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# Ethics of Law Practice Marketing

Frederick C. Moss

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# The Ethics of Law Practice Marketing

Frederick C. Moss\*

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## I. Introduction

Before the *Bates*<sup>1</sup> decision by the United States Supreme Court in 1977, lawyers "marketed" their practices only in informal ways. Lawyers increased their "visibility" among those who may have needed legal services by obtaining memberships in social clubs and business and civic organizations.<sup>2</sup> Despite these and many other subtle and not-so-subtle business-getting activities, the profession's official party line was that a lawyer's good reputation should be the primary source of his business.<sup>3</sup> Any overt effort toward promoting publicity or other ways of getting business was viewed by the bar as beneath the standards of the profession.<sup>4</sup> The recent inclusion of advertising by lawyers within the protections of the first amendment,<sup>5</sup> however, has brought law firm marketing practices out of the closet.

Today the public relations and advertising experts are preaching the advantages of the planned marketing of legal services.<sup>6</sup> However, their recommended marketing strategies do not focus only or even primarily upon advertising per se.<sup>7</sup> The "PR" experts

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

2 See, e.g., J. CARLIN, *LAWYERS ON THEIR OWN* 126 (1962); V. MORIN, *HOW TO MAKE MONEY PRACTICING LAW* 24-25 (6th ed. 1977); J. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* 5-7 (1947).

3 The original American Bar Association (ABA) Canon 27 began: "The most worthy and effective advertisement possible, even for a young lawyer, . . . is the establishment of a well-merited reputation . . ." See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-6 (1982) [hereinafter cited as MODEL CODE]; Llewellyn, *The Bar's Troubles, and Poulitices—and Cures?*, in 5 *LAW AND CONTEMPORARY PROBLEMS* 104, 115 (1938).

4 CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). See generally H. DRINKER, *LEGAL ETHICS* ch. 8 (1953).

5 *Bates*, 433 U.S. 350.

6 The American Bar Association Journal reported that almost one out of five of its members contacted in a poll engaged in internal public relations activity such as issuing news releases. The number of members who had used an outside public relations consultant more than doubled over the previous year's 6%. Reskin, *Lawyer Advertising Levels Off; P.R. Use Growing*, A.B.A. J., June 1984, at 48.

7 See, e.g., Foonberg, *How a Small Firm Can Get and Keep Clients*, A.B.A. J., June 1984, at 50; Kaufman, *The Firm Brochure*, 28 *PRAC. LAW.* 79 (1982); Madory, *Marketing as a Problem-Solving Technique*, 26 *LAW OFF. ECON. & MGMT.* 208 (1985); Morgan, *How Small Firms Can*

realize that while advertising in newspapers, magazines, and the Yellow Pages may be advantageous for the marketers of standard products and routine services, it is less effective for sellers of individualized personal services.<sup>8</sup> Consequently, the PR consultants are pushing marketing programs which instead emphasize strategies such as seeking referrals from "business forwarders," receiving greater media exposure through news releases, authoring feature articles and newsletters, and touting one's expertise by sponsoring seminars on current legal topics.<sup>9</sup>

However, while listening to this pitch, one cannot help but wonder whether these lay PR experts understand the nature of the restrictions that the legal profession continues to place on the getting of business by lawyers,<sup>10</sup> notwithstanding *Bates* and its progeny.<sup>11</sup> Many of the articles written on law practice marketing pay only lip service at best to the American Bar Association (ABA) Model Code of Professional Responsibility.<sup>12</sup> The tacit assumption seems to be that after the PR people propose marketing strategies, it is up to the lawyers to determine whether they are permissible.

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*Attract Corporate Litigation*, A.B.A. J. Oct. 1984, at 59; Santangelo, *Marketing for Small Firms—A Myth or a Reality?*, 56 N.Y. St. B.J. 42 (1984); Smock & Heintz, *Attracting Clients With Marketing*, 69 A.B.A. J. 1432 (1983) [hereinafter cited as Smock]; Winter, *The Fine Art of Rainmaking*, A.B.A. J., Oct. 1984, at 54. See also Goldstein, *Marketing Lawyer's Services Into the 1980's*, 24 LAW OFF. ECON. & MGMT. 87 (1983).

8 See Goldstein, *supra* note 7, at 99; Hazard, Pearce & Stempel, *Why Lawyers Should Be Allowed To Advertise: A Marketing Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1105 (1983) [hereinafter cited as Hazard]; Morgan, *supra* note 7, at 60-61; Santangelo, *supra* note 7, at 44; Smock, *supra* note 7, at 1434-36.

9 See note 7 *supra*.

10 The Committee on Ethics of the Maryland State Bar apparently felt compelled to issue an ethics opinion sua sponte concerning some law practice marketing advice given by a nonlawyer in a local bar journal. Opinion 84-98 (1984), summarized in ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 801:4346 [hereinafter cited as LAWYER'S MANUAL]. The nonlawyer suggested that lawyers should train and give incentives to their staff to solicit business for their employers. The ethics committee's caveat cited provisions of the ethics code prohibiting solicitation. In Goldstein, *supra* note 7, at 102, a New York City practitioner is quoted as having said, "You have to bear in mind that the [advertising] agencies don't have the foggiest notion about the Canons of Ethics and what you can and cannot do."

11 *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985); *In re R.M.J.*, 455 U.S. 191 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 430 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); *In re Primus*, 436 U.S. 412 (1978); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

12 Santangelo, *supra* note 7, at 44: "Then there are the ethical considerations—what are they (consult the Bar Association)?" Morgan, *supra* note 7, at 60, discusses "getting in the door" of targeted potential clients via the "cold call" method. (Apparently, this method involves an in-person or telephone contact with the prospective client.) However, he discourages this practice as ineffective without ever considering its ethical propriety. See text accompanying notes 392-94 *infra*. In Winter, *supra* note 7, at 58, there is one reference to the potential ethical problem involved with the direct solicitation aspects of "cold calling" prospective clients. In Smock, *supra* note 7, at 1434, only one sentence is devoted to possible ethical restrictions upon the authors' suggested marketing strategies.

Perhaps this is a legitimate assumption. It may be unreasonable to assume that the lay PR specialist can master the intricacies of the Code of Professional Responsibility—especially when the sands of legal ethics continue to shift as much as they have in recent years. It is difficult enough for attorneys, even law professors, to keep abreast of the latest revisions and interpretations.

In the end, the responsibility for keeping marketing activities by lawyers in line with the profession's ethical<sup>13</sup> restrictions rests solely with the lawyers.<sup>14</sup> Recognizing this, this article will outline the ethical problems inherent in several of the marketing strategies commonly recommended to lawyers and law firms. It will focus upon the United States Supreme Court's analysis of the commercial speech doctrine as applied to lawyer advertising,<sup>15</sup> only to the extent necessary to explain the present state of affairs, and in an attempt to discern the path ahead when traversing the murkier regions of this developing landscape.

In discussing the ethical aspects of these marketing activities, frequent reference will be made to the now superseded ABA Model Code of Professional Responsibility.<sup>16</sup> It was the model for almost all of the state disciplinary codes in effect today. Furthermore, it is not manageable in an article of reasonable proportions to measure each marketing strategy against the codes of fifty-one jurisdictions. Reference will be made from time to time, however, to specific state code provisions as examples of common variations on the ABA Code. The recently adopted ABA Model Rules of Professional Conduct<sup>17</sup> will also be examined throughout this analysis in order to throw some light on how Code restrictions are changed, if at all, by the Rules. Recent decisions in both the federal and state courts have necessitated a rethinking and redrafting of the states' rules governing lawyer advertising and solicitation.<sup>18</sup> Nearly all of the

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13 Of course, the term "ethical" by no means implies "moral." Clearly, there are many violations of the legal profession's ethical proscriptions which do not impugn the violator's moral worth. The rules against advertising are a good example.

14 Committee on Professional Ethics, Conn. Bar Ass'n Informal Op. 82-17 (1982) [hereinafter cited as Conn. Informal Op.]. In this article, the first ethics opinions from a state will be cited fully. Subsequent citation to any opinions from that state will be cited in a shortened form by state, opinion number, and year, and will include a reference to the note in which that state's opinions are fully cited. When available, the citation of any opinion will include a reference to a summary of that opinion contained in either the Lawyer's Manual, *supra* note 10, or the Current Reports Volume of the Lawyer's Manual on Professional Conduct [hereinafter cited as CURRENT REPORTS]. For a summary of the Connecticut opinion cited in this note, see LAWYER'S MANUAL, *supra* note 10, at 801:2057.

15 See notes 1 and 11 *supra*.

16 MODEL CODE, *supra* note 3.

17 MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as MODEL RULES]. The Model Rules were adopted by the ABA effective August 2, 1983.

18 See note 11 *supra*. See also *Spencer v. Honorable Justices of Supreme Court of Pennsylvania*, 579 F. Supp. 880 (E.D. Pa. 1984) (holding invalid some aspects of the state rules

states are now considering whether to adopt the Model Rules with a few having already done so.<sup>19</sup> But regardless of whether they embrace the Rules, the states surely will use the ABA's new Rules as a guide.

Much of this area is currently in a state of flux. Therefore, it will be difficult to say what the law is in certain instances. The best example, perhaps, is direct mail advertising. Courts and ethics committees are struggling to devise distinctions between mailings which are prohibited solicitations and those which are not. The issue is in the balance at this moment. Nevertheless, certain ethical restrictions and guideposts remain constant. There is little controversy within the legal profession about such matters as interference with the lawyer's independence by lay intermediaries, conflicts of interest, and aiding the unauthorized practice of law. Law marketing activities can run afoul of these ethical restrictions even though the rules regarding advertising and solicitation are diligently followed.

