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ARTICLES

LAWYER ADVERTISING: IS THERE REALLY A PROBLEM?

*Mylene Brooks**

I. INTRODUCTION

You are watching television and during a string of commercials you view a man dressed in biker leathers and boots expounding his legal *specialty* with respect to motorcycle accidents. "I am an attorney. I also ride bikes, and therefore I know best about the legal problems associated with motorcycle ownership and accidents." He even has a nice catchy telephone number that is placed across the bottom half of the TV screen for the entire 30 second commercial: "1-800-4BIKERS." Though a large number of Californians are lawyers by profession, the majority of people are not savvy in the legal field. In fact, it is safe to assume that most people feel very intimidated when they are required to come in contact with attorneys.

You are a motorcycle rider and you have recently been in an accident. You are injured and cannot work. You have no idea where to begin . . . and then you hear these magic words one day while at home recuperating: "I am an attorney, and I ride bikes. Been in a motorcycle accident? Call 1-800-4BIKERS for a free consultation. No fees unless you recover." Well, you think to yourself, I have nothing to lose. If he doesn't win the case, I owe nothing. Plus, he's a motorcycle accident specialist. Sounds great!

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The reality is that more and more attorneys are advertising in this fashion.¹ Yet, for a great many non-advertising attorneys, the above hypothetical advertisement is embarrassing, especially today as the public's perception of attorneys has greatly diminished. Still, the question of attorney advertising is not easy to address.

It has been over sixteen years since the Supreme Court ruled that states may not impose blanket prohibitions on advertising by lawyers and other professionals.² However, the issue remains alive today as attorneys and state bar associations continue to be divided by their beliefs. Many lawyers consider the ability to advertise a blessing. Still many others are convinced that at least some advertising is a primary cause of the profession's image problems. In fact, Lonny D. Morrison, President of the State Bar of Texas has stated, "I don't think anything has had such a detrimental effect on the image of lawyers as advertising."³

On the other hand, there are lawyers who believe that advertising is key to informing the public, as well as improving access to legal services, especially for the poor.⁴ Sara-Ann Determan, Chairperson of the American Bar Association ("ABA") Standing Committee on the Delivery of Legal Services, stated that "[i]f something is in bad taste, it's a small price to pay for increasing access [to legal services]."⁵ Determan reiterated that the Supreme Court has said states can only prohibit advertising that is false, misleading or deceptive.⁶ Burnele V. Powell, Chairperson of the ABA Standing Committee on Professional Discipline and a professor at the University of North Carolina School of Law in Chapel Hill, further stated that "advertising serves a useful purpose . . . [it] gives people information that they can use to pursue their own interests. That is something this profession has always championed."⁷

This Article will present a historical perspective of attorney advertising and discuss its protection under the First Amendment. In addition, a recent Supreme Court case dealing with CPA advertising and Iowa's

1. American Bar Association, *Report on the Survey on the Image of Lawyers in Advertising* (Comm'n on Advertising), Jan. 1990, at 2. "According to the Television Bureau of Advertising, nearly \$47 million was spent on legal services advertising on television in 1986 . . ." This figure was up \$10 million from the previous year indicating a continuing trend. *Id.*

2. *See* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

3. James Podgers, *Image Problem*, A.B.A. J., Feb. 1994, at 67.

4. *Id.*

5. *Id.*

6. *Id.*; *see also* *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

7. *See* Podgers, *supra* note 3, at 67.

restrictive attorney advertising statutes is analyzed under current standards. Finally, this Article discusses possible solutions to the advertising problem.

II. THE PROFESSIONAL REGULATION OF ATTORNEYS: A HISTORICAL PERSPECTIVE

A. *The Attorney During The Classical Period*

The origin of the legal profession can be traced back to medieval England.⁸ But, the development of the attitude regarding the inappropriateness of overt pursuit of clients has its origin in ancient Greek and Roman law.⁹

In ancient Greece, a legal controversy was believed to concern only the judge and the persons actually involved in the underlying transaction.¹⁰ Members of this society felt that outside interference in the legal process was inappropriate, although it was understood that friends and relatives could accompany a litigant to trial and render assistance.¹¹ As time passed, a litigant who was escorted to court surrounded by supporters was perceived to be a person of power and dignity, and a person not so supported was pitied.¹²

However, by the sixth century B.C., the practice of intervention on behalf of a friendless litigant became abused.¹³ The intervenor became known as a "sycophant," an individual who voluntarily undertook the prosecution of a matter motivated by money, prestige, means of political agitation, or as a means to harass other litigants.¹⁴ As a result, disinterested intervenors were looked upon with suspicion and often were required to invent or allege some private interest in a matter in order to avoid a charge of sycophancy or abuse of process.¹⁵

During ancient Roman times, the disinterested intervenor also endured an aura of distrust.¹⁶ Even though advocacy became a recognized profession during the Republic, the counselor was required to maintain the

8. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 78 (1953).

9. See generally FREDRICK W. MAITLAND ET AL., *A SKETCH OF ENGLISH LEGAL HISTORY* 37-42 (1978).

10. See Max Radin, *Maintenance By Champerty*, 24 CAL. L. REV. 48 (1935).

11. *Id.*

12. *Id.* at 49.

13. *Id.*

14. *Id.*

15. *Id.* at 48.

16. *Id.*

pretense of a personal connection with the proceedings.¹⁷ The sycophancy of Greece was termed “calumnia” under the Roman system.¹⁸ The calumniator was viewed as one who brought unfounded or trivial actions and society still believed that a legal controversy concerned only persons actually involved in the transaction.¹⁹ This general attitude coupled with the skepticism felt for disinterested intervenors naturally discouraged the overt pursuit of business by people seeking to render legal services.²⁰

B. The Attorney In English History

In England, as in early Greece and Rome, representation in litigation developed slowly and was rare.²¹ Similarly, it was the custom to take friends and advisors to trial.²² Trial in medieval England was perilous, in that trial by battle,²³ or judicial combat, was often implemented as a form of dispute resolution.²⁴ In trial by battle, the accuser had until nightfall to prove, by his body, the truth of his charge.²⁵ If unable to accomplish this, not by death, but by making the accused cry “craven,” the accuser was deemed a perjurer.²⁶ The intervening champion-for-hire, maintaining a fiction of personal connection with the proceedings, purported to serve as a witness asserting that he knew the truth of the cause for which he was fighting.²⁷ This professional champion-for-hire, motivated by money, represented an interference in the legal proceedings and was disapproved of by society.²⁸

Over time, trial by battle became obsolete. The English judicial system evolved into a system where legal expertise lay with a small

17. *Id.*

18. *Id.* at 52-53.

19. *Id.* at 53.

20. Louise L. Hill, *Solicitation By Lawyers: Piercing the First Amendment Veil*, 42 *ME. L. REV.* 369, 370-73 (1990).

21. POUND, *supra* note 8, at 79.

22. HENRY S. DRINKER, *LEGAL ETHICS* 12 (1953).

23. In trial by battle, one would swear to the truth of his cause and, in personal battle, attempt to prove his position. Representation was also a part of this process in that in certain situations a person could retain a champion to intervene on his behalf. Initially, champions were used where the litigant was blind, disabled, elderly, or an infant, woman, or priest. Nevertheless, over time, champions were freely used by every class of litigants and some people even permanently maintained them. FREDRICK W. MAITLAND ET AL., *A SKETCH OF ENGLISH LEGAL HISTORY* 37-42 (1978).

24. *Id.*

25. *Id.* at 50.

