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Just Shoot Me A Text: The Florida Bar's Regulations On Attorney Advertisements And Modern Communications

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Abstract

The common thread between all attorney advertisements consists of the delicate balance between the professionalism of the practice of law and protected commercial speech under the First Amendment of the U.S. Constitution.¹ Traditionally, solicitation and advertising by lawyers has been looked down upon in the practice of law

KEYWORDS: advertisements, communications, letters

JUST SHOOT ME A TEXT: THE FLORIDA BAR'S REGULATIONS ON ATTORNEY ADVERTISEMENTS AND MODERN COMMUNICATIONS

JAZLYN JUDA*

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I. INTRODUCTION

The common thread between all attorney advertisements consists of the delicate balance between the professionalism of the practice of law and

*. Jazlyn Juda will receive her J.D. in May 2017 from Nova Southeastern University, Shepard Broad Law Center. Jazlyn would like to thank the board members and her colleagues of the Nova Law Review for all of their hard work and dedication to improve and refine this Comment. She would also like to thank all of her friends and family—particularly her grandmother, Barbara Trump, and mother, Tamberly Juda—for their infinite love and support. Jazlyn extends a special thank you to her aunt, Kimberly Juda, for helping her to become a better professional woman and teaching her to always “keep her eye on the prize.”

protected commercial speech under the First Amendment of the U.S. Constitution.¹ Traditionally, solicitation and advertising by lawyers has been looked down upon in the practice of law.² In order to maintain the nobleness of the profession, lawyers were expected to build a reputation that would attract their business and clientele.³ The prohibition on advertising began as a rule of legal etiquette and not rules of ethics, as advertising regulations are modernly viewed.⁴ Lawyers treated the legal profession more as a public service rather than as a trade or means of earning a living.⁵ It was believed that commercializing legal services would lower the nobleness and honor of the profession.⁶

Over time, these strong views against attorney advertisements evolved into a standard for rules of ethics.⁷ The Canons of Professional Ethics, drafted in 1908 by the American Bar Association (“ABA”), entirely prohibited attorney advertising and solicitation, claiming advertising and solicitation by lawyers was unprofessional.⁸ Later in 1969, the ABA drafted the Model Code of Professional Responsibility (“ABA Model Code”), which was adopted by every state in the nation and followed the Canons model of prohibiting all forms of attorney advertisements.⁹ After the Supreme Court of the United States decided in *Bates v. State Bar of Arizona*¹⁰ that attorney advertisements were classified as commercial speech and thus protected under the First Amendment, the ABA was left to change the standards of attorney advertisements in order to reflect this landmark decision and to uphold First Amendment protection of attorney advertisements.¹¹ As a result of this decision, the ABA Model Rules of Professional Conduct (“ABA Model Rules”) were drafted and later approved by the ABA in 1983, allowing attorney advertisements, but strongly prohibiting in-person

1. See U.S. CONST. amend. I; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); HENRY S. DRINKER, LEGAL ETHICS 210–12 (1953).

2. DRINKER, *supra* note 1, at 210–12.

3. Veronica Wooten Brace, *Limits on Marketing of Attorney Services*, 8 U. FLA. J.L. & PUB. POL’Y 109, 110 (1996).

4. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371 (1977); Brace, *supra* note 3, at 110.

5. DRINKER, *supra* note 1, at 210; Brace, *supra* note 3, at 110.

6. DRINKER, *supra* note 1, at 211–12.

7. See Brace, *supra* note 3, at 110.

8. CANONS OF PROF’L ETHICS Canon 27 (AM. BAR ASS’N 1908); Brace, *supra* note 3, at 110–11.

9. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-101(A)–(B) (AM. BAR ASS’N 1975); Brace, *supra* note 3, at 111.

10. 433 U.S. 350 (1977).

11. *Id.* at 383–84; Brace, *supra* note 3, at 111; see also U.S. CONST. amend. I.

solicitation by lawyers.¹² The ABA Model Rules have since served as the model for professional lawyering codes for sixty-five percent of the states, leaving the majority of the states to permit various forms of attorney advertisements.¹³ Throughout the history of the legal profession, in response to constitutional challenges and decisions of the Supreme Court of the United States, the ABA has amended both ABA Model Code and ABA Model Rules, permitting attorney advertising but still retaining a heavy grip in regulating advertising as much as the Constitution and the Supreme Court of the United States has allowed.¹⁴

The delicate balance between the honor and nobleness of the legal profession and the First Amendment's protection of commercial speech is critical in the case of a Florida law firm that is challenging The Florida Bar's Standing Committee on Advertising for denying the firm's proposed plan to send automated text messages in hopes of obtaining potential clients.¹⁵ The law firm's plan consists of obtaining "a daily list provided by the . . . county clerk of court to [retrieve] phone numbers of [people who had been] arrested the previous day."¹⁶ The law firm would then use these contacts to send automated text messages advertising the firm's legal services to these listed individuals.¹⁷ The text messages would provide an *opt out* option for the recipients to choose to not receive any future communications from the firm.¹⁸ The Committee found that the firm's proposal of automated text messages is considered direct solicitation and is thus prohibited by Rule 4-7.18(a) of The Florida Bar's Rules of Professional Conduct,¹⁹ which involves direct contact with prospective clients.²⁰ The law firm countered the Committee's response by claiming that text messages are not similar to direct telephone communications, and that due to modern habits and modern

12. MODEL RULES OF PROF'L CONDUCT r. 7.1-3 (AM. BAR ASS'N 1983); Brace, *supra* note 3, at 111 n.19.

13. MODEL RULES OF PROF'L CONDUCT r. 7.1-3 (1983); Brace, *supra* note 3, at 111.

14. *Bates*, 433 U.S. at 383; Brace, *supra* note 3, at 111; *see also* MODEL RULES OF PROF'L CONDUCT r. 7.1-3 (1983 & 2013); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 (1975).

15. Nathan Hale, *Fla. Bar Rejects Firm's Plan to Send Ads Via Text Messages*, LAW360 (May 22, 2015, 6:32 PM), <http://www.law360.com/articles/659251/fla-bar-rejects-firm-s-plan-to-send-ads-via-text-messages>; *see also* U.S. CONST. amend. I; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976); DRINKER, *supra* note 1, at 210-12.

16. Hale, *supra* note 15.

17. *Id.*

18. *Id.*

19. *See* FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a) (2014).

20. *Id.* r. 4-7.18 (2014); Hale, *supra* note 15.

modes of communication, text messages serve the same purpose as email or direct mail.²¹

This Comment will focus on commercial speech, the rights of lawyers to advertise legal services, and the regulations that The Florida Bar has placed on attorney advertisements.²² This Comment will also discuss why Florida's regulations on attorney advertisements are neither consistent with the Supreme Court of the United States' decisions, nor take into consideration modern modes of communication utilized in today's society.²³ Part II of this Comment will examine regulations on attorney advertisements on a national level and discuss the Supreme Court of the United States' decisions regarding commercial speech and protection of attorney advertisements and solicitations under the First Amendment, as well as the ABA's rules on attorney solicitation and advertising.²⁴ Part III of this Comment will explain the various modes of attorney advertisements, including direct and indirect solicitation of potential clients and targeted letters to potential clients.²⁵ Part IV of this Comment will introduce the State of Florida's rules regarding attorney advertisements and solicitations and compare Florida's rules to the ABA's rules regarding attorney advertisements.²⁶ This Comment will then analyze attorney advertisements via text messages in Part V and explain how text messages are indirect modes of advertising and why Florida should consider modern modes of communication in regulating attorney advertisements.²⁷ Ultimately, this Comment will conclude that text messages can be considered direct communications, which are protected forms of commercial speech that should not be restricted by The Florida Bar.²⁸

II. A NATIONAL LOOK AT ATTORNEY ADVERTISEMENTS: THE AMERICAN BAR ASSOCIATION AND THE SUPREME COURT OF THE UNITED STATES

A. *Opening the Door to Protection of Attorney Advertisements*

Commercial speech was first recognized as protected speech under the First Amendment in *Virginia State Board of Pharmacy v. Virginia*

