputation of the legal profession as a whole.[133] The thirty-day ban was, therefore, an attempt "to protect the flagging reputation of Florida lawyers by preventing them from engaging in conduct that . . . 'is universally regarded as deplorable and beneath common decency because of its intrusion upon the special vulnerability and private grief of victims or their families.'"[134] Justice O'Connor had "little trouble crediting the Bar's interest as substantial"[135] because the Court previously had identified the States' interest in protecting the privacy and tranquility of citizens as substantial and the States' interest in regulating the practice of professions as compelling.[136]

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[130] *See id.* at 635.

[131] *See id.* at 620. As the Court noted, the two-year study was extensive and included hearings, surveys, and reviews of public commentary. *See id.*

[132] *See id.* at 623-35.

[133] *See id.* at 624-25.

[134] *Id.* at 625.

[135] *Went For It*, 515 U.S. at 625. As Justice O'Connor noted later in her opinion, "The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered." *Id.* at 635.

[136] *See id.* at 625. Justice O'Connor cited *Goldfarb v. Virginia State Bar*, in which the Court recognized that "States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." 421 U.S. 773, 792 (1975). Justice O'Connor also quoted the well-accepted proposition from *Edenfield v. Fane* that "'the protection of potential clients' privacy is a substantial state interest.'" *See Went For It*, 515 U.S. at 625 (quoting Edenfeld v. Fane, 507 U.S. 761, 769 (1993)).

The Court further concluded that the thirty-day ban also directly and materially advanced the State's interests, thus satisfying the next prong of the *Central Hudson* test.[137] Justice O'Connor distinguished *Edenfield v. Fane*,[138] in which the Court struck down under the First Amendment a Florida prohibition on in-person solicitation by certified public accountants (CPAs).[139] Unlike *Edenfield*, in which the State had offered no evidence that in-person solicitation by CPAs posed a threat of fraud or overreaching, Florida, in this case, had submitted a two-year, 106-page study substantiating its claims that direct-mail solicitations by lawyers immediately following accidents intrudes on potential clients' privacy and tarnishes the image of the legal profession.[140] Indeed, a critical component of Florida's successful defense of its thirty-day ban, as divined from Justice O'Connor's majority opinion, was the evidence assembled by the State specifically demonstrating actual harm stemming from direct-mail solicitations of accident victims.[141] Unlike the rule in *Edenfield*,

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[137] *See Went For It*, 515 U.S. at 626. Justice O'Connor emphasized that "'mere speculation or conjecture'" cannot satisfy the state's burden of showing that its regulation advances its interest in a direct and material way. *See id.* (quoting *Edenfield*, 507 U.S. at 770). Rather, the state must actively "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*

[138] 507 U.S. 761 (1993).

[139] *See id.* at 777.

[140] *See Went For It*, 515 U.S. at 626-28. As Justice O'Connor noted, Florida's study contained both statistical and anecdotal evidence. *See id.* at 626. On the statistical side, the State produced a random survey of Florida adults, which revealed that Floridians as a whole have negative feelings toward attorneys who employ direct-mail advertising to solicit clients. *See id.* at 626-27. The survey indicated that more than half of the general population considered it a violation of their privacy for attorneys to contact individuals concerning accidents. *See id.* at 627. Specifically, Justice O'Connor found it "significant" that 27% of individuals who had actually received direct-mail advertising from lawyers in the past "reported that their regard for the legal profession and for the judicial process as a whole was 'lower' as a result of receiving the direct mail." *Id.* at 627.

The State also produced voluminous anecdotal evidence demonstrating that many Floridians were highly critical of direct-mail soliciting by attorneys in the wake of accidents. *See id.* The study even included excerpts of complaints from individuals who had received direct-mail solicitations from lawyers. *See id.* Justice O'Connor noted that one recipient reported "how he was 'appalled and angered by the brazen attempt' of a law firm to solicit him by letter shortly after he was injured and his fiancée was killed in an auto accident." *Id.* (quoting summary of record of Florida study). Another recipient found it "despicable" and "inexcusable" that a Pensacola lawyer wrote to the recipient's mother three days after his father's funeral. *See id.*

[141] *See id.* at 628-29. Justice O'Connor further noted that the court of appeals' reliance upon *Shapero* to invalidate the Florida thirty-day ban was erroneous for several reasons, including the fact that the State in *Shapero* had not advanced any evidence justifying its regulation. *See id.* at 629. Unlike the present case, the Court

this restriction was specifically aimed at "a concrete, nonspeculative harm."[142] As Justice O'Connor explained, the Florida Bar was not targeting offensive direct-mail advertisements in the abstract,[143] but rather, was "concerned . . . with the demonstrable detrimental effects that [sending offensive direct-mail solicitations just days following an accident] has on the profession it regulates."[144]

Finally, Justice O'Connor found that Florida had chosen reasonable means to advance its governmental interests, thus satisfying the final prong of the *Central Hudson* test.[145] The Justice explained that the thirty-day ban left several alternative channels available to attorneys for communicating with the public.[146] As a result, the Court upheld Florida's thirty-day, direct-mail solicitation ban.

Court observers have predicted that *Went For It* heralds a major change in the Court's approach toward attorney advertising.[147] In

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explained, *Shapero* did not deal with a state regulation defended on privacy grounds, nor did it deal with a blanket prohibition on direct-mail solicitations. *See id.* Moreover, "the State in *Shapero* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail." *Id.* Rather, the State in *Shapero* attempted to justify its regulation "on the basis of blanket, untested assertions of undue influence and overreaching." *Id.* Justice O'Connor found "the Court's perfunctory treatment of privacy in *Shapero* to be of little utility in assessing [Florida's] ban on targeted solicitation of victims in the immediate aftermath of accidents . . . . [because it] targets a different kind of intrusion." *Id.* at 630.

[142] *Id.* at 629.

[143] For example, Justice O'Connor distinguished *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), in which the Court struck down the federal government's attempt to ban potentially offensive direct-mail advertisements for contraceptives. *See Went For It*, 515 U.S. at 631. The Court in *Bolger* stated that citizens whose sensibilities might be offended by contraceptive advertisements could simply avert their eyes and throw such mail into the trash, thus avoiding any injury arising from the delivery of such advertisements. *See id.* (citing *Bolger*, 463 U.S. at 72). In contrast, the Justice opined, the harm flowing from the receipt of a direct-mail solicitation immediately following an accident cannot be minimized simply by throwing the letter away. *See id.* Justice O'Connor rejected *Bolger* as a basis "for dismissing the [Florida] Bar's assertions of harm, particularly given the unrefuted empirical and anecdotal basis for the Bar's conclusions." *Id.* at 631-32.

[144] *Went For It*, 515 U.S. at 631. As the State articulated, the main purpose behind the thirty-day ban was to protect Floridians against "crass commercial intrusion by attorneys upon their personal grief in times of trauma." *Id.* at 630.

[145] *See id.* at 632. The *Central Hudson* test, as amended by *Board of Trustees of The State University of New York v. Fox*, only requires a "reasonable" fit between the state's interest and the means chosen to advance its interest, rather than a perfect fit as required by the "least restrictive means" test. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 492 U.S. 469, 480 (1989).

[146] *See Went For It*, 515 U.S. at 634.

[147] *See, e.g.*, Jodi Vanderwater, Note, Florida Bar v. Went For It: *Restricting Attorney Advertising to Preserve the Image of the Legal Profession*, 27 LOY. U. CHI. L.J. 765, 799 (1996) (noting that *Went For It* "marks the beginning of a new era for attorney

fact, some commentators claim that the decision "revive[s] the idea, largely dormant since *Bates*, that the image of the legal profession can justify regulation of lawyer advertising."[148] At the very least, some suggest, the decision will embolden states to strengthen their attorney-advertising regulations, very likely doing so in the name of image.[149] As the next section of this Article suggests, however, the significance of *Went For It* may be highly exaggerated. If anything, *Went For It* is a very narrow holding that does not afford states the power to discipline lawyers, such as Osias, on the basis that their marketing schemes threaten to tarnish the image of the legal profession.

II. THE IMPLICATIONS OF *WENT FOR IT*: SOUNDING THE HORN OF RETREAT FROM CONSTITUTIONAL PROTECTION OF ATTORNEY ADVERTISING?

In the months immediately following *Went For It*, several Court watchers worried that the decision marked the beginning of the end for meaningful constitutional protection of attorney advertising.[150] The zeitgeist regarding *Went For It* was, and still seems to be, that *Went For It* stands for the proposition that states may restrict attorney advertising to protect the integrity and reputation of the legal

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advertising").

[148] Elizabeth D. Whitaker & David S. Coale, *Professional Image and Lawyer Advertising*, 28 TEX. TECH. L. REV. 801, 827 (1997).

[149] *See* Vanderwater, *supra* note 147, at 799 (maintaining that "the decision will likely encourage states to clamp down on attorney advertising in the name of image"); Richard P. Martel, Jr., Comment, *Regulation of Advertising in the Legal Profession — Still Hazy After All These Years*, 1997 DET. C.L. REV. 123, 158 (noting prediction of others that *Went For It* will "encourage the states to toughen their regulations on attorney advertising").

[150] Such dire predictions surfaced in both the popular legal press, *see, e.g.*, Richard C. Reuben, *Florida Bar's Ad Restriction Constitutional*, A.B.A. J., Aug. 1995, at 20 (observing that, while some in the legal community view the decision as narrow, many others fear that it will provide justification for greater restrictions on attorney advertising generally), and in the law reviews, *see, e.g.*, Jonathan M. Remshak, Survey, 6 SETON HALL CONST. L.J. 453, 461 (1995) (stating that *Went For It* "represents a retreat from a twenty-year-long expansion of First Amendment protection for commercial speech . . . . [and] opens the door for the creation of greater restrictions on how, when, and to whom commercial speech may be directed"); Christina Derry, Recent Decision, 69 TEMP L. REV. 523, 545 (1996) (concluding that "*Went For It* represents a step backward, and could establish a trend toward a more conservative and paternalistic view of First Amendment protections"); Daniel Zelenko, Note, *Do You Need a Lawyer? You May Have to Wait 30 Days: The Supreme Court Went Too Far in* Florida Bar v. Went For It, 45 AM. U. L. REV. 1215, 1218 (1996) (arguing that *Went For It* "has reduced the amount of First Amendment protection available to attorneys by giving states more ability to regulate commercial . . . speech").

profession, a notion that, according to prevailing wisdom,[151] the Court laid to rest in *Zauderer*.[152] Indeed, one prominent First Amendment attorney, Felix Kent,[153] divined from the decision "that a majority of the Justices have turned away from the previous, more liberal interpretations of the First Amendment as applied to commercial speech in general and lawyer advertising in particular."[154] Kent, echoing the prevailing wisdom, predicted that, "based on the reasoning of the majority in [*Went For It*], a restriction on lawyer advertising may well be upheld in the future if the restriction will enhance the reputation of the profession."[155] For Kent and other Supreme Court watchers, *Went For It* spelled the end of *Bates v. State Bar of Arizona*.

Judging from the treatment that *Went For It* has received in the lower courts, however, the reports of *Bates*'s death have been greatly exaggerated. If *Went For It* sounded the horn of retreat from constitutional protection of attorney advertising, the lower courts apparently have not heard it. Courts have cited and relied upon the case in seventy-two published opinions since it was decided.[156] Only a handful — seventeen — of these decisions actually involve attorney advertising.[157] Of those seventeen, the courts primarily have relied on

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[151] Professor Ronald Rotunda has voiced this opinion. According to him, *Went For It* marks "the first time that the Court has upheld advertising restrictions based on the need to protect the dignity of lawyers." Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of* Florida Bar v. Went For It, 49 ARK. L. REV. 703, 704 (1997). Professor Rotunda further noted that "the Court in the past has specifically rejected this purported justification." *Id.*

[152] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 648 (1985) (expressing disapproval of the idea that promotion of the legal profession's reputation could be considered a substantial state interest); *see also supra* notes 91-116 and accompanying text (discussing whether *Zauderer* was overruled *sub silentio* by *Went For It*).

[153] Kent's writings frequently appear in the *New York Law Journal* and often focus on the Supreme Court's recent commercial speech decisions. *See, e.g.*, Felix A. Kent, *First Amendment and Commercial Speech in 1998*, N.Y. L.J., Dec. 18, 1998, at 3 (discussing absence of commercial speech decisions during the 1998 term); Felix A. Kent, *Compelled Contributions to Commercial Speech*, N.Y. L.J., Aug. 15, 1997, at 3 (discussing Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130 (1997)) ; Felix A. Kent, *A Significant First Amendment Decision*, N.Y. L.J., June 21, 1996, at 3 (discussing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996)).

[154] Felix A. Kent, *Advertising in a Post-*Bates *' World: High Court More Conservative*, N.Y. L.J., June 30, 1997, at S2.

[155] *Id.*

[156] *Shepard's* result obtained on *Westlaw*. The case has been cited in forty-one *federal* court opinions and in twenty-nine *state* court opinions. This figure was accurate at the time this Article was drafted.

[157] Several *federal* cases involve attorney advertising. *See* Falanga v. State Bar of Georgia, 150 F.3d 1333 (11th Cir. 1998) (discussed *infra*); Ficker v. Curran, 119 F.3d

Went For It for nothing more significant than as a citation in support of the recitation of the *Central Hudson* test.[158] With one or two exceptions, discussed below,[159] the lower courts have not explained or discussed the case in any detail. Indeed, it is somewhat ironic that a decision, which has been decried for establishing a double standard

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1150 (4th Cir. 1997); McDevitt v. Disciplinary Bd., 1997 WL 88154, at *2 (10th Cir. Mar. 3, 1997) (citing *Went For It* in setting forth the *Central Hudson* test); Revo v. Disciplinary Bd., 106 F.3d 929, 933 (10th Cir. 1997) (stating that the Court, in *Went For It*, found maintenance of the public's respect for the legal system to be a substantial state interest); Bell v. Legal Advert. Comm., 998 F. Supp. 1231, 1238 (D.N.M. 1998) (relying on *Went For It* for the proposition that "courts have tended to require evidence supporting an assertion that a particular type of advertising is inherently misleading or otherwise deserving of being banned"); Sterns v. Lundberg, 922 F. Supp. 164, 167 (S.D. Ind. 1996) (including *Went For It* in string cite, as "*cf.*" for proposition that "[f]ederal courts are in universal agreement that the regulation of lawyers' conduct is a fundamentally important state interest"); *cf.* Silverman v. Walkup, 21 F. Supp.2d 775, 779 (E.D. Tenn. 1998) (citing *Went For It* in support of the proposition that "the State's interest in establishing standards for licensing and regulating professional practitioners of *chiropractic medicine* in such a way as to protect the reputation of the profession is substantial") (emphasis added).