26. *Id.*

27. *Id.*

28. *Id.* at 37-42.

number of persons whose experience developed from the earlier accompaniment of litigants to trial.²⁹ These legal specialists remained a suspicious class because of the old prejudice against representation, as well as the perception that these advocates encouraged vexatious and profit-seeking lawsuits.³⁰ Nevertheless, the legal system continued to develop, which led to a necessary increased skill and education level of legal practitioners.³¹ Thus, reliance on these legal specialists, who now openly acted on behalf of others, naturally followed. It is from this medieval period that the legal profession as it is known today resulted.³²

The law came to be regarded as a learned profession, along with medicine and theology, and training in the law became more formalized.³³ The professions were distinguishable from craft and trade associations by parameters of society, wealth, and education.³⁴ Members of the professions were generally men from leading families who trained in the classics rather than in elaborate apprenticeship programs.³⁵ Professionals had little regard for the competition and *caveat emptor* of the crafts because they were not completely dependent upon their professions for their livelihood.³⁶

Lawyers were few in number and formed a closely knit group, as was the general practice of the other specialized craftsmen's associations.³⁷ Many lawyers of the time considered the legal profession a public service, rather than a business.³⁸ Afraid of being referred to as tradesmen, lawyers refused to compete for clients for fear of ruining their intimacy amongst their colleagues.³⁹ Further, it was unnecessary for lawyers to actively pursue clients because there were very few legal experts and many clients.⁴⁰ Thus, the principles of etiquette and good taste of the class of legal professionals, along with the existence of readily available business,

29. DRINKER, *supra* note 22, at 79.

30. Radin, *supra* note 10, at 59.

31. POUND, *supra* note 8, at 78.

32. *Id.*

33. STEPHEN RUBIN, *The Legal Web of Professional Regulation*, in REGULATING THE PROFESSION 29, 32 (Roger D. Blair & Stephen Rubin eds., Sept. 28, 1980).

34. *Id.*

35. *Id.*

36. DRINKER, *supra* note 22, at 5.

37. RUBIN, *supra* note 33, at 32.

38. POUND, *supra* note 8, at 5; *see also* DRINKER, *supra* note 22, at 5.

39. Paul H. Francis & Jennifer J. Johnson, *The Emperor's Old Clothes: Piercing The Bar's Ethical Veil*, 13 WILLAMETTE L. REV. 221, 224 (1976).

40. *Id.*

led to the attitude that solicitation of business was unnecessary.⁴¹ As such, client solicitation was not an issue and thus not practiced.

C. *The Attorney in the United States*

In colonial America, it was customary for young men desiring to be members of the legal profession to travel to England to study law.⁴² Due to their training and community positions, these men established high standards of education and performance for the legal profession.⁴³ As in England, the number of trained lawyers in colonial America was small and the factors which discouraged overt client seeking activity in England carried over to the colonies.⁴⁴

In America, lawyers played a significant role in the formative period of the Republic.⁴⁵ However, as the new nation began to grow, a widespread perception developed among the public that special privileges were accorded to members of the professions.⁴⁶ Consequently, a hostility developed toward the regulated professions, particularly the legal profession.⁴⁷ Bar associations, viewed as exclusive and secret trade unions, were perceived as undemocratic and un-American.⁴⁸ As a result, states enacted significant legislation which lowered or eliminated qualifications of character, education, and training.⁴⁹ By 1860, only nine of thirty-nine states required a definite, though nominal, period of preparation for admission to the bar.⁵⁰

In the nineteenth century, the bar in the United States was essentially open, and this greatly enlarged group of lawyers competed for business insufficient to accommodate their number.⁵¹ The competition among so

41. *Id.*

42. FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 32 (1969).

43. DRINKER, *supra* note 22, at 19.

44. Deborah L. Rhode, *Solicitation*, 36 J. LEGAL EDUC. 317, 317-18 (1986).

45. Twenty-five of the fifty-six signers of the Declaration of Independence were lawyers, as were thirty-one of the fifty-five members of the Constitutional Convention. 29 *ENCYCLOPEDIA BRITANNICA* 217-18 (15th ed. 1988).

46. DRINKER, *supra* note 22, at 19.

47. *Id.*

48. *Id.*

49. *Id.* A number of states (Indiana (1850), Michigan (1850), New Hampshire (1842), Maine (1843), and Wisconsin (1849)) passed statutes and even amended their constitutions upholding the inherent and "natural" right of every voter of good moral character to practice law. *Id.* at n. 38.

50. *See id.*

51. *See* DRINKER, *supra* note 22.

many "professionals" led to the onset of lawyer advertising and solicitation.⁵² In fact, Abraham Lincoln attempted to attract clients by running the following ad in the August 10, 1838 *Sangamo Journal*: "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."⁵³

Legal practitioners were no longer a small homogeneous group who shunned the overt pursuit of clients. 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.⁵⁴ 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.⁵⁵ 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.

It is postulated that reform was also sought because a business crisis, in the form of competition, was perceived.⁵⁶ In the past, the class of legal professionals had no need to advertise. Most lawyers were general practitioners in small towns and legal services were rendered in an intimate relationship based upon the lawyer's reputation in the community.⁵⁷ As such, an attorney would prosper as long as his reputation was one of strong character, education, and training. However, once the states enacted laws allowing virtually anyone to become a lawyer, the influx of attorneys impacted the seasoned attorney's livelihood.⁵⁸ As a result, bar associations throughout the country were reorganized by these veteran attorneys in order to fight back against this perceived crisis.⁵⁹

In 1887, the Alabama State Bar Association formulated and adopted the first formal code of ethics for the American legal profession.⁶⁰ The *Alabama Code of Ethics* ("Alabama Code") stressed the need for high

52. See generally LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1980).

53. *Id.* at 1.

54. DRINKER, *supra* note 22, at 12.

55. *Id.*

56. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 649 (2d ed. 1985).

57. LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1980).

58. See generally *id.*

59. DRINKER, *supra* note 22, at 12.

60. *Id.* at 23.

moral principles, and addressed the matter of lawyer advertising.⁶¹ The *Alabama Code* stated that “[n]ewspaper advertisements, circulars and business cards, tending professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided.”⁶² As such, within the first formal code of ethics, lawyer advertising was not condemned, but solicitation of clients was proscribed.

Subsequently, in 1908, the ABA promulgated and adopted the *Canons of Professional Ethics* (“*Canons*”) to govern its members. The *Canons* were adopted in whole or in part throughout the United States.⁶³ However, while the *Alabama Code* allowed attorney advertising, the *Canons* did not.⁶⁴

This broad prohibition on advertising by the ABA was based on several considerations. First, the law being deemed a profession, not a trade, embraced the “cherished” tradition of the English barristers. This tradition was essential to the lawyer’s respect for his chosen profession, as well as respect for his fellow lawyers.⁶⁵ Second, weakening public opinion called for a definite statement by the bar of the accepted rules of professional conduct.⁶⁶

Furthermore, the ABA believed that advertising and solicitation did not benefit either the public or the attorney in the same way as in the case of the sale of merchandise.⁶⁷ In fact, such practice was believed to increase unnecessary litigation.⁶⁸ Also, extensive advertising was considered against public policy because it tended to commercialize the profession.⁶⁹ More interesting, however, was the concern with safeguarding potential clients against deception on the part of the unscrupulous attorney who might lure such clients through improper advertising.⁷⁰

61. See 188 ALA. XXIII-XXXIV (1899).

62. *Id.* at XXIII, Rule 16 (emphasis added).

63. DRINKER, *supra* note 22, at 25. “[I]n 1908, there were forty-four state associations, twelve of which had adopted formal codes of professional ethics By 1914, thirty-one had adopted the American Bar Association Code, with little or no change; Michigan, Virginia, Mississippi, Missouri, and North Carolina had adopted it in place of their own existing codes.” *Id.*

64. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

65. DRINKER, *supra* note 22, at 12.

66. *Id.* at 25.

67. *Id.* at 211.

68. *Id.* at 212.

69. *Id.*; see also notes 51-53 and accompanying text.