21. Hale, *supra* note 15.

22. See *infra* Part II–IV.

23. See *infra* Part IV–V.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part V.

28. See *infra* Part VI.

*Citizens Consumer Council, Inc.*²⁹ In this case, the Supreme Court of the United States held that commercial speech is entitled to protection under the First Amendment, even if the speech is purely economic or the speaker's motive of the speech is to receive pecuniary gain.³⁰ The appellees, consumers of prescription drugs, brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute under the First Amendment.³¹ The state statute prohibited pharmacists to advertise prices of prescription drugs.³² The Court explained that commercial speech was of general public interest and served as a benefit to society, providing consumers with the knowledge and availability of goods and services.³³ It was further held that a state's interest in protecting and upholding the professionalism of the field might not be sufficient enough to maintain the prohibition of an advertisement.³⁴ Ultimately, the Court extended First Amendment protection to commercial speech and concluded that although a state is free to regulate commercial speech, a state may not place a complete ban on advertisements or commercial speech and keep the knowledge of the availability of goods and services away from consumers.³⁵

The protected First Amendment right to commercial speech was extended to attorney advertisements in the case of *Bates*.³⁶ This was the first case subsequent to *Virginia State Board of Pharmacy* to weigh the rights of attorneys to advertise against the ABA Model Rules and state bar rules in the light of commercial speech and First Amendment protection.³⁷

In this case, the appellants were two licensed attorneys in the State of Arizona who in order to generate business, placed an advertisement in a local newspaper advertising legal services and the prices of the services offered by

29. 425 U.S. 748, 770 (1976); *see also* U.S. CONST. amend. I.

30. *Va. State Bd. of Pharmacy*, 425 U.S. at 762; *see also* U.S. CONST. amend.

I.

31. *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50, 753–54; *see also* U.S.

CONST. amend. I.

32. *Va. State Bd. of Pharmacy*, 425 U.S. at 749–50.

33. *Id.* at 764–65.

34. *Id.* at 766, 770.

The challenge now made, however, is based on the First Amendment. This casts the [b]oard's justifications in a different light, for on close inspection it is seen that the [s]tate's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other.

Id. at 769.

35. *Id.* at 770; *see also* U.S. CONST. amend. I.

36. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *see also* U.S.

CONST. amend. I.

37. *Bates*, 433 U.S. at 357, 363, 384; *see also* U.S. CONST. amend. I; *Va. State*

Bd. of Pharmacy, 425 U.S. at 773; MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (AM. BAR ASS'N 1970).

the firm.³⁸ The Arizona State Bar claimed that the firm's use of a newspaper advertisement to generate business violated Disciplinary Rule 2-101(B) incorporated by the Supreme Court of Arizona that read:

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.³⁹

A hearing was held before the Special Local Administrative Committee, which decided that the appellants should be suspended from practicing law for a period of six months.⁴⁰ The appellants challenged the Committee's decision as a violation of their First Amendment rights.⁴¹ Focusing on their previous decision and precedent set by *Virginia Board of Pharmacy*, the Supreme Court of the United States determined that the same First Amendment protection of commercial speech was applicable to attorney advertisements of legal services and fees.⁴² The Court explained that even if a speaker's intent in making the speech is purely economic, such speech is protected in certain contexts.⁴³ Stressing the societal interests served by commercial speech, the Court discussed how commercial speech informs the public of the availability, prices, nature of products and services, and assures "informed and reliable decision-making."⁴⁴ Since the decision of the Court in *Bates*, attorney advertisements are not subject to complete prohibition or suppression; however, states retain a right to regulate attorney advertisements.⁴⁵

B. *How Far Can Regulation of Attorney Advertisements Go?*

Both landmark decisions of *Virginia State Board of Pharmacy* and *Bates* determined that commercial speech was protected under the First Amendment; however, both cases held that states retained the right to

38. *Bates*, 433 U.S. at 353–54.

39. *Id.* at 355; *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(B) (1970).

40. *Bates*, 433 U.S. at 356.

41. *Id.*; *see also* U.S. CONST. amend. I.

42. *Bates*, 433 U.S. at 357; *see also* U.S. CONST. amend. I; *Va. State Bd. of Pharmacy*, 425 U.S. at 773.

43. *Bates*, 433 U.S. at 364.

44. *Id.*

45. *Id.* at 383–84.

regulate commercial speech under certain contexts.⁴⁶ These two Supreme Court of the United States' decisions determine that commercial speech is protected under the First Amendment but retains lesser protection than other constitutionally protected forms of speech.⁴⁷ Despite the lessened protection that commercial speech is granted under the First Amendment, commercial speech is still protected from unwarranted governmental regulation.⁴⁸ Both cases are influential decisions in regard to protection of commercial speech under the First Amendment; however, neither of these decisions discussed to what extent commercial speech could be regulated by the government or by the states.⁴⁹

Following *Virginia State Board of Pharmacy*, the Supreme Court of the United States set a standard consisting of a four-prong analysis for what constitutes commercial speech and the extent of how far the government or states may regulate commercial speech.⁵⁰ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵¹ the Supreme Court was presented with the question of whether a regulation from the Public Service Commission of New York completely banning promotional advertising of an electrical utility company violated the First Amendment.⁵² The Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.”⁵³ For commercial speech to be protected under the First Amendment, the speech must concern lawful activity and may not be misleading.⁵⁴ If the speech is concerning lawful activity and is not misleading, the speech falls within First Amendment protection.⁵⁵ The Court determined that in order to restrict commercial speech, the asserted governmental interest to be served by the restriction on commercial speech must be substantial.⁵⁶ If the asserted governmental interest to be served is substantial, it must be “determine[d] whether the

46. See U.S. CONST. amend. I; *Bates*, 433 U.S. at 357, 363, 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770–72.

47. U.S. CONST. amend. I; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562–63 (1980); *Bates*, 433 U.S. at 357, 363; *Va. State Bd. of Pharmacy*, 425 U.S. at 761, 770.

48. *Bates*, 433 U.S. at 363; see also U.S. CONST. amend. I.

49. *Bates*, 433 U.S. at 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770; see also U.S. CONST. amend. I.

50. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *Va. State Bd. of Pharmacy*, 425 U.S. at 748.

51. 447 U.S. 557 (1980).

52. *Id.* at 558; see also U.S. CONST. amend. I.

53. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

54. *Id.* at 564; see also U.S. CONST. amend. I.

55. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564; see also U.S. CONST. amend. I.

56. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

regulation directly advances the governmental interest asserted, and whether [the regulation] is not more extensive than is necessary to serve that interest.”⁵⁷ Taken together, this analysis is known as the *Central Hudson* test.⁵⁸ Based on the *Central Hudson* test, in determining whether commercial speech is guaranteed First Amendment protection and whether the government or state has the ability to restrict the commercial speech, the protection of the speech looks at the nature of the expression and nature of the governmental interest served by the regulation imposed.⁵⁹ Regulations of commercial speech are measured under an intermediate scrutiny analysis.⁶⁰ A state’s restrictions on commercial speech “must be substantially related to the achievement of an important [state] objective.”⁶¹

The Court in *Central Hudson* held that in order to determine whether the restriction on commercial speech is in proportion to the government or state interest, the restriction must directly advance the government or state interest involved, and if the government or state interest could be served by a more limited restriction on commercial speech, the excessive restriction will not meet First Amendment muster.⁶² In other words, the restriction imposed may only extend as far as the interest that it serves.⁶³ Similar to *Virginia State Board of Pharmacy* and *Bates*, the Court in *Central Hudson* held that a ban on advertising could not survive if the ban is imposed to protect ethical or professional standards of a profession.⁶⁴ The Court concluded, as stated in *Virginia State Board of Pharmacy*, “[t]he advertising ban does not directly affect [the] professional standards [of a profession] one way or the other.”⁶⁵

57. *Id.*

58. *Id.*

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

Id.

59. *Id.* at 563; *see also* U.S. CONST. amend. I.

60. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995).

61. *Intermediate Scrutiny*, BLACK’S LAW DICTIONARY (10th ed. 2014).

62. *See* U.S. CONST. amend. I; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at

564.

63. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

64. *Id.*; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378, 383 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

65. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 769) (alteration in original).