Several *state* cases also involve attorney advertising. *See In re* Lassen, 672 A.2d 988, 998 (Del. 1996) (relying on *Went For It* for the proposition that "[t]he United States Supreme Court has recently recognized that preservation of the integrity of the bar and maintenance of the public's perception of the bar are valid objectives of state regulation of attorneys"); *In re* Robbins, 469 S.E.2d 191, 193 (Ga. 1996) (upholding limitations on advertising as "specialist," and citing *Went For It* for the sole proposition that attorney advertising is a form of commercial speech); Board of Prof'l Ethics and Conduct v. Kirlin, 570 N.W.2d 643, 646 (Iowa 1997) (reprimanding attorney for violating state ethics rules, and citing *Went For It* only for purposes of setting forth *Central Hudson* test); Board of Prof'l Ethics and Conduct v. Wherry, 569 N.W.2d 822, 825 (Iowa 1997) (upholding constitutionality of restriction on attorney advertising of specialties, and citing *Went For It* only for the purpose of setting forth *Central Hudson* test); *In re* Charges of Unprofessional Conduct Against 97-29, 581 N.W.2d 347, 351 (Minn. 1998) (upholding constitutionality of rule prohibiting in-person or telephone solicitation of clients under *Ohralik v. Ohio State Bar Ass'n* and federal appeals court decision, and relying on *Went For It* only for recitation of the *Central Hudson* test); *In re* Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 155 N.J. 357, 367, 715 A.2d 216, 220-21 (1998) (relying on *Went For It* in upholding constitutionality of the New Jersey disciplinary rule, which is similar to Florida's, prohibiting solicitation of accident victims and families); Oklahoma Bar Ass'n v. Leigh, 914 P.2d 661, 666 (Okla. 1996) (suspending attorney and citing *Went For It* for purposes of setting forth the *Central Hudson* test); Comm'n For Lawyer Discipline v. Benton, 980 S.W.2d 425, 433 (Tex. 1998) (relied upon *Went For It*, without discussion, in upholding constitutionality of a Texas rule prohibiting post-verdict communication with jurors); *In re* Pavilack, 488 S.E.2d 309, 310 (S.C. 1997) (reprimanding attorney who ran ad which, the court found, was misleading, and citing *Went For It* only in passing in setting forth *Central Hudson* test); Lawyer Disciplinary Bd. v. Allen, 479 S.E.2d 317, 325 (W.V. 1997) (upholding constitutionality of law prohibiting telephone solicitation, but citing *Went For It* only for purposes of setting forth the *Central Hudson* test).

[158] *See* cases collected in *supra* note 157.

[159] *See infra* notes 161-78 and accompanying text.

of commercial speech — one for advertising by "businesses" and another for advertising by "professionals" — is relied upon for the most part in run-of-the-mill "business" commercial speech cases.[160]

The lower court treatment of the case suggests both that *Went For It* has been interpreted narrowly and that the lower courts are unwilling to extend it beyond the solicitation context. Indeed, although a few cases have invoked the decision to uphold solicitation bars similar to Florida's,[161] the decision has yet to be invoked in any meaningful way as direct support for other types of attorney-advertising restrictions. Even within the solicitation context, moreover, one federal court of appeals has refused to apply *Went For It*, and declined to read the case as standing for the proposition that states may prohibit attorney advertising solely as a means of promoting or maintaining a positive view of the legal profession.

In *Ficker v. Curran*,[162] the Fourth Circuit found unconstitutional a Maryland restriction, passed shortly after the *Went For It* decision, that prohibited an attorney from mailing targeted solicitation to arrestees and their relatives within thirty days of an accident, disaster, criminal charge, or traffic charge.[163] A criminal defense attorney and the owner of a direct-mail company that provides direct-mail services to attorneys challenged the restriction.[164] The State defended the law's constitutionality under *Went For It*.

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[160] In fact, *Went For It* has been relied upon in contexts ranging from a New York State Liquor Authority's attempt to prevent a brewer from using labels that depicted a frog giving "the finger," *see* Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87, 92 (2d Cir. 1998), to the prohibition of the sale of guns at a county fairgrounds. *See* Nordyke v. Santa Clara County, 110 F.3d 707, 712 (9th Cir. 1997).

[161] *See, e.g., Falanga*, 150 F.3d at 1347 (upholding Georgia's broad ban on in-person solicitation); *In re* Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 715 A.2d at 221 (upholding New Jersey ban similar to Florida's); *In re* Charges of Unprofessional Conduct, 581 N.W.2d at 351 (upholding ban on in-person or telephone solicitation). Indeed, *Falanga* and other cases prohibiting in-person or telephone restrictions are not really applications of *Went For It*, but, rather, applications of the Supreme Court's earlier decision in *Ohralik*, which approved of restrictions on in-person solicitation. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 467 (1978).

[162] 119 F.3d 1150 (4th Cir. 1997).

[163] *See id.* at 1151 (noting that the law was passed in the 1996 session of the Maryland General Assembly); *see also* Alan Cooper, *Soliciting by Mail Approved: The 4th Circuit Nixes a Ban in Criminal and Traffic Cases*, NAT'L L.J., Aug. 11, 1997, at A7 ("Following the U.S. Supreme Court's 1995 ruling in [*Went For It*], . . . the Maryland Legislature adopted a . . . rule [similar to Florida's].").

[164] *See Ficker*, 119 F.3d at 1151. The Fourth Circuit stated that "Ficker is a Maryland attorney who represents traffic defendants facing possible incarceration . . . . [and] has traditionally obtained clients by mailing letters to individuals who have been issued traffic citations." *Id.* The circuit court then stated that "Boehm [the other plaintiff] owns and manages LETS Company, which

The Fourth Circuit, in disagreeing with the State's arguments in support of the regulation, catalogued a litany of factors that distinguished the case from the situation the Supreme Court confronted in *Went For It.* The court of appeals first distinguished *Went For It* by noting that the interests served by the Florida ban differed substantially from those served by the Maryland ban. The interests served by the Florida ban were protecting "the privacy of accident victims and wrongful death clients" and providing them "with a period to cope with their grief before being asked to redress an emotional loss."[165] By contrast, the court explained, "[w]hile a criminal or traffic defendant may be shaken by his arrest, what he needs is representation, not time to grieve."[166] Second, the court noted that, "while accident victims typically have three years . . . to file a claim, criminal defendants are subject to a much more accelerated calendar."[167] Consequently, the court explained, "[t]he relative urgency of the defendant's need for legal representation finds no parallel in the civil plaintiff."[168] Third, the court opined, "[u]nlike an accident victim, who can choose to avoid public scrutiny of his private affairs by not filing a suit or by settling quietly, the criminal arrestee is in the legal system involuntarily and has already had his privacy compromised before a solicitation letter is ever sent."[169] Finally, observed the court, a criminal defendant has a Sixth Amendment *right to counsel.*[170] Thus, "the effect of the law, if not its intent, is to make it more difficult for our opponents to get legal representation."[171]

The Fourth Circuit had cogent reasons to distinguish *Went For It* in the *Ficker* decision based upon the facts, i.e., the differences between civil litigants and criminal defendants. The court of appeals, however, went further. The court rejected the notion that *Went For It* established that the dignity of the legal profession can be a substantial state interest. The court also appeared to reject the notion that *Went For It* opened the door to the use of opinion polls as

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produces and mails attorney advertising letters to individual Maryland [residents] with criminal offenses or jailable traffic offenses." *Id.*

[165] *Id.* at 1155 (citing *Went For It*, 515 U.S. at 629-32).

[166] *Id.*

[167] *Id.*

[168] *Id.* at 1155-56.

[169] *Id.* at 1156.

[170] *See Ficker*, 119 F.3d at 1156 (stating that, "unlike a civil litigant, the criminal or incarcerable traffic defendant enjoys a Sixth Amendment right to counsel").

[171] *Id.* (internal quotation omitted).

a means of determining whether an interest is appropriately considered substantial.

To support its asserted interest in protecting the reputation of the legal profession, the State attempted to use a study purporting to show that "'many' traffic offenders thought targeted direct mail violated their privacy."[172] As an initial matter, the *Ficker* court observed that a different study, which used a larger sample population and had a smaller margin for error, "show[ed] that a majority of North Carolinians would *not* object to receiving attorney letters after getting a traffic ticket, and would actually like to receive such letters" in some instances.[173] The court stated that it refused to "resolve this battle of studies."[174] Even more significantly, the court remarked that it would not "credit or discredit state interests based on the shifting sands of polling data, which change according to techniques, sample populations, and even the phrasing of the questions."[175]

Finally, the Fourth Circuit flatly rejected the notion that the letters would cause reputational harm to the legal profession or that such harm was a proper concern for the State in the absence of some other asserted interest. According to the court, in *Went For It*, the *timing* of the letters caused disrespect for the legal profession, and, thus, the *timing* of the letters was viewed as the target of the law. Drawing the contrast, the court noted that, in the case of Maryland's prohibition on solicitation, timing was not an issue.[176] Consequently, the court concluded, the real targets of the Maryland law were the letters themselves.[177] On this point, the Fourth Circuit echoed the

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[172] *Id.* at 1154.

[173] *Id.*

[174] *Id.*

[175] *Id.* To avoid the appearance of a conflict with *Went For It*, the Fourth Circuit asserted that the majority in *Went For It* "used [polling] data only as confirmation of the fact that the regulation targeted a 'concrete, nonspeculative harm,'" not as a basis for the decision itself. *Id.* at 1154 n.2 (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 629 (1995). According to the court of appeals, "If the Court had rested its decision on the polling data, presumably it would have undertaken some evaluation of the reliability of the data, which it declined to do." *Id.* The Fourth Circuit also injected a bit of common sense into its rejection of the State's polling data: "It is hardly clear . . . that where criminal and traffic defendants, in need of timely legal advice and representation, receive just such information in the mail, they will hold the legal profession in low esteem." *Id.* at 1154.

[176] *See Ficker*, 119 F.3d at 1154 (stating that "any negative attitude toward the legal profession that a criminal defendant might have after receiving unwanted mail on day one or twenty-one will not dissipate by day thirty-one").

[177] *See id.* ("Any disrespect to the legal profession engendered by targeted direct-mail solicitation would not be caused by the timing of the targeted letters, as was the

sentiments of the dissenters in *Went For It*: "The fact that protected speech might prove offensive to some people has never justified its suppression for all people, and the Supreme Court forbids us from banning speech merely because some subset of the public or the bar finds it embarrassing, offensive, or undignified."[178]

It is too early to tell whether *Ficker*'s refusal to extend *Went For It* outside of its immediate factual context is likely to become the exception or the rule.[179] *Ficker*, however, provides the most comprehensive judicial treatment of *Went For It* to date and is the first case to confront the issue of whether protecting the dignity of the legal profession *alone* may be considered a substantial state interest. As such, *Ficker* is likely to carry a great deal of influence for those courts, both federal and state, confronted with an attempt to restrict attorney advertising on the basis of protecting the dignity of the legal profession.

The empirical evidence (i.e., the lower court treatment of *Went For It*) suggests that *Went For It* is limited to its particular facts. But it is still early. Thus, the question becomes whether the decision reasonably can be interpreted as authorizing broader bans on attorney advertising. Does *Went For It* signal the reduction, if not elimination, of meaningful protection for attorney advertising? Under *Went For It*, could Osias be disciplined for her risqué advertisements? A careful reading of *Went For It* reveals that attorney advertising in general, and Osias's advertisements in particular, retain the same constitutional protection now as they did before the decision.

On their face, New York's disciplinary rules seem to prohibit precisely the type of advertisements Osias used. The disciplinary rules applicable to advertising and solicitation provide as follows:

> (a) A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the

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case in [*Went For It*], but a general distaste for such solicitation.").

[178] *Id.* at 1154; *see also Zauderer*, 471 U.S. at 648.

[179] Without engaging in a careful analysis of *Ficker*, courts in at least three cases, two of which preceded *Ficker*, have read *Went For It* as approving of the notion that protection of a profession's reputation is a substantial state interest. *See* Revo v. Disciplinary Bd., 106 F.3d 929, 933 (10th Cir. 1997) ("The Board asserts that it has a substantial interest in maintaining the public's respect for the legal system — respect which may be eroded by personal injury solicitation letters. The Supreme Court found this interest substantial in *Went For It*."); Silverman v. Walkup, 21 F. Supp.2d. 775, 779 (E.D. Tenn. 1998) (reading *Went For It* as holding that the state has a substantial interest in protecting the reputation of the *chiropractic* profession); *In re* Lassen, 672 A.2d 988, 998 (Del. 1996) (interpreting *Went For It* as recognizing a substantial state interest in the protection of the integrity of the bar).

> preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading, *or cast reflection on the legal profession as a whole.*
>
> (b) Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of the lawyer's legal services, or claims that cannot be measured or verified . . .[180]

On their face, both sections (a) and (b) appear to bar Osias's ads. Section (b), in fact, seems geared toward precisely the exaggerated, self-laudatory captions that accompany Osias's ads.[181] In addition, section (b)'s prohibition of "statements or claims . . . that cast reflection on the legal profession as a whole" would seem to encompass the sexually suggestive pictures.[182]

The question, however, is whether disciplinary action pursuant to these rules is constitutionally permissible. For those who interpret *Went For It* broadly, the answer is likely to be yes because, for them, *Went For It* stands for the proposition that a state may prohibit advertising that casts the legal profession in a bad light. For those who have a more restrained view of the decision, however, the answer must be no.

As suggested above,[183] the restrained interpretation of *Went For It* seems to be winning out in the lower courts. Judging from the proposed changes to New York's disciplinary rules, the restrained interpretation also is winning out in the legislatures and bar associations. Telling in this regard are the most recent proposals of the New York Special Committee to Review the New York Lawyer's Code of Professional Responsibility. The proposals would change

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[180] N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.6 (1998) (emphasis added).

[181] *See Inadmissible, supra* note 11, at 3 ("We will ride anything . . . to get to your closing on time," "We don't play golf . . . we're too busy closing your loans," "Anywhere . . . Anytime . . . Anyhow . . . Anybody. . . Any position . . . We are Ready . . . to close your loan."); *see also supra* notes 1-13 and accompanying text (describing the various captions used by Osias in her ads). While her editorial comments easily constitute "puffery" as well, the same could be said for the pictures themselves, given Osias's poses and attire.

[182] N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.6(b) (1998). This, however, is less than clear. Section (a), after all, is directed at "statements or claims," not pictures. Depicting lawyers as "sexy" is not necessarily bad for the reputation of lawyers as a whole. Indeed, many would say that it would *improve* the public perception of attorneys.