70. DRINKER, *supra* note 22, at 212.

The lawyers associated with the ABA who formulated and implemented the *Canons* were primarily commercial lawyers who represented large clients, rather than the smaller, less dignified practitioners.⁷¹ At that time, membership in the ABA was selective. In 1900, just 1.3 percent of the country's lawyers were members, and grew to only 3 percent by 1910.⁷² Thus, it is not surprising that the 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.⁷³ The *Canons*, and their proscription against advertising and solicitation, remained intact for six decades. Ultimately, these proscriptions were carried over to the *Model Code of Professional Responsibility* ("*Model Code*") which replaced the *Canons* in 1969.⁷⁴ This occurred even though the question had arisen as to whether this prohibition worked to defend the values of the profession or "to mask the self-seeking stratagems of a conservative elite."⁷⁵

The *Model Code*, as originally passed in 1969, contained disciplinary rules prohibiting advertising and solicitation that were similar to the proscriptions in the *Canons*.⁷⁶ However, it became apparent to the members of the bar that an absolute prohibition on lawyer advertising was inappropriate.⁷⁷ Consumer awareness was increasing and the public sought more information regarding the availability of legal services.⁷⁸ Also, the Supreme Court was analyzing the First Amendment interests against restrictions placed on speech.⁷⁹ As such, the ABA amended the *Model Code* six times, eventually allowing lawyer advertising. However, the *Model Code* took a restrictive approach, known as the "laundry list" approach, and explicitly designated the information which lawyers could

71. FRIEDMAN, *supra* note 56, at 651; JEROLD S. AUERBACH, UNEQUAL JUSTICE 41-42 (1976).

72. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW, THE LAW MAKERS 287, 289 (1950).

73. AUERBACH, *supra* note 71, at 42-43.

74. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 348 (1976).

75. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101, 2-103, 2-104, 2-105 (1980).

76. *Id.*

77. BLOOMFIELD, *supra* note 74, at 349.

78. Beginning in the mid-1960s, states began to enact legislation to protect consumers against unfair and deceptive commercial practices. By 1981, forty seven states provided the public with a private right of action to recover for alleged violations of such laws. TANG THANH LE, PROTECTING CONSUMER RIGHTS 21 (1987).

79. *See generally* *Bigelow v. Virginia*, 421 U.S. 809 (1975); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

use in publications regarding their services.⁸⁰ Nevertheless, solicitation continued to be prohibited.

As a result of the *Model Code* being criticized as irrelevant, ambiguous and contradictory, the ABA appointed a special commission to examine it.⁸¹ This resulted in the ABA's adoption of the *Model Rules of Professional Conduct* ("Model Rules") in 1983. The *Model Rules* enlarged the sphere of acceptable lawyer advertising in the face of the Supreme Court's response to restrictions on speech and the view that the public sought information. Rather than approach lawyer advertising from a regulatory format of the laundry list, the drafters of the *Model Rules* chose to approach the matter more liberally, prohibiting only false or misleading communications.⁸²

Following the adoption of the *Model Rules* by the ABA, most of the individual states, which operate as separate jurisdictions, adopted the *Model Rules* in their entirety or with some modification.⁸³ As they stand, the *Model Rules* represent the primary standard by which the conduct of a lawyer is judged.

III. ATTORNEY ADVERTISING AND FIRST AMENDMENT PROTECTION

In 1976, the Supreme Court extended the protection of the First Amendment of the United States Constitution to commercial speech.⁸⁴ One year later, the Supreme Court had the opportunity to review commercial speech protection in the context of attorney advertising.⁸⁵ The result was the extension of commercial speech protection to advertisements disseminated by lawyers. Thus, legal advertising could no longer be subject to blanket suppression.⁸⁶

In *Bates v. State Bar of Arizona*,⁸⁷ two attorneys placed an advertisement offering legal services at "very reasonable fees," and listed the costs of certain services, violating the Arizona rule prohibiting any form of attorney advertising.⁸⁸ The Supreme Court held that a state may not

80. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980).

81. See Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

82. MODEL RULES OF PROFESSIONAL CONDUCT Rules 7.1, 7.2, 7.3 (1992).

83. Over two-thirds of the states have adopted the *Model Rules* to date. *Id.* at viii.

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

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

86. *Id.* at 383.

87. *Id.* at 350.

88. *Id.* at 354-55.

prevent the publication in a newspaper of a truthful advertisement concerning the availability and terms of routine legal services.⁸⁹ The Court relied on the fact that the relevant Arizona disciplinary rule at issue served to inhibit the free flow of commercial information and kept the public uninformed.⁹⁰ Further, the Court reasoned that the failure of attorneys to advertise may create an image that the profession fails to reach out and serve the community.⁹¹

The decision in *Bates*, that attorney advertising cannot be subject to blanket suppression, represented a major step towards the deregulation of attorney advertising. However, the narrowly construed holding continued to allow for some advertising regulation such as restraining false, deceptive, or misleading advertisements, as well as restraint on the time, place, and manner of advertising.⁹² Since *Bates*, the Supreme Court has tended to reject prophylactic rules relating to attorney advertising as violative of the First Amendment.⁹³

In undertaking the analysis of the commercial speech of attorneys, the Supreme Court distinguished lawyer advertising from in-person lawyer solicitation, the latter deemed impermissible.⁹⁴ In a 1980 case that did not involve lawyer advertising, the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁹⁵ formulated a four-part test for determining the constitutionality of a restriction on commercial speech:

- (1) The speech must not be misleading and it must concern lawful activity;
- (2) the asserted state interest promoted by the restriction must be substantial;
- (3) the restriction must directly advance the asserted state interest; and
- (4) the restriction must not be more extensive than necessary to serve the asserted state interest.⁹⁶

89. *Id.* at 384.

90. *Bates*, 433 U.S. at 370.

91. *Id.*

92. *Id.* at 383-84.

93. See *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

94. See *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

95. 447 U.S. 557 (1980).

96. *Id.* at 566.

The fourth part of the test was later modified to require only a "reasonable fit" between the asserted state interest and a restriction on commercial speech.⁹⁷

Subsequently, the Supreme Court had the opportunity to adopt a similar four-part *Central Hudson* test in a situation that involved published attorney advertising and the use of direct mailings.⁹⁸ The case of *In re R.M.J.*⁹⁹ involved a Missouri rule that limited the content of a lawyer's advertisement to specific categories of information, and in some instances specific language.¹⁰⁰ The Missouri Supreme Court upheld the rule and found that an attorney violated this rule when he included unsanctioned language in a newspaper advertisement.¹⁰¹ However, the United States Supreme Court, using the more exact *Central Hudson* test, found that the Missouri rules unconstitutionally interfered with protected speech.¹⁰² The Court concluded that Missouri had not shown that an absolute prohibition was necessary to cure any possible deception as required under the fourth prong of the test.¹⁰³

In *Zauderer v. Office of Disciplinary Counsel*,¹⁰⁴ the Supreme Court addressed the regulation of commercial speech by attorneys, and reaffirmed the approach taken in *In re R.M.J.* In *Zauderer*, an Ohio attorney placed two advertisements in a local newspaper. The first advertisement offered representation for defendants in drunk driving cases, and a refund of the fee if the client was convicted.¹⁰⁵ The second advertisement was directed to women injured through the use of the Dalkon Shield and included an accurate drawing of the birth control device.¹⁰⁶ Both advertisements stated that cases would be handled on a contingent fee basis and if there was no recovery, no legal fees would be owed.¹⁰⁷

The Ohio Office of Disciplinary Counsel brought charges against the attorney for misleading advertisements based on: (1) failure to disclose regarding the cost and fee differentiation; (2) offering representation on a contingent fee basis in a criminal case with respect to the drunk driving

97. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

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

99. *Id.*

100. *Id.*

101. *Id.* at 197-98.