The Court found that the state's interest in upholding professionalism is not a substantial interest in regulating commercial speech.⁶⁶

In 1982, the Court took the *Central Hudson* test and analyzed it from the perspective of attorney advertisements in the case of *In re R.M.J.*⁶⁷ Comparing this Supreme Court decision to *Bates*, *In re R.M.J.* was the first case subsequent to *Central Hudson* to apply the four-prong analysis of what constitutes commercial speech and the extent of regulation permitted on attorney advertisements.⁶⁸ The Court in *In re R.M.J.* emphasized the holding of *Bates*, where the Court held that commercial speech protection under the First Amendment extended to attorney advertisements and “advertising by attorneys may not be subjected to blanket suppression.”⁶⁹ The Court found in *Bates* that the advertising of prices for legal services offered was neither advertising unlawful activity nor a misleading advertisement, preventing the speech from being prohibited on that basis.⁷⁰ The Court in *Bates* also rejected suppression of an attorney advertisement based on the state interest that attorney advertisements had negative effects on the profession.⁷¹

The Court in *In re R.M.J.* found that although *Bates* was a critical case in analyzing the extent of protection of attorney advertisements under the First Amendment, the decision in *Bates* was a narrow decision in holding that attorney advertisements could still be regulated by states.⁷² The Court found that “[f]alse, deceptive, or misleading advertising remains subject to restraint, and . . . advertising by the professions poses special risks of deception, ‘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.’”⁷³ In regards to attorney advertisements, the Court in *Bates* did not set any standards or regulations “on potentially or demonstrably misleading advertis[ements].”⁷⁴ However, in circumstances subsequent to *Bates*, the Court reasoned that regulation and prohibition of advertisements are permissible where the advertisements are likely to be misleading.⁷⁵ The

66. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 571–72.

67. 455 U.S. 191, 203, 206 (1982).

68. *Id.*; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *Bates*, 433 U.S. at 383; see also U.S. CONST. amend. I.

69. *In re R.M.J.*, 455 U.S. at 199 (quoting *Bates*, 433 U.S. at 383); see also U.S. CONST. amend. I.

70. *Bates*, 433 U.S. at 382–83.

71. *Id.* at 368–69, 371.

72. *In re R.M.J.*, 455 U.S. at 200; see also U.S. CONST. amend. I; *Bates*, 433 U.S. at 383.

73. *In re R.M.J.*, 455 U.S. at 200 (quoting *Bates*, 433 U.S. at 383).

74. *Id.* at 202.

75. *Id.*

Court in *In re R.M.J.* set the official standard for the commercial speech doctrine in the context of advertising for professional services as follows:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the [s]tate[] may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the [s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.⁷⁶

Even though a state holds the ability to regulate non-misleading commercial speech, “the [s]tate must [still] assert a substantial interest, and the interference with the speech must be in proportion to the interest served.”⁷⁷ Regulations on commercial speech and professional advertising “must be narrowly drawn, and the [s]tate lawfully may regulate only to the extent regulation furthers the [s]tate’s substantial interest.”⁷⁸

While *Central Hudson* established a four-pronged analysis as to what constitutes commercial speech and the extent that the government may regulate commercial speech, the *Central Hudson* test focused on commercial speech in a general context.⁷⁹ The Court in *In re R.M.J.* took the four-pronged analysis of *Central Hudson* and applied it to professional advertising.⁸⁰ The four-pronged analysis of *Central Hudson* is used by the Supreme Court of the United States in determining whether certain contexts of commercial speech are protected under the First Amendment, and the extent to which such speech may be regulated by the states.⁸¹

C. *The ABA Model Rules of Professional Conduct*

The ABA is a professional organization of lawyers and law students from all over the nation.⁸² The ABA was founded in 1878 and has since expanded to four hundred thousand members, committed to: “[S]erving . . .

76. *Id.* at 203.

77. *Id.*

78. *In re R.M.J.*, 455 U.S. at 203.

79. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564–66 (1980).

80. *In re R.M.J.*, 455 U.S. at 203–04; *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

81. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

82. *See About the American Bar Association*, A.B.A., http://www.americanbar.org/about_the_aba.html (last visited Dec. 18, 2015).

members, improving the legal profession, eliminating bias . . . and advancing the rule of law throughout the United States and around the world.”⁸³ The ABA aims to uphold the legal profession and provide practical tools and resources for lawyers.⁸⁴

One of the roles of the ABA is to establish model ethical codes, which the majority of states in the nation have adopted as a part of their own ethical standards.⁸⁵ The current ethical rules established by the ABA are the ABA Model Rules.⁸⁶ The ABA Model Rules “were adopted by the ABA House of Delegates in 1983 [and] [s]erve as models for the ethical rules of most states.”⁸⁷ California is the only state that does not model their ethical and professional rules for lawyers after the ABA Model Rules.⁸⁸ The current ABA Model Rules set ethical and professional standards for lawyers across the nation in regard to the client-lawyer relationship, acting as a counselor, acting as an advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and maintaining the integrity of the profession.⁸⁹

The ABA standards regarding attorney advertising and solicitation are found in Rule 7.2 and Rule 7.3 of the ABA Model Rules.⁹⁰ The general rule of attorney advertising is found in Rule 7.2 of the ABA Model Rules and reads “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”⁹¹ The ABA and ABA Model Rules follow the precedent by *Bates*, recognizing that attorney advertisements serve a fundamental benefit to the consumers in need of legal services.⁹² The ABA states:

To assist the public in learning and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer

83. *Id.*

84. *Id.*

85. *Id.*; *About the Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Dec. 18, 2015).

86. *See About the Model Rules*, *supra* note 85.

87. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013).

88. *About the Model Rules*, *supra* note 85; *see also* CAL. RULES OF PROF'L CONDUCT (2015).

89. MODEL RULES OF PROF'L CONDUCT (2013).

90. *Id.* r. 7.2–3.

91. *Id.* r. 7.2.

92. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977).

should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.⁹³

The modern ABA Model Rules completely overturned the ABA's 1969 ABA Model Code and the 1908 Canons of Professional Ethics—both of which defined the traditional view of attorney advertising as unprofessional and placed complete bans on attorney advertisements.⁹⁴ After the ABA Model Rules were adopted in 1983, attorney advertisements were recognized as protected commercial speech under the First Amendment, and ethical attorney advertisements came as a result of the Supreme Court of the United States decisions in *Virginia State Board of Pharmacy*, *Bates*, and *In re R.M.J.*⁹⁵

The ABA Model Rules discuss the rules of attorney solicitation in Rule 7.3:

A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer. A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if: (1) the target of the solicitation has [been] made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress, or harassment.⁹⁶

The distinction that the ABA Model Rules make between the rules regarding attorney advertising and attorney solicitation involves the use of real-time or live communications to a specific audience.⁹⁷ The ABA defines

93. MODEL RULES OF PROF'L CONDUCT r. 7.2 cmt. (2013).

94. *About the Model Rules*, *supra* note 85; *see also* MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 (AM. BAR ASS'N 1975); CANONS OF PROF'L ETHICS Canon 27 (Am. Bar Ass'n 1908).

95. *In re R.M.J.*, 455 U.S. 191, 199–200 (1982); *Bates*, 433 U.S. at 383–84; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 773 (1976); *see also* U.S. CONST. amend. I.

96. MODEL RULES OF PROF'L CONDUCT r. 7.3 (2013).

97. *See id.* r. 7.2 (ABA professional rules of attorney advertisements); MODEL RULES OF PROF'L CONDUCT r. 7.3 (2013) (ABA professional rules of attorney solicitations).

solicitation as “a targeted communication initiated by the lawyer that is directed to a specific person and . . . offers to provide, or can reasonably be understood as offering to provide, legal services.”⁹⁸ A communication to the general public is not considered solicitation by the ABA.⁹⁹ The ABA Model Rules express concern for potential abuse through solicitation of direct in-person or live communication by a lawyer to a potential client.¹⁰⁰ According to the ABA Model Rules, “[the] potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services.”¹⁰¹ The ABA Model Rules explain that communications with potential clients can be sent through other electronic modes of communication that are not considered to be real-time or live communications, such as e-mail or other electronic modes of communication.¹⁰² The ABA’s goal in prohibiting direct solicitation by attorneys of potential clients is to prevent a potential client from hiring an attorney based on undue influence, intimidation, or pressure under the circumstances.¹⁰³

The ABA has a substantial interest in prohibiting direct, in-person solicitation to protect the consumer of legal services; however, targeted or direct solicitation may benefit the consumer or potential client, as well as the attorney.¹⁰⁴ In an article published by the ABA Journal in 2013, Stephanie Francis Ward discussed how consistently targeting advertisements to a specific audience may benefit a legal practice.¹⁰⁵ Ward countered the traditional belief that lawyers should attract their business clientele through good work and not through advertisements,¹⁰⁶ by stating, “[s]ome lawyers believe that if you do good work, people will automatically come to you. They are wrong. People need reminders.”¹⁰⁷ Ward stressed the ABA’s promotion of direct advertisements by referring to the fact that personal injury lawyers often send targeted advertisements and letters to accident

98. MODEL RULES OF PROF’L CONDUCT r. 7.3 cmt. (2013).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 (1978); MODEL RULES OF PROF’L CONDUCT r. 7.3. cmt (2013).