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governing advertising), *aff'd without opinion*, 760 F.2d 261 (3d Cir. 1985); Lovett and Linder, Ltd. v. Carter, 523 F. Supp. 903 (D.R.I. 1981) (invalidating restriction on where lawyer advertising may be placed in publications); Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, 521 F. Supp. 1219 (S.D. Iowa. 1981) (invalidating restrictions on placement of lawyer advertising and on the inclusion of the attorney's race in the advertisement), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982); Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), *aff'd without opinion*, 698 F.2d 1218 (6th Cir. 1980); Lyon v. Alabama State Bar, 451 So. 2d 1367 (Ala. 1984); Grievance Comm. v. Trantolo, 192 Conn. 27, 470 A.2d 235 (1984); Florida Bar v. Schreiber, 420 So. 2d 599 (Fla. 1982), *vacating and withdrawing earlier opinion*, 407 So. 2d 595 (1981); Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933 (Ky. 1978); State Bar Grievance Adm'r v. Jaques, 407 Mich. 26, 281 N.W.2d 469 (1979); Woll v. Kelly, 116 Mich. App. 791, 323 N.W.2d 560 (1982); Johnson v. Director of Professional Responsibility, 341 N.W.2d 282 (Minn. 1983); *In re Appert*, 315 N.W.2d 204 (Minn. 1981); Walls v. Mississippi State Bar, 437 So. 2d 30 (Miss. 1983); McLellan v. Mississippi State Bar Ass'n, 413 So. 2d 705 (Miss. 1982); *In re von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 105 S. Ct. 2701 (1985); *In re Greene*, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982); *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978); *In re* Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982).

19 As of early March 1986, the Model Rules had been adopted with some changes by eleven states: Arizona (1 CURRENT REPORTS, *supra* note 14, at 445); Arkansas (1 CURRENT REPORTS, *supra* note 14, at 1126); Delaware (1 CURRENT REPORTS, *supra* note 14, at 961); Minnesota (1 CURRENT REPORTS, *supra* note 14, at 855, 882); Missouri (1 CURRENT REPORTS, *supra* note 14, at 924); Montana (1 CURRENT REPORTS, *supra* note 14, at 855); Nevada (2 CURRENT REPORTS, *supra* note 14, at 14, 37); New Hampshire (2 CURRENT REPORTS, *supra* note 14, at 14); New Jersey (1 CURRENT REPORTS, *supra* note 14, at 334); North Carolina (1 CURRENT REPORTS, *supra* note 14, at 1026); and Washington (1 CURRENT REPORTS, *supra* note 14, at 961). The bars of New York (1 CURRENT REPORTS, *supra* note 14, at 1047), Oregon (1 CURRENT REPORTS, *supra* note 14, at 1048), and Vermont (1 CURRENT REPORTS, *supra* note 14, at 855) have rejected the Model Rules. See Falsgraf, *Quo Vadis Model Rules?*, A.B.A. J., Apr. 1986, at 8.

## II. Advertising

Having just noted that the restrictions on advertising and solicitation are not the only rules governing law practice marketing, we must begin with advertising nevertheless. Under modern ethical rules, all public and semi-public communications (mailings, for example) made by lawyers about themselves, their firm, or the law are subject, at a minimum, to the rules governing advertising.

In the very recent past, and according to many current but now obsolete state ethical codes, public communications by lawyers about themselves were not permitted, except in a few limited situations. Even after *Bates*,<sup>20</sup> some jurisdictions permitted advertising only in print media of general circulation and severely restricted the information which could be disseminated.<sup>21</sup> Otherwise, a lawyer could not pay or even request another to recommend her services to others except in a few narrow circumstances. One exception permitted the mailing of "professional announcements" to other lawyers, relatives, friends, and past and present clients.<sup>22</sup> Another rule allowed recommendation of the lawyer either by bar-approved lawyer referral services or by qualified legal assistance organizations.<sup>23</sup>

Presently, however, it is clear that the first amendment protects a lawyer's commercial speech, where she offers to provide legal services of a certain nature at a price.<sup>24</sup> This means that state advertising restrictions must change radically. The states can no longer generally prohibit public and semi-public commercial communications by lawyers, subject to a few permitted exceptions. Rather, they must generally permit such communications, and any exceptions must delineate the circumstances under which they will be either proscribed altogether or restricted to some lesser

20 433 U.S. 350 (1977).

21 Before *Bates*, the Model Code provided that "a lawyer shall not prepare . . . [or] use any form of public communication . . . to attract lay clients." MODEL CODE, *supra* note 3, DR 2-101(A) (1976). In 1977, DR 2-201(B) was amended to permit a lawyer to "publish or broadcast . . . in print media . . . or over radio broadcast" twenty-five categories of information. Several states modified their rules to permit only the *Bates* advertisement and nothing more. "For example, Alabama and North Carolina allow[ed] the advertisement of only services such as the four listed in the *Bates* ad, while Ohio prohibit[ed] the use of all drawings except the scales of justice used in the *Bates* ad." L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 71 (1980). See also *id.* at 43-57. Mississippi prohibited all lawyer advertising except in newspapers. See *McLellan v. Mississippi State Bar Ass'n*, 413 So. 2d 705 (Miss. 1982).

22 MODEL CODE, *supra* note 3, DR 2-102(A)(2). See generally H. DRINKER, *supra* note 4, at 232-42.

23 MODEL CODE, *supra* note 3, DR 2-104(D).

24 *Bates*, 433 U.S. 350. The percentage of lawyers who have advertised was estimated to have risen to 24% by October 1985. Reskin, *Lawyer Advertising is on the Rise*, A.B.A. J., Apr. 1986, at 44.

extent.<sup>25</sup>

Essentially, the Supreme Court has held that commercial speech loses its protected status, and thus may be prohibited, when its content is false, misleading, or relates to an illegal transaction,<sup>26</sup> or when the form or method of the communication is inherently misleading<sup>27</sup> or inherently conducive to causing harm to the public.<sup>28</sup> Therefore, any commercial communication by a lawyer to the public may not be false or misleading, regardless of the manner in which the communication is distributed or to whom it is sent.<sup>29</sup> This includes letters, firm brochures, news letters, and press releases, as well as advertising copy.

As a consequence, those who have responsibility for the drafting of such communications must be particularly aware of how the new ethics rules, as construed by the bar ethics committees and the courts, define misleading statements. It is here—in the sweep of the term “misleading”—that the severest (and arguably the most unreasonable) restrictions on lawyer marketing are found.

#### A. *What is Misleading?*

Many of the states' post-*Bates* ethics codes dealing with advertising are still quite restrictive. Their narrowness is based upon the acceptance by the profession of several untested and questionable assumptions. Many of these assumptions can be found in the cautionary language of the early Supreme Court decisions dealing with constitutionally protected advertising. In lowering the restraints upon advertising by some professions, it is clear that the Court wished to go slow when it came to other professionals, especially lawyers, who were sure to challenge the restrictions to which they were then subjected. One assumption underlying this caution was noted in the final footnote to Justice Blackmun's opinion for the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer*

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25 This conclusion is practically compelled by the United States Supreme Court's holdings in *In re R.M.J.*, 455 U.S. 191 (1983), and *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), which in effect told the states that they may not prohibit lawyer advertising that is not false or misleading. The new ABA Model Rules of Professional Conduct adopted this approach in Rule 7.1.

26 See *Zauderer*, 105 S. Ct. at 2275; *R.M.J.*, 455 U.S. at 203; *Bates*, 433 U.S. at 383.

27 See *Friedman*, 440 U.S. at 12-17 (prohibition of trade names by optometrists upheld).

28 *Ohralik*, 436 U.S. 447 (in-person solicitation prohibitable).

29 DR 2-101(A) in the Model Code refers to “public” communications by lawyers. This is not to say that lawyers may make false and misleading private communications. DR 1-102(A)(4) prohibited a lawyer from engaging “in conduct involving dishonesty, fraud, deceit, or misrepresentation.” MODEL CODE, *supra* note 3. The analogue to DR 2-102(A) in the Model Rules, Rule 7.1, forbids any “false or misleading communication about the lawyer or the lawyer's services.” MODEL RULES, *supra* note 17. Model Rule 8.4(c) is identical to DR 1-102(A)(4).



*Council*.<sup>30</sup> After holding that it was unconstitutional to prohibit pharmacists from advertising the price of prescription drugs, Justice Blackmun noted:

[T]he distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.<sup>31</sup>

In his opinion for the Court in *Bates*, Justice Blackmun continued the notion that many legal services are unique and, perhaps, not advertisable.<sup>32</sup> However, in doing so, Justice Blackmun accepted an assumption that he had rejected earlier when it was offered as an argument against all advertising by lawyers; that is, that the public "lacks sophistication concerning legal services."<sup>33</sup> Blackmun went on to say that as a consequence of this assumed "fact,"<sup>34</sup>

Misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction.<sup>35</sup>

Again in *In re R.M.J.*,<sup>36</sup> the majority opinion by Justice Powell reiterated the fundamental assumption that lawyer advertising possesses a greater potential for deception than product advertising.

Indeed, the Court [in *Bates*] recognized the special possibilities for deception presented by advertising for professional services. The public's comparative lack of knowledge, . . . and the absence of any standardization in the "product" renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling. . . . [T]he potential for deception and confusion is particularly strong in the context of advertising professional services . . . .<sup>37</sup>

Thus, the Court validated by fiat two basic assumptions: that professional services are largely unique, and that the public is pecu-

30 425 U.S. 748 (1976). In *Virginia State Bd. of Pharmacy*, the Supreme Court held for the first time that commercial speech, that is, advertising, was protected by the first amendment.

31 *Id.* at 773 n.25.

32 *Bates*, 433 U.S. at 383.

33 *Id.*

34 *Id.*

35 *Id.* at 383-84 (footnote omitted).