102. *In re R.M.J.*, 455 U.S. at 205-06.

103. *Id.* at 207.

104. 471 U.S. 626 (1985).

105. *Id.* at 629-30.

106. *Id.* at 630-31.

107. *Id.* at 631.

advertisement; and (3) use of illustrations in attorney advertising with respect to the Dalkon Shield advertisement and soliciting clients in violation of Ohio rules.¹⁰⁸

Eight Supreme Court justices agreed that the Dalkon Shield advertisement constituted commercial speech and that the Ohio rules were subject to the tests set forth in *Bates* and *In re R.M.J.*¹⁰⁹ Further, five justices examined the rule against solicitation and found that the prohibition was impermissible as applied to this advertisement because the statements concerning the Dalkon Shield were neither false nor deceptive.¹¹⁰ For similar reasons the Court struck down the blanket prohibition on illustrations.¹¹¹ Because the Court found that the advertisements were not misleading, Ohio was forced to prove that the rules constituted the least restrictive alternative necessary to prevent deception, which the state was unable to do.¹¹²

However, the Supreme Court did uphold the Ohio rules related to disclosure requirements for legal fees and costs.¹¹³ Applying a rational basis test, the Court found that whenever the disclosure requirements are reasonably related to the state's interest in preventing deception, the requirements should be upheld given the likelihood that consumers would misunderstand the difference between legal fees and costs.¹¹⁴ In addition, the Court's opinion maintained the distinction between the two forms of attorney commercial speech, solicitation and advertising, acknowledging that even print advertisements are a form of solicitation.¹¹⁵

The Supreme Court continued to extend protection for attorney advertising in *Shapiro v. Kentucky Bar Association*¹¹⁶ by upholding an attorney's right to send letters advertising his services to victims of foreclosure.¹¹⁷ The relevant state rule prohibited all targeted, direct mail advertising in certain situations regardless of whether the court found it to be false or misleading.¹¹⁸ The Supreme Court reversed the Kentucky

108. *Id.* at 630-33.

109. *Zauderer*, 471 U.S. at 637-39 (Justice Powell took no part in the decision of the case).

110. *Id.* at 641-42.

111. *Id.* at 647.

112. *Id.* at 644.

113. *Id.* at 651-53.

114. *Zauderer*, 471 U.S. at 651-52.

115. *Id.* at 641-42.

116. 486 U.S. 466 (1988).

117. *Id.* at 479-80.

118. *Id.* at 470 n.2. The pertinent rule provided in full:

A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also

Supreme Court decision, holding that absolute prohibition on direct mail advertising was violative of the First Amendment.¹¹⁹ The United States Supreme Court distinguished targeted, direct mail solicitation from in-person solicitation because the former affords the consumer an opportunity for reflection.¹²⁰ Once again, the Court emphasized that restrictions on truthful, non-deceptive communication must be supported by a substantial state interest.

Justice O'Connor's strong dissent criticized the majority's decision as an unfortunate product of the Court's holding in *Zauderer*.¹²¹ Using the four-part *Central Hudson* test, Justice O'Connor supported granting states "considerable latitude to ban advertising that is 'potentially or demonstrably misleading,' as well as truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."¹²² Thus, Justice O'Connor would permit states to ban all but the most minimal kinds of price advertising to protect the dignity of the profession, and to curb possible attorney abuse of their clients and justice system.

These three cases¹²³ illustrate the Supreme Court's emphasis on consumer protection. The Court assessed the validity of state regulation by balancing the benefits of more truthful information to the consumer against the possibility of deception.¹²⁴ In making its decisions, the Court analyzed both the content of the advertisement and the mode of communication.¹²⁵ The cases evidence a preference for greater disclosure and a desire to avoid prophylactic rules when narrower regulations would suffice.¹²⁶ In fact, the cases dealing with commercial speech can be divided into two broad categories: (1) factually verifiable information, presented within standardized and easily comparable units; and (2)

sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.

Id.

119. *Shapero*, 486 U.S. at 472.

120. *Id.* at 475-76; see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978).

121. *Shapero*, 486 U.S. at 480-81 (O'Connor, J., dissenting).

122. *Id.* at 485 (quoting *In re R.M.J.*, 455 U.S. 191, 202 (1982)) (emphasis omitted).

123. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

124. See generally Robert B. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775 (1979).

125. See *Shapero*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

126. See *Shapero*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

subjective, non-verifiable information or information provided in a manner that discourages comparison shopping.¹²⁷

Advertisements falling within the first category include the price quotations in *Bates*, the listing of practice areas in *In re R.M.J.*, the illustrations in *Zauderer*, and the solicitation letters in *Shapero*. In each case, the Court struck down the blanket restrictions in favor of a case-by-case analysis.¹²⁸ The Court emphasized the benefits to consumers that flow from freer restrictions and the fact that the consumer would be able to use the information in these advertisements to make a more informed decision.¹²⁹ In each case, the state had taken a more paternalistic approach, preferring to restrict a great deal of truthful advertisements in the hopes of preventing possible deception.

In contrast, advertisements in the second category have no overriding benefits for consumers. Although such advertisements increase the amount of information available to the public, the information cannot be easily verified and offers little value to a consumer engaged in comparison shopping. In some cases, the manner of presentation, not the information provided, warrants censure. For example, in *Zauderer*, the attorney's failure to abide by state disclosure requirements subjected him to reprimand because the manner of presentation left the consumer with an incomplete picture of the product advertised, namely the price of his services.¹³⁰ The Supreme Court found that in-person solicitation forces consumers to make purchasing decisions without comparison shopping, thus falling into the second category and justifying an absolute ban.¹³¹ Because the forms of commercial speech within this second category give rise to the greatest possibility of deception, the Court tends to defer to the states and uphold prophylactic rules, especially rules prohibiting solicitation for pecuniary gain.¹³²

127. See Reich, *supra* note 124, at 780.

128. See *Shapero*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

129. See *Shapero*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

130. *Zauderer*, 471 U.S. at 652.

131. See *Ohralik*, 436 U.S. at 457, 467 (1978).

132. See *Zauderer*, 471 U.S. at 641 (the Court reflected on the *Ohralik* decision).

IV. EDENFIELD V. FANE

The Supreme Court's recent decision in *Edenfield v. Fane*,¹³³ has sparked heated discussion, some lawyers believing that the ruling in favor of accounting professionals soliciting clients supports personal solicitation by lawyers. However, in regard to attorney solicitation, further considerations must be addressed.¹³⁴

A. *The Facts*

Plaintiff Scott Fane was a CPA licensed to practice in Florida.¹³⁵ Prior to moving to Florida, Fane had an accounting practice in New Jersey where he often obtained clients by making unsolicited telephone calls explaining his services.¹³⁶ New Jersey law allowed this direct, personal, and uninvited solicitation.¹³⁷

The Florida Board of Accountancy ("Board") had a comprehensive rule prohibiting CPAs from engaging in the type of solicitation that Fane had found most effective in New Jersey.¹³⁸ The Board's rules provided that a CPA "shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services . . . where the engagement would be for a person or entity not already a client of [the CPA], unless such person or entity has invited such a communication."¹³⁹ "[D]irect, in-person, uninvited solicitation' means 'any communication which directly or implicitly requests an immediate oral response from the recipient,' which, under the Board's rules, includes all '[u]ninvited in-person visits or conversations or telephone calls to a specific potential client.'"¹⁴⁰

Fane brought this action against the Board in the United States District Court for the Northern District of Florida, seeking declaratory and injunctive relief on the ground that the Board's anti-solicitation rule violated the First Amendment, *inter alia*.¹⁴¹ The District Court ordered

133. 113 S. Ct. 1792 (1993).