104. *Ohralik*, 436 U.S. at 464; *see also* MODEL RULES OF PROF’L CONDUCT r. 7.3 cmt (2013).

105. Stephanie Francis Ward, *50 Simple Ways You Can Market Your Practice*, A.B.A. J. (July 1, 2013, 10:19 AM), http://www.abajournal.com/magazine/article/50_simple_ways_you_can_market_your_practice.

106. *Id.*

107. *Id.*

victims, and criminal defense lawyers often refer to arrest reports in hopes of targeting and obtaining potential clients.¹⁰⁸ This practice of targeted advertisements benefits both the consumers who are in need of legal services and who may not know how to go about obtaining legal representation and the attorneys who are in need of business and clientele.¹⁰⁹

III. PROTECTED FORMS OF ATTORNEY ADVERTISEMENTS

Looking at the ABA Model Rules and at the ethical and professional rules of the states that are modeled after the ABA Model Rules, there are many permissible forms of attorney advertisements and solicitation through written or electronic communications.¹¹⁰ Two forms of attorney advertisements that result in a gap between the standards for attorney advertisements of the ABA and state ethical and professional rules are indirect and direct solicitation, specifically targeted letters to potential clients.¹¹¹

A. *Direct Solicitation v. Indirect Solicitation*

In *Ohralik v. Ohio State Bar Ass'n*,¹¹² the Supreme Court of the United States held that “the [s]tate—or the Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the [s]tate has a right to prevent.”¹¹³ In this case, the appellant, a practicing lawyer, learned of a young girl who was a driver in a recent car accident.¹¹⁴ The appellant visited the young accident victim in the hospital, where he told the accident victim that he would represent her, and subsequently, the accident victim signed an agreement retaining the appellant’s legal representation and agreed that the appellant would receive one-third of the victim’s recovery.¹¹⁵

After obtaining the signed retainer agreement with the accident victim, the appellant contacted the passenger of the vehicle that the victim was driving and informed the passenger that she had a chance of recovery

108. *Id.*

109. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376–77 (1977).

110. *See* MODEL RULES OF PROF’L CONDUCT r. 7.2(a), 7.3(a)–(b) (AM. BAR ASS’N 2013); *About the Model Rules*, *supra* note 85.

111. *See Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 479 (1988); MODEL RULES OF PROF’L CONDUCT r. 7.3(a)–(b) (2013).

112. 436 U.S. 447 (1978).

113. *Id.* at 449.

114. *Id.*

115. *Id.* at 450.

against the driver and persuaded her to sign a contingent fee agreement.¹¹⁶ When the passenger of the vehicle decided she did not want to sue the driver and attempted to revoke her agreement with the appellant, the appellant claimed that the agreement was binding and could not be revoked.¹¹⁷ The driver of the vehicle also attempted to revoke her agreement with the appellant.¹¹⁸ Both the driver and passenger of the vehicle brought complaints against the appellant with the Grievance Committee of the Geauga County Bar Association.¹¹⁹ These complaints were later referred to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, who determined that the appellant violated the Ohio Code of Professional Responsibility, and appellant argued that it was his First Amendment right to solicit his legal services to potential clients.¹²⁰

In *Ohralik*, the Court stated that “[t]he solicitation of business by a lawyer through direct, in-person communication with [a] prospective client has long been viewed as inconsistent with the profession’s ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.”¹²¹ The Court determined that a state has a stronger interest in heavily regulating direct in-person solicitation than in regulating indirect attorney advertisements made towards the public.¹²² In-person direct solicitation by attorneys of potential clients is still considered to be commercial speech and thus protected under the First Amendment; however, in-person direct solicitation receives a lower level of judicial scrutiny.¹²³ The Court distinguished the in-person solicitation used by the appellant in *Ohralik* from the indirect advertising at issue in *Bates*, in that in-person solicitation may discourage potential clients in need of legal representation and “may disservice the individual and societal interest, identified in *Bates*, in facilitating ‘informed and reliable decision-making.’”¹²⁴ The Court also recognized a significant difference between in-person direct solicitation and indirect advertisements in that “[u]nlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or

116. *Id.* at 449, 451.

117. *Ohralik*, 436 U.S. at 452.

118. *Id.*

119. *Id.*

120. *Id.* at 452–53; *see also* U.S. CONST. amend. I.

121. *Ohralik*, 436 U.S. at 454.

122. *Id.* at 457–58.

123. *Id.* at 457; *see also* U.S. CONST. amend. 1.

124. *Ohralik*, 436 U.S. at 457–58; *see also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1974).

reflection.”¹²⁵ In-person solicitation—because of the intimidation and undue influence that it has the potential to cause—does not stand up to the precedent set forth by the Court in *Virginia Board of Pharmacy* and *Bates*, in holding that commercial speech, specifically attorney advertisements, serve the fundamental function of informing the public of the availability and nature of goods and services and promote rational decision-making.¹²⁶

The Court in *Ohralik*, held that a state has a substantial interest in regulating in-person direct solicitation by attorneys to potential clients, because “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.”¹²⁷ It was decided by the Court that a state has reason to believe that in-person solicitation may be harmful to the person who is solicited, and thus, the state has an interest in protecting its people from this harm.¹²⁸ The Court held that being officers of the courts, attorneys serve the role of administering justice and a state has an interest in regulating attorneys and the standards of the legal profession, including setting forth standards regarding attorney advertisements.¹²⁹

The Supreme Court of the United States set fundamental precedent regarding direct and indirect solicitation and attorney advertisements in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*.¹³⁰ In this case the appellant was a practicing attorney who in hopes of expanding his practice, ran advertisements for his law firm in a local newspaper.¹³¹ The appellant targeted defendants of drunk driving cases.¹³² When the Ohio Office of Disciplinary Counsel saw the appellant’s newspaper advertisement, the appellant was informed that his advertisement violated the Ohio Code of Professional Responsibility, which prohibited offering representation to criminal defendants on a contingent-fee basis.¹³³ Appellant then withdrew the advertisement.¹³⁴ One year later, the appellant ran another newspaper advertisement targeting women who had suffered injuries from the use of a particular contraceptive device.¹³⁵ As with the

125. *Ohralik*, 436 U.S. at 457.

126. *See id.* at 457, 466–67; *see also Bates*, 433 U.S. at 364; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764–65 (1976).

127. *Ohralik*, 436 U.S. at 464–65.

128. *Id.* at 466.

129. *Id.* at 460.

130. 471 U.S. 626, 641–42, 645–47 (1985).

131. *Id.* at 629–30.

132. *Id.*

133. *Id.* at 630; *see also* OHIO CODE OF PROF’L RESPONSIBILITY DR 2-106(C) (1970).

134. *Zauderer*, 471 U.S. at 630.

135. *Id.* at 630–31.

targeted drunk driving advertisements previously posted by the appellant, this advertisement attracted the attention of the Ohio Office of Disciplinary Counsel.¹³⁶ The appellant was charged with violating several disciplinary rules of the Ohio Code of Professional Responsibility, including that the targeted drunk driving advertisement was “false, fraudulent, . . . and deceptive to the public” because it offered representation on a contingent-fee basis in a criminal case” and the advertisement targeted toward injured women was not *dignified* and violated the state rule that “[a] lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice.”¹³⁷ In its opinion, the Court stressed that because the appellant was proposing a commercial transaction, the appellant’s speech was commercial and fell within the boundaries of First Amendment protection.¹³⁸ The question for the Court then was the extent that the use of direct advertisements may be regulated.¹³⁹ Throughout its holding, the Court kept in mind that complete prohibition or “blanket bans on price advertising by attorneys and rules preventing attorneys from using non-deceptive terminology to describe their fields of practice are impermissible.”¹⁴⁰ The Court also kept in mind throughout its holding, that in regards to rules prohibiting in-person solicitation, there are some circumstances where rules prohibiting in-person solicitation of potential clients by attorneys may be permissible.¹⁴¹ Differentiating the use of in-person solicitation by the appellant in *Ohralik*, with the use of newspaper advertisements by the appellant in *Zauderer*, the Court determined that the use of newspaper advertisements, though directed toward a specific audience, did not invade the privacy of those individuals who read the newspaper and saw the advertisement for legal services.¹⁴² The Court further discussed that print advertisements do not have the same high risk of overreaching or undue influence that in-person solicitation has.¹⁴³ The Court stated:

Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the

136. *Id.* at 631.