[183] *See supra* notes 150-61 and accompanying text (discussing *Ficker* and the fact that lower courts have been conservative in their interpretations and applications of *Went For It*).

disciplinary rules of New York.[184] In 1996, after *Went For It* was debated in the legal community, the Special Committee recommended removing section (b) in its entirety and deleting the phrase "cast reflection on the legal profession as a whole" from the disciplinary rules.[185] The Committee recommended deletion of the "casts reflection" language on the grounds that it "is vague and likely to be unenforceable under established Supreme Court precedents."[186] The proposed removal of this language puzzled the editors of the *New York Law Journal*:

> On the one hand, we agree with the proposition that the deleted language is vague and therefore objectionable. On the other hand, the committee is probably wrong in its perception of the Supreme Court's view of the state of the law on this subject. In its most recent decision on the topic, . . . the Supreme Court upheld a Florida rule prohibiting targeted, direct mail advertising to accident victims within 30 days of the accident, in the process expressly adopting the argument that damage to the reputation of the profession was a valid consideration in evaluating the propriety of a state's regulation of lawyer advertising.[187]

The Committee also proposed eliminating section (b) in its entirety and rephrasing it to prohibit puffery and self-laudation *only* if the advertisements are "false, deceptive, or misleading." The reason, explained the Committee, is that the present formulation is too vague to survive a constitutional challenge.[188] Thus, if *Went For It* spelled the end for *Bates*, the Special Committee was oblivious. Therefore, with a few scattered exceptions, the courts, legislatures, and bar associations have refused to read *Went For It* broadly. There are several potential explanations for this reluctance.

First, in light of *Zauderer*, it is difficult to read *Went For It* as approving "dignity of the profession" as a substantial state interest. In *Zauderer*, the Court appeared to disapprove of the notion that the public's perception of lawyers could ever be a "substantial government interest":

> [A]lthough the State undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is

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[184] The rules were last amended in 1993.

[185] Anthony E. Davis, *Proposed Changes to the New York Lawyers' Code – Part II*, N.Y. L.J., July 1, 1996, at 3.

[186] *Id.*

[187] *Id.*

[188] *See id.*

> an interest substantial enough to justify the abridgment of their First Amendment rights .... [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.[189]

If *Went For It* holds, as a general matter, that maintenance of the dignity of the legal profession is a substantial interest, then the Court must have overruled *Zauderer sub silentio.* But the *Went For It* majority expressly relied on *Zauderer* in reaching its decision.[190] Consequently, the argument continues, *Went For It* cannot reasonably be read as having approved of the idea that maintaining the dignity of the profession is a substantial state interest, and those who read *Went For It* in this way are reading it too broadly. This argument has some force, but, ultimately, fails to persuade.

Zauderer does not *hold* that protecting or promoting the dignity of the legal profession is not a substantial state interest; the Court in *Zauderer suggests* that it is *unlikely to consider such an interest substantial.*[191] The Court's discussion of the point is mere dicta.[192] (Accordingly, it is not necessary to read *Went For It* as implicitly overruling *Zauderer* to conclude that it approves of the promotion, maintenance, and dignity of the legal profession as a substantial state interest.)[193]

Other reasons, however, militate against the broad interpretation of *Went For It.* First, although not necessarily inconsistent with *Zauderer*, such an interpretation may be inconsistent with some of the Supreme Court's other commercial speech cases.[194]

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[189] *Zauderer*, 471 U.S. at 648.

[190] *Went For It*, 515 U.S. at 638.

[191] *See id.*

[192] Indeed, the resolution of this issue was not essential to the Court's resolution of the case. As the Court noted, while the purpose of the disciplinary rule under which Zauderer was punished was to "ensure that attorneys advertise 'in a dignified manner,' .... [t]here [was] ... no suggestion that the illustration actually used ... was undignified; thus, it is difficult to see how the application of the rule to appellant in this case directly advances the State's interest in preserving the dignity of attorneys." *Zauderer*, 471 U.S. at 647. The remainder of the Court's analysis concerned the State's asserted interest in preventing the public from being misled and manipulated.

[193] The dissenters in *Went For It* characterized *Zauderer*'s statements regarding whether the dignity of the profession is a substantial interest as a "holding." *See Went For It*, 515 U.S. at 638 (Kennedy, J., dissenting) (stating that, "in *Zauderer*... where we struck down a ban on attorney advertising, we *held* that ....) (emphasis added).

[194] *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977) (invalidating a New York statute banning the advertising and display of contraceptives). Of course, *Carey* involved commercial speech of a "business" nature (and implicated other interests the Court had deemed important as well), not of a "professional" nature.

More importantly, despite the apparent unanimity among Court observers that *Went For It* elevates the dignity of the legal profession to the level of "substantial interest," it is not at all clear that the majority ever actually does so. To be sure, Justice O'Connor rather loosely bandies about the notion that the integrity of the legal profession is the aim that the Florida restriction ultimately seeks to promote and protect.[195] Moreover, at the conclusion of her opinion for the majority, the Justice seems to treat the privacy interest and professionalism interests as separate and distinct.[196] In the course of her analysis, however, Justice O'Connor does not treat them as separate interests, regardless of any contrary intention. In other words, Justice O'Connor does not treat the interests asserted by the State as an *either/or* proposition, and her analysis *depends* on the presence of both asserted interests.[197]

Indeed, Justice O'Connor uses the presence of the asserted interest of privacy to distinguish the Supreme Court's previous cases, such as *Shapero*.[198] Furthermore, the Justice seems to reject the idea that the public's disapproval of lawyers' advertising as an abstract matter would be enough to justify a regulation: "While it is undoubtedly true that many people find the image of lawyers sifting through accident and police reports in pursuit of prospective clients unpalatable and invasive, this case targets a different kind of intrusion."[199] Although Justice O'Connor might like to elevate the promotion and maintenance of professionalism for its own sake as a substantial state interest, the Justice did not go that far in *Went For It*. As the Justice's language suggests, Justice O'Connor actually rejected such a notion. Under *Went For It*, the Court apparently will deem professionalism a substantial state interest *only* if it serves some other state interest, such as the protection of privacy. Alternatively, a

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Consequently, if *Went For It* was Justice O'Connor's attempt to *bifurcate* commercial speech into two categories, with separate standards for "mere" businesses and for professionals (principally attorneys), then *Carey* easily could be distinguished.

[195] *See Went For It*, 515 U.S. at 625-33.

[196] *See id.* at 634-35 ("The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered.").

[197] *See* John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 771 (1997) ("The Court directly linked [the State's interest in privacy] with the State's asserted interest in maintaining the dignity of the legal profession . . . . Given this linkage, it has been argued that [*Went For It*] probably does not signal 'any major rethinking of lawyer advertising.'")

[198] *See Went For It*, 515 U.S. at 629 ("Contrary to the dissent's suggestions . . . the State in *Shapero* did not seek to justify its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests.").

[199] *Id.* at 630 (distinguishing *Shapero*).

regulation that promotes professionalism *as a consequence* of serving some other goal would survive constitutional scrutiny.

Went For It, however, provides neither express nor tacit approval of the idea that professionalism can be enforced for its own sake in the context of attorney advertising. That omission leaves open the question of whether professionalism *should* be promoted for its own sake and whether it even makes sense to do so. As the next section explores, there are normative reasons why the emphasis on professionalism should be relaxed. In fact, as the debate concerning whether the law is a profession or a business reveals, professionalism has been increasingly on the wane among lawyers for the last several decades.

III. PROFIT VERSUS PRINCIPLE: THE DEBATE CONCERNING THE LAW AS A BUSINESS OR A PROFESSION

Osias's provocative marketing campaign promises only to heighten the already contentious debate over whether the practice of law is a profession or a business. Although the debate has been simmering since the turn of the twentieth century, it boiled over when the Supreme Court decided *Bates v. State Bar of Arizona*. By countenancing competitive practices such as lawyer advertising, *Bates* and its progeny legitimized commercialism within the law and allowed it to burgeon over the last several decades under the aegis of constitutionalism. Lawyers are increasingly embracing the commercial side of the law, often to the exclusion of their professional responsibilities, and Osias's unconventional ads are no exception. In fact, Osias's ads represent, at the present time, the most extreme commercial example of the rejection of professional values concerning the portrayal of lawyers. The very notion that the law is a noble profession, detached from business, could be at stake today, thus making the profession-versus-business debate more relevant than ever.

In framing the profession-versus-business debate, it is useful to organize the competing sides according to contrasting paradigms. This Article employs the terms "profession paradigm" and "business paradigm" to identify the competing camps in the debate.[200] The profession paradigm, which is the traditional paradigm, postulates a

[200] For an application of a theory of paradigms to legal professionalism, see generally Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

dichotomy between a business and a profession.[201] The profession paradigm exalts the practice of law as a higher calling, a noble profession, devoted to public service, and thus distinguishes it from a mere trade or occupation. Members of the profession, in turn, are expected to maintain themselves with dignity by observing a special code of conduct that includes suppressing the commercial aspects of the practice in order to uphold and preserve the paradigm's values.

The business paradigm, by contrast, repudiates the business-profession dichotomy and assigns no particular value to the standards of conduct deemed essential under the profession paradigm. Rather, conduct under the business paradigm is governed by the morality of the marketplace, and while the practice of law still is regarded as a worthy endeavor, it is no different from any other occupation. In fact, the pursuit of profit through commercialism itself defines the essence of lawyering under the business paradigm.

This section traces the rise and decline of the profession paradigm and then explores how the ascendancy of the business paradigm in the last several decades has provoked a professionalism crisis within the law. This section catalogues the arguments supporting each side and then explores how Osias's marketing strategy, in particular, informs the profession-versus-business debate. Finally, this section analyzes whether the rise of the business paradigm, and the converse decline of the profession paradigm, will ultimately prove detrimental to American law.

A. The Profession Paradigm in American Law

The profession paradigm, as a clearly identifiable ideology, arose in the late nineteenth century as a reaction to the widespread perception that the legal profession was degenerating into a business.[202] Leaders of the bar grew concerned that commercialization would seriously erode the business-profession dichotomy and allow the practice of law to degenerate into a "mere" occupation.[203] Pressures of commercialization had begun to grow in

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[201] *See id.* at 1230.

[202] *See id.* at 1241. During the late nineteenth century, there was an "extraordinary outpouring of rhetoric, from all the public pulpits of the ideal — bar association and law school commencement addresses, memorial speeches on colleagues, articles and books — on the theme of the profession's 'decline from a profession to a business.'" Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910, in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 61 (Gerard W. Gawalt ed., 1984).

[203] *See* Pearce, *supra* note 200, at 1238. The profession paradigm was a "response to rising concerns that entrepreneurial aspects of law were undermining the

the mid-nineteenth century because the bar "was essentially open," and the ranks of lawyers swelled immensely.[204] The huge influx of attorneys, in turn, forced some legal practitioners actively to pursue clients to maintain a livelihood.[205] Bar elites perceived the increasing competition among lawyers as a threat to professionalism.[206] Thus, under the banner of preserving the cherished tradition of the law as a higher calling, distinct from a business, entrepreneurial activities such as advertising and solicitations of clients were proscribed.[207]

With the rise of the profession paradigm, however, came the difficulty of defining "profession" in the first place, a difficulty that exists even today. Clearly, the term "evokes favorable emotions and suggests status."[208] Unfortunately, scholars do not uniformly agree on whether the term "profession" is even susceptible to a static or uniform definition.[209] Quite a few legal commentators engaging in

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profession's reputation." *Id.* at 1231.

[204] *See* Mylene Brooks, *Lawyer Advertising: Is There Really a Problem?*, 15 LOY. L.A. ENT. L.J. 1, 6 (1994).

[205] *See id.* at 6-7. By contrast, lawyers in England were few in number. *See id.* at 5. English lawyers also did not suffer from pressures to actively pursue clients. *See id.* The practice of law in England was "distinguishable from craft and trade associations by parameters of society, wealth, and education." *Id.* Its members were born of affluence — "generally men from leading families who trained in the classics rather than in elaborate apprenticeship programs." *Id.* As such, they "had little regard for the competition and caveat emptor of the crafts because they were not completely dependent upon their professions for their livelihood." *Id.* In addition, that there were relatively few lawyers in the practice ensured a "readily available business," further negating the need to actively pursue clients. *See id.* In fact, English lawyers eschewed commercialism; the practice of law was regarded as a public service, not a business, and thus lawyers abstained from competing for clients altogether for fear of being branded "tradesmen." *See id.* ("Afraid of being referred to as tradesmen, lawyers refused to compete for clients for fear of ruining their intimacy amongst their colleagues.").

[206] As one commentator has observed:

> During the latter part of the nineteenth century, leaders of the bar, who were predominantly business lawyers, attempted to stop commercialism in the as yet unregulated legal profession. To achieve this end, the leaders of the bar sought to reestablish standards of character, education, and training within the profession, continuing to hold firm to the belief that passivity and patience were a lawyer's cardinal virtues. This ideology ran counter to the opinions of the newly emerging "class" of less educated attorneys who did not favor allowing business to seek the attorney.

Brooks, *supra* note 204, at 7.

[207] *See* A.B.A. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). The Canons of Professional Ethics (Canons) were promulgated by the ABA in 1908 and were largely adopted by the states, often with virtually no change. *See* DRINKER, *supra* note 32, at 25.

[208] Rotunda, *supra* note 151, at 705.

[209] *See* Pearce, *supra* note 200, at 1238 n.39 (noting that "[c]ommenators do not

the profession-versus-business debate employ the term without bothering to define it, as if there is some intuitive sense about the word that lends it meaning.[210] The failure to define the term, however, may be less an oversight than the recognition that professionalism is "like pornography, hard to define, but easy to recognize."[211]

Despite its elastic nature, however, "profession" is a term that is "so important to lawyers that at least a working definition seems

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agree on a single definition of professionalism"); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144, 145 (Robert L. Nelson, David M. Trubek, Rayman L. Solomon eds., 1992) (observing that "[p]rofessionalism has no commonly accepted definition"). Indeed, an ABA Commission charged with studying the decline of professionalism in the law noted that "'Professionalism' is an elastic concept the meaning and application of which are hard to pin down. That is perhaps as it should be. The term has a rich, long-standing heritage, and any single definition runs the risk of being too confining." A.B.A. Commission on Professionalism, Report: *". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in* 112 F.R.D. 243, 261 (1986) [hereinafter Commission on Professionalism Report].