134. See *infra* part V.

135. *Fane*, 113 S. Ct. at 1796.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* (alteration in original) (quoting FLA. ADMIN. CODE § 21A-24.002(2)(c) (1992)).

140. *Fane*, 113 S. Ct. at 1796.

141. *Id.* at 1797.

summary judgment in favor of Fane, the Court of Appeals affirmed, and the United States Supreme Court, granting certiorari, also affirmed.¹⁴²

B. Analysis

Initially, the United States Supreme Court determined that this type of personal solicitation is commercial expression entitled to First Amendment protection, while acknowledging that an earlier opinion had upheld a ban on in-person solicitation by lawyers.¹⁴³ As in the previously discussed attorney advertising cases, the Court stressed the desires of the consumer and that "solicitation may have considerable value [because it] allows spontaneous communication between buyer and seller."¹⁴⁴ The Court stated that "[i]n denying CPAs and their clients these advantages, Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard."¹⁴⁵

The Court applied the *Central Hudson* test to determine whether the law restricting personal solicitation by CPAs was reasonably tailored to serve a substantial state interest, thus passing First Amendment scrutiny.¹⁴⁶ The Court's inquiry included: (1) "whether the State's interests in proscribing [personal solicitation] are substantial; [(2)] whether the challenged regulation advances these interests in a direct and material way; and [(3)] whether the extent of the restriction on protected speech is in reasonable proportion to the interests served."¹⁴⁷

1. Prong One

In undertaking the first query, the Court accepted the State's interests as proffered by the Board.¹⁴⁸ "First, the Board asserted an interest in protecting consumers from fraud or overreaching by CPAs.¹⁴⁹ Second, the Board claimed that its ban is necessary to maintain both the fact and appearance of CPA independence in auditing a business and attesting to its financial statements."¹⁵⁰ The Court recognized that the state has substan-

142. *Id.*

143. *Id.*

144. *Id.*

145. *Fane*, 113 S. Ct. at 1798.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1799.

150. *Fane*, 113 S. Ct. at 1799.

tial interest in ensuring the accuracy of commercial information, preventing deception and fraud, as well as maintaining standards of ethical conduct in licensed professions.¹⁵¹

2. Prong Two: The Determinative Prong

The second prong of *Central Hudson* “requires that a regulation impinging upon commercial expression ‘directly advance the state interest involved; . . . [an] ineffective or remote support for the government’s purpose’” will not suffice.¹⁵² As such, the state’s burden of justifying the restriction cannot be satisfied by speculation. The state “must demonstrate that the harms it recites are real and that its restriction[s] will in fact alleviate” those harms.¹⁵³

The Court found that the Board’s concerns were unjustifiable based on Fane’s actions because the Board was unable to prove that a ban on CPA solicitation would promote its asserted interests in any substantial manner.¹⁵⁴ The Board failed to introduce any studies that could suggest that personal solicitation of prospective clients by CPAs would lead to fraud or overreaching.¹⁵⁵ Further, the Board’s records failed to disclose any evidence from other states to back its contention although twenty-one states placed no specific restrictions on CPA solicitations.¹⁵⁶ Thus, having failed this prong of the *Central Hudson* test the Court was unable to uphold the rule prohibiting CPA solicitation.¹⁵⁷

3. The Board’s Prophylactic Rule Contention in the Alternative

Relying on *Ohralik*, the Board argued in the alternative that the solicitation ban could be justified as a prophylactic rule.¹⁵⁸ The Board acknowledged that while Fane’s solicitations may not have involved any misconduct, “all personal solicitation by CPAs must be banned, because this contact most often occurs in private offices and is difficult to regulate or monitor.”¹⁵⁹

151. *Id.*

152. *Id.* at 1800.

153. *Id.*

154. *Id.* at 1803.

155. *Fane*, 113 S. Ct. at 1801-02.

156. *Id.*

157. *Id.* at 1801-02.

158. *Id.* at 1802.

159. *Fane*, 113 S. Ct. at 1802.

But, the Court rejected the Board's argument because "*Ohralik* does not stand for the proposition that blanket bans on personal solicitation by all types of professionals are constitutional in all circumstances."¹⁶⁰ The holding in *Ohralik* was narrow and depended upon certain unique features of in-person solicitation by attorneys. The Court stated, "the constitutionality of a ban on personal solicitation will depend upon the identity of the parties and the precise circumstances of the solicitation."¹⁶¹ Further, the Court clearly stated that a prohibitive rule was justified in rare situations "inherently conducive to overreaching and other forms of misconduct," such as in the case of a lawyer personally soliciting an unsophisticated, injured or distressed lay person.¹⁶²

In *Fane*, the clients, solicited initially by telephone, would subsequently meet with the CPA in their own offices at a time of their choosing.¹⁶³ If the potential clients were unreceptive to this initial telephone contact, they could terminate the call. Invasion of privacy was not a significant concern where the prospective client had an existing professional relationship with an accountant. The prospective client is far less susceptible to manipulation than the young accident victim in *Ohralik*.¹⁶⁴ In contrast to *Fane*, the clients in *Ohralik* were approached at a "moment of high stress and vulnerability" and were thus much more prone to manipulation by a soliciting attorney trained in the art of persuasion.¹⁶⁵ In *Fane*, the Court found that "[t]he Board's reliance on *Ohralik* was misplaced . . ."¹⁶⁶ Instead, the Court held tight to the opinion that "[b]road prophylactic rules in the area of free expression are suspect" and that "a State may not curb protected expression without advancing a substantial governmental interest."¹⁶⁷

4. Justice O'Connor's Dissent

In *Fane*, Justice O'Connor reiterated her dissent in *Bates* where she postulated that the Court's past decisions increasingly have led to "unprofessional forms of attorney advertising being protected speech."¹⁶⁸ In explicitly addressing the issue of attorney advertising in her dissent,

160. *Id.*

161. *Id.*

162. *Id.* (quoting *Ohralik*, 436 U.S. 447, 464).

163. *Id.* at 1803.

164. *Fane*, 113 S. Ct. at 1803.

165. *Id.*

166. *Id.*

167. *Id.* at 1803-04.

168. *Id.* at 1804.

Justice O'Connor stated, "I see no constitutional difference between a rule prohibiting in-person solicitation by attorneys, and a rule prohibiting in-person solicitation by [CPAs]."¹⁶⁹

Relying on past cases dealing with advertising, Justice O'Connor maintained that the Court's focus was too narrow in its determination that advertisement was protected speech with the exception of speech found to be misleading, false, amounting to overreaching, invasion of privacy, or exercising undue influence.¹⁷⁰ Justice O'Connor also stated, "the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large."¹⁷¹ Justice O'Connor asserted that certain forms of typical competition in the business world may be prohibited because "pure profit seeking degrades the public-spirited culture of the profession," and that commercialization has a profound effect on the profession.¹⁷²

Furthermore, Justice O'Connor directly contended that the majority in *Fane* avoided analyzing the Florida rule under the *Central Hudson* test altogether, claiming instead that the majority characterized *Fane*'s suit as an "as-applied" challenge.¹⁷³ The result, as Justice O'Connor sees it, is that a commercial speaker can claim First Amendment protection for particular instances of prohibited commercial speech even where the prohibitory law satisfies the *Central Hudson* test.¹⁷⁴ Thus, the majority implied that the *Central Hudson* itself was satisfied which should have led to a reversal of the judgment of the court of appeals and upholding the Florida law.¹⁷⁵

V. EDENFIELD V. FANE'S EFFECT ON ATTORNEY ADVERTISING

Currently, a key issue is whether states are required to follow the Supreme Court's previous rulings that states may only impose measures necessary to prevent false, misleading or deceptive advertising, or whether the more aggressive approach followed by Iowa and other states will pass

169. *Fane*, 113 S. Ct. at 1805.