36 455 U.S. 191 (1982).

37 *Id.* at 202-03.

liarily unable to evaluate claims about them. These assumptions form the colored lenses through which many courts and state ethics committees look at lawyer advertising when they draft their advertising rules and assess whether a particular ad is "misleading." Appreciation of this perspective is essential to understanding the restrictiveness of much of the current regulation of attorney advertising.<sup>38</sup>

The post-*Bates* ABA Model Code prohibited a lawyer from using "any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."<sup>39</sup> The Code did not define these terms or distinguish between them in any way. Nor did the Disciplinary Rules (DRs) contain examples to illustrate the meanings of these terms.<sup>40</sup> Indeed, it is difficult to discern any difference in meaning between "false" and "fraudulent" on one hand, and "misleading" and "deceptive" on the other. A material statement or claim that is false is thereby fraudulent. A fraudulent statement or claim must mislead, as does a deceptive one. And all of the above are certainly unfair.<sup>41</sup> Granted, a statement may be literally true but misleading nevertheless.<sup>42</sup> Therefore, it would seem that these prohibitions boil down to two: false statements and misleading statements. This is how

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38 It will be argued, *see note 71 infra*, that the Supreme Court's decision in *Zauderer* signals a major change in the Court's view toward the nature of lawyer advertising. The Court now appears to be unwilling to accept at face value the assumption that there is something unique about the advertising of professional services which justifies an enhanced level of scrutiny and regulation. If this change in attitude persists, then many states' current advertising restrictions are constitutionally untenable.

39 MODEL CODE, *supra* note 3, DR 2-101(A).

40 However, Ethical Consideration (EC) 2-9 did state:

[E]xamples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service, which cannot be measured or verified.

MODEL CODE, *supra* note 3.

41 In considering whether a particular business activity is "unfair" within the meaning of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (Supp. 1984), the Supreme Court has listed several factors which the Commission might consider: (1) regardless of whether the activity has been considered unlawful, whether it offends public policy; "in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness"; (2) "whether it is immoral, unethical, oppressive, or unscrupulous"; or (3) "whether it causes substantial injury to consumers." *FTC v. Sperry & Hutchinson*, 405 U.S. 233, 244-45 n.5 (1972). Former FTC Commissioner Robert Pitofsky, in *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 680-87 (1977), suggests three types of nondeceptive advertisements which may be "unfair": "first, claims published without reasonable prior substantiation; second, claims which tend to overreach or exploit particularly vulnerable groups; and third, instances in which sellers fail to provide consumers with information necessary to make choices among competing products." *Id.* at 681.

42 For example, a lawyer who has never handled a drunk driving case could say that he has never lost such a case in court.

the ABA Model Rules are formulated.<sup>43</sup>

Most of us would have little trouble understanding what is covered by the term "false." "Misleading," on the other hand, may be subject to some debate because the concept involves several aspects, including not only the content of the statement, but also how, when, where, and to whom it is made. It is common for the drafters of more recent disciplinary rules to include definitional illustrations or examples of what is considered "misleading" and thus prohibited. These examples are often stated in the broadest possible terms. For instance, Model Rule 7.1 states in part:

A communication is false or misleading if it:

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

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

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.<sup>44</sup>

The comment to Rule 7.1 is more specific: "The prohibition in paragraph (b) . . . would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."<sup>45</sup> The comment also makes clear that "[t]his Rule governs all communications about a lawyer's services," not just public advertisements.<sup>46</sup>

Several states' advertising regulations are modeled after Proposal "B," one of two proposed revisions of the ABA Model Code which were circulated by the ABA's Task Force on Lawyer Advertising in 1977 following the *Bates* decision.<sup>47</sup> Proposal B contained

43 See note 29 *supra*. In light of the comments by Pitofsky, see note 41 *supra*, it could be argued that the Model Rules do not cover all of the possible abuses of lawyer advertising by prohibiting only false and misleading ads.

44 MODEL RULES, *supra* note 17, Rule 7.3.

45 See text accompanying notes 91-106 *infra* for a discussion of endorsements.

46 The Preamble to the Model Rules states that: "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." This would make the comments in the Rules functionally equivalent to the Ethical Considerations of the Model Code, which were described in its "Preliminary Statement" as "a body of principles upon which the lawyer can rely for guidance in many specific situations." It remains to be seen whether courts and ethics committees will cite the comments to the Rules as if they were rules themselves.

47 Proposal B is reproduced in full in L. ANDREWS, *supra* note 21, at app. II. According to Andrews, Proposal B was adopted by at least 19 states: California, the District of Columbia, Florida, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, South Dakota, Virginia, and Wisconsin. *Id.* at app. III.

further examples of misleading or otherwise prohibited "public communications." These included "statement[s] of opinion as to the quality of the [legal] services";<sup>48</sup> "[a]ppeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion";<sup>49</sup> and statements "intended or . . . likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format."<sup>50</sup>

Other states have adopted selected parts of these various Model Code provisions. For example, Texas recently amended its version of DR 2-101(A) to prohibit any "statements of opinion as to the quality of legal services," "predictions of success," testimonials or endorsements, and "statistical data or information about past performances not susceptible to reasonable verification by the public."<sup>51</sup> In short, specific restrictions on the content of lawyer advertising may vary greatly from state to state. Most, however, seem to be based on the assumption mentioned earlier: that lawyer advertising should be held to a higher standard than ordinary product and nonprofessional services advertising because it is inherently more likely to mislead or seduce an overly gullible and naive public.

### 1. Record of Past Performances

Some states have prohibited all information regarding past performance regardless of its verifiability.<sup>52</sup> Even when such information is permitted on the condition that it be capable of "reasonable verification by the public," as under the Texas rule, most claims based upon past performance will be prohibited. While it may be true, for example, that Lawyer X's clients have recovered on the average of \$100,000 over the last five years, the public would have great difficulty verifying this statistic. Many recoveries are by way of settlement, which are usually not a matter of public record,

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48 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C)(4) (Draft Proposal B 1977).

49 *Id.* at DR 2-101(C)(5).

50 *Id.* at DR 2-101(C)(6).

51 Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, § 8a (CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A)(1)-(8) (1973)) [hereinafter cited as TEXAS CODE]. In 1977, the Supreme Court of Texas suspended the state disciplinary code insofar as it was inconsistent with the *Bates* holding. After two referenda in 1978 and 1980 failed to achieve the majority vote necessary to amend the advertising rules, the court issued new rules by court order, effective September 1, 1982. 45 Tex. B.J. (Sept. 1982) (special insert).

52 For example, Florida's DR 2-101(C)(2) prohibits "any form of communication which: . . . (2) Contains statistical data or other information based on past performance." The Florida Bar, 438 So. 2d 371, 372 (Fla. 1983). Idaho, New Jersey, and New Mexico all either have or had identical code provisions. NATIONAL CENTER FOR PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE 72L, 107L, 108L (1980) [hereinafter cited as STATE CODES].

and Lawyer X's client files are not open to public inspection. A lawyer who advertises truthfully, for example, that she has appeared in the tax or bankruptcy court 275 times, could argue that her appearances are a matter of public record. Whether this fact is "susceptible to *reasonable* verification" is doubtful.<sup>53</sup>

What may be allowed by provisions similar to Texas' is a statement by Lawyer X which refers to a widely publicized fact that she represented a client who recovered a large settlement or award, or was acquitted of a crime.<sup>54</sup> However, such an advertisement is very close to listing "clients regularly represented," and under the Model Code would require written consent from the named client.<sup>55</sup>

But even with such written consent, jurisdictions which adopt some form of the Model Rules' prohibition against statements "likely to create an unjustified expectation about results the lawyer can achieve,"<sup>56</sup> may deem any recitation of past victories, individual or otherwise, misleading. The comment to Model Rule 7.1 condemns these kinds of statements because they "may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances [of their cases]."<sup>57</sup> In states like Texas, which offer a hope of reciting some information about past cases as long as it is reasonably verifi-

53 Such a claim also may run afoul of prohibitions against holding oneself out as a specialist. See MODEL CODE, *supra* note 3, DR 2-105; MODEL RULES, *supra* note 17, Rule 7.4. These prohibitions generally prevent a lawyer from implying that she is a specialist unless she has been officially certified as such by the state bar. See text accompanying notes 135-36 *infra*. But cf. Zauderer v. Office of Disciplinary Counsel, 105 S. Ct. 2265 (1985) (lawyer's advertisement that he was handling a particular kind of case for several clients was not an impermissible claim of expertise).

54 Imagine a television advertisement featuring an attorney who says: "Hi! Do you know me? I represented John DeLorean at his drug smuggling trial and won."

55 MODEL CODE, *supra* note 3, DR 2-101(B)(16). The Model Code is biased in favor of practitioners who represent institutions or persons on a continuing basis. The defenders of those accused of crimes and plaintiffs' personal injury attorneys do not usually "regularly" represent most of their clients. Therefore, they could not take advantage of this kind of advertising information, whereas firms which represent banks and insurance companies could. Ironically, perhaps, the latter lawyers are less likely to want or need to advertise than the former. I am indebted to my colleague Walter Steele for this observation.

56 MODEL RULES, *supra* note 17, Rule 7.1(b).

57 The comment to New Jersey Rule 7.1, effective September 10, 1984, adopted the identical language of the Model Rules comment. NEW JERSEY RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1984) [hereinafter cited as N.J. RULES]. The parent of this comment, Model Code EC 2-9, stated that "suggestions that the . . . prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result" would be deceptive. MODEL CODE, *supra* note 3. See also Committee on Professional and Judicial Ethics of the State Bar of Mich. Op. CI-830 (1982) [hereinafter cited as Mich. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4851 (sending a newsletter to present and past clients containing news clippings about out-of-state verdicts in personal injury cases is misleading unless accompanied by a disclaimer that similar results may not be possible in Michigan); Committee on Professional Ethics of the N.Y. State Bar Ass'n Op. 539 (1982) [hereinafter cited as N.Y. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6106

ble by the public, that hope may be all but snatched away by the ban on all "predictions of future success,"<sup>58</sup> and the raising of "unjustified expectations about results."<sup>59</sup>

In sum, it would seem that in most states public and semi-public communications by lawyers about themselves which specify past accomplishments face a clear risk of being deemed unethical.