137. *Id.* at 631–33 (footnote omitted); *see also* OHIO CODE OF PROF’L RESPONSIBILITY DR 2-101(A)(1), 104(A), 106(C) (1970).

138. U.S. CONST. amend. I; *Zauderer*, 471 U.S. at 637–38; *see also* *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978) (holding that commercial speech includes any speech that proposes a commercial transaction).

139. *Zauderer*, 471 U.S. at 629.

140. *Id.* at 638.

141. *Id.*; *see also* *Ohralik*, 436 U.S. at 457–58.

142. *Zauderer*, 471 U.S. at 642; *see also* *Ohralik*, 436 U.S. at 457.

143. *Zauderer*, 471 U.S. at 642.

personal presence of a trained advocate. In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.¹⁴⁴

An indirect advertisement, although aimed toward a specific audience, allows a potential client to reflect on the need and ability of hiring a particular lawyer and to freely make the choice of hiring a particular attorney, without undue influence or added pressure of in-person solicitation.¹⁴⁵ In the case of *Ohralik*, the state had a substantial interest in regulating in-person solicitation of potential clients by attorneys in order to protect its citizens from undue influence or intimidation.¹⁴⁶ The Court determined that this substantial state interest could not stand to regulate the use of indirect solicitation of potential clients by attorneys, because indirect advertisements do not carry the same risk of undue influence that in-person solicitations carry.¹⁴⁷

B. *Targeted Letters to Potential Clients*

In *Shapiro v. Kentucky Bar Ass'n*,¹⁴⁸ the Supreme Court of the United States was faced with the issue of “whether a [s]tate may . . . prohibit lawyers from soliciting [and advertising] legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems.”¹⁴⁹ The petitioner was a practicing attorney who filed for approval by the Kentucky Attorneys Advertising Commission of a letter that he had hopes of sending “to potential clients who . . . had a foreclosure suit filed against them.”¹⁵⁰ “The Commission did not find the letter [to be] false or misleading,” however, the Commission did find that the letter violated a “Kentucky Supreme Court Rule [that] prohibited the mailing or delivery of written advertisements ‘precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.’”¹⁵¹ The Commission then urged the Supreme Court of Kentucky to amend its rules after finding that the rule “ban[n]ing . . .

144. *Id.*

145. *Id.*

146. *Ohralik*, 436 U.S. at 449, 462, 466 (holding that a state has reason to assume that in-person solicitation of potential clients by an attorney will be injurious to the person who is solicited).

147. *Zauderer*, 471 U.S. at 642.

148. 486 U.S. 466 (1988).

149. *Id.* at 468.

150. *Id.* at 469.

151. *Id.* at 469–70.

targeted, direct mail advertise[ments] violated the First Amendment.”¹⁵² The petitioner then petitioned the Kentucky Bar Association’s Committee on Legal Ethics for an advisory opinion on the validity of the rule, which resulted in the Committee on Legal Ethics’ adoption of the ABA’s Rule 7.3 on attorney solicitation.¹⁵³

In analyzing targeted direct solicitation by attorneys to potential clients, the Court reiterated its fundamental holding in *Zauderer* that “[t]he ‘unique features of in-person solicitation by lawyers [that] justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain,’ . . . are *not present* in the context of written advertisements.”¹⁵⁴ The Court pointed out that previous precedent set by the Court in regards to attorney advertisements never distinguished between the constitutionality and protection of various modes of written advertisements to the general public.¹⁵⁵ The Court made the analysis based upon the four prong analysis of *Central Hudson Gas & Electric Corp.*¹⁵⁶ The Court here distinguishes between advertisements that target specific individuals and read “[i]t has come to my attention that your home is being foreclosed on” and advertisements that more broadly read “[i]s your home being foreclosed on?”¹⁵⁷ The Court determined that the advertisement not targeting specific individuals is commercial speech that can be regulated or prohibited.¹⁵⁸ Whereas, the more broad advertisement could not be prohibited without violating the First Amendment as long as the advertisement was not false, misleading, or advertising unlawful activity.¹⁵⁹

The Supreme Court of Kentucky, the preceding court below the Supreme Court of the United States, had relied on the holding of *Ohralik* and found that the state’s complete prohibition on all targeted, direct mail solicitation was permissible under the First Amendment, because of the “serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services.”¹⁶⁰ The Supreme Court of the United States in its holding did not agree that the precedent set

152. *Id.* at 470; *see also* U.S. CONST. amend. I.

153. *Shapero*, 486 U.S. at 470; *see also* MODEL RULES OF PROF’L CONDUCT r. 7.3 (AM. BAR ASS’N 1983).

154. *Shapero*, 486 U.S. at 472 (alteration in original) (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 641 (1985)).

155. *Id.* at 473.

156. *See Shapero*, 486 U.S. at 472; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

157. *Shapero*, 486 U.S. at 473.

158. *Id.* at 472–73.

159. *See* U.S. CONST. amend. I; *Shapero*, 486 U.S. at 473, 479.

160. *Shapero*, 486 U.S. at 474; *see also* U.S. CONST. amend. I; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 468 (1978).

by *Ohralik*—that direct in-person solicitation by attorneys of potential clients—was present in the case of *Shapero* regarding targeted, direct mail solicitation.¹⁶¹ The Court made a fundamental distinction between direct and indirect solicitation.¹⁶² The Court stated:

Of course, a particular potential client will feel equally *overwhelmed* by his legal troubles and will have the same *impaired capacity for good judgment* regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose *condition* makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility.¹⁶³

The Court found that it is not to whom the targeted solicitation is sent that makes the solicitation prone to regulation, but the mode of communication in which the solicitation is sent that makes the solicitation prone to regulation.¹⁶⁴ The mode of communication is a fundamental factor in determining whether direct solicitation is overreaching or cause for undue influence.¹⁶⁵

Compared to print advertising, targeted direct mail solicitation “‘poses much less risk of overreaching or undue influence’ than does in-person solicitation.”¹⁶⁶ The Court held that written communications, either targeted or made toward the general public do not “‘involve[] ‘the coercive force of the personal presence of a trained advocate’ or the ‘pressure on the potential client for an immediate yes-or-no answer to the offer of representation.’”¹⁶⁷ People receiving a written communication has the ability to draw their attention either towards or away from the solicitation.¹⁶⁸ A targeted letter also does not have the ability to invade the privacy of a recipient any more than an attorney solicitation directed to the public at large can invade on a recipient’s privacy.¹⁶⁹ The Court ultimately held that “a truthful and non-deceptive letter, no matter how big its type and how much it

161. *Shapero*, 486 U.S. at 475–76; see also *Ohralik*, 436 U.S. at 449, 467–68.

162. See *Shapero*, 486 U.S. at 474–75.

163. *Id.* at 474.

164. See *id.* at 475.

165. *Id.*

166. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 642 (1985)).

167. *Shapero*, 486 U.S. at 475 (quoting *Zauderer*, 471 U.S. at 642).

168. *Id.* at 475–76.