170. *Id.* at 1803.

171. *Id.* at 1804; see also *Zauderer*, 471 U.S. at 676-77; *Shapero*, 486 U.S. at 488-91; *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990).

172. *Fane*, 113 S. Ct. at 1804 (citing *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792).

173. *Id.* at 1805.

174. *Id.*

175. *Id.* at 1806.

constitutional scrutiny.¹⁷⁶ The following is an example of a more restrictive state rule regarding attorney advertising and an analysis of its constitutionality under the advertising cases.

A. Iowa's Advertising Rules

The *Iowa Code of Professional Responsibility for Lawyers* ("Iowa Code"), considered among the most restrictive in the United States, includes a general provision prohibiting "false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement[s]" in advertising.¹⁷⁷ The *Iowa Code* also contains an exclusive "safe harbor" listing of permissible methods of disseminating such advertising.¹⁷⁸ Such methods include the general use of the print media and telephone directories, however the *Iowa Code* specifically prohibits all in-person solicitation.¹⁷⁹ Written solicitation, which includes direct mailing, is permitted under very limited circumstances.¹⁸⁰ The *Iowa Code* also contains a provision allowing for

176. *Id.* at 1802-04.

177. IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS Canon 2 DR 2-101(A) (1989).

178. *Id.* at DR 2-101(B). The Iowa Code states in pertinent part:

(1) General Print Media. Lawyer advertising may be communicated to the public in newspapers, periodicals, trade journals, "shoppers", [sic] and other similar advertising media, published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, PROVIDED THAT the publisher agrees in writing to print all the disclaimers required by these rules in type size not smaller than 9-point on each page bearing the ad.

(2) Lawyer Telephone and City Directory Listings. A lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements.

(a) Alphabetical Listings. The lawyer's name, address, and telephone number and designation as a lawyer, *only*, may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(b) Classified Listings. Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys" except that a lawyer who has complied with DR 2-105(A)(4) [compliance reporting regarding hours devoted to a particular field] may be listed in no more than *three* classifications or headings identifying those fields or areas of practice as listed in DR 2-105(A)(2)

(c) Display and Box Advertisements. All other telephone or city directory advertising permitted by these rules, including display or box advertisements, shall include the disclosures required by DR 2-101(A), (D), and (F), unless such disclosures are published as provided in DR 2-101(B)(1).

Id. (emphasis added).

179. *Id.* at DR 2-101(B)(4).

180. *Id.* The Iowa Code states in pertinent part:

the limited use of restricted radio and television communication, as well as biographical and informational brochures.¹⁸¹ Moreover, the advertising

(b) **Written Solicitation.** A lawyer who wishes to engage in written solicitation by direct mail to persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could upon reasonable inquiry be known to the soliciting lawyer shall, prior to the dissemination of the solicitation, file all such proposed written documents or solicitations with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association. The soliciting lawyer shall, in addition thereto, bear the burden of proof regarding:

- (i) the truthfulness of all facts contained in the proposed communication;
- (ii) how the identity and specific legal need of the potential recipient were discovered; and
- (iii) how the identity and knowledge of the specific need of the potential recipient were verified by the soliciting lawyer.

All such written solicitations shall contain the disclosures required by DR 2-101(A), (D), and (F). No such dissemination shall be made until the committee or its designee shall, upon the facts presented, render a written finding that the solicitation is not false, deceptive, or misleading. No information disseminated by the soliciting lawyer shall make any reference to such submission and finding. Each separate written solicitation intended for dissemination must be submitted for a finding in accordance herewith.

(c) **Direct Mail.** Information permitted by these rules may be communicated by direct mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. All such communications shall contain the disclosures required by DR 2-101(A),(D), and (F).

(d) All communications authorized by paragraphs "b" and "c" hereof and the envelope containing the same shall, in addition to other disclosures that may be required hereunder, carry the following disclosure in red ink in 9-point or larger type: "ADVERTISEMENT ONLY". [sic] A copy of all direct mail communications shall be filed with the . . . Iowa State Bar Association . . . contemporaneously with the mailing of the communications to the general public and shall contain the disclosures required by DR 2-101(A),(D), and (F).

Id. (emphasis added).

181. *Id.* DR 2-101(B)(5) and (6). The Iowa Code states in pertinent part:

(5) **Electronic Media.** Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications to the extent possible, shall be made only in the geographic area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides, and shall contain the disclosures required by DR 2-101(A),(D), and (F) and DR 2-105 (A)(3).

(6) **Biographical and Informational Brochures.** Brochures or pamphlets containing biographic and informational data as permitted by these rules, shall only be disseminated directly to clients, members of the Bar, or in response to direct request, and shall include the disclosures required by DR 2-101(A), (D), and (F), and DR 2-105(A)(3).

Id. (emphasis added).

lawyer has the obligation to retain records of all information communicated through all permissible means of advertising.¹⁸²

Advocates of this more restrictive approach to attorney advertising are delighted that Iowa's advertising rules, specifically electronic media advertising, circumvented the Supreme Court's inquiry as to their constitutionality, and stand based on the Court's finding of lack of federal question jurisdiction.¹⁸³

The case of *Committee on Professional Ethics v. Humphrey*¹⁸⁴ originated in 1982 when three attorneys aired unauthorized advertisements on a television station in Des Moines, Iowa.¹⁸⁵ After three days, at the request of the State Ethics Committee, the station discontinued the advertisements. The Committee then commenced an action to enjoin the attorneys from using the ads based on violations of the Professional Canons, specifically, DR 2-101 and DR 2-105.¹⁸⁶ The attorneys counter-claimed, asserting that the rules violated the First and Fourteenth Amendments of the U.S. Constitution.¹⁸⁷

Subsequently, the case reached the Iowa Supreme Court which held the rules permissible. The Iowa court relied heavily on the *Zauderer* opinion in making its determination. The court contrasted the two cases finding that "special problems" exist in the field of electronic advertising, thus "warrant[ing] a special rule to regulate lawyer advertising in the

182. DR 2-101(B)(7). The Iowa Code states in pertinent part:

(7) Record Retention. Whether or not it contains fee information, a lawyer shall preserve a copy of each advertisement placed in a newspaper, the classified section of the telephone or city directory, or periodical, and a tape of the radio, television, or other electronic or telephonic media commercial, or recording, for at least three years and a record of the date or dates . . . and name of the medium through which it was aired.

Id. (emphasis added).

183. *Humphrey v. Committee on Professional Ethics*, 475 U.S. 1114 (1986).

184. 377 N.W.2d 643 (Iowa 1985), *cert. denied*, 475 U.S. 1114 (1986) (dismissed for want of substantial federal question).

185. One of the commercials featured an actor and actress portraying a doctor and a nurse in an examination room. While the nurse peers at an X-ray, the doctor says:

We see first hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of lawyer could be important. That's something to think about.

All of the commercials featured an actress portraying a receptionist in a law office who says:

If you're injured through the negligence of others, call the law firm of Humphrey, Haas & Gritzner. Cases involving auto accidents, workers' comp, serious personal injury and wrongful death handled on a percentage basis. No charge for initial consultation. Call now at 288-0102.

Committee on Professional Ethics v. Humphrey, 355 N.W.2d 565, 566 (Iowa 1984).

186. *See supra* note 178 for specific language.

187. *Committee*, 355 N.W.2d at 566-67.

[television] media.”¹⁸⁸ The court also stated that the use of electronic advertising presented a very strong potential for abuse, justifying its regulation.¹⁸⁹ As such, the court determined that it was in the interest of the public to allow the rule to stand.¹⁹⁰

B. *The Advertising Cases Applied to the Iowa Code*

The result in *Humphrey* may have been very different if the relevant rule had been analyzed by the Supreme Court and scrutinized under *Bates* and its progeny, as well as *Fane*.