[210] Perhaps it is, as Professor Carl T. Bogus explains, that:

> [w]e are not as interested in defining "profession" or developing a definitive list of the professions as we are in investigating the special characteristics that influence an occupational group to make the kinds of contributions that professions make. This may be a tautological statement in that it says a profession is an occupation that produces professional results, but it has meaning nonetheless: for while we may have trouble defining the term, we intuitively know what we expect of a profession.

Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 933 (1996).

[211] Peter M. Brown, *Professional Responsibility: Has the Rise of Megafirms Endangered Professionalism?*, A.B.A. J., Dec. 1989, at 38. As Professor Bogus observes, "It has been said that there are four 'true professions' — law, medicine, divinity, and the military — but there is no obvious and common set of elements that separates these from other occupations." Bogus, *supra* note 210, at 933. At the same time, however, we do have greater expectations of lawyers than, say, mechanics, bakers, or sanitation engineers.

Robert L. Nelson and David M. Trubek, in attempting to define lawyer "professionalism," write that "professionalism should not be seen as a unitary or fixed set of values, but rather as an ongoing process that defines the normative orientations of lawyers." Robert L. Nelson & David M. Trubek, *Introduction: New Problems and New Paradigms in Studies of the Legal Profession*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1, 5 (Robert L. Nelson, David M. Trubek, Rayman L. Solomon eds., 1992). If that is the case, however, and we accept a definition of professionalism that is so elastic, it seems that the business-profession dichotomy is illusory. That is, if it is possible for the definition of lawyer professionalism to include the pursuit of profit as its primary goal — because "professionalism" is not a "unitary or fixed set of values," — then what it means to be part of the legal profession would be no different than what it means to participate in any other business endeavor.

essential."[212] Fortunately, the ABA Commission on Professionalism (known as the Stanley Commission), which was established in 1984 to address the decline of professionalism in the law due to the massive infiltration of commercialism, identified several elements that fairly characterize the legal profession:

> An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:
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> 1. That its practice requires substantial intellectual training and the use of complex judgments.
>
> 2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
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> 3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and
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> 4. That the occupation is self-regulating — that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.[213]

The Stanley Commission's efforts go a long way toward defining legal professionalism. Although the contours of what it means to be part of a profession, or to act professionally, may still elude precise definition, the term "profession" is invoked to distinguish the practice of law from that of a mere business.[214]

The particular characteristics of the "profession" are designed to "serve the essential purpose of differentiating the practice of law from a mere 'industry' or 'trade.'"[215] Professor Russell G. Pearce makes this clear when he advances three conditions, which mirror the elements identified by the Stanley Commission, that he argues characterize the legal "profession." These conditions also allow for a bargain between the profession and society in which the former "agree[s] to use its skills for the good of its clients and the public" in exchange for the latter "ced[ing] authority to the profession, including the exclusive right to practice law and autonomy from government and, to some

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[212] Commission on Professionalism Report, *supra* note 209, at 261.

[213] *Id.* at 261-62.

[214] *See* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 331 (1996) ("The creation of a 'profession' . . . distinguished the lawyer from the tradesman who generated income for his or her services.").

[215] David A. Kessler, *Professional Asphyxiation: Why the Legal Profession Is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 455 (1997) (noting that "[t]he particular characteristics applicable to the legal profession . . . seem to expand or contract in response to their latest quantification").

extent, market regulation."[216] According to Professor Pearce, the three conditions of esoteric knowledge, altruism, and autonomy distinguish a profession from a business and make the bargain between the profession and society "both necessary and possible."[217] First, under the profession paradigm, "lawyers differ from businesspersons in that they possess esoteric knowledge inaccessible to lay persons."[218] Second, "in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest."[219] Finally, unlike businesses, which are subject to government regulation and market control, the legal profession is autonomous in that it enjoys the authority to regulate its own members.[220]

As Professor Pearce's analysis suggests, the central concern of the profession paradigm, since its inception, has been reconciling the lawyer's call to public service with his need to maintain a livelihood.[221]

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[216] Pearce, *supra* note 200, at 1238.

[217] *See id.* Esoteric knowledge, the first condition, makes the bargain necessary because unlike the knowledge of business, the knowledge of the legal profession is inaccessible. *See id.* at 1239. Esoteric knowledge makes it difficult for lay persons to assess the legal profession's product. *See id.* By contrast, people have a working understanding of businesses "so that government could regulate them and individuals could make knowledgeable purchases on the market." *Id.*

The second condition, altruism, "made the bargain acceptable." *See id.* According to Professor Pearce, because legal professionals possess esoteric knowledge, some assurance is necessary that the profession would not exploit clients or attempt to advance personal interests at the expense of society. *See id.* at 1239-40. Lawyers thus promise to "place[ ] the interests of the common good and of their clients above their own financial and other self-interests" to distinguish themselves from businessmen, who simply "maximized financial self-interest." *Id.* at 1239. The profession, moreover, enforces the promise of altruism through licensing, ethical guidelines, and disciplinary bodies. *See id.* at 1240.

Finally, the third condition of autonomy is a necessary corollary to the first two conditions. *See id.* Unlike business, "which was subject to government regulation and market control, the profession obtained the authority to regulate itself." *Id.* Thus, the notion of law as a profession, as opposed to a mere business, could be preserved.

[218] *Id.* at 1231.

[219] *Id.*

[220] *See id.* As Professor Pearce explains, the conditions of inaccessible knowledge and altruism allowed the profession to become self-regulatory. *See id.*

[221] Indeed, some commentators observe that "[t]he American legal profession has never been able to reconcile the ideals of professionalism with the practical application of commercialism in the practice of law." Hornsby & Schimmel, *supra* note 214, at 331. However, the right of lawyers to be compensated for professional services rendered has never been challenged — nor should it. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 114 (1994). Rather, what the profession paradigm demands is that lawyers "resist the

Indeed, within the practice of law, there always has been "a tension of principle versus profit."[222] The profession paradigm thus begins with the proposition that a lawyer's need to earn money is merely incidental to his public service responsibilities.[223] Roscoe Pound, Dean Emeritus of Harvard Law School, formulated the classic definition of professionalism in 1953 when he described it as "a group of men pursuing a learned art as a common calling in the spirit of a public service."[224] For Dean Pound, the legal profession is "no less a public service because it may incidentally be a means of livelihood."[225] While lawyers necessarily operate within a commercial framework, they nevertheless carry a higher responsibility that distinguishes them from a mere tradesman who sells his services or hawks his wares.[226]

The profession paradigm likewise posits that maintaining the dignity[227] and reputation of lawyers is critical because they are

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temptation to make self-interest the primary, if not the sole, goal of the practice of law." *Id.*

[222] Peter A. Joy, *What We Talk About When We Talk About Professionalism: A Review of Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession*, 7 GEO. J. LEGAL ETHICS 987, 1005 (1994) (book review).

[223] *See* Re, *supra* note 221, at 114 ("Public service, pro bono service, and a genuine concern for the interests and welfare of clients should distinguish the legal profession from business enterprises, where profit is the sole or primary goal.") (footnote omitted).

[224] ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953). The notion that commitment to public service is a hallmark of the legal profession had been expressed well before Dean Pound gave his classic definition of professionalism. In 1873, for example, Edward Ryan said in a graduation address: "I welcome you to a calling of incessant labor, high duty and grave responsibility. If our profession be, as I believe, the most honorable, it is also the most arduous of all secular professions. Duty is the condition of all dignity." Edward Ryan, *Address to the Graduating Law Students of the University of Wisconsin, 1873*, 19 NOTRE DAME L. REV. 117, 117 (1943). As part of dedicating themselves to public service, the graduates were counseled to avoid the lure of material rewards. *See id.* at 133.

[225] POUND, *supra* note 224, at 5. Interestingly, though, while financial self-interest is only an incidental concern under the profession paradigm, "the pursuit of achievement and service was [itself] the source of financial success." Pearce, *supra* note 200, at 1245. According to Professor Pearce, "The invisible hand of reputation, and not of economic efficiency, drove the legal services market . . . . [and thus] the lawyers who made the most money were those who were the most professional." *Id.* Thus, while financial motivations are secondary, financial success is not incompatible with the profession paradigm.

[226] *See* LOUISE L. HILL, LAWYER ADVERTISING 40-41 (1993); *see also* Joy, *supra* note 222, at 1008 ("[P]rofessionalism has historically meant the subordination of financial reward to social responsibility.").

[227] Professor Carl M. Selinger submits that "dignity," as it concerns lawyers, "signifies public respect for four qualities among lawyers: their personal capabilities, their learning, their independence and objectivity, and their faithfulness to the legal system itself." Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of*

"officers of the court." Thus, as the Supreme Court has recognized, lawyers "are essential to the primary governmental function of administering justice."[228] An unfavorable public image of lawyers, it is said, threatens to "undermine the public's respect for the fairness of the judicial process and eventually its willingness to accept the outcomes of that process."[229] Undignified marketing schemes are

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the Legal Profession, 32 WAKE FOREST L. REV. 861, 867 (1997). Professor Selinger is concerned that public respect for each of these qualities is on the wane. *See id.* *But see* Watkins, *supra* note 197, at 776 ("Dignity is in the eye of the beholder [and] [j]ust as it is impossible to determine whether a particular advertisement is dignified, it is impossible to conclude, on the basis of anything but taste and personal preference, whether a particular form of advertising is dignified.").

[228] Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975); *see also* Burnele Venable Powell, *Diagnosis and Prescription: Illusory Lawyer Disciplinary Reform and the Need for a Moratorium*, 1 J. INST. FOR STUDY OF LEGAL ETHICS 263, 269 (1996) (observing that, "[f]ar from being in pursuit of crass commercial objectives, [lawyers] act as officers of the courts and by ultimate extension, as instruments of the public interest"); Zelenko, *supra* note 150, at 1241-42 (observing that, as officers of the court, "[l]awyers may have a greater responsibility than other professionals because their work is essential to the fair administration of justice"); L. Anita Richardson, *Stopping the Chase*, A.B.A. J., Jan. 1995, at 38 (observing similar theme). Accordingly, maintaining professional standards means no less than the preservation of our justice system. *See* Todd Mitchell, Note, *Privacy and Popularity: The Supreme Court Attempts to Polish the Public Image of the Legal Profession in* Florida Bar v. Went For It, 74 N.C. L. REV. 1681, 1714 (1996) (maintaining that "true professionalism is required to sustain our justice system"). The preamble to the Model Rules of Professional Conduct seems to reflect this concern when it states that "[l]awyers play a vital role in the preservation of society [and] [t]he fulfillment of this role requires an understanding by lawyers of their relationship to our legal system." MODEL RULES OF PROFESSIONAL CONDUCT preamble (1983). The Model Rules, however, do not require lawyer advertisements to be dignified. In fact, such a dignity requirement was intentionally omitted from the Model Rules. The 1908 Canons of Professional Ethics expressly provided that lawyers "should strive at all times . . . to maintain the dignity of the profession." CANONS OF PROFESSIONAL ETHICS Canon 29 (1908). The Model Code of Professional Responsibility, in similar fashion, required lawyers to present ads "in a dignified way." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980). The Model Rules, however, removed the dignity requirement on the basis that it serves no interest recognized by the Supreme Court as a legitimate basis for regulating advertising. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 legal background.

[229] Selinger, *supra* note 227, at 872; *see also* Mitchell, *supra* note 228, at 1714 ("When lawyers behave in an unprofessional manner, public confidence in and respect for the legal profession decline, and, the argument goes, the vitality of our legal system will suffer a corresponding decline."); N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 923 (1995-96) (stating that "confidence in the American justice system begins with the public perception of lawyers"). One bar leader expressed the concern that "[w]hen people lose confidence in lawyers, they lose confidence in the rule of law. This loss jeopardizes the justice system and threatens to loosen the glue that holds our society together." Lynne Liberato, *Small Examples, Great Truths*, HOUSTON LAW., July/Aug. 1993, at 6. Professor Selinger also identifies several other values, in addition to public respect for the judicial process, that are threatened by a

particularly opprobrious and are deemed unprofessional, because, as the profession paradigm insists, they lower the public's estimation of lawyers.[230]

Under the profession paradigm, Osias's marketing campaign is objectionable both for its blatant commercialism, as well as for its undignified subject matter. First, Osias places profit over principle by essentially "hawking her wares." In fact, Osias violates the profession paradigm simply by resorting to advertising. The profession paradigm eschews all forms of commercialism, including advertising,[231] because commercialism entails the maximization of financial self-reward which, it is claimed, necessarily conflicts with the commitment to selfless public service.[232] Moreover, "any commercial

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decline in dignity of the legal profession, including

> the recruitment of capable and learned individuals to the legal profession, the assurance that all lawyers will receive a broad, theoretical legal education, protection of the public from lawyer wrongdoing, the willingness of potential clients to use lawyers when they should do so, and the performance by the profession of its "public citizen" role, which includes a role in supporting the rule of law.

Selinger, *supra* note 227, at 886.

[230] *See* Rotunda, *supra* note 151, at 703 ("[t]he avowed purpose [of prohibitions against undignified advertisements] is to protect the public image of the legal profession"); Hornsby & Schimmel, *supra* note 214, at 328 (noting that the impetus behind regulations on lawyer advertising stems from the assumption that "sensationalized ads cause the public to have a lowered image of the legal profession"). The Supreme Court's lawyer advertising cases are blamed for diminishing the public's respect for the judicial process. It has been argued that when the Court afforded constitutional protection to lawyer advertising, the Court invited

> the trained advocates of our most competitive profession . . . to stoop to the values of the marketplace. Many accepted the invitation. As lawyer advertising rapidly degenerated into today's exploitative carnival, the public's level of confidence in the bar plummeted. Moreover, the profession of the law is integrally associated with . . . the judicial branch of government. Put more bluntly, from the public's point-of-view, judges are lawyers with robes. The unfortunate long term result of attorney advertising . . . was that the public's perception of the integrity of the judicial branch of government was marred.

Amicus Curiae Brief for The Academy of Florida Trial Lawyers at 4, *Florida Bar v. Went For It*, 515 U.S. 618 (1995) (No. 94-226).

[231] *See* Pearce, *supra* note 200, at 1259 (opining that "'pure' professionalism is hostile to business conduct, such as advertising or ancillary business practices"); Powell, *supra* note 228, at 269 (explaining the view that "advertising is incompatible with the duties of a professional"); Jonathan K. Van Patten, *Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. REV. 212, 217 (1995) (stating that "advertising is said to tarnish the dignified public image of the profession").