## 2. Reputation

Although lawyers are urged to rely on their reputations to attract business, they cannot recite the cases or statistics which generated that reputation. Nevertheless, may a lawyer directly state her professional reputation in a particular field of law? Any attempt to do so would meet a host of objections under every version of the disciplinary code or rules. Under the ABA Model Code, claiming a superior reputation would be prohibited as "self-laudatory."<sup>60</sup> The ABA's Model Rules have omitted the "self-laudatory" language of the Code, and the comment to Rule 7.1 speaks only of the requirement that lawyer communications be "truthful" and not create unjustified expectations about future results.<sup>61</sup> The Rules' requirement that a statement be capable of being "factually substantiated," an obvious pitfall for claims of high repute, applies only to comparisons of lawyers' services.<sup>62</sup> Theoretically, then, reputational claims are permissible under the Model Rules if they are true, do not create unjustified expectations, and are not otherwise inherently misleading.

It is difficult to understand how a claim of "national recognition as one of the top plaintiffs' personal injury lawyers in the country," for example, would create expectations other than that the

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(lawyer cannot describe selected cases she has handled and the amounts recovered in each because prior results are potentially misleading).

58 TEXAS CODE, *supra* note 51, DR 2-101(A)(4).

59 *Id.* at DR 2-101(A)(8).

60 MODEL CODE, *supra* note 3, DR 2-101(A). Disciplinary Rule 2-101(C)(6) of Proposal B also prohibited "self-laudation." A state prohibition on self-laudatory statements by lawyers was upheld as not unconstitutionally vague in *Committee on Professional Ethics v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated*, 105 S. Ct. 2693 (1985). A Connecticut ethics committee held that a law firm may not advertise in a pamphlet circulated by a realtor the statement that the firm was a "well-respected business in [the] community." The committee labeled the statement self-laudatory and unfair because it was subjective and incapable of confirmation by any objective standard. Conn. Informal Op. 81-6 (1980), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2052. A Michigan ethics panel disallowed the use of the phrase "nationally recognized" in conjunction with advertising an area of practice because it might mislead the public into believing that the firm had been designated an expert by a national certifying authority. Mich. Op. CI-553 (1981), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4809.

61 MODEL RULES, *supra* note 17, Rule 7.1(b).

62 "A communication is false or misleading if it: . . . (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." *Id.* at Rule 7.1(c).

best that can be done will be done for that attorney's clients. A claim of high esteem among one's peers is not so much a prediction of future success as a claim of recognized competence. But as such, it may be objected to as being misleading because its truth is not objectively or factually verifiable. While the Model Rules do not define unverifiable claims as misleading, this notion pervades the restrictions of the Model Rules and, even more so, many state regulations on advertising.<sup>63</sup> Verifying whether an attorney possesses a particular reputation depends upon whom you ask. It is easy to claim an exceptional reputation and difficult to disprove. By the same token, the claimant would have equal difficulty proving the truth of the claim. How many lawyers must agree that the claim is valid, and from which communities must they come? The lack of verifiability of reputations might make them misleading even under the Model Rules.

But, it is a non sequitur to say that something is potentially misleading because it is difficult to verify. At one time it was difficult to confirm the claim that the world is round, not flat, but this did not render the claim misleading. The gist of the complaint against claims about the quality of services seems to be that they are merely subjective (unverifiable) opinions masquerading as objective facts. But there is little reason to believe that the public does not recognize the difference between products and services.<sup>64</sup> It is equally doubtful that the adult public is unable to perceive the difference between claims concerning subjective and objective qualities.<sup>65</sup> Statements which essentially claim, "We are good!" are obviously different from the statement, "We have offices in ten major cities." No one expects the former claim to be verifiable. Thus, the lack of verifiability misleads no one. In fact, it may make consumers more skeptical of the claim.<sup>66</sup>

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63 A major impetus for this restrictive criterion can be found in *Bates*. See text accompanying note 35 *supra*.

64 There is evidence that consumers rely on different sources of information about prospective purchases of goods as opposed to services before acting. See Hazard, *supra* note 8, at 1098 n.44.

65 See *id.* at 1097 ("[T]he obviously biased source of the message encourages [the public] to seek corroboration through other available reputation information.") (footnote omitted); Murdock & Linenberger, *Legal Advertising and Solicitation*, 16 LAND AND WATER L. REV. 654, 666, 671-73 (1981) [hereinafter cited as Murdock].

66 Murdock, *supra* note 65, at 676 ("Puffing is an accepted part of advertising and consumers are not predisposed to interpret statements of quality as being anything but opinion."); Hazard, *supra* note 8, at 1097. It is instructive to note that "[i]t has been traditional in advertising regulation to permit a 'puffing' defense, which applies to claims not capable of measurement ('Bayer Works Wonders' . . .)." Pitofsky, *supra* note 41, at 677. Pitofsky elaborates on this point: "It is hard to imagine that a significant number of sensible consumers would be deceived by such claims . . . . Perhaps more to the point, it is [unlikely] that it could be established that many consumers believe that the examples of 'puffing' listed above contain any product claim at all." *Id.* See *Bristol-Myers Co. v. FTC*, 46 F.T.C.

On the other hand, touting one's good reputation is making two claims: that one is good, and that others think likewise. The latter seems closer to a statement of fact than the former. And because any attempt to verify reputation is unresolvable, it can be argued that a general prohibition of reputational claims is appropriate.<sup>67</sup>

Because an advertised claim of reputation is most like a claim of recognized competence, it would be banned in those states which explicitly prohibit "statement[s] of opinion as to the quality of legal services."<sup>68</sup> Some states do allow statements concerning the quality of legal services, but require that they be reasonably verifiable by the public.<sup>69</sup> The underlying rationale is that claims regarding the quality of services are inherently misleading because, unlike products, services cannot be objectively sampled or tested by the consumer before purchase.<sup>70</sup> For the same reason, the consumer is disadvantaged by the absence of testing and comparison information from neutral persons. Consequently, the consumer has no means of judging the accuracy of the claims unless she knows and consults with persons who have received services from the claimants.<sup>71</sup>

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162, 175-77 (1949), *aff'd*, 185 F.2d 58 (4th Cir. 1950) (the claim that a toothpaste will "beautify the smile" held to be within the scope of the puffing defense). See also Note, *The Need for a Statutory Definition of "Deceptive" Advertising*, 19 NEW ENG. L. REV. 127, 136 (1983) (opinions are not deceptive because they are not capable of measurement).

67 But this argument has troubling aspects. First, why are other providers of services such as insurance companies, real estate agencies, and investment counselors allowed to make quality claims about their services and their reputations ("We are recognized nationally as a name you can trust."), while lawyers cannot? Second, it has been forcefully argued that in evaluating services, consumers need and search for reputational information to supplement advertising claims. Murdock, *supra* note 65, at 672, 674, 676-77. In simpler times, lawyers' reputations were known, or could be ascertained easily. If lawyers are not allowed in their advertising to point out where in the community their reputation might be found, they should be allowed to tender a "character witness," so to speak. Though widely prohibited in lawyer advertising, testimonials or endorsements are the obvious solution to the modern phenomenon of anonymity. The only regulation necessary from the public's point of view is that which is necessary to ensure the testimonials are genuine. See text accompanying notes 91-106 *infra*.

68 See, e.g., TEXAS CODE, *supra* note 51, DR 2-101(A)(2); text accompanying notes 107-34 *infra* (discussing quality claims).

69 See, for example, the ethics rules recently adopted in Missouri, effective January 1, 1986, summarized in 1 CURRENT REPORTS, *supra* note 14, at 924.

70 See text accompanying note 35 *supra*. See also N.Y. Op. 540 (1982), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6106; Conn. Informal Op. 81-6 (1980), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2052; Legal Ethics Comm. of the D.C. Bar Op. 117 (1982) [hereinafter cited as D.C. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2306.

71 But see note 67 *supra*. A similar argument was advanced by the Office of Disciplinary Counsel of the Supreme Court of Ohio in *Zauderer*. Counsel argued that a ban on lawyer ads which offered advice to persons with a specific legal problem was necessary because "the indeterminacy of statements about law" made it impossible for the bar to distinguish deceptive from nondeceptive ads. 105 S. Ct. at 2278. The Supreme Court rejected this



Claims of reputation, like claims of competence, face another objection of being misleading when they relate to particular areas of practice. The objection is that such claims amount to holding oneself out as an expert or specialist.<sup>72</sup> This is one of the most heavily restricted areas of lawyer advertising.<sup>73</sup> In most states a lawyer cannot claim to be recognized in a particular field of practice unless that area of practice is one in which the state certifies specialists and the lawyer has been so certified.<sup>74</sup>

In sum, statements by lawyers in materials which will be received by the public cannot contain facts about past accomplishments in specific cases because they may create unjustified expectations, nor may they claim to possess a worthy reputation because such claims are unverifiable and potentially misleading. However, this does not mean that all references to experience are forbidden.