169. *Id.* at 476.

speculates, can never *shout at the recipient or grasp him by the lapels*, . . . as can a lawyer engaging in face-to-face solicitation.”¹⁷⁰ Because attorney advertisements are commercial speech and thus, protected under the First Amendment, a state may not raise a substantial interest in restricting truthful and non-deceptive lawyer solicitations, including targeted direct mail solicitations.¹⁷¹

IV. FLORIDA’S REGULATIONS ON ATTORNEY ADVERTISEMENTS

A. *Recognizing Commercial Speech Protection in Florida*

The State of Florida has long been known for its strict standards in regulating attorney advertisements.¹⁷² Florida first recognized attorney advertisements as commercial speech and protected under the First Amendment in the year 1989.¹⁷³ Following the precedents set by the Supreme Court of the United States in *Virginia State Board of Pharmacy*, the Florida Bar took the initiative of conducting a survey of the public opinion on attorney advertising, and “[a]fter conducting hearings, . . . surveys, and reviewing extensive public commentary, the [Florida] Bar determined that several changes to its advertising rules were in order.”¹⁷⁴ As a result of these findings, “[i]n late 1990 the [Supreme Court of Florida] adopted the [Florida] Bar’s proposed amendments with some modifications.”¹⁷⁵ The Supreme Court of Florida took the initiative to pass the amended rules to attorney advertisements because of the precedents set by the Supreme Court of the United States in *Virginia State Board of Pharmacy* and *Bates*.¹⁷⁶ The Supreme Court of Florida cited *Bates* stating that the Supreme Court upheld “reasonable restrictions on the time, place, and manner of advertising.”¹⁷⁷ The Supreme Court of Florida explained “[s]ince lawyers render professional

170. *Id.* at 479 (citation omitted).

171. *Id.*; see also U.S. CONST. amend. I.

172. Lyriisa Barnett Lidsky & Tera Jckowski Peterson, *Medium-Specific Regulation of Attorney Advertising: A Critique*, 18 U. FLA. J.L. & PUB. POL’Y 259, 260 (2007).

173. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995); Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d 451, 455 (Fla. 1990); see also U.S. CONST. amend. I.

174. *Went For It, Inc.*, 515 U.S. at 620; see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

175. *Went For It, Inc.*, 515 U.S. at 620; see also Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 452.

176. Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 456–57; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977); *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

177. Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues, 571 So. 2d at 458 (quoting *Bates*, 433 U.S. at 384).

services [that] vary from attorney to attorney, case to case, and client to client, the potential for deception . . . in advertising is great.”¹⁷⁸ The amended rules to attorney advertisements in Florida supported “reasonable restrictions on the time, place, and manner of advertising” and reduced deception of potential clients caused by advertisements.¹⁷⁹ These amended Florida Bar Rules were the first amendments to the Florida Bar Rules subsequent to the Supreme Court decisions of *Virginia State Board of Pharmacy* and *Bates*, upholding commercial speech as protected under the First Amendment and extending this protection to attorney advertisements.¹⁸⁰ Maintaining its strict regulations on attorney advertisements, Florida has proceeded to “push[] the First Amendment envelope that safeguards the right of attorneys to inform potential clients about the [legal] services they offer.”¹⁸¹

The Florida Bar, even after the Supreme Court of Florida passed the amended rules allowing Florida to be a more permissive state towards attorney advertisement, continued to reveal its beliefs about the negative effects that attorney advertisements place on the legal profession.¹⁸² In 1994, after the attorney advertising rules were recently amended to allow attorney advertisements, former Florida Bar President, Patricia A. Seitz, expressed to the ABA that “[a]ggressive ads have caused the public to see the legal system as a lottery of fictitious claims in which lawyers make out like bandits in fees.”¹⁸³ Patricia A. Seitz also expressed that attorney advertisements were to blame for “[i]ncreas[ing] the public’s cynicism about the legal system, which undermines the system that lawyers take an oath to uphold.”¹⁸⁴ In the year 2000, as advertisements became more popular and used amongst attorneys, the Florida Bar decided that it was time to take a stronger stance against attorneys who violated any Florida rules regarding attorney advertisements.¹⁸⁵ The Florida Bar subsequently passed a motion to

178. *Id.*

179. *Id.* (quoting *Bates*, 433 U.S. at 384).

180. *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 457–58; see also *Bates*, 433 U.S. at 384; *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

181. Lidsky & Peterson, *supra* note 172, at 261.

182. See *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 452, 455; Lidsky & Peterson, *supra* note 172, at 260 n.1.

183. James Podgers, *Image Problem: Burned by a Fall in Public Favor, the Organized Bar Turns Up the Heat on Lawyer Advertising*, A.B.A. J., Feb. 1994, at 66, 68; see also *Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Advert. Issues*, 571 So. 2d at 452, 455.

184. Podgers, *supra* note 183, at 68.

185. Gary Blankenship, *Bar to Take a Harder Line Toward Lawyer Ad Violations*, FLA. B. NEWS, July 1, 2000, at 13.

initiate grievances against any Florida Bar attorney who violated the Bar rules in regard to attorney advertisements.¹⁸⁶ The Bar's motive for initiating grievances against violators of the Florida Bar rules of attorney advertisements was due to appeals.¹⁸⁷ The Bar was frustrated that since advertisement appeals take several months, attorneys may still run their advertisements, and by the time the appeal has been decided, the advertisement could have already been exposed through various media and communications.¹⁸⁸

The Florida Bar maintained its strong grip on regulating attorney advertisements in 2004, when it was announced that the Florida Bar was forming an Advertising Task Force.¹⁸⁹ The purpose of creating the Advertising Task Force was to review Florida's attorney advertisement regulations and determine when changes or amendments to the rules would be necessary.¹⁹⁰ The Florida Bar President at the time, Kelly Overstreet Johnson, expressed that "many lawyers still dislike or oppose lawyer advertising, believing [it is] the [strongest] cause of public discontent with the profession."¹⁹¹ Johnson also explained that because Supreme Court of the United States precedent prohibits complete bans on attorney advertisements, it is important to make sure that the Florida Bar's rules remain "as consistent . . . as possible and enforced."¹⁹²

In 2013, the Florida Bar petitioned to the Supreme Court of Florida to consider proposed amendments to Subchapter 4-7 of the Rules Regulating the Florida Bar.¹⁹³ The Florida Bar proposed to the Supreme Court of Florida that they strike all current rules regarding attorney advertisements and adopt entirely new rules, which ultimately the Supreme Court of Florida adopted.¹⁹⁴ The adoption of entirely new rules regarding attorney advertisements was due to a "contemporary study of lawyer advertising, which . . . include[d] public evaluation and comments about lawyer advertising."¹⁹⁵ After analyzing the findings, the Florida Bar came to the

186. *Id.*

187. *See id.*

188. *Id.*

189. *See New Bar Panel to Review Attorney Advertising Rules*, FLA. B. NEWS, Dec. 15, 2003, at 1.

190. *Id.*

191. *Id.*

192. *Id.*

193. *In re Amendments to the Rules Regulating the Fla. Bar—Subchapter 4-7, Lawyer Advert. Rules*, 108 So. 3d 609, 609 (Fla. 2013); *see also* FLA. RULES OF PROF'L CONDUCT r. 4-7.11 (2014).

194. *In re Amendments to the Rules Regulating the Fla. Bar—Subchapter 4-7*, 108 So. 3d at 609, 611.

195. *Id.* at 609–10.

conclusion that entirely new rules, which prevent the “dissemination of misleading and unduly manipulative information,” should be adopted.¹⁹⁶ The new advertising rules were “designed to make the advertising rules more cohesive, easier for lawyers who advertise to understand, and less cumbersome for the [Florida] Bar to apply and enforce.”¹⁹⁷

B. *Distinguishing Standards of the Florida Bar and the American Bar Association*

Florida is a state that has modeled its ethical and professional rules of conduct after the ABA Model Rules.¹⁹⁸ Florida’s Rules of Professional Conduct regarding attorney advertisements and solicitations are found in Rule 4-7.18, which reads:

Except as provided in subdivision (b) of this rule, a lawyer may not: (1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer’s behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain. The term *solicit* includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules; [and] (2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.¹⁹⁹

The Florida Bar Standing Committee on Advertising’s Handbook on Lawyer Advertising and Solicitation also contains regulations that lawyers in the State of Florida must comply with, in addition to the Florida Rules of Professional Conduct.²⁰⁰ The Handbook on Lawyer Advertising and Solicitation cites Rule 4-7.11(a) of the Florida Rules of Professional Conduct: “Florida’s lawyer advertising rules apply to all forms of communication seeking legal employment in any print or electronic forum, including but not limited to newspapers, magazines, brochures, flyers, television, radio, direct mail, electronic mail, and Internet, including banners,

196. *Id.* at 610.

197. *Id.*

198. *See About the Model Rules, supra* note 85.