[232] *See* Whitney Thier, Comment, *In a Dignified Manner: The Bar, the Court, and Lawyer Advertising*, 66 TUL. L. REV. 527, 540 (1991) ("Money-making, if 'incidental,' is not in itself contemptible."); Re, *supra* note 221, at 113 ("[T]he principal goal of [belonging to the legal profession] is to serve clients, as well as to administer justice

practice by lawyers runs the risk of spillover effects, or negative externalities, on other lawyers or the administration of justice as a whole."[233] As Dean Pound warned, one of the most serious threats to the profession paradigm is lawyers "mak[ing] the money-making aspect of the calling the primary or even the sole interest."[234]

Osias's ads are also objectionable because of their presumably offensive, and hence undignified, subject matter. The fear of the profession paradigm is that such ads will lower the public image of the legal profession.[235] This will, in turn, jeopardize the public's confidence in lawyers and the judicial process itself.[236] Most lawyers surveyed about Osias's ads have complained that they demean the profession, to say nothing about how the ads demean women.[237] The president of the Nassau County Bar declared Osias's ads "a disgrace that degrades the profession."[238] Other ethics observers have decried the ads for being in poor taste and eroding the public view of lawyers.[239]

[and] [t]he key ideal of the profession is service, rather than maximization of profits and billable hours."). *But see* Bates v. State Bar of Arizona, 433 U.S. 350, 379 (1977) ("It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort.").

[233] Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 FORDHAM L. REV. 569, 582 (1998). Indeed, advertising is considered antithetical to the profession because:

> [b]y its very nature, advertising involves the calculated manipulation of symbols to shape consumer preferences. As to whether such preferences reflect real needs or merely reflect desires that the media promotes until individuals finally come to view them as necessities, the marketplace is indifferent. Equally so, when legal representation is fostered by advertising, the market is indifferent to whether the requested services are pursued to vindicate that which the public has defined as good or what an individual rationalizes as desirable.

Powell, *supra* note 228, at 269-70.

[234] POUND, *supra* note 224, at 354.

[235] *See* Hornsby & Schimmel, *supra* note 214, at 328.

[236] *See id.* at 331.

[237] *See* Tennen, *supra* note 1, at 8. In fact, as a general matter, lawyers have become concerned with the decline of professionalism. A 1990 survey revealed that almost 65% of attorneys bemoaned that law had become less a profession and more a business. *See* Margaret C. Fish, *Lawyers Give Thumbs Up*, NAT'L L.J., May 18, 1990, at S2.

[238] Wise, *supra* note 4, at 1. While leaders of the bar express fear that negative publicity swirling around Osias's ad campaign will rub off on the profession itself and harm the public image of all lawyers, Osias simply responds that they are "jealous" of her success. *See Exhibit A: When Networking Isn't Enough*, NAT'L L.J., Dec. 11, 1995, at A10 [hereinafter *Networking*].

[239] *See* Wise, *supra* note 4, at 1. Although Osias's use of sex to sell legal services is the primary reason her ads are considered undignified, her emphasis on profit also

The profession paradigm is concerned that "a wholesale depression of the legal profession, brought on by a belief that the law may not be a high and noble calling, and may in fact be a business instead of a profession, could lead to its societal ineffectiveness."[240] Adherents of the profession paradigm insist that it is not enough simply to speak of professional values. Rather, "[b]y words and by deed, lawyers should conduct themselves as members of a noble profession dedicated to public service and the administration of justice."[241] That is the essence of the profession paradigm. Yet Osias's words and deeds seem to reflect very different values. Roping up five men in their underwear as part of an effort to sell legal services hardly seems to inspire faith in the practice of law as a higher calling, detached from the crass commercialism of the larger culture. As one adherent of the profession paradigm urges:

> It must be made clear that what is permissible in other areas of commerce is not permissible in ours. The argument that no direct injury is shown from distasteful ads cannot be allowed to carry the day . . . . Attorneys cannot simply create market share by hiring an ad agency. This is still a profession where steadily making one's way, building trust and reputation through effort and self-improvement, must be the paradigm. We are of our culture, but we need not sink with it.[242]

Despite the impassioned rhetoric by adherents of the profession paradigm, however, the view that law is a profession, not a business, has been steadily eroding over the last several decades. As the next section details, the legal field has witnessed the emergence of a new paradigm, the business paradigm, which has successfully challenged, and is gradually replacing, the dominance of the profession paradigm. Moreover, recent developments in the law promise only to

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ties into the dignity analysis. *See* Thier, *supra* note 232, at 528 (explaining that "it is incumbent upon lawyers that they be dignified in order to maintain the public confidence [because] [t]he hallmark of dignity and professionalism lies in unselfish public service, which can be achieved only through suppression of the profit motive").

[240] Hornsby & Schimmel, *supra* note 214, at 331. While Hornsby and Schimmel do not find this argument credible or persuasive, they do argue that the public image of the profession could be valuable insofar as its effect on the self-image of lawyers is concerned. *See id.*

[241] Re, *supra* note 221, at 114.

[242] Robert Battey, Note, *Loosening the Glue: Lawyer Advertising, Solicitation and Commercialism in 1995*, 9 GEO. J. LEGAL ETHICS 287, 319 (1995); *see also* Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 956-57 (1995) ("We must remember that if lawyers are to continue to claim status as a profession, we must proclaim and enforce standards that are compatible with those of a profession.").

hasten the sweep toward the business paradigm in the future, portentously raising issues for proponents of the profession paradigm. These proponents believe that any decline in professionalism will be occasioned by deleterious consequences for both lawyers and society at large.

B. The Rise of the Business Paradigm: Prompting a Professionalism Crisis Within the Law

Although historically a tension existed within the law between principle and profit, the growing consensus in recent decades is that the latter is triumphing over the former. Osias's ads represent the triumph of profit over principle, as the prospects of financial self-reward have prevailed against the competing aspirations of the profession paradigm.[243] In a legal climate dominated by the profession paradigm, Osias never would be able to use sexually provocative ads to attract clients, at least not with impunity. In fact, legal advertising of any sort is considered unprofessional under the profession paradigm.[244] Under the business paradigm, however, only market forces serve as a deterrent, and, if a particular marketing strategy proves to be commercially successful, as in Osias's case, there may be no deterrence at all.

Osias is clearly a disciple of the business paradigm, and she means business. In most of her public statements, and in appearances before business groups, Osias is "expound[ing] her views that 'a little cleavage, a little leg' can get a businesswoman far"[245] and counseling women that, to be successful in the legal field, they must use their "sexual weapons" to "manipulate men."[246] At the same time, Osias spurns the profession paradigm and battles a powerful state bar that seeks to temper her pursuit of profit by forcing her to observe standards of professionalism set forth in disciplinary

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[243] Interestingly, in pursuing her marketing campaign, Osias herself exploited a tension, albeit a qualitatively different one, that exists between men and women. As Osias explains, "there's a sexual tension that always exists between men and women and women have to learn to use it to their advantage and manipulate it [in order to draw attention and to get men to advance women]." *Lawyer Sells Sex Appeal*, *supra* note 25.

[244] *See* Pearce, *supra* note 200, at 1259; Powell, *supra* note 228, at 269.

[245] James Bernstein, *Inside Stories*, NEWSDAY, May 5, 1997, at C3.

[246] *See Leggy Lawyers*, *supra* note 3, at 12. As Osias has explained elsewhere, "[a] man's vulnerable point is his desire for sex. Why not, women, use it? Not to walk around with a couch, but to use it as an enticement, to get that male person to mentor you." *Women Spotlighted by Scandal*, on THE GERALDO RIVERA SHOW (Investigative New Group television broadcast, Aug. 27, 1998), available in WESTLAW, 1998 WL 3235433 [hereinafter *Women Spotlighted by Scandal*].

regulations.[247] Profit, not principle, rules Osias's actions, and thus the consequences of her ads on the professional reputation of other lawyers is merely a secondary concern for her.

The mere fact that a lawyer actually attempts to use sex to sell legal services is perhaps the best attestation to the rise of the business paradigm in American law today. As one legal commentator recently observed, "the widespread perception [today] is that law practice is a business."[248] While there has long been a concern that creeping commercialism is transforming the practice of law into a business,[249] what is different about the last several decades, especially after *Bates*, "is that concern over commercialism has become a crisis."[250] Indeed, the ascension of the business paradigm has provoked a professionalism crisis within the law.[251]

The rise of the business paradigm is attributable both to changes in Supreme Court jurisprudence and to increased competition within

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[247] *See supra* notes 1-14 and accompanying text.

[248] Pearce, *supra* note 200, at 1232; *see also* Thier, *supra* note 232, at 540 ("Commercialism is rampant in the legal profession.").

[249] The concern over whether the law is losing its professional aspects and becoming a business has persisted since the turn of the century. *See* Bogus, *supra* note 210, at 913; Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 670 (1994) (stating that "the sense that law has declined from a noble profession infused with civic virtue to commercialism . . . has been a recurrent theme for at least a hundred years").

[250] Bogus, *supra* note 210, at 913 (citation omitted). The Court in *Bates* escalated the profession-versus-business debate when it rejected the bar's assertion that advertising to attract business is unprofessional. As the Court stated:

> We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated . . . .But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge.

Bates v. State Bar of Arizona, 433 U.S. 350, 368-69 (1997). The Supreme Court's lawyer advertising cases following *Bates* have reflected the polar tensions of the debate. *See* Steven H. Hobbs, *Ethics in the Age of Entrepreneurship*, 39 S. TEX. L. REV. 599, 611 (1998) (stating that "the old profession-business debate . . . ha[s] been simmering since *Bates*"). Justice O'Connor obviously has been the most stalwart defender of the profession paradigm; this support is illustrated by the Justice's defense of the paradigm in numerous dissenting opinions prior to *Went For It*. Although the Court's holding in *Went For It* is narrow, *see supra* notes 156-78 and accompanying text, the decision is in many ways a vindication of Justice O'Connor's position — and a long-awaited one at that. *See* Battey, *supra* note 242, at 318 ("Justice O'Connor certainly deserved her day in the sun after all these years.").

[251] *See* Pearce, *supra* note 200, at 1232.

the practice of law.[252] As recounted in Part I, the Supreme Court was pivotal in facilitating greater competition, and hence greater commercialism, when the Court relaxed regulations against lawyer marketing under cover of constitutionalism.[253] The assault on the profession paradigm was fully joined in 1977 when the Court handed down *Bates*. Justice Blackmun, who wrote the majority opinion, boldly declared that "the belief that lawyers are somehow 'above' trade has become an anachronism,"[254] thus lending legitimacy to the business paradigm within legal circles.[255] Even if *Went For It* reinvigorates the profession paradigm and signals a shift away from the business paradigm, at least in Supreme Court jurisprudence — which seems unlikely given the Court's narrow holding[256] — what is clear is that "overturning *Bates* would not change the role that the *Bates* decision has played in confirming that the perspective of law as a business had moved from the margin to the center of the legal community's discourse."[257]

While *Bates* validated the business paradigm by allowing it to prosper constitutionally, legal commentators have fostered its growth

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[252] *See* Bogus, *supra* note 210, at 913 ("The commercialization of the practice of law is often attributed to increased competition."). As competition increases, even more aggressive marketing schemes, such as Osias's ads, can be expected simply out of economic reality. *See* James Parkerson Roy, *Marketing a Law Practice Does Not Harm the System*, 43 LA. B.J. 18, 20 (1995) ("The practice of law today is truly a business, and all businesses must market their services or products to the public as a matter of economic necessity.").

[253] Commentators have observed that "[b]y permitting legal advertising, the Court allowed the profession to fully enter the entrepreneurial age." Hobbs, *supra* note 250, at 605; *see also* Re, *supra* note 221, at 98 (stating that "much of the perceived commercialism of the legal profession has been directly attributed to attorney advertising"). What is perhaps most egregious, however, is that the Court created its commercial speech jurisprudence, including lawyer advertising rights, out of whole cloth. As one commentator observed, "[t]he Court's extension of free speech protection to advertising has provoked the criticism that it revives the spirit of *Lochner v. New York*, substituting judicial for legislative judgments of what degree of regulation best serves the public's economic welfare." Sullivan, *supra* note 233, at 576-77 (citing Lochner v. New York, 198 U.S. 45 (1908)).

[254] *Bates*, 433 U.S. at 371-72. Justice Blackmun attacked the apparent presumption of the profession paradigm "that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar." *Id.* at 368.

[255] As Professor Pearce explains, *Bates* makes the view that law is a business "a respectable position in mainstream legal discourse." Pearce, *supra* note 200, at 1249.

[256] *See supra* Part II. *But see* Battey, *supra* note 242, at 290 (arguing that "the wilderness of almost unfettered commercialism, toward which the Court was heading, was a dangerous, minatory place, and that the Court's gradual return to older notions of professionalism and dignity should continue and should accelerate [due to *Went For It*]").

[257] Pearce, *supra* note 200, at 1249-50.

by exposing as hypocritical the historical justifications for the profession paradigm. Commentators have observed that the regulations against advertising and solicitation adopted in the early 1900s[258] did not affect lawyers associated with the bar because they were, for the most part, business lawyers.[259] Rather, the proscriptions directly affected small and solo practitioners who had difficulty attracting clients.[260] Indeed, regulations such as the ban on lawyer advertising have been decried "as a hypocritical exercise in constraining the business conduct of small and solo practitioners while permitting the business practices of big firms, such as the use of social networks to recruit wealthy clients."[261]

The ethics rules of the profession paradigm also have been attacked as functioning as perverse instruments of the professional elite to maintain their social standing during the turn of the century. As one observer notes, there is "ample evidence" to support the view that the advertising ban, for example, "is rooted in trade restrictions imposed in the early 1900s to ensure that 'the right people' practiced law."[262] After all, advertising was not only permitted in the practice of law during the nineteenth century, but it was "common and acceptable."[263] In fact, even Abraham Lincoln advertised.[264] Some legal historians have linked the severe marketing restrictions of the

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[258] *See, e.g.*, CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

[259] *See* Brooks, *supra* note 204, at 9 (observing that "[t]he lawyers associated with the ABA who formulated and implemented the Canons were primarily commercial lawyers who represented large clients, rather than the small, less dignified practitioners").

[260] *Id.* (commenting that, given the composition of the bar, "it is not surprising that proscriptions against advertising and solicitation did not impact the practice of the well established lawyer, but rather worked to the disadvantage of the small law firm and solo practitioner who had problems procuring clients").

[261] Pearce, *supra* note 200, at 1247; *see also Bates*, 433 U.S. at 370-71 (noting that "cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contact with potential clients").

[262] Alan S. Flink, *Legal Advertising Facts, Myths and Recommendations — Report of the A.B.A. Commission on Advertising*, 43 R.I. B.J. 13, 17 (1995).