1. *Central Hudson* Applied to *Humphrey*

Relying on the *Central Hudson* test, the Iowa Supreme Court upheld the relevant rules as constitutional based upon “special problems” that are inherent in the field of electronic advertising.¹⁹¹ Notwithstanding the fact that the court’s opinion seemed very result oriented, the court stated that electronic advertising lay closer to in-person solicitation than to written advertising deemed permissible in *Shapero*.¹⁹²

In determining that electronic advertising was more akin to in-person solicitation, the Iowa court stated that once an individual is bombarded with a television commercial, the listener or viewer has lost his opportunity, supposedly accorded only to the reader of printed advertisements, to pause and restudy, and to thoughtfully consider.¹⁹³ This forced intrusion upon an individual’s senses presents a strong potential for abuse because the advertisement’s purpose is to incite the listener to make an immediate phone call. In addition, such advertisements are much more difficult to regulate than printed advertisements which are easier to document and to

188. *Humphrey*, 377 N.W.2d at 645.

189. *Id.* at 647.

190. *Id.* The case was subsequently appealed to the United States Supreme Court where it was dismissed for want of substantial federal question, thus eluding the constitutionality inquiry. 475 U.S. 1114 (1986).

191. *Humphrey*, 377 N.W.2d at 645-46.

192. *Id.* at 646. It was apparent from the language of the opinion that the Iowa Supreme Court carried strong feelings about violating the attorney advertising rules as promulgated. The court made a distinction between the dissemination of protected information and “*crass personal promotion*,” exposing a strong bias against attorney advertising. *Id.* at 647. In fact the court stated, “the rule provides only for the regulation of a form of advertising which is recognized as ripe for abuse. We have no apologies to make for *our* rule. We believe it to be decidedly in the interest of the public in the state we serve.” *Id.* (emphasis added).

193. *Id.* at 646.

preserve. However, these arguments, reeking of anti-advertising bias, are weak in their basis.

The more accurate inference is that electronic advertising is more akin to printed communication than to in-person solicitation. In *Shapero*, the Court stated that targeted, direct-mail solicitation “‘pose[d] much less risk of overreaching or undue influence’ than does in-person solicitation. . . . [W]ritten communication does 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.’”¹⁹⁴ Further, written communication conveys information about legal services that are more conducive to reflection and the exercise of choice on the part of the consumer.¹⁹⁵ The opinion in *Shapero* relied heavily on the language from *Zauderer*, which strongly contrasted written communication with in-person solicitation.¹⁹⁶ The *Shapero* Court found that personalized direct-mail solicitation, although presenting attorneys with opportunities for isolated abuses or mistakes, does not justify a total ban on that mode of protected speech.¹⁹⁷ Thus, it is apparent that the rule at issue in *Shapero* did not meet the *Central Hudson* test.

Similarly, the pertinent rule in *Humphrey* would not meet the *Central Hudson* test for the following reasons. The Court in *Shapero* relied on the fact that the consumer would not be forced to make an immediate decision regarding the attorney’s services because of the lack of coercion based on personal presence of the attorney. Such is also the case here in dealing with a television commercial, assuming that the commercial is protected commercial speech, and not deceptive or misleading. The individual subjected to a commercial advertising an attorney’s services has the option of turning the channel versus listening and watching the advertisement. The viewer is not bombarded with information that could force him to unwillingly make a phone call. Even if the individual stays tuned to the commercial, the individual would not feel any pressure to make any type of decision regarding the attorney’s services. Just because the advertisement is not written does not mean that the viewer has lost his opportunity to thoughtfully consider the options. On the contrary, it is just as likely that a person viewing a commercial will be able to tune out the information that he finds irrelevant. If this were not the case, there would likely be a

194. *Shapero*, 486 U.S. at 475 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626).

195. *Id.* at 476.

196. *Id.* at 475-77.

197. *Id.* at 476.

strong case against home shopping networks “forcing” viewers to spend money against their free will, arguably due to the consumers’ inability to thoughtfully consider their options.

There is very little risk of overreaching or undue influence via televised attorney advertising. All the watcher has to do is turn the channel. Although there may be a small chance for isolated abuses causing the listener to be misled or deceived, the risk is not great enough to justify a prohibition of television advertising. Iowa should regulate against such potential abuses through more precise means, especially when the regulation has the potential to infringe upon the valuable free flow of commercial speech. One possible method of specific regulation is a closer monitoring by the State Ethics Committee for “actual” harm potentially evident in commercials.

In this case, the commercial did not comply exactly with the Iowa Code. But there is little evidence that strict compliance is necessary to prevent deception as required under *Central Hudson*. The fact that the truthful and accurate commercial was merely deemed a dramatization by the Iowa Bar Association Ethics Committee in violation of the rule does not support a complete ban on such advertising.

2. *Fane* Reexamined: Attorney Solicitation

The holding in *Fane* has a very narrow application; a prohibition on in-person solicitation by CPAs is inconsistent with the free speech guarantees of the First and Fourteenth Amendment.¹⁹⁸ However, the majority opinion wasted no time in addressing the issue of attorney advertising.¹⁹⁹ The Court differentiated between the solicitation of a CPA and that of an attorney, leaving open the strong possibility that a similar prohibition on attorney advertising would meet the *Central Hudson* test and thus be upheld.²⁰⁰

In order to defeat the Florida rule prohibiting solicitation, the *Fane* Court relied heavily on the language in *Ohralik* to distinguish a CPA from a lawyer:

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. Such an individual may place his trust in a lawyer, regardless of

198. *Fane*, 113 S. Ct. at 1796.

199. *Id.* at 1802-03.

200. *Id.*

the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes. Under such circumstances, it is not unreasonable for the State to presume that in-person solicitation by lawyers more often than not will be injurious to the person solicited.²⁰¹

From this language, it is apparent that a court could easily find the *Central Hudson* test satisfied because in-person solicitation by an attorney would be considered inherently misleading. Thus, if the advertising rule at issue in *Humphrey* was analyzed under *Fane*, it would appear that the television commercials that violated the *Iowa Code* would probably not be protected under the First Amendment if it could be shown that electronic advertising was more like in-person solicitation than written advertisements. On the other hand, the Iowa rules relating to electronic media could be found too prohibitive, and thus unconstitutional, if television advertising were found to be closer to the written expression of information found constitutionally protected in *Shapiro*.

Nevertheless, it is possible that *Edenfield v. Fane* has opened the doors for professional advertising to be given more First Amendment protection, unless there is evidence of deception or fraud. For example, the Court in *Fane* held that prophylactic rules against solicitation are not justified in a business context where the solicitation is not inherently conducive to overreaching and other forms of misconduct.²⁰² Further, upon application of the *Central Hudson* test, the Court in *Fane* found that the prohibition on advertising did not advance the state interest of protecting against overreaching and fraud in any direct and material manner.²⁰³ The Supreme Court has never upheld a similar prophylactic prohibition under the *Central Hudson* test because of the difficulty in proving that such a rule has actually advanced the state's interests in a

201. *Id.* at 1802 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978)).

202. *Id.* at 1803-04.

203. *Fane*, 113 S. Ct. at 1801-02.

material way and that the rule is the least restrictive means of protecting the state's substantial interests.²⁰⁴

Thus, the trend of restrictive state advertising rules may be coming to a halt. If the Supreme Court is given the opportunity to address state attorney advertising prohibitions in the near future, it is unlikely that any such prohibition will withstand the *Central Hudson* test.²⁰⁵

VI. POTENTIAL SOLUTIONS

It appears that the problem with attorney advertising arises in the context of "unprofessional" advertising and the impact such advertising has on the image of the profession.²⁰⁶ It is also evident from history that the problems of attorney advertising were not perceived as severe until economics became an issue.²⁰⁷ An excess of lawyers and a lack of business has sparked the urgency to procure clients by any means necessary. Thus, the catalyst behind "unprofessional" advertising is the attorneys need to make a living.