199. FLA. RULES OF PROF’L CONDUCT r. 4-7.18(a) (2014).

200. *See* FLA. BAR STANDING COMM. ON ADVERTISING, HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION 1 (10th ed. 2013, rev. 2014).

pop-ups, websites, social networking, and video sharing media.”²⁰¹ In regard to Rule 4-7.18 of the Florida Rules of Professional Conduct and prohibited forms of attorney solicitation, the Handbook on Lawyer Advertising and Solicitation states:

A lawyer may not contact a prospective client in person, by telephone, telegraph, or facsimile, or through other means of direct contact, unless the prospective client is a family member, current client, or former client. This prohibition does not extend to unsolicited direct mail or email communications made in compliance with Rule 4-7.18(b).²⁰²

Attorneys who advertise through direct mail and email communications must not use “coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence” in order to obtain clientele.²⁰³ According to the Florida Rules of Professional Conduct, a lawyer is not permitted to send potential clients advertisements through direct mail or email communications if the lawyer has been informed that the potential client does not wish to receive the communications from the lawyer.²⁰⁴

On a national perspective, Rule 7.2 and Rule 7.3 of the ABA Model Rules set the standards for attorney advertisements and solicitations.²⁰⁵ In contrast to the Florida Rules of Professional Conduct that specifically list the modes of communications in which a lawyer may not advertise to a potential client, Rule 7.2 of the ABA Model Rules states that “a lawyer may advertise services through written, recorded or electronic communication, including public media.”²⁰⁶ Some of the communications in which Florida prohibits lawyers from advertising through are permitted by the ABA Model Rules.²⁰⁷ For example, it can be argued that telephone communications classify as electronic communications and are thus permissible under the ABA Model Rules, but not permissible under the Florida Rules of Professional

201. *Id.* at 2.

202. *Id.* at 4.

203. HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 19; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-7.18(b) (2014).

204. HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 19; *see also* FLA. RULES OF PROF'L CONDUCT r. 4-7.18(b) (2014).

205. MODEL RULES OF PROF'L CONDUCT r. 7.2, 7.3 (AM. BAR ASS'N 2013); *see also supra* Section II.C.

206. *See* FLA. RULES OF PROF'L CONDUCT r. 4-7.11(a)–(b) (2014); MODEL RULES OF PROF'L CONDUCT r. 7.2(a) (2013).

207. *See* FLA. RULES OF PROF'L CONDUCT r. 4-7.11 (2014); MODEL RULES OF PROF'L CONDUCT r. 7.2 (2013).

Conduct.²⁰⁸ Rule 7.3 of the ABA Model Rules specifically discusses solicitation of clients by attorneys and distinguishes that a lawyer may not solicit through any live or real-time communications; whereas the Florida Rules of Professional Conduct define *solicit* as in-person communications.²⁰⁹

V. EXTENDING FIRST AMENDMENT PROTECTION TO ATTORNEY
ADVERTISEMENTS VIA TEXT MESSAGES

A. *Classifying Attorney Advertisements Via Text Messages as Protected Commercial Speech*

A Florida law firm has recently challenged the Florida Bar for denying the law firm's proposal of sending automated text messages to potential clients advertising the firm's legal services.²¹⁰ The Florida Bar classified automated text messages to potential clients as direct solicitation by telephone prohibited by the Florida Advertising Rules and Florida Rules of Professional Conduct.²¹¹ The law firm has argued that text messages may be classified as direct mail or email, which are permitted by the Florida Advertising Rules and the Florida Rules of Professional Conduct.²¹² Based on the decisions of the Supreme Court of the United States in regards to direct and indirect attorney advertisements, text messages more closely resemble the indirect communications in *Shapero* than the direct solicitation analyzed in *Ohralik*.²¹³

When analyzing attorney advertisements through the use of text messages, direct text messages to potential clients by attorneys reflect the same communications that the Supreme Court of the United States analyzed in *Shapero*.²¹⁴ Similar to the issue in the case of the Florida law firm sending direct text messages to potential clients, the Supreme Court of the United States was left with the question of whether a state may prohibit direct letters to targeted potential clients in *Shapero*.²¹⁵ As the Court pointed out in

208. See FLA. RULES OF PROF'L CONDUCT r. 4-7.11(a) (2014); MODEL RULES OF PROF'L CONDUCT r. 7.2(a) (2013).

209. See FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a)(1) (2014); MODEL RULES OF PROF'L CONDUCT r. 7.3(a) (2013).

210. Hale, *supra* note 15.

211. FLA. RULES OF PROF'L CONDUCT r. 4-7.18(a)(1) (2014); HANDBOOK ON LAWYER ADVERTISING AND SOLICITATION, *supra* note 200, at 4; Hale, *supra* note 15.

212. Hale, *supra* note 15; see also FLA. RULES OF PROF'L CONDUCT r. 4-7.18 (2014).

213. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978).

214. See *Shapero*, 486 U.S. at 479.

215. *Id.* at 468; Hale, *supra* note 15.

Shapero, a recipient of written communications has the ability to read the communication or avert their attention away from the communication.²¹⁶ Text messages, like letters, have the ability to be read, ignored and looked at later, or if the recipient chooses, not even seen at all.²¹⁷ In this respect, text messages are similar to written communications, such as emails or letters.²¹⁸

In the context of direct solicitation, text messages do not reflect the same in-person solicitation that the Court analyzed in *Ohralik*.²¹⁹ In-person solicitation, or live communications such as soliciting through the telephone, are distinguished from text messages in that text messages do not have the same high risk of intimidation or undue influence that live or in-person solicitation may have.²²⁰ Recipients of text messages are not pressured to accept legal representation immediately and are not pressured by the presence of an attorney.²²¹ Advertisements sent via text message also allow the recipient to reflect on the message, compare the nature and availability of goods and services, and allow for rational decision-making.²²² Unlike direct in-person solicitations, text messages are not immediate communications that urge an immediate response.²²³ Attorney advertisements via text message are classified as commercial speech and are thus deserving of First Amendment protection because they are direct communications that propose a transaction and serve the public interest of informing the public of the availability, nature, and prices of services.²²⁴

216. *Shapero*, 486 U.S. at 475–76 (“A letter, like a printed advertisement—but unlike a lawyer—can readily be put in a drawer to be considered later, ignored, or discarded.”).

217. *See id.*

218. *See id.*; *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 642 (1985).

219. *Shapero*, 486 U.S. at 475; *see also Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978).

220. *Zauderer*, 471 U.S. at 642; *Ohralik*, 436 U.S. at 457.

221. *Zauderer*, 471 U.S. at 642 (“Print advertising may convey information and ideas more or less effectively, but in most cases, it will lack the coercive force of the personal presence of a trained advocate.”); *Ohralik*, 436 U.S. at 465 (“[T]he 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.”).

222. *Ohralik*, 436 U.S. at 457; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (holding that “commercial speech . . . inform[s] the public of the availability, nature, and prices of products and services, and . . . serves individual and societal interests in assuring informed and reliable decision-making.”).

223. *Zauderer*, 471 U.S. at 642 (“In addition, a printed advertisement, unlike a personal encounter initiated by an attorney, is not likely to involve pressure on the potential client for an immediate yes-or-no answer to the offer of representation.”); *Ohralik*, 436 U.S. at 457 (“The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making.”).

224. *Bates*, 433 U.S. at 364; *see also* U.S. CONST. amend. I.

B. *Text Messages Applied to the Central Hudson test*

If attorney advertisements via text messages are classified as commercial speech, in order to determine whether such commercial speech may be restricted or prohibited by a state, the *Central Hudson* test must be applied.²²⁵ The first prong of the four-part analysis asks whether the speech is protected under the First Amendment.²²⁶ *Bates* extended commercial speech protection to attorney advertisements, allowing attorney advertisements to be considered protected First Amendment speech.²²⁷ Attorney advertisements via text messages propose a transaction and inform the public of the availability of goods and services, qualifying as commercial speech.²²⁸ Attorney advertisements via text messages, which do not advertise unlawful activity and are not misleading or deceptive, meet the conditions for First Amendment protection.²²⁹

The second part of the *Central Hudson* test requires that the asserted governmental interest be substantial.²³⁰ In regard to the Florida Bar denying a Florida law firm's proposal to send automated text messages to potential clients, the Florida Bar can argue that its asserted interest in restricting the automated text messages would be to protect Florida citizens in need of legal services.²³¹ As the Court found in the case of *Ohralik*, a state has reason to assume that in-person solicitation of potential clients by an attorney may be harmful to the person who is solicited.²³² However, text messages, like other written communications, do not have the ability to intimidate or cause undue influence like other forms of in-person solicitation.²³³ Attorney advertisements also serve the important function of informing consumers of goods, which is fundamental to the freedom of speech of both attorneys and consumers.²³⁴ This asserted state interest of protecting consumers in Florida would fail in the case of attorney advertisements via text messages.²³⁵ The

225. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

226. *Id.*; see also U.S. CONST. amend. I.