[263] *See id.*

[264] *See id.* Abraham Lincoln's ad ran in the August 10, 1838 edition of the *Sangamo Journal* and read: "STUART & LINCOLN, Attorneys and Counsellors at Law, will practice, conjointly, in the Courts of this Judicial Circuit — Office No. 4 Hoffman's Row, upstairs. Springfield." LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (1980). *But see* Burger, *supra* note 242, at 955 (arguing that it is no "justification to assert that there is a long history of advertising . . . . [because] [t]oday's slick advertising campaigns bear no resemblance — absolutely none — to what Lincoln did").

profession paradigm to discriminatory efforts by a predominantly Anglo-Saxon elite to keep Catholic and Jewish immigrants from practicing law in the early twentieth century.[265] Others have viewed the restrictions as anti-consumer devices designed to artificially inflate the price of legal services.[266] The rhetoric of the profession paradigm, meanwhile, has been attacked as simply a mask to conceal the profit-driven motives of lawyers.[267]

Commentators highlight that the irony of the profession paradigm was that business lawyers in the 1900s, while railing against commercialism, which they claimed threatened to swallow the profession, and stressing the importance of selfless public service and dignity, were nevertheless profit-driven and pursued great wealth and power.[268] Today, more than ever, the rhetoric of the profession paradigm is assailed as self-serving. Critics question whether there is a meaningful difference between, on the one hand, small and solo practitioners who market their services through television, radio, or magazine ads, and, on the other hand, lawyers at large firms who promote their firms at eating and social clubs.[269] Why is it, critics ask, that efforts by the former to procure clients are considered, from an ethics standpoint, undignified and questionable, while the efforts of corporate law firms to attract clients are considered tasteful and acceptable, even though the two groups are simply promoting their practices through different methods?[270]

Harsh criticism has been leveled at the organized bar for "seemingly subscrib[ing] to the view that profit motivation is unprofessional when it is flaunted before the public, but not when it

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[265] *See* Pearce, *supra* note 200, at 1247; *see also* Joy, *supra* note 222, at 1000 (explaining that the profession paradigm has been used "to discriminate against religious and racial minorities").

[266] *See* Pearce, *supra* note 200, at 1247-48 (describing opposition to the profession paradigm by consumer advocates such as Ralph Nader and Mark Green).

[267] *See, e.g.*, MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 114-15 (1975); *see generally* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). The profession paradigm has also been attacked for allowing lawyers to maintain a monopoly over the practice of law. *See* Pearce, *supra* note 200, at 1248; Joy, *supra* note 222, at 1000.

[268] *See* Thier, *supra* note 232, at 537-41 (noting the sanctimony of corporate lawyers/bar leaders who, while "decrying commercialism in the legal profession, and advocating dignity and public service," nevertheless pursued great wealth and power).

[269] *See* Flink, *supra* note 262, at 16-17.

[270] *See id.* at 17 (observing that "[m]ost find the 'marketing' of the corporate law firm to be essentially in good taste and acceptable and the solo or small practitioner's advertising program, particularly if it is on radio or television, to be at best, questionable").

occurs behind oak-paneled walls."[271] Unremarkably, critics of the profession paradigm have also noted that restrictions on legal advertising do not affect most of the lawyers who espouse them because those individuals practice in settings in which the restrictions are irrelevant, further exposing the hypocrisy of the paradigm.[272]

This is borne out by Osias's experience in the New York real estate market where established lawyers, who are mostly male, rely on networking opportunities to generate business, and thus are not dependent on advertising to sustain a livelihood. For Osias, by contrast, advertising was essential to the success of her practice. Despite spending several years, as she claims, relying on traditional networking strategies to generate business, she could not attract clients because the male lawyers of the "old boy's network" would "give each other the business."[273] If Osias's account is accurate, then advertising restrictions in the New York legal market would indeed serve to keep nouveaux legal upstarts down by hindering their ability to attract new clients or, more importantly, to take old clients away from more established lawyers in the field.

Regardless of whether the attacks on the profession paradigm are fully warranted, the reality is that commercialism is rampant within the practice of law today. The surfeit of lawyers today has made resort to commercialism virtually necessary for some lawyers.[274]

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[271] Thier, *supra* note 232, at 541 (adding that "the view that commercialism is unprofessional stands as a glaring and reprehensible hypocrisy"); *see also* Hornsby & Schimmel, *supra* note 214, at 335 (observing that the "justification for restrictions on business-getting techniques [has come] at the cost of accusations of elitism and hypocrisy").

[272] *See* Hornsby & Schimmel, *supra* note 214, at 335 ("Many of those who advocate restrictions in the name of public interest have either been in practice settings where the restrictions are not relevant or are among those forced to preserve a practice or otherwise compete with those lawyers who would or do advertise."); LAWYER ADVERTISING AT THE CROSSROADS, AMERICAN BAR ASSOCIATION I (1995) ("Many who oppose advertising complain about its effects on the image of the profession but in fact are far more concerned about the fiscal impact on their practice."); *see also* Pearce, *supra* note 200, at 1260 (describing view of some legal commentators who believe that "taboos on business behavior are illegitimate products of a bigoted bar elite").

[273] France, *supra* note 1, at A10.

[274] *See* Bogus, *supra* note 210, at 914 (noting that, as measured by statistical figures documenting the increase in the number of lawyers in the last several decades, "competition became more than twice as stiff for lawyers over the past two decades, and with law schools now producing 38,000 new lawyers annually, the screw is tightening every year") (footnote omitted). Of course, small and solo practitioners, and the fierce competition between them, are in no way singularly responsible for the rise of the business paradigm in the last several decades. If anything, large firms are just as responsible for elevating the business paradigm over the profession paradigm. Legal observers have commented that, for corporate law firms in the last

Meanwhile, the ever-increasing number of lawyers will only fuel competition and ensure even greater commercialism in the future.[275] The figures are staggering. Current projections indicate that there will be over one million lawyers in the United States by the turn of the century.[276] For over one hundred years, up until 1970, the growth in the number of lawyers was commensurate with the growth of the general population.[277] In 1960, for example, the ratio of lawyers to the general population was one lawyer for every 627 persons.[278] By 1991, however, the ratio had changed dramatically to approximately one lawyer for every 295 persons.[279] Although total enrollment at

several decades, "'a new era has dawned, one in which the practice of law has ceased to be a gentlemanly profession and instead has become an extremely competitive business.'" Pearce, *supra* note 200, at 1254 (quoting Tamar Lewin, *A Gentlemanly Profession Enters a Tough New Era*, N.Y. TIMES, Jan. 16, 1983, § 3, at 1). In addition, "[h]igh salaries of lawyers and billing practices exacerbate the growing feeling that the practice of law is becoming, or has already become, more of a business or commercial activity rather than a profession, the purpose of which is to render service." Re, *supra* note 221, at 98. The transformation of the law is apparent as partners at large corporate law firms now get paid comparable to big business executives, often commanding salaries of over one million dollars annually. *See* Pearce, *supra* note 200, at 1251. Meanwhile, the commitment to selfless public service at the top law firms is claimed to be conspicuously absent. *See* Joy, *supra* note 222, at 1007 (reporting that the "commitment to pro bono work is absent among many of the top 100 income-producing law firms").

[275] *See* Kessler, *supra* note 215, at 460 ("There are a variety of causes for the overall increase in competition and commercialism within the practice of law, the most obvious of which is the sheer number of people entering the profession."); Bogus, *supra* note 210, at 913-14 (noting that "the factor generally accorded the greatest weight in increasing competition — and hence commercialism — within the bar is the enormous growth in the number of lawyers over the past two decades"). Compounding matters even further is the "ever-increasing debt load from loans necessary to cover the costs of obtaining a law degree." Kessler, *supra* note 215, at 477. The enormous debt loads of new law school graduates "has led to an extreme limitation on available avenues of practice, the main option being an associate position with a large firm for those fortunate to receive an offer." *Id.* In other words, mounting debt is forcing new graduates, out of economic necessity, to focus on the business side of the law rather than its public service side. *Id.* ("[t]his 'new breed of law student may be more moved by self-promotion . . . than by vague notions of justice, equality, and reform'") (quoting Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1450 (1995)).

[276] *See* Re, *supra* note 221, at 104.

[277] *See* Kessler, *supra* note 215, at 460 (adding that, today, the number of lawyers is "more than twice its historical average").

[278] *See id.*

[279] *See* Re, *supra* note 221, at 104. Compare the ratio in the United States with Japan's where there is one lawyer for every 10,000 persons, and the glut of lawyers domestically becomes striking. *See id.* On the other hand, "[s]ome observers tend to explain the difference by noting the relative disuse of the formal legal system by the Japanese, and by the Japanese concept of justice that places a greater value on the importance of community." *Id.*

America's law schools has fallen off slightly in the last two years or so,[280] the general consensus is that, when it comes to lawyers in America, there are just "too many of them."[281]

An increased number of lawyers, of course, means increased competition.[282] An inundated legal marketplace, in turn, breeds cutthroat commercial practices and spawns an "urgency to procure clients by any means necessary."[283] Osias's coquettish ads personify the urgency of procuring clients "by any means necessary."[284] Her

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[280] *See* Jennifer L. Reichert, *More Students Apply to Law School, Fewer Enroll*, TRIAL, June 1998, at 95 ("While the number of applications to law school has increased, the total enrollment fell for the second year in a row, according to the ABA. It recently reported that in October 1996, a total of 128,623 students were enrolled in law schools. One year later, that number had dropped to 125,886 — a 2.1 percent decrease.").

[281] *See* Kessler, *supra* note 215, at 460; *see also* Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 510 (1998) (noting how "[t]he number of lawyers has risen dramatically over the last quarter century"); Cynthia G. Hawkins-Leon, *The Socratic Method-Problem Method Dichotomy: The Debate over Teaching Method Continues*, 1998 B.Y.U. EDUC. & L.J. 1, 15 (1998) (commenting on "the 'boom' in the number of law school graduates during the 1960's, 1970's, and 1980's"); Mike Jay Garcia, *Key Trends in the Legal Profession*, 71 FLORIDA B.J. 16, 24 (1997) (citing a 1995 survey conducted by the Florida Bar finding that lawyers complained about "too many attorneys and too much competition" within the practice of law). A running joke among comedians is that "there will soon be more lawyers than people." Re, *supra* note 221, at 105.

[282] Ironically, as more and more lawyers are admitted into the practice, the need to rely on advertising, especially eye-catching advertising, increases substantially because of greater competition. One solution for dealing with excessive competition is to regulate entry into the practice rather than attempting to regulate the tremendous number of lawyers who are actually admitted to the bar. *See* Brooks, *supra* note 204, at 29 ("State bar associations should regulate the perceived problem of advertising at the beginning, and not at the end, by strongly encouraging the nation's law schools to personally address the problem of attorney glut.").

[283] *See id.* at 28.

[284] It has already been explained that Osias's marketing scheme violates the profession paradigm by maximizing financial self-interest and extolling the pursuit of profit at the expense of a commitment to altruism. *See supra* notes 231-39 and accompanying text. Under the profession paradigm, a lawyer is required "to temper one's selfish pursuit of economic success by adhering to standards of conduct." Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488 (1988) (O'Connor, J., dissenting). Contrary to Dean Pound's admonishment, Osias appears to make moneymaking her primary ambition as opposed to an incidental concern. *See* POUND, *supra* note 224, at 5. Unabashedly commercial, Osias is "hawking her wares" rather than subordinating her commercial self-interest in favor of a devotion to selfless public service. Osias's ads are also claimed to be imperiling the public image of the legal profession because of their sexual subject matter. Osias's ads thus violate the profession paradigm by undermining public respect for lawyers and, hence, public respect for the judicial process itself. The New York Supreme Court's Grievance Committee warned Osias that her marketing scheme "casts the legal profession in a negative light and invites both criticism and ridicule." Scott Brede, *Fleshing Out New Clients*,

willingness to break open, actually, to break wide open, the taboos of the profession paradigm only underscores the enormous economic pressures facing lawyers today.[285] More often than not, "the catalyst behind 'unprofessional' advertising is the attorneys [sic] need to make a living."[286] In Osias's case, the struggle for economic survival was the impetus behind her advertising campaign. Traditional barriers, such as Osias's need to break through the "glass ceiling" of a "completely male-dominated" real estate industry in New York,[287] merely exacerbated her financial difficulties, leading her to resort to a marketing campaign heretofore unheard of within the practice of law.[288]

CONN. LAW TRIBUNE, Sept. 1, 1997, at 1.

[285] *See* Kessler, *supra* note 215, at 461 (noting that "the increasing use of aggressive advertising . . . demonstrates the fundamental shift in the practice of law toward self-preservation and client attraction").

[286] Brooks, *supra* note 204, at 28; *see also* Bates v. State Bar of Arizona, 433 U.S. 350, 354 (1977) (noting that the attorneys in that case also resorted to advertising due to economic struggles).

[287] *See* Wise, *supra* note 4, at 1. Even the legal press in New York has been denounced for purportedly displaying a bias against women. As one reader of the *New York Law Journal*, who expressed outrage over the paper's coverage of Osias advertisements, stated:

> I am a member of the bar and female, and I see nothing wrong with Rosalie Osias's advertisements. Some people are afraid to be creative — or perhaps just do not have the ability. Kudos to Ms. Osias for knowing her market and for being bold enough to tap into it.
>
> Among other things, law is a business. And in a society where a publication like the Law Journal — 40 percent of whose readership, I would guess, is comprised of members of that profession who happen to be female — takes a gender-neutral term like "lawyer" and feels compelled to modify it with the word "woman" — a choice which reinforces an implied (and what I heretofore thought was blessedly moribund) association of "lawyer" with "male" (otherwise why the need for modification?), a lawyer whose gender still (!) generates a modifier needs to use everything in her arsenal to develop her practice.
>
> Query: If a male lawyer had run an analogous ad campaign for his practice, would the Law Journal headline have read, "Male Lawyer's Suggestive Ads Stir Ire . . ."? And, on a different level, in the case of a male, would ire have been stirred?

Sandra L. Mallenbaum, *Colleague in Gender Sees Ads as Creative*, N.Y. L.J., Nov. 29, 1995, at 2.