### 3. Biographical Information

After the *Bates* decision, most of the states followed the ABA and adopted its Proposal "A" which permitted attorneys to include twenty-five categories of information in their advertisements. Much of the information was biographical and included date and place of birth,<sup>75</sup> admissions to the bar,<sup>76</sup> schools attended, degrees and scholastic distinctions,<sup>77</sup> public offices held,<sup>78</sup> military service,<sup>79</sup> legal teaching positions,<sup>80</sup> memberships and offices held in bar as-

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argument stating that it could not see any distinction between attorney advertising and advertising of other goods or services. It noted that determining deception in attorney advertising could be either "simple and straightforward" or "exceedingly complex, just as with other forms of advertising." *Id.* at 2279. "The qualitative distinction the State has attempted to draw eludes us." *Id.* This is a striking departure from the Court's comments in earlier cases about the uniqueness of lawyer ad claims. *See* text accompanying notes 30-38 *supra*. It could mark the end to many restrictions currently placed on lawyer advertising which are premised on this rejected assumption. For example, in *Zauderer*, the Court also struck down Ohio's blanket ban on the use of illustrations in attorney advertising. The State sought to justify the proscription for similar reasons, that is, that skillfully used illustrations operate on the subconscious level of the reader, and that it is too difficult for the State to prove them to be manipulative or misleading. Thus, to protect the public from possible harm, a total ban on illustrations is necessary. The Court was unconvinced. 105 S. Ct. at 2280-81. *See* text accompanying notes 181-85 *infra*.

72 *See* Mich. Op. CI-553 (1981), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4809.

73 *See* text accompanying notes 135-57 *infra*.

74 MODEL CODE, *supra* note 3, DR 2-105; MODEL RULES, *supra* note 17, Rule 7.4. *See* text accompanying note 142 *infra*.

75 MODEL CODE, *supra* note 48, DR 2-101(B)(3) (Proposal A).

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

77 *Id.* at DR 2-101(B)(5).

78 *Id.* at DR 2-101(B)(6).

79 *Id.* at DR 2-101(B)(7).

80 *Id.* at DR 2-101(B)(9).

sociations and legal fraternities,<sup>81</sup> and foreign language ability.<sup>82</sup> Some states were more restrictive. For example, the provision of the Missouri Code successfully challenged in *R.M.J.*<sup>83</sup> permitted only ten categories of information.<sup>84</sup> The *R.M.J.* case, however, should sound the death knell for this type of "laundry list" restriction on the content of legal advertising.<sup>85</sup>

The ABA Model Rules of Professional Conduct contain no list of the kinds of information which lawyers may include in promotional communications. In fact, the comment to Model Rule 7.2, after listing several examples of information which is permitted, states that the Rule allows lawyers to publish "information that might invite the attention of those seeking legal assistance."<sup>86</sup> Of course, the prohibitions against false and misleading communications apply to biographical information. For example, the Ethics Committee of the Mississippi State Bar ruled that a lawyer cannot list his honorary positions in law school because the public may be

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81 *Id.* at DR 2-101(B)(10), (11).

82 *Id.* at DR 2-101(B)(14).

83 455 U.S. at 194 n.3.

84 Whereas the ABA Model Code permitted the advertising of twenty-five kinds of information, Kentucky allowed only nine, and Oklahoma allowed only seven (name, address, telephone numbers, foreign language ability, whether credit cards or other credit arrangements were accepted, office hours, and four specifics about fee information). STATE CODES, *supra* note 52, at 84L, 123L.

85 The lawyer in *R.M.J.* advertised in the newspaper and yellow pages that he was licensed in Missouri and Illinois and that he was admitted before the United States Supreme Court. This information was not included in the ten categories of information permitted to be advertised under the state code. The Supreme Court dealt quickly with the arguments in support of the restrictions. Justice Powell noted: "Such information is not misleading on its face." *R.M.J.*, 455 U.S. at 205. The attorney was in fact licensed in the states advertised, and Justice Powell acknowledged that this information would be highly relevant to consumers in light of the fact that the lawyer's office was within easy reach of citizens living in those two states. Therefore, because the information was not misleading, it could not be prohibited altogether. Under the *Central Hudson Gas* test, the prohibition on advertising this information could have been upheld only if it were potentially misleading, the state could demonstrate that an absolute ban was the only way to avoid this harmful effect, and the state could assert a substantial interest that was directly advanced by the ban. 447 U.S. at 561-66. In *R.M.J.*, the state failed to identify any substantial interest which was advanced only by a complete ban on the listing of jurisdictions where a lawyer is licensed to practice. *R.M.J.*, 455 U.S. at 205. Following its *Zauderer* decision, the Supreme Court vacated *Committee on Professional Ethics and Conduct v. Humphrey*, 355 N.W.2d 565, 571 (Iowa 1984), *vacated*, 105 S. Ct. 2693 (1985), which had held the "laundry list" approach to be constitutional because the Iowa ethics code contained a provision permitting the addition of other information to the list. *See* MODEL CODE, *supra* note 3, DR 2-101(C).

86 The perspective of the Model Rules is critically different from that of the Model Code and many state codes. The Model Code's laundry list of permitted information represented the information which some in the legal profession assumed consumers needed. This was as arrogant as it was fallacious. Absent prolonged study of the matter, the bar is not qualified to say what the public needs in the way of consumer information. It has been strongly argued that the bar has consistently failed to permit lawyers to advertise the kind of information that is useful to the public. L. ANDREWS, *supra* note 21, at 43; Murdock, *supra* note 65, at 673; Hazard, *supra* note 8, at 1108.

misled into believing that the lawyer is more qualified than others who do not list those positions.<sup>87</sup> Two state bar ethics committees have ruled that a lawyer should not list presently held public offices in her advertisements.<sup>88</sup> They reasoned that to do so may imply to the public that the attorney is able to improperly influence a public body or official as a result of her position. This would encourage lay persons to choose counsel for improper reasons. Disciplinary Rule 2-101(B)(5) of the ABA's Proposal B specifically prohibited any statement or claim which "is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official."<sup>89</sup> It is likely that an advertisement which lists a currently held public office would be similarly dealt with under the ABA Model Rules. Rule 7.1 includes within its definitions of "false or misleading" communications those which are "likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law."<sup>90</sup> Otherwise, it is clear after *R.M.J.* that a lawyer's communications with the public are not restricted to any list of approved information and may include any biographical information which is accurate and not misleading.

#### 4. Endorsements and Testimonials

The ABA Model Code permitted the advertisement of names of regularly represented clients when the clients gave written consent.<sup>91</sup> This consent would have to have been given gratis, because DR 2-103(B) forbade an attorney from giving anything of value to anyone in return for being recommended for employment. And "anything of value" included reciprocal referrals of business clients.<sup>92</sup> The Code did not include explicit client endorsements or

87 Ethics Comm. of the Miss. State Bar Op. 71 (1982) [hereinafter cited as Miss. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:5103.

88 Committee on Professional Ethics, State Bar of Wis. Op. E-83-22 (1984) [hereinafter cited as Wis. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:9111; Ethics Advisory Comm. of the S.C. Bar Op. 80-5 (1980) [hereinafter cited as S.C. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:7901.

89 MODEL CODE, *supra* note 3, DR 2-101(B)(5).

90 MODEL RULES, *supra* note 17, Rule 7.1(b). More to the point, perhaps, is Rule 8.4(e) which states: "It is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official."

91 MODEL CODE, *supra* note 3, DR 2-101(B)(16).

92 Committee on Professional Responsibility, Chicago Bar Ass'n Op. 82-3 (1982) [hereinafter cited as Chi. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3202; Conn. Informal Op. 82-19 (1982), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2057; Mich. Op. CI-512 (1980), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4803; Mich. Op. CI-801 (1982), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4847.

testimonials in its list of information fit for public consumption.<sup>93</sup> In fact, under DR 2-103(C), a lawyer was not permitted even to “request a person or organization to recommend or promote” the lawyer’s services regardless of whether something of value was offered in exchange for the recommendation.<sup>94</sup>

A testimonial or endorsement would also violate the Model Code’s ban on self-laudatory statements.<sup>95</sup> Obviously, if a lawyer cannot say anything laudatory about herself, she cannot have someone else do it for her.<sup>96</sup> Finally, testimonials and endorsements would necessarily contain references to the quality of the endorsed lawyer’s or firm’s services. Statements regarding quality are often banned altogether, or banned when not capable of objective verification.<sup>97</sup>

The ABA Model Rule 7.1(b) prohibits, as false or misleading, any communication about the lawyer or her services which “is likely to create an unjustified expectation about results the lawyer can achieve.”<sup>98</sup> The commentary to this rule flatly states that this paragraph “would ordinarily preclude advertisements . . . containing client endorsements”<sup>99</sup> on the ground that they would create the unjustified expectation that similar results could be obtained for others regardless of specific factual and legal circumstances. However, the commentary to Rule 7.2 states that the Rule permits, “with their consent, names of clients regularly represented”<sup>100</sup> to be publicly disseminated by lawyers.

It is clear that the Model Rules continue to draw a distinction between listing regularly represented clients on one hand, and endorsements on the other, although the reason for the distinction may be difficult to perceive in some instances. Why would lawyers

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93 Proposal B specifically forbade endorsements or testimonials in DR 2-101(C)(3).

94 Excepted from this ban were lawyer referral services sponsored or approved by a bar association and legal services organizations listed in DR 2-103(D), which included law schools, governmental or nonprofit legal aid or defender offices, and organizations that recommended, furnished, or paid for legal services for its members, such as unions and the NAACP. A lawyer could request these organizations to recommend her services to prospective clients. See *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217 (1967); *NAACP v. Button*, 371 U.S. 415 (1963).

95 The Model Code prohibited “any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.” MODEL CODE, *supra* note 3, DR 2-101(A). The Model Rules have omitted the explicit ban on self-laudatory statements, see MODEL RULES, *supra* note 17, Rule 7.1, but many statements of self-praise could be interpreted as violating the ban on statements that “create an unjustified expectation about results the lawyer can achieve.” MODEL RULES, *supra* note 17, Rule 7.1(b). See text accompanying notes 112-27 *infra*.