It seems that bar associations are attempting to solve the problem of "unprofessional" advertising by prohibiting advertising altogether. This is based on the ideology that law is a profession, not a business. However, the problem really begins with the law schools which are allowed to operate under the business guise. The reality is that the nation's law schools are aware of attorney glut, yet continue to accept and "process" many students every year into an already saturated profession, thereby increasing the need for attorneys to use aggressive methods in order to earn a living. These methods ultimately include advertising in a variety of different forms: television, billboards, direct mailings, and even in-person solicitation. Upon graduation, law students are thrust into a profession that holds its image and decorum as sacred, not to be tarnished by the need to

204. See *Shapero*, 486 U.S. 466 (1988); *Zauderer*, 471 U.S. 626 (1985); *In re R.M.J.*, 455 U.S. 191 (1982).

205. A number of states, namely Arizona, Florida, Iowa, Mississippi, Nevada, and New Mexico, have adopted rules that seek to severely restrain the types and extent of lawyer advertising. These states have taken it upon themselves to halt the supposed detrimental effects that some attorney advertising has on the profession as the public perceives it by intensifying their laws against such advertising. See ARIZ. RULES OF PROFESSIONAL CONDUCT ER 7.1 to 7.4 (1992); FLA. RULES OF PROFESSIONAL CONDUCT Chapter 4 Rule 4-7.1 to 4-7.8 (1992); IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS Canon 2 DR 2-101 to 2-105 (1992); MISS. RULES OF PROFESSIONAL CONDUCT Rule 7.1 to 7.5 (1992); NEV. SUPREME COURT RULES Rule 195 to 199 (1992); N.M. CODE OF PROFESSIONAL RESPONSIBILITY 16-701 to 707 (1992).

206. See generally *supra* part I.

207. See generally *supra* part II.C.

earn a living. It is at this time that the profession holds itself out as above trades and expects its members to act accordingly. But why shouldn't a law school be subjected to the same constraints as a newly practicing attorney? Why is the school able to put economics above the "good of the profession?" The obvious answer is that law schools should be subject to the same traditional and historical regulations as the profession itself. 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.

A radical solution would be the regulation of law school admissions. Otherwise, the burden is on the little guy to survive in a profession whose members have historically relied on reputation and word of mouth for success. The reality now is that it is almost impossible to succeed relying solely on such a passive method. The burden should ultimately be on the entity most able to correct the problem, law schools. If the consequence is down-sizing in order to protect the hallowed image of the profession, then that is the sacrifice that must be made. Thus, if the bar associations are going to regulate anything, it should be the law schools that are taking students' money and putting them out on the street with a dismal prospect of finding work. It is here that the profession begins its regulation of "professional conduct." However, the law schools have a duty as well to act professionally. If economics is not a proper component of the profession, then it follows that it should not be fundamental to the study of law either.

For those concerned with the perceived image problem, the reputation of the legal profession can be adequately protected on a case-by-case basis. Advertisements 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. An attorney who generates such an advertisement takes the risk that the consumer will either be overly suspicious of the quality of services offered or will ignore the advertisement completely. Further, attorneys who do not provide quality service may be driven out of the market by the demand of expending significant resources in an ongoing effort to produce new clients rather than thriving on repeat and referral business. These factors and the realities of economic pressures and commercial life require the recognition of legal services as a market commodity and the removal of any distinctions between legal advertising and other forms of commercial speech.

Currently, advertising is regulated under the auspices of protecting the prospective client from being misled, and protecting against overreaching

by soliciting lawyers. As such, most state bar associations now have a monitoring or disciplinary system concerned with attorney advertising.

Some state bar associations are devoting a great deal of effort to reviewing and regulating advertising. In fact, several state bar associations have included within their ethics rules provisions that mandate attorneys to submit their advertisements to an advertising committee set up to give advisory opinions and check compliance prior to dissemination. Two questions arise at this point: What criteria are these committee members using to determine whether an advertisement is permissible? Is the committee making a value judgment when viewing a potential television commercial or are they only concerned with general compliance with state rules? With restriction, there will always be enforcement problems, thus the consumer should make the ultimate decision.

Of course, ethical rules must be in place to regulate such lawyer conduct. However, the resources of the state bar associations may be better utilized in areas of malpractice and fraud than in the area of legitimate advertising. In fact, these resources which the bar associations are expending could be put to better use, such as helping lawyers to advertise in a more responsible manner instead of restricting all advertising. This could be accomplished by state bar associations designing advertising models for use by their attorneys.

Furthermore, a variety of laws are in place to protect the consumer against deceit regarding the nature and quality of goods and services. So why not allow attorneys to advertise their services subject to the current laws regarding advertising? The Federal Trade Commission Act²⁰⁸ protects against deceptive trade practices which include false or misleading advertising. In addition, states have also enacted legislation to protect the consumer. Thus, states and bar associations could relax their restrictive advertising rules and allow attorneys to be subject to the current consumer laws. It would follow that if the advertisement is not misleading, but merely deemed "unprofessional," the market can deal with the attorney in the way that it sees fit. *Caveat emptor*.

VII. CONCLUSION

A discriminating group of attorneys in the United States would like to advance their belief that the legal profession is a very selective society. In that respect, these attorneys, most of whom are employed in large firms, wish to continue in their belief that law is not a commercial profession, but

208. 15 U.S.C. § 41 (1988).

rather a dignified, moral, and passive profession which is not synonymous with a commercial venture. These attorneys view lawyer advertising as the cause of the profession's negative image. Further, these attorneys view advertising as a tool only necessary for the lower echelon of attorneys. As such, the debate has also intensified the inherent conflict between the interests of disparate segments of the legal profession.

The Supreme Court decisions in the area of advertising support the proposition that states should be required to prove deception before they are permitted to ban any form of advertising. The Court encourages the dissemination of more information and procedures that ban only actually misleading advertisements. Although the Supreme Court has not actually addressed many forms of advertising, including broadcast media, prior decisions demand that states abandon absolute bans and extensive restrictions. This ideology would better serve society.

No longer is our society one of small, stagnant communities. Attorneys of the past were able to build a strong practice based on their reputation, character, and training. Attorneys were fewer in number and did not have to advertise to earn a living. However, times have changed drastically. Today, many attorneys do not want to admit that the legal profession has matured into a business. Those who strongly oppose this transition hold a false concern for the traditional ways, couched in concern for the profession. Historically, it appears that those opposing competitiveness within the profession were more concerned with their relationships with other attorneys and the potential loss of intimacy once a member of this select fraternity began plotting to steal another's clients and blowing their professional horn through advertising.

Nevertheless, the 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?

We must remember that lawyers were historically passive and patient. They did not advertise for clients because advertising was unnecessary and attorneys were few in number and usually from wealthy families who did not depend on their profession for their livelihood. These young men actually held disdain for all forms of trade and competition because they considered themselves, as did society, an elite group of intellectuals. Thus, attorneys were able to remain demure while practicing for the public good and ignoring competition.

Increased access to legal services through advertising enables attorneys to better serve the community and may actually increase respect for the legal profession. Advertising can be useful in communicating to consumers, truthful, and sometimes necessary, information about the legal system, as well as the availability of legal services. We should encourage the flow of information which ultimately fosters choice.

Allowing attorneys to advertise is unlikely to impact the profession's "negative" image. Further, attorney advertising has not been clearly found to harm the public image of attorneys. Thus, if more good can be accomplished through advertising — more access to legal aid for the majority — then it appears that the profession has done its job and should not be so concerned with attorney advertising which has not been clearly found to harm the public image of attorneys.