[288] Some legal observers, while conceding that Osias faced barriers in the New York legal market, nevertheless impugned her methods for overcoming them. An editorial in the *National Law Journal* observed that while Osias's desire to "crack the glass ceiling protecting the male-dominated corporate culture" may sound noble, "even if this poppycock were true, it's hardly the best way to do it." Editorial, NAT'L L.J., Aug. 11, 1997, at A20. Another commentator, while acknowledging "the plight of fledging young attorneys in an era of oversupply of lawyers and a general reshaping of the profession," asks:

> [H]aven't the same practice start-up concerns faced by today's new

In the future, the legal community can only expect more lawyer marketing that breaks through the traditional constraints of the profession paradigm, further leading to the impression that the practice of law is a business rather than a profession.[289] It is unclear, however, how the public image of lawyers would be affected if particular segments of the legal market became saturated by Osias's particular brand of advertising. It is one thing to have only one Osias in the market, as there is now, routinely using sexual allure to sell legal services. It would be quite another matter to have hundreds of lawyers using risqué or salacious ads to attract clients. Conceivably, there could be a serious public backlash if a large number of lawyers decided to rely on sexually provocative ads.

On the other hand, it is possible that Osias's marketing scheme is nothing more than a novelty, albeit a highly successful one. After all, a large number of lawyers are not sitting in law firm conference rooms drawing up marketing strategies to figure out how much skin they should flash in order to attract clients.[290] In fact, despite the erosion of the profession paradigm in the last several decades, many lawyers still seem to think that Osias's ads are unbecoming of a lawyer.[291]

> lawyers been around for years? Why not use the same methods to establish a practice that lawyers used before advertising was permitted? Curator duty, referrals from "mentors," lawyer referral services and referrals from family members, business associates, social contacts and acquaintances proved successful in the past and could be no less productive now . . . .

Harry J. Philips, Jr., *Advertising Detracts from the Professional Image of Lawyers*, 43 LA. B.J. 19, 22 (1995).

[289] Ironically, whereas the growth of the bar in the latter nineteenth century led to the creation of the profession paradigm in order to suppress the commercialism perceived to be invading the law, the massive lawyer explosion today is undermining the profession paradigm and giving rise to the business paradigm within the law.

[290] When questioned about whether the legal community could expect similar ads like those by Osias, most lawyers who were surveyed responded that others "may try it but probably wouldn't get away with it." Tennen, *supra* note 1, at 1. Other lawyers, in fact, may not run similar ads because of the belief that such a campaign would not be commercially viable — a theory that, based on Osias's success, is not self-evident. From an ethics standpoint, moreover, Osias *has* gotten away with it, at least based upon the fact that the Nassau County Bar ultimately decided not to pursue disciplinary actions against her. *See No Bar to the Sexy Ads*, NEW YORK DAILY NEWS, Oct. 31, 1995, at 1. After the disciplinary investigation against her was closed, Osias issued a press release proclaiming that her position had been vindicated and that "lawyers can now use plenty of cleavage and leg in advertising." *Today's News: Update*, N.Y. L.J., July 31, 1997, at 1. Shortly thereafter, however, a grievance committee was once again investigating Osias to determine whether her press release contained "false and misleading statements." *See id.*

[291] *See* France, *supra* note 1, at A10.

Moreover, if legal ads that employ sexual imagery do tarnish lawyers' reputations, as the profession paradigm insists, then it is reasonable to assume that lawyers simply will not employ such ads. As highlighted by Justice Kennedy's dissent in *Went For It*, the problem of offensive legal marketing is "largely self-policing [because] [p]otential clients will not hire lawyers who offend them."[292] Indeed, it has been argued that "the market tends to be self-correcting" because lawyers, pursuing their economic self-interest, will not rely on marketing strategies that damage their reputations.[293]

The view that offensive or undignified lawyer ads are self-policing, however, presupposes that such ads do, in fact, damage the reputations, or more accurately, the commercial well-being, of individual lawyers who pursue such ad campaigns. The shortcoming of such a view is that, although such ads may negatively impact the image of the profession as a whole, the prospects of financial gain from a particular marketing campaign will encourage the individual lawyer to pursue it, regardless of its impact on other lawyers. Again, Osias's example is relevant. A slew of lawyers and bar leaders expressed their fervent outrage over Osias's ads, many of whom claimed she would bring disrepute to the profession,[294] and even

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[292] Florida Bar v. Went For It, 515 U.S. 618, 643 (1995) (Kennedy, J., dissenting).

[293] Watkins, *supra* note 197, at 782 (arguing that lawyers will not market themselves in a manner that "tarnish[es] their own reputations or damage[s] consumer trust"); Hobbs, *supra* note 250, at 618 ("noting that [l]awyers who overreach their clients or are obnoxious in their pursuit of business will lose clients"); Flink, *supra* note 262, at 19 (stating that "the marketplace should and will eliminate . . . tasteless and undignified ads").

[294] Several lawyers commented that Osias's advertising demeans women and "trivializes" and "hurts" the legal profession. *See* Tennen, *supra* note 1, at 8. One lawyer commented: "People already have a jaded view of attorneys. Using sex to sell is not only demeaning to the profession but to women as well." *Id.* Another lawyer remarked: "We have to remind ourselves that we are advertising the legal profession and not a nightclub." *Id.* It has been reported that "[m]ost of the women in the industry 'are appalled' by the advertising campaign and are unlikely to give Ms. Osias work when they reach positions of influence." France, *supra* note 1, at A10. One female lawyer commented: "I'm not a bad-looking woman, but I would never use my sexuality to get business." *Id.* Bar leaders have likewise condemned Osias's ads. A former member of the Professional Ethics Committee of the Nassau County Bar Association stated that "this type of advertising is in bad taste. It creates a bad image for lawyers who are already getting a bad rap." *Class Act Graces Classy Profession*, SUN-SENTINEL (Fort Lauderdale), Oct. 6, 1995, at 12A. Meanwhile, William F. Levine, president of the Bar Association of Nassau County called Osias "a public menace" and stated: "If I weren't a lawyer and I saw a lawyer cavorting that way . . . I'd think less of that lawyer, and it might well lower my general view of the legal profession." France, *supra* note 1, at A10.

Some supporters of Osias, however, argue that her detractor's arguments are not logical:

some potential clients vowed never to employ her "ever."[295] For all this backlash that Osias has had to endure for pioneering her sexual advertising campaign, however, her ads have attracted a great number of clients.[296] Thus, whatever negative impact her ads may have had on the profession as a whole have not been necessarily factored into her own economic equation.[297] Moreover, consider the fact that Osias, in particular, probably has little regard for the reputation of other lawyers in an industry she considers "completely male-dominated."[298]

> If, as [critics of Osias] suggest, the ads lessen the public's perception of attorneys, the ads would be unsuccessful and would not bring Ms. Osias the business they apparently are. What we have is a very clever and creative way of obtaining business that seems to bother only the attorney's competitors, not the potential clients.

David Reid Dillon, *Female Lawyer's Ads Defended by Logic*, N.Y. L.J., Dec. 21, 1995, at 2.

[295] *See* France, *supra* note 1, at A10. One potential client remarked: "If she marketed herself differently, there is a very good chance that I would have done business with her because I believe it is good for women to network and stay together . . . . But her ads are offensive to me. I would never give her a deal. Ever." *Id.* The relevant question, however, is whether most of the potential clients who were outraged by Osias's ads would have likely employed her even had she not run the ads.

[296] As noted previously, Osias's advertising campaign has been extremely successful in attracting clients. Osias has hired several additional associates and has spread her practice across five locations. *See supra* notes 16-19 and accompanying text.

[297] Some commentators, however, believe that dignified ads, which help maintain the positive reputation of the profession, also ensure a healthy bottom line that endures long-term. Jerome E. Bogutz and William E. Hornsby, Jr., who reviewed a survey conducted by the ABA Commission on Advertising concerning legal advertising, advised lawyers who intend to advertise that "the study suggests that you exercise good judgment in the quality and content of your advertising." Jerome E. Bogutz & William E. Hornsby, Jr., *Dignity in Lawyer Advertising: What the Survey Says*, BAR LEADER, July-Aug. 1990, at 15. As they explained:

> To compromise your profession for short-term gains is short sighted. If you believe clients want competent representation from professionals they can respect and trust, then we believe . . . that such good judgment will not only improve respect for you and your profession but, in the long term, should prove positive to your bottom line.

Id.

[298] *See* Wise, *supra* note 4, at 1. As Osias complained, "[t]his really is a male-dominated industry. The men network, and they have a group, and it's a clique, and they give each other the business." *See* France, *supra* note 1, at 1. Osias explains that she "was trying to represent banking institutions that are run by men and owned by men . . . . Men control the industries. They control the world. They control the banks, the law firms, the accounting firms and you've got to get their attention and you've got to get men to mentor you." *Lawyer Sells Sex Appeal*, *supra* note 25; *see also Women Spotlighted by Scandal*, *supra* note 246 ("If I want new clients, those men aren't gonna give me the business because I'm a woman. They're gonna give the business to their buddies. There's an old boys' network out there.").

The simple fact that Osias's ads have been wildly successful undermines the notion that the problem of undignified marketing campaigns will be self-policing. Osias's astonishing financial success resulting from her sexual advertising campaign is perhaps the best incentive for other struggling lawyers to implement similar marketing schemes. Osias's success, moreover, highlights the growing professional isolation between individual lawyers resulting from the decline of the profession paradigm.[299] As one legal commentator has observed, "the increase in competition for clients and fragmentation of the bar have isolated many lawyers from their peers, and as a result self-policing has essentially disintegrated."[300] The growing economic pressures bearing down on struggling practitioners in today's highly competitive and overpopulated legal market,[301] coupled with the rise of the business paradigm and its accompanying relaxation of ethical restraints, likely portends more sexual advertising in the future.

Proponents of the profession paradigm fear that a whole series of sexually provocative ads would further erode public confidence in lawyers and threaten people's confidence in the rule of law.[302] Some empirical evidence suggests, however, that there is little or no relationship between lawyer advertising and the public image of lawyers.[303] Practically speaking, "lawyers in the United States have

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[299] As one commentator observed:

> [L]awyers must concentrate on policing their own. Each individual lawyer must not only be held accountable for her own actions, but must also accept the responsibility of emphasizing similar means of self-control among her fellow members of the bar. Such behavior was quite common prior to the second half of the twentieth century, and is repeatedly stressed in modern legal ethics codes and rules [but unfortunately is no longer the case today]."

Kessler, *supra* note 215, at 484.

[300] *Id.* (arguing that, as a response, "[a]utonomous control and self-regulation . . . must be reinforced among practitioners, before the courts and state administrative agencies choose to do it for us").

[301] *See supra* notes 272-81 and accompanying text.

[302] *See* Cooper & Humphreys, *supra* note 229, at 923 (maintaining that favorable public image of lawyers is essential to the judicial system). *But see* Brooks, *supra* note 204, at 31. Brooks states:

> [T]he fear remains that through advertising the image of the profession will deteriorate to such an extent that attorneys will be scorned by non-attorneys as "unprofessional." Yet what is so unprofessional about profit seeking? We live in a capitalistic society made strong by its competitive spirit. Why then would one segment of this society choose not to participate in capitalism for the sole purpose of keeping with tradition and maintaining passive and patient lawyers?

Id.

[303] *See* Cebula, *supra* note 281, at 515 (finding that "[r]egarding the cause of the declining image of lawyers, the advertising of legal services is not the problem");

almost always had an image problem," even before lawyer advertising received constitutional protection.[304] Moreover, there are many factors, other than legal advertising, contributing to lawyers' negative public image,[305] such as grossly unethical behavior by certain members of the bar.[306]

In fact, some advertising may actually improve the public image of lawyers.[307] A 1994 ABA study on the effects of legal advertising on

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Rotunda, *supra* note 151, at 729 (suggesting that "extensive scientific evidence that presently exists shows that there is, at best, no connection between advertising and solicitation and the public attitude toward lawyers"); THE IMPACT OF ADVERTISING ON THE IMAGE OF LAWYERS, AMERICAN BAR ASSOCIATION 20 (1995) (arguing that "lawyer advertising does not influence the public's image of lawyers in general, regardless of the style and content of that advertising"); Hornsby & Schimmel, *supra* note 214, at 353-56 (noting that "results indicate that the types of advertisements have little or no effect on the public's image of lawyers in general [although] lawyers who advertise in stylish ways have superior public images when compared to lawyers in general"); Sullivan, *supra* note 233, at 583 (finding that "only minute percentages of the public attribute negative views of lawyers to advertising").

[304] Cebula, *supra* note 281, at 508 (determining that "the image of the legal profession was already on a downward trend prior to the *Bates* decision") (citation omitted).

[305] *See* Martel, Jr., *supra* note 149, at 157 n.219 ("A distaste for attorney advertising is but one aspect which contributes to the public's negative perception of the legal profession [and] [f]urthermore, it can be argued that prohibiting advertising would only eliminate one of the more visible symptoms contributing to a negative public image."); *see generally* Lauren Dobrowalski, *Maintaining the Dignity of the Profession: An International Perspective on Legal Advertising and Solicitation*, 12 DICK. J. INT'L L. 367 (1994) (sounding similar theme); *see also* Rotunda, *supra* note 151, at 730 ("only 2% of the people refer to or blame advertising as the reason for their increased negative view of lawyers"). Professor Rotunda argues:

> [S]ome people do have a negative view of lawyers, but advertising restrictions will not serve to improve the public's perception. That is because the primary way that people learn about lawyers is through reading and watching fictionalized portrayals of lawyers, ranging from John Grisham's novels to Night Court and L.A. Law [and, more currently, Ally McBeal and Law and Order]. When people are asked to name the lawyer that they most admire, frequently cited names are Perry Mason and Matlock. Indeed, Matlock is more widely admired than First Lady Hillary Rodham Clinton. Many people think that Matlock is a real person!

Id. at 730-31 (footnotes omitted).

[306] *See* Martel, Jr., *supra* note 149, at 157 n.219 (finding that "prohibiting advertising does not get rid of the basic cause of a negative public image, which is that unethical lawyers degrade the profession") (citing Dobrowalski, *supra* note 305, at 367).

[307] *See* Cebula, *supra* note 281, at 505 (suggesting that "lawyer advertising may well serve to raise the image of the legal profession"); Sullivan, *supra* note 233, at 584 (noting one study that suggested that certain commercials "may have neutral to positive effects upon consumers' images of the lawyers in the ad and the legal profession in general").

the public image of lawyers found that people who saw "stylish"[308] or "sensational"[309] commercials came away with the impression that lawyers were "more intelligent."[310] By contrast, people who saw "talking heads" commercials, which involved lawyers at a firm informing potential clients about the services their firm offered, "came away with the opinion that the lawyers were less honest."[311] Some commentators have thus suggested that "if the law would like to improve the public image of lawyers, it should get out of the way [and] should reduce its regulatory control."[312] Ironically, the "talking heads" commercials were the only informative commercials of the three, yet the people who viewed them had the least favorable view of lawyers.[313]

The results of the ABA study at least support the argument that Osias's marketing campaign will not lower the public image of lawyers. Possibly, Osias's ads, which are accompanied by clever captions featuring a play on words, will be considered creative and imaginative by many members of the public.[314] Even if that is a stretch, it is at least fair to conclude that Osias's ads do not have the same potential for offending the public as does the practice of direct mail solicitations following an accident, the issue addressed in *Went For It*.[315]

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[308] "Stylish" commercials included "visually attractive imagery, actors, slogans, and dramatizations." Rotunda, *supra* note 151, at 735.