96 DR 1-102(A)(2).

97 See note 62 *supra* and text accompanying notes 107-34 *infra*.

98 MODEL RULES, *supra* note 17, Rule 7.1(b).

99 *Id.* at Rule 7.1 comment.

100 *Id.* at Rule 7.2 comment.

advertise their "regularly represented" clients unless it were to convey the message that these particular clients are satisfied with the professional services they receive?<sup>101</sup> The listing of a regular client is a tacit endorsement and an implicit claim of competence, if not of expertise, where the client is the kind who obviously could command the highest quality legal assistance in a specialized area of the law.<sup>102</sup> Despite the fact that genuine endorsements and testimonials, as well as the listing of present and past clients not regularly represented, greatly help consumers,<sup>103</sup> the Rules and the Code prohibit them.<sup>104</sup> Thus, Lawyer X may not publicly commu-

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101 Cf. note 55 *supra* (Model Code is biased in favor of lawyers who represent institutions or persons on a continuing basis).

102 The listing of all the largest banks in town as clients, for example, could say much about the nature and quality of a firm's practice. This might possibly contravene DR 2-105's ban on holding oneself out as a specialist absent some form of disclaimer of expertise or certification. See text accompanying notes 135-57 *infra*. However, in *Zauderer*, 105 S. Ct. at 2276 n.9, the Supreme Court commented that a state could not discipline an attorney for making accurate statements of fact regarding the nature of her practice merely because it was possible that some readers of the advertisement would infer that the lawyer has some expertise in those areas.

103 Murdock, *supra* note 65, at 676-77.

104 For example, a lawyer was prohibited from including in a monthly flier from a credit union to its members promotional statements to the effect that he represented the credit union and that his services were available to individual members also. The ethics panel warned that the members may believe that the credit union was endorsing the attorney's services or otherwise recommending him. The committee noted that the credit union was not qualified to act as an attorney referral service. Mich. Op. CI-591 (1980), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4815. An Oregon opinion held that a lawyer cannot be listed in material distributed by a financial and estate planning company as the company's "recommended lawyer." Legal Ethics Comm. of the Ore. State Bar Op. 447 (1980) [hereinafter cited as Ore. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:7104. The District of Columbia Bar's ethics committee disapproved a television commercial in which Redskins fullback John Riggins endorsed a local personal injury law firm. Riggins said, "[I]f you have been hurt on the job or by someone's carelessness, call the law firm of [name]. It could be the most important call you'll ever make. I'd rather you hear it from me than from some stranger." The D.C. Code explicitly banned all testimonials and endorsements. The committee upheld the provision on the ground that it was designed to ensure that advertisements contain information that would assist the public in making an informed decision when selecting an attorney. The commercial's obvious purpose was to convince the viewer that this paid speaker believed in the worth of the sponsoring firm based upon personal experience when this was not true. D.C. Op. 142 (1984), *supra* note 70, summarized in 1 *CURRENT REPORTS*, *supra* note 14, at 703. Unfortunately, the ethics opinion in the Riggins committee decision refused to draw a distinction between genuine and simulated endorsements. Theoretically, simulated endorsements, in which persons are paid to say that they believe in the worth of a particular firm when they have never been represented by that firm, are prohibitable on the ground that they are false or misleading. But there seems to be no similar justification for banning genuine endorsements. As noted earlier, these kinds of commercials are widely used in other advertising and could be of great assistance to the public in selecting counsel now that the reputations of firms and lawyers are generally unknown to the public. If the genuine endorser has been paid to endorse a firm, the firm could be required to disclose this information. This appears to be the position of the new Missouri rules on advertising which permit testimonials. However, if the endorsement is simulated or paid, this fact must be disclosed in the advertisement. 1 *CURRENT REPORTS*, *supra* note 14, at 924. This is a courageous first step.

nicate statements from past or present clients, or business associates familiar with the quality of her work, regarding Lawyer X or her professional services.

Again, the bar's fear of endorsements seems to stem from its view that the public possesses a remarkable degree of naiveté with regard to advertising.<sup>105</sup> The core concern underlying the Model Rules' prohibition of endorsements and testimonials is that a statement of satisfaction with a lawyer's services by a present or former client will mislead the public into believing, without justification, that similar results can be achieved for them. There seems to be no proof justifying this assumption. If the public were that easily seduced and manipulated, then we would look with similar concern at the commonplace television advertising of insurance companies whose clients, standing amid the wreckage of homes recently blown away by tornadoes, tell us how happy they are to have been insured by the advertiser. We do not fear for the public in these cases. And it is neither self-evident nor proved that such concern is justified when the testimonial pertains to any other professional service.<sup>106</sup>

#### 5. Statements About or Comparisons of the Quality of Legal Services: "Puffery" and Self-Laudation

Ethical Consideration 2-9 of the ABA Model Code of Professional Responsibility states: "Examples of information in lawyer advertising that would be deceptive include . . . representations concerning the quality of service, which cannot be measured or verified."<sup>107</sup> The ABA's 1977 Proposal B forbade even an "implication" regarding the quality of legal services "which is not susceptible of reasonable verification by the public."<sup>108</sup> This prohibition has been carried over in Model Rule 7.1(c) but only with regard to comparisons of legal services of other lawyers which cannot be "factually substantiated."<sup>109</sup> The absence of a specific prohibi-

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105 "The lack of sophistication on the part of many members of the public concerning legal services . . . require[s] that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer." MODEL CODE, *supra* note 3, EC 2-9. A prime example of this paternalistic attitude is displayed in a Florida ethics opinion which forbade a lawyer from using the phrase "Jesus is Lord" and a dove-peace graphic in his advertising on the grounds that they were potentially misleading, that they represented a prohibited testimonial, and that they were an unverifiable, self-laudatory opinion about the quality of the services offered. Professional Ethics Comm. of the Fla. Bar Op. 82-1 (undated), *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:2502.

106 In a similar vein, the Supreme Court in *Zauderer* rejected the notion that lawyer advertising aimed at persons with a particular kind of legal problem, and which utilized an illustration, was inherently deceptive. The asserted deceptiveness was neither proved nor self-evident. *See* note 102 *supra*.

107 MODEL CODE, *supra* note 3, EC 2-9.

108 MODEL CODE, *supra* note 48, DR 2-101(C)(4).

109 *See* note 62 *supra*.

tion of statements regarding the quality of legal services such as were contained in the Code indicates that the ABA has relaxed its standards in this area. Indeed, the ABA makes a significant break with its past views on the purposes of advertising when it acknowledges, in the comment to Rule 7.2, that “[a]dvertising involves an active quest for clients.”<sup>110</sup> Tacit in this admission seems to be a recognition that in order for advertising of legal services to be useful to the public, it must refer to quality. It requires little common sense to understand that restricting advertising to the availability and costs of legal services alone does not permit the dissemination of enough information to motivate the lawyer to pay the cost of advertising or for the public to discriminate between advertisers.<sup>111</sup>

However, statements concerning the quality of an attorney’s work run into a commonplace restriction on lawyer advertising—the prohibition against self-laudatory remarks. The Model Code specifically forbade them,<sup>112</sup> but the Model Rules and their commentary contain no explicit mention of self-laudatory claims or statements. This lends further credence to the view that the Rules permit statements regarding the quality of legal services. Perhaps the comment to Rule 7.1 of the recently adopted New Jersey Rules of Professional Conduct<sup>113</sup> puts it as candidly as possible when it acknowledges that “the very nature and function of advertising may make self-laudation unavoidable.”<sup>114</sup>

Nevertheless, the ban on statements regarding the quality of

110 The first paragraph of the comment to Rule 7.2 states:

To assist the public in 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 should not seek clientele. However, the public’s need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. 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.

MODEL RULES, *supra* note 17, Rule 7.2 comment. Cf. MODEL CODE, *supra* note 3, EC 2-2 (“Preparation of advertisements . . . should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers.”).

111 Murdock, *supra* note 65, at 674-75, points out that studies show that consumers of legal services need evaluative information, not the useless, objective facts permitted by codes modeled after the ABA’s Model Code. The studies showed that consumers were most interested in receiving information about lawyers’ competency and interest in and ability to explain problems, as well as their reputation and truthfulness. The authors noted that presently this kind of information is not allowed in lawyer advertising because of its quality implications.

112 See note 48 *supra*.

113 N.J. RULES, *supra* note 57.

114 N.J. RULES, *supra* note 57, Rule 7.1 comment. However, the New Jersey Rules absolutely prohibit comparisons of lawyers’ services. *Id.* at Rule 7.1(3).

legal services and otherwise self-laudatory claims by lawyers continues in many states.<sup>115</sup> And in jurisdictions which do not expressly prohibit self-laudatory claims, lawyer communications must avoid creating unjustified expectations or being otherwise misleading. Recent opinions by state ethics panels illustrate the difficulty lawyers will have in determining what they are permitted to say about the quality of their work.

For example, the District of Columbia Bar's ethics panel has ruled that a law firm may not advertise that it provides "quality legal services."<sup>116</sup> This claim was found to have two vices. First, it made a factually unverifiable statement about the quality of legal services, that is, that the advertiser's services are above the required minimum level of competence. Second, the panel believed it implied that some other lawyers' services are not "quality" and that the advertiser's services are better.<sup>117</sup> Under this latter view, the ABA's Model Rules would also prohibit a claim of quality legal services. The Rules forbid comparisons of lawyers' services which cannot be factually verified.<sup>118</sup> But even conceding that the claim, "We provide quality legal services," is not factually verifiable, it stretches the meaning of the statement beyond acceptable limits to say that it also makes invidious comparisons. It is equally plausible that the statement, "We provide quality legal services," is simply a request for trust; it is another way of saying, "We won't let you down," or, "We do competent legal work."<sup>119</sup> To claim compe-

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115 For example, the amendments to the Florida Code of Professional Responsibility, effective January 1, 1984, prohibit "any . . . communication which . . . is intended or is likely to attract clients by use of . . . puffery, self-laudation or hucksterism." The Florida Bar, 438 So. 2d 371, 372 (Fla. 1983) (DR 2-101(C)(6)).