227. *Bates*, 433 U.S. at 384; see also U.S. CONST. amend. I.

228. See *Zauderer*, 471 U.S. at 638; *Ohralik*, 436 U.S. at 455–56.

229. *Bates*, 433 U.S. at 383; see also U.S. CONST. amend. I.

230. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566, 568–69.

231. See *Hale*, *supra* note 15.

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

233. See *Zauderer*, 471 U.S. at 642 (holding that print advertisements generally pose a much less risk of overreaching or undue influence than in-person solicitation).

234. See U.S. CONST. amend. I; *Zauderer*, 471 U.S. at 642; *Bates*, 433 U.S. at 364.

235. See *Ohralik*, 436 U.S. at 466 (holding the State has reason to assume in-person solicitation of potential clients by an attorney will be injurious to the person who is solicited).

Florida Bar may also argue that direct solicitation should be prohibited in order to maintain the nobleness of the legal profession.²³⁶ As the Court held in *Virginia State Board of Pharmacy*, a state interest in upholding professionalism of a field may not be a sufficient interest in restricting commercial speech.²³⁷ The asserted state interest in upholding the dignity of the legal profession would also fail under the *Central Hudson* test in analyzing attorney advertisements via text messages to potential clients.²³⁸

If the asserted state interests were determined to be substantial, it must then be determined whether the restrictions directly advance the asserted state interest.²³⁹ If the Florida Bar were to assert the interests of protecting consumers or upholding the legal profession, then restricting text messages by attorneys to potential clients would have to carry out these interests.²⁴⁰ The restrictions also may not be more extensive than is necessary to serve that interest.²⁴¹ If the Florida Bar were able to carry out its asserted interests without restricting or prohibiting attorney advertisements via text messages, then the restriction or prohibition of the commercial speech would violate the First Amendment.²⁴²

C. *Keeping up with Modern Modes of Communication*

In the year 2000, the Florida Bar noted that a “member of the Florida Bar might feel lost without a cell phone.”²⁴³ Fifteen years later, that opinion should not have changed considering that technology has only grown more popular and become more useful.²⁴⁴ The opinion of the Florida Bar in 2000 was that technology must be “utilize[d] . . . to become more efficient and [to] provide the public with a better justice system.”²⁴⁵ At the time, technology was seen as “giving the decision-maker more information to make . . .

236. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 766 (1976).

237. See *id.* at 766, 770.

238. *Id.* at 766 (holding an asserted state interest in upholding professionalism of a field may not be sufficient); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

239. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

240. See *id.*

241. See *id.*

242. See *id.* (holding that a state’s asserted interest in restricting commercial speech must be narrowly drawn and may not be more extensive than is necessary to serve that interest).

243. Gary Blankenship, *The Florida Bar: Changing Through Technology*, FLA. B. J., Apr. 2000, at 37, 37.

244. See Hale, *supra* note 15.

245. Blankenship, *supra* note 243, at 39–40.

decision[s].”²⁴⁶ Relating to commercial speech, attorneys who choose to advertise must ensure that their advertisements are able to keep up with evolving technology in order to provide consumers with the knowledge of the nature and availability of goods and services.²⁴⁷ If in the year 2000, the Florida Bar was noting how extensive the use of cell phones were, this number has only expanded, and attorneys today must also utilize these communications.²⁴⁸

In 2000, evolving technology was already a major concern for the practice of law, as stated, “[t]echnology—and how lawyers use it—will be an important factor in determining what the practice of law looks like in the next [ten] years, let alone the next [fifty].”²⁴⁹ It is important for lawyers to recognize where the profession is headed and be able to keep up with the profession.²⁵⁰ Society and technology is something that is constantly and rapidly changing that lawyers, along with state bar associations, must be able to recognize.²⁵¹ Rules regarding commercial speech and attorney advertisements should also be flexible and able to keep up with society and technology.²⁵² It will be “[t]he lawyers who are able to stay on top of changing times [that will be] the ones who are going to be successful.”²⁵³ There will be even more expansive growth and changes in technology, and it is essential that the legal profession, including commercial speech and attorney advertisements, be able to keep up with these changes.²⁵⁴

VI. CONCLUSION

Throughout the history of the legal profession, advertising by attorneys has consistently been looked down upon and considered unprofessional.²⁵⁵ These consistent negative views of attorney advertisements have influenced the ethical and professional standards of the

246. *Id.* at 40.

247. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (“And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.”).

248. *See* Blankenship, *supra* note 243, at 40; Hale, *supra* note 15.

249. Blankenship, *supra* note 243, at 40.

250. *Id.*

251. *See id.*

252. *Id.*; DRINKER, *supra* note 1, at 212.

253. Blankenship, *supra* note 243, at 40.

254. *See id.*

255. *See* DRINKER, *supra* note 1, at 212; Brace, *supra* note 3, at 110–11; *supra*

Part I.

ABA, as well as a majority of state bar ethical and professional standards.²⁵⁶ It was not until 1977 in the case of *Bates*, where the Supreme Court of the United States determined attorney advertisements to be commercial speech and thus protected under the First Amendment, that the ABA standards and state bar ethical and professional rules began to permit attorneys to freely advertise their legal services and fees.²⁵⁷ Even after the Court extended First Amendment protections to attorney advertisements, ethical and professional rules have still maintained strict standards and regulations on attorney advertisements.²⁵⁸ These strict regulations consist of the delicate balance between maintaining the honor and dignity of the legal profession and upholding the First Amendment rights of attorneys to freely advertise their legal services and fees.²⁵⁹ Florida is a state that has consistently placed some of the strictest regulations on attorney advertisements.²⁶⁰

Attorney advertisements that directly solicit potential clients are a great concern for the ABA, as well as state bar associations, including the Florida Bar.²⁶¹ One of the modes of communication that is currently at issue in the State of Florida, is targeted automated text messages to potential clients.²⁶² The Florida Bar has struck down a firm's proposed plan of sending automated text messages to potential clients, as direct solicitation via telephone in violation of the Florida Rules of Professional Conduct.²⁶³ Upon a closer analysis of the use of text messages by attorneys to potential clients, these communications more closely resemble the direct solicitation that was held to be constitutionally protected commercial speech in *Zauderer* and *Shapero*.²⁶⁴ Text messages sustain the fundamental public interest of informing consumers of the nature, availability, and prices of available services and promote rational decision-making by the consumer.²⁶⁵

In conclusion, the Florida Bar should allow attorney advertisements via text messages because these communications are considered protected

256. See DRINKER, *supra* note 1, at 212; Brace, *supra* note 3, at 110–11; *supra* Section I.C.

257. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977); Brace, *supra* note 3, at 111, 113; Lidsky & Peterson, *supra* note 172, at 263–64, 272–73.

258. *Bates*, 433 U.S. at 379; see also U.S. CONST. amend. I; MODEL RULES OF PROFESSIONAL CONDUCT r. 7.1–.3 (2013).

259. See *supra* Part I.

260. Lidsky & Peterson, *supra* note 172, at 260–61; see also *supra* Part IV.

261. See *supra* Section III.B.

262. See *supra* Parts I, V.

263. See *supra* Part I.

264. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 475–76, 478 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 641–42 (1985); Hale, *supra* note 15; *supra* Section V.A.

265. See *supra* Part V.

forms of commercial speech under the First Amendment.²⁶⁶ Text messages do not invade the privacy of the recipient, nor demand an immediate response, proving to not violate the ABA Model Rules or Florida Rules of Professional Conduct.²⁶⁷ Florida must also consider allowing attorneys to advertise legal services through targeted text messages in order to keep up with evolving modern communications.²⁶⁸

266. U.S. CONST. amend. I; *see also supra* Part V.

267. MODEL RULES OF PROF'L CONDUCT r. 7.3, 7.3 cmt. (AM. BAR ASS'N 2013); FLA. RULES OF PROF'L CONDUCT r. 4-7.18 (2014); *see also Zauderer*, 471 U.S. at 642; *supra* Part V.

268. *See supra* Section V.C.