[309] "Sensational" commercials included such things as "carnival music in the background" or a dramatization of "a car hitting a bicycle rider with the sounds of a music box interspersed with screeching tires and then the siren of an ambulance." *Id.*

[310] *See id.*

[311] *Id.*

[312] *Id.* at 736. Rotunda explained that, according to an ABA study of television advertising, those individuals

> who viewed the stylish commercials — which are not in compliance with the rules of restrictive states — had 'superior public images' of lawyers [and thus] [t]he lesson to be learned: if you want to improve the public image of lawyers, do the opposite of what many state bars urge; decrease restrictions on legal advertising; use dramatization in commercials; broadcast polished advertisements.

Id.; *see also* Cebula, *supra* note 281, at 515 (finding evidence supporting the view that "[l]egal advertising should not be subject to more stringent regulation than other forms of advertising") (quotation omitted).

[313] *See* Rotunda, *supra* note 151, at 735.

[314] *See* Dillon, *supra* note 294, at 2 (suggesting that "what we have [in Osias's ads] is a very clever and creative way of obtaining business that seems to bother only the attorney's competitors, not the potential clients").

[315] Indeed, at least one post-*Went For It* case has noted that "mere" advertising is not the same as solicitation and that the two activities implicate different concerns. *See supra* notes 162-78 and accompanying text.

On the other hand, sexually provocative ads like those used by Osias seem to go beyond stylish or sensational ads, which may be, at worst, simply tacky or tawdry. Osias's ads, even if not offensive, may still be considered highly embarrassing, and hence undignified. As one legal observer, having Osias's marketing campaign in mind, argued, "[a]dvertising that is so repugnant that it serves as an embarrassment to the profession should not be tolerated."[316]

Several problems arise with trying to regulate undignified ads, however. First, as some observers suggest, there is an inherent difficulty in defining "dignity," which "is not a self-defining term."[317] Second, even if it can be agreed that Osias's ads are undignified, it is unclear whether states have a substantial interest in regulating undignified ads to preserve the professional image of lawyers, even after *Went For It*.[318] Third, and finally, even if constitutional difficulties could be avoided, simply because Osias's ads *could* be regulated does not mean that they *should* be regulated.

Banning undignified ads may help preserve the public image of lawyers, but it does not follow that the interests of consumers would correspondingly be advanced by such regulations.[319] If, in an unregulated market, Osias is permitted to use any marketing campaign she desires (including using sex to sell her legal services), prospective clients can gain useful information about what kind of person she is and, accordingly, can make an informed decision as to whether they want to hire that kind of lawyer.[320] Prospective clients

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[316] Martel, Jr., *supra* note 149, at 156 (suggesting that "additional restrictions on [lawyer] advertising are necessary").

[317] Rotunda, *supra* note 151, at 734. As one commentator argues, "it is impossible to conclude, on the basis of anything but taste and personal preference, whether a particular form of advertising is dignified." Watkins, *supra* note 197, at 776 ("Like obscenity, dignity is in the eye of the beholder."). It is not clear that this argument is compelling, however. No doubt it is difficult to define "dignity" given its subjective component, but the suggestion that certain ads can never be branded as undignified seems to be an extreme view. The law draws lines all the time. Besides, under the profession paradigm there would be no difficulty in agreeing that Osias's ads are undignified and should be regulated. Interestingly, several terms used in the profession/business debate are claimed to be like obscenity, and thus difficult to define, including the term "profession," *see supra* note 209 and accompanying text, and now the term "dignity."

[318] *See supra* Part II.

[319] *See* Rotunda, *supra* note 151, at 734 ("The law's emphasis on dignity does not serve the interests of [prospective clients but rather] simply ignores the[ir] interests and needs.").

[320] The Court's decision in *Bates*, after all, subscribes to the view that "consumers in a more open market would be able to make informed decisions regarding the purchase of legal services." Pearce, *supra* note 200, at 1249. Although the Court agreed that advertising may sometimes highlight irrelevant factors, the Court found

who believe her marketing strategy is repugnant, and utterly unprofessional, will not hire her. Regulations forbidding all lawyers from employing sexually provocative marketing campaigns, however, would make Osias appear more dignified than she would in an unregulated market.[321] Such regulations enforce an artificial sameness among lawyers and suppress useful information that prospective clients would rely on in hiring a lawyer.[322] In fact, if "dignity" really is as difficult to define as some suggest, then letting consumers decide for themselves which lawyer ads are dignified may be an ideal solution to the problem.[323]

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that "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision." Bates v. Florida Bar Ass'n, 433 U.S. 350, 374 (1977). As one commentator observed, "[i]t is ironic that in *Went For It* the Florida Bar suppressed information about the legal system to improve the public image of lawyers. This logic is counterintuitive. To promote the legal system, . . . consumers should be given more information, not less." Zelenko, *supra* note 150, at 1242.

[321] Professor Rotunda uses the example of a Wisconsin lawyer named Ken Hur who is well-known for running a series of, arguably, undignified television advertisements. *See* Rotunda, *supra* note 151, at 732. For example, in one commercial, Hur "is playing the banjo while singing off key, and asking prospective clients to hire him, while promising the initial meeting costs 'just ten bucks.' He tells the viewer that he needs the money to take more banjo lessons." *Id.* at 732-33. Professor Rotunda explains:

> Hur pokes fun at the legal profession, and — by his constant reference to "just ten bucks" — he appeals to individuals who may feel overawed by lawyers, or who believe that lawyers are too stuffy. His advertisements attract such prospective clients who otherwise would feel ill at ease. If the law prohibited Ken Hur's advertisements, it would be as if the law forced him to dress in a three-piece suit, both metaphorically and literally. The type of client who would prefer to hire someone like Ken Hur would be out of luck.

Id. at 733. The same applies to Osias. If the law prohibited her from using sexually provocative ads, clients who would be against hiring such a lawyer would not have relevant information at their disposal to make an informed choice.

[322] *Id.* at 734 ("When the law prohibits [advertisements] in the name of dignity, it does not serve the interests of prospective clients who rely on [advertisements] to help them pick a lawyer.").

[323] *See* Brooks, *supra* note 204, at 29 (arguing that "[a]dvertisements that are misleading can be regulated through the state bar, while those that are only distasteful will be left to the judgment of the consumer"). As perverse as it may sound, allowing Osias to use sex to sell legal services may actually help boost the reputation of some lawyers. That is, if Osias's ads are as repugnant and undignified as some of her critics charge they are, then those lawyers who uphold lofty professional standards of conduct will only appear that much more respectable relative to Osias. Outlawing sexually provocative ads, by contrast, would enforce conformity among members of the bar and hoist Osias to a level of professionalism that is perhaps not warranted. Rather than discouraging Osias, members of the bar might want to encourage her advertising campaign, as non-intuitive as that may sound.

An approach to sexually provocative advertising that strives to keep prospective clients informed, moreover, dovetails with the Court's anti-paternalistic approach to its advertising cases, including its general skepticism of "regulations that seek to keep people in the dark for what the government perceives to be their own good."[324] The Court has repeatedly emphasized how "the free flow of information is indispensable"[325] in a free enterprise economy and how advertising, "however tasteless and excessive it sometimes may seem," nevertheless contributes to "intelligent and well-informed" consumer decisions.[326]

Unfortunately, sexually provocative ads do not necessarily contribute to intelligent and well-informed consumer decisions as a whole. While Osias's sexually provocative ads might provide insight into the kind of person she is, her ads do not necessarily promote commercial intercourse. It is difficult to conclude that Osias's ads provide consumers of legal services the information that they really need to make well-informed choices: "clean, factual information" about the quality of her legal services.[327] As the New York Grievance Committee complained, Osias's ads contain "extraneous content not designed to educate legal consumers to an awareness of legal needs or to provide information relative to the selection of appropriate counsel."[328] Rather than offering factual information, Osias's lascivious ads are simply irrational appeals to primal sexual urges.

Then again, although no lawyer has used sex to sell legal services before, Osias's brand of advertising is not qualitatively different from other legal advertising that appeals to emotions. In fact, the use of irrational appeals to sell legal services is rampant among lawyers today.[329] What is so puzzling about Osias's commercial success,

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[324] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 503 (1996).

[325] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

[326] *Id.*

[327] *See* Battey, *supra* note 242, at 315.

[328] Scott Brede, *Fleshing Out New Clients*, CONN. L. TRIB., Aug. 25, 1997, at 1.

[329] One commentator bemoans how the use of images to sell legal services is rampant among lawyers, as he complains that

> [d]epictions of heavily bandaged people in wheelchairs, wrecked automobiles, speeding ambulances, worried doctors, police officers writing accident reports, helicopters (presumably rushing victims to the hospital) and frantic family members contribute absolutely nothing to the flow of valid commercial discourse, but instead effectively push the emotional buttons of the persons most in need of clean, factual information.

Battey, *supra* note 242, at 315 (noting that "[w]ords . . . are only one component of an advertisement [and that] [i]mages in many cases present the more powerful

however, is that she not only gained clients solely on the strength of her sex appeal, but that the clients who were attracted to her firm were highly sophisticated business clients, including banking executives who are well educated regarding legal services.[350] The Court's trust in the ability of consumers to evaluate information independently and to make informed choices when choosing legal services seems to be misplaced, at least as Osias's example is concerned.[351]

Consumers of legal services, in fact, may not even care about informative legal ads. As one of the previously noted studies revealed, people who viewed informative "talking heads" commercials thought less of lawyers than did those people who viewed stylish or sensational ads.[352] Perhaps consumers of legal services, even sophisticated clients, are seeking creative and intriguing lawyers rather than the stereotypical stuffy lawyer. If that is the case, then Osias is surely satisfying their desires.

Whatever the explanation, Osias has not been harmed by her decision to use sex to sell legal services, as her commercial success copiously demonstrates. And, as the evidence suggests, Osias's ads hardly threaten the public image of lawyers. Rather, Osias has only drawn ire from bar leaders and other lawyers in the industry who have protested that her ads are wholly unprofessional and degrade the public image of the legal profession.[353] Mostly, competing lawyers, not potential clients, have found fault with Osias's marketing campaign. If anything, the attacks against Osias by the bar elite tend only to confirm the profession paradigm's proclivity to serve elitist interests by restraining natural market forces to keep certain members of the profession down. Osias's response to the bar leaders who have denounced her ads as undignified is, simply, that they are

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message, and here again, abuse is rampant").

[350] *See* Hand, *supra* note 22, at 19.

[351] As one commentator notes, "Our First Amendment was founded on the principle that free speech and the total dissemination of information would enable citizens to choose wisely." Marc David Lawlor, Note, *Ivory Tower Paternalism and Lawyer Advertising: The Case of* Florida Bar v. Went For It, 40 ST. LOUIS L.J. 895, 923 (1996). It is difficult, however, to conclude that those Osias clients who enlisted her services solely on the basis of her sexually provocative ads were choosing wisely.

[352] *See supra* notes 307-13 and accompanying text.

[353] The divergent reaction between lawyers and potential clients in Osias's case is no surprise. Studies have consistently revealed that when it comes to opinions over attorney advertising, lawyers tend to have a "negative to neutral" view, whereas consumers' views range from "neutral to positive." Rotunda, *supra* note 151, at 730 n.99.

"jealous" of her commercial success,[334] a perhaps fitting retort for a lawyer who fully espouses the business paradigm and reaps its benefits.

IV. CONCLUSION

In the end, the story of Osias's marketing campaign speaks volumes to the profession-versus-business debate. As this Article has explored, her marketing campaign would be professionally and commercially perilous in a legal environment dominated by the profession paradigm. Osias's example thus attests to the rise of the business paradigm in the law simply by virtue of her astounding commercial success. At the same time, however, her success does not sound the death knell for the profession paradigm. Many lawyers surveyed expressed their sharp disagreement, and sometimes fervent outrage, over Osias's ad campaign, and many believe she should be disciplined.[335] The New York state bar even considered leveling disciplinary charges against Osias before eventually opting to refrain out of the concern that any attempt to sanction her would only generate additional publicity.[336] Although the profession paradigm has declined in the last several decades, and lawyers now operate in a more commercially tolerant environment under the business paradigm, it is equally clear that the tugs and pulls of professionalism still constrain lawyers' behavior.[337]

Ultimately, the profession-versus-business debate is not a false dilemma. Law is neither a profession nor a business.[338] It is both. Law is still a profession as lawyers continue to feel the pressures of conforming to professional standards of conduct, particularly given the threat of disciplinary action. At the same time, law is also a

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[334] *Networking*, *supra* note 238, at A10.

[335] *See supra* note 314.

[336] *See supra* note 315.

[337] Even the Court in *Bates*, while ushering in a new era of commercialism in the law, recognized that the profession paradigm would not be completely supplanted by the business paradigm. The Court stated that

> [w]e suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

Bates v. State Bar of Arizona, 433 U.S. 350, 379 (1977).

[338] *See* Powell, *supra* note 228, at 270 (recognizing that law has several dimensions, including both professional and business dimensions); *see also* Pearce, *supra* note 200, at 1264 (explaining the view that declares law as both a business and a profession).

business and, especially in recent years, lawyers are increasingly importing commercialism into their practices due to the weakening constraints of the profession paradigm. Actually, law has always been a business and its commercial aspects are simply becoming more visible in recent years with the rise of the business paradigm.

As this Article has demonstrated, the rise of the business paradigm has had a salutary effect on the law, even if, at minimum, it simply exposed some of the dubious and hypocritical assumptions underlying the profession paradigm. Indeed, if anything, breaking more of the shackles of the profession paradigm could yield still greater benefits for clients and lawyers alike by providing consumers with relevant information in choosing a lawyer and by allowing fledgling lawyers to compete successfully for clients against more established lawyers in a particular market. The challenge for the legal community in the future will be either to achieve a balance between the profession and business paradigms in order to moderate, and possibly reconcile, the competing paradigmatic values or, perhaps better yet, to conclude that the profession paradigm is wholly antiquated and should be cast out altogether. However the challenge is resolved, it is one that confronts all lawyers today and will affect how both the public and lawyers regard the law and what they will come to expect of it.