116 D.C. Op. 117 (1982), *supra* note 70, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2306.

117 See also Professional Ethics Comm. of the Kan. Bar Ass'n Op. 83-29 (1983) [hereinafter cited as Kan. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3816.

118 MODEL RULES, *supra* note 17, Rule 7.1(c).

119 An Illinois opinion held that it was appropriate for a lawyer to describe her services as "competent." Committee on Professional Ethics, Ill. State Bar Ass'n Op. 689 (1980) [hereinafter cited as Ill. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3003-04. The Wisconsin Supreme Court, in *In re Marcus & Tepper*, 107 Wis. 2d 560, 320 N.W.2d 806 (1982), held that the state had failed to present clear and convincing evidence that the lawyers' advertising claims of "[c]ompetent work at competitive prices" and "a high standard of work" were misleading. However, the District Court in *Spencer v. Honorable Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 887 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985), characterized the use of the term "competent" as similar to claiming that one is "experienced" or an "expert," and thus it was prohibitable by the state as an unverifiable, subjective claim as to the quality of a lawyer's legal services. Alabama requires that all published attorney advertising except professional notices contain the following disclaimer: "No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services." *Mezrano v. Alabama State Bar*, 434 So. 2d 732, 734 (Ala. 1983).



tency is not also to claim incompetency on the part of others in the same market.

The D.C. Bar Opinion rests upon a view of the public as particularly gullible vis-à-vis lawyer advertising. Even if it were conceded that a claim of quality is an assertion that other lawyers are merely competent or worse, who can deny that such an assertion is true? But more importantly, what difference does it make whether it is "true" or only a matter of the advertiser's opinion? Is the public somehow misled by this opinion? Is not the bar being overly paternalistic, if not patronizing, toward the lay public?

For decades the Federal Trade Commission (FTC) has been scrutinizing advertising with a eye trained for deception. However, it is clear that the FTC would not even furrow its institutional brow at an advertised claim of "quality" or "competence." Such claims are considered mere "puffs," and, far from being questionable, "puffs" are a recognized defense to an FTC action.<sup>120</sup> Opinions regarding quality are judged not to be deceptive, regardless of their verifiability, because the FTC recognizes that the public understands that such statements are self-serving opinions by merchants, and as such, are not to be accepted at face value, if at all.<sup>121</sup>

Other kinds of statements made in attorney advertising which have run afoul of the bar's concerns about self-laudation and unverifiable quality claims are illustrated by the following ethics panel opinions. The Connecticut Bar ruled that the statement, "My office will handle all the details of your real estate transaction . . . to assure your ease of mind," was self-laudatory and, thus, prohibited.<sup>122</sup> The same state ethics committee likewise objected to a claim of "guaranteed satisfaction" as self-laudatory and "subjective," that is, incapable of confirmation by any objective standard.<sup>123</sup>

On the other hand, the Chicago Bar panel permitted a firm to say, "Our firm usually finds solutions for people with foreclosure problems that enable them to remain in their homes."<sup>124</sup> New York City's Bar ethics committee would not allow law firms to advertise that their "track record over these years has been very good,"<sup>125</sup> or

120 See Pitofsky, *supra* note 41, at 677 nn.64-66 (citing cases discussing the FTC and the "puffery" defense).

121 See Hazard, *supra* note 8, at 1097 n.44 (the authors observe that when the thing to be purchased is a service rather than a product, consumers tend to rely more on reputational information and less on advertising).

122 Conn. Informal Op. 82-22 (1982), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2058.

123 Conn. Informal Op. 81-6 (1980), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2052.

124 Chi. Op. 81-1 (1981), *supra* note 92, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3202.

125 Committee on Professional Ethics of the Ass'n of the Bar of the City of N.Y. Op. 81-

that they have “the experience and know how to make sick companies well again.”<sup>126</sup> In the latter two cases, the Bar panel felt that the statements promised too much with regard to future results. And yet, Maine’s ethics overseers found the following lawyer ad neither misleading nor creative of unjustified expectations:

INJURED? Who’s on your side when the insurance company decides how much to pay you for your injury? . . . WE WILL FIGHT FOR YOU.<sup>127</sup>

Perhaps the key to some understanding of what should be permitted may be gleaned from *Oklahoma Bar v. Schaffer*.<sup>128</sup> In that case, Schaffer’s advertisement for his legal clinic stated that within five working days after a client had provided all the necessary information regarding one of five listed routine services, “We will file the necessary court documents, or . . . begin providing . . . services—or our services are free.”<sup>129</sup> The trial court which upheld Schaffer’s discipline based upon this ad, held that Shaffer had made an inherently deceptive guarantee of quality.<sup>130</sup> The Oklahoma Supreme Court, however, disagreed. It ruled that a promise is deceptive if its fulfillment is clearly beyond the control of the promisor. That was not the case here. Fulfillment of Schaffer’s pledge was well within his control, and therefore not deceptive. In any event, the court noted, even if this was a promise of quality, the state has no substantial interest in discouraging the expeditious performance of legal services.<sup>131</sup>

Certainly *Schaffer’s* proposition, that a lawyer may make any promise of performance which does not depend upon matters beyond her control in the ordinary course of affairs, is a helpful common-sense rule. However, if this were the extent of what is permitted, this would be “spartan fare”<sup>132</sup> at best. The final comment of the *Schaffer* court harkens back to the more flexible approach taken by the United States Supreme Court.<sup>133</sup> Only by continually focusing upon the alleged state interest being asserted to justify prohibiting or restricting lawyers’ commercial speech will

91 (undated) [hereinafter cited as N.Y.C. Op.], summarized in *LAWYER’S MANUAL*, *supra* note 10, at 801:6330.

126 N.Y.C. Op. 81-64 (undated), *supra* note 125, summarized in *LAWYER’S MANUAL*, *supra* note 10, at 801:6326.

127 Professional Ethics Comm’n of the Bd. of Overseers of the Bar Op. 46 (Me. 1984), summarized in *LAWYER’S MANUAL*, *supra* note 10, at 801:4208.

128 648 P.2d 355 (Okla. 1982).

129 *Id.* at 356.

130 *Id.* at 359.

131 *Id.*

132 *Bates*, 433 U.S. at 367.

133 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

the questionable assumptions underlying those restrictions be examined. In balancing competing interests, it must be remembered that the first amendment has placed its finger on the scale in favor of more disclosure, not less.<sup>134</sup>

## 6. Claims of Expertise or Specialization

In its efforts to ensure that the public is not misled by lawyer advertising, the bar has striven to prevent lawyers from claiming to be experts in specialized areas of law unless such claims are true and verifiable. This has led to the widely adopted approach of prohibiting all claims of expertise or specialization unless that jurisdiction has adopted standards and methods of certifying legal specialists. Disciplinary Rule 2-105(A)(2) of the superseded ABA Model Code prohibited a lawyer from holding herself out "as a specialist, as practicing in certain areas of law or as limiting [her] practice," except in two traditionally recognized areas,<sup>135</sup> and otherwise only to the extent permitted by the state bar agency created to certify specialists. If a state has not set up such an agency, then lawyers in that state may not claim to be specialists.<sup>136</sup>

Of course, one of the primary public benefits of lawyer advertising is that it provides the public with information about the availability and costs of legal services. *Bates* made clear that the public's strong interest in receiving such information overrides the bar's interest in banning lawyer advertising altogether. But information concerning legal costs must be attached to specific legal services in order to allow the public to compare them. Indeed, *Bates* upheld the advertisement of certain named legal services. Herein lies the

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134 "Although . . . the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less." *Bates*, 433 U.S. at 375. See also *Central Hudson Gas*, 447 U.S. at 562 ("Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all."). But cf. *Zauderer*, 105 S. Ct. at 2276 n.9 (noting that divisions have "left open the possibility" that nonverifiable claims regarding the quality of legal services can be banned by the states).

135 Those areas are patent and trademark practice. See MODEL CODE, *supra* note 3, DR 2-105(A)(1).

136 See *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984), *aff'd in part, rev'd in part*, 105 S. Ct. 2265 (1985) (The Ohio Supreme Court held that an attorney who advertised that his firm was representing some women who had used the Dalkon Shield had held himself out to be an expert in those kinds of cases. Given that the state had no standards or criteria for certifying experts, the attorney had acted improperly.). See also *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978); N.Y.C. Op. 80-15 (undated), *supra* note 125, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6304. But see *In re* Johnson, 341 N.W.2d 282 (Minn. 1983) (court held that where the state had failed to establish procedures for certifying specialists, it was unconstitutional to prohibit an attorney licensed and practicing in that state to advertise his certification by the National Board of Trial Advocacy as an expert in "Personal Injury Wrongful Death" litigation).

seeds of a dilemma for the bar. If a lawyer offers her services to the public in three areas of law, is she not claiming thereby to be a specialist in those three areas?<sup>137</sup> What if she claims to "limit" her practice to, or to "concentrate" in, those three areas? In other words, when does an attorney cross the line between legitimately listing the particular services which she offers, and implicitly claiming to be an expert in the listed areas?

The dilemma has been partially resolved by means of a device suggested by the Supreme Court in *Bates* and reinforced in *Central Hudson Gas*.<sup>138</sup> The device is the mandatory disclaimer.<sup>139</sup> The state ethics code involved in the *R.M.J.* case illustrates its use. The Missouri Ethics Rules provided a list of twenty-three specific areas of legal practice which an advertising attorney could list if she did not use any of three other more general listings authorized by the Rule.<sup>140</sup> However, if the lawyer advertised any of the specific areas of practice, she had to attach the following disclaimer: "Listing of the above areas of practice does not indicate any certification of expertise therein."<sup>141</sup> If jurisdictions have a system for certifying specialists in certain fields of practice, then a lawyer so certified may advertise that fact only in the manner prescribed by the ethics rules.<sup>142</sup>

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137 In *Lovett & Linder, Ltd. v. Carter*, 523 F. Supp. 903, 910-11 (D.R.I. 1981), the lawyers' advertisement contained a list of sixteen areas of practice without further explanation. The court agreed with the bar disciplinary committee that this was not only misleading "huckstering," but also tantamount to an unfounded claim of expertise in the listed areas of practice even though the ad explicitly disclaimed any expertise or specialization.

A plan to place a "Lawyers Directory" in the Yellow Pages listing lawyers under any of thirty-three areas of practice which they chose and paid for, was disapproved by the Montana Supreme Court. In *re Mountain Bell Advertising*, 185 Mont. 68, 604 P.2d 760 (1979). The court felt that lawyers would be holding themselves out as specialists in any of the areas they chose when the state had not adopted any certification procedures, and the public would thereby be misled. See also N.Y. Op. 539 (1982), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6106; N.Y.C. Op. 80-15 (undated), *supra* note 125, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6304; *Durham v. Brock*, 498 F. Supp. 213, 225 (M.D. Tenn.), *aff'd mem.*, 698 F.2d 1218 (6th Cir. 1980) (the listing of a few areas of practice implies expertise therein) (dictum); *Eaton v. Supreme Court*, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981) (lack of any limitations on the areas of law in which a firm was willing to consult was equal to a claim of universal competence).

138 In *Bates*, the Court suggested that while the state may not totally prohibit advertising in certain cases, it may nevertheless require supplemental information such as warnings or disclaimers to accompany it. 433 U.S. at 384. See note 134 *supra*. In *Central Hudson Gas*, the Court indicated that if less restrictive regulations of commercial speech were possible, such as requiring supplemental information, then complete prohibitions could not withstand constitutional scrutiny. 447 U.S. at 570. See note 85 *supra*.

139 See, e.g., *Mezrano*, 434 So. 2d at 734; *Durham*, 498 F. Supp. at 225.

140 An attorney could list one of three general descriptive terms, "General Civil Practice," "General Criminal Practice," or "General Civil and Criminal Practice," if the attorney did not choose to list any of the twenty-three more specific areas permitted by the rule. *R.M.J.*, 455 U.S. at 195.

141 *R.M.J.*, 455 U.S. at 195, 196 n.6.

142 See *MODEL CODE*, *supra* note 3, DR 2-105(A)(3). The questions that can arise regard-

The ABA's Model Rules of Professional Conduct continue this approach to the problem in Rule 7.4. It permits a lawyer to communicate to the public that she "does or does not practice in particular fields of law," but prohibits a lawyer from stating or implying that she is "a specialist."<sup>143</sup> There is, however, a further refinement in the comment.

If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. However, stating that the lawyer is a "specialist" or that the lawyer's practice "is limited to" or "concentrated in" particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist. Hence, use of these terms may be misleading unless the lawyer is certified or recognized in accordance with procedures in the state where the lawyer is licensed to practice.<sup>144</sup>

Thus, according to the Model Rules, a lawyer may advertise that she accepts only "white collar crime" cases, or that she practices only criminal law, but she may not use the talismatic words that she "limits" her practice to or "concentrates" in this kind of case. One is tempted to remark that only lawyers could produce a rule with such gossamer fine distinctions. The justification for the distinctions, that these two terms have acquired a secondary meaning, seems to assume too much. Does the lay public attach such an

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ing the proper use of disclaimers are not always addressed adequately in the rules. For example, the Texas Board of Legal Specialization can certify lawyers as specialists in certain areas of practice, such as Personal Injury Trial Law. If an attorney lists one of these certifiable areas of practice in her advertisement, and she has been certified, she must state therein, "Board Certified, (area of practice), Texas Board of Specialization." If she lists a certifiable area of practice in which she has not been certified, she must state, "Not certified by the Texas Board of Legal Specialization." If she lists an area of practice in which one cannot be certified, she must state, "No designation has been made by the Texas Board of Legal Specialization." However, the question arose concerning the proper disclaimer to be used when an attorney wished to list an area of practice that was not certifiable but was clearly included within a certifiable specialty, such as "Workers' Compensation—Silicosis, Lead Poisoning, and Other Occupational Diseases." This is a subspecialty of personal injury trial law. The Texas ethics committee decided that if the lawyer is certified in the subsuming area, she must so state, but should also include the following caveat: "Workers' Compensation is included in Personal Injury Trial Law. However, no designation has been made in Workers' Compensation law as such." If the lawyer is not board certified in the subsuming area, she must state, "Not certified in Personal Injury Trial law, which would include Workers' Compensation." Professional Ethics Comm., State Bar of Tex. Op. 418 (1984) [hereinafter cited as *Tex. Op.*], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:8304.

It is questionable whether the public understands what is meant when a lawyer indicates that she is "Certified by the Board of Specialization," or by the notation that a certain area of practice has been "designated" by that board. If there is any doubt about the public's understanding, then it is open to question whether these disclaimer rules are designed to protect the public or are merely an attempt by the bar to protect itself from what it perceives to be forms of unfair competition. See *Murdock*, *supra* note 65, at 672-73.

143 MODEL RULES, *supra* note 17, Rule 7.4.

144 *Id.* at Rule 7.4 comment.

extravagant meaning to the words?<sup>145</sup> Since lawyers have never been allowed to use those words in the short time they have been permitted to advertise, where would the public have learned this "secondary meaning"? It is true that physicians do use the terms to indicate a specialization, but they have been allowed to advertise for even a shorter time than lawyers.

Even conceding that the terms may connote specialization to some of the public, do not the words permitted by the Rule imply the very same meaning as those which are prohibited? In short, the Rules' attempted resolution of the dilemma, as construed by the comment, seems a triumph of formalism over common sense.

The position of the Model Rules and of many states may have been thrown into doubt by the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*.<sup>146</sup> There the disciplined lawyer placed an ad in a newspaper which asked whether the reader had used the Dalkon Shield intrauterine birth control device.<sup>147</sup> The ad went on to state: "Our law firm is presently representing women on such cases," and offered free information to users of the device.<sup>148</sup> Although attorney Zauderer was not found by the state bar's grievance commission to have held himself out as an expert in Dalkon Shield cases,<sup>149</sup> the Supreme Court of Ohio thought otherwise. After the court noted that *Bates* and *R.M.J.* did not totally prohibit the states from restricting lawyer advertising, it said, "It is our view that . . . [a] lawyer should not be permitted to hold himself out as an expert in certain designated areas unless there are in existence certain standards or criteria . . . in the Disciplinary Rules."<sup>150</sup>

145 Obviously the meaning lawyers attach to such words as "concentrates" or "limited to" is irrelevant; lawyers should not assume consumers look at legal advertising with the same intensity and emotion as they do. As Murdock, *supra* note 65, at 660, points out, consumers do not have the same philosophical opposition to lawyer advertising as some lawyers do.

146 105 S. Ct. 2265 (1985).

147 *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 461 N.E.2d 883, 884 n.1 (1984), *aff'd in part, rev'd in part*, 105 S. Ct. 2265 (1985).

148 10 Ohio St. 3d at 45 n.1, 461 N.E.2d at 884 n.1.

149 The Board of Commissioners on Grievances and Discipline recommended that Zauderer be suspended indefinitely from the practice of law based upon the following findings: (1) use of the Dalkon Shield diagram violated the disciplinary rule against the use of illustrations; (2) the ad gave unsolicited legal advice to those from whom he later accepted employment; (3) the advertisement failed to state specific fee rates as required; (4) the advertisement misleadingly failed to include information about potential litigation costs; and (5) Zauderer recommended employment of himself to a nonlawyer who had not sought his advice. *Id.* at 45-46, 461 N.E.2d at 885.

150 *Id.* at 48, 461 N.E.2d at 886. The court misstated itself here. It meant to say that lawyers should not be allowed to hold themselves out as experts in *any areas* of practice unless the state had created "certain standards or criteria." The Minnesota Supreme Court reached the opposite conclusion concerning the propriety of this kind of advertisement in *In re Appert*, 315 N.W.2d 204 (Minn. 1981).

On review by the United States Supreme Court, the Justices brushed aside the view that the advertisement suggested any special expertise in handling Dalkon Shield suits. Writing for the Court, Justice White said that a state may not prevent an attorney from making accurate statements of fact concerning her practice merely because of the possibility that some of the public might infer expertise in the areas of law mentioned.<sup>151</sup> Two weeks after deciding *Zauderer*, the Supreme Court vacated and remanded for further consideration *Humphrey v. Committee on Professional Ethics*.<sup>152</sup> The attorneys disciplined in *Humphrey* advertised their firm on television. The commercials consisted of three different dramatizations of two persons talking about someone who had been injured through the negligence of another. One person would comment that it was important for that injured person to talk to a lawyer. The commercials ended with a voice-over which announced that the firm handled cases involving auto accidents, work comp, serious personal injury and wrongful death on a percentage basis. The disciplinary committee argued that the ads were self-laudatory comments about the advertisers' expertise.<sup>153</sup> It also contended that they misrepresented the firm's experience because the lawyers had little actual trial experience when the commercials were broadcast.<sup>154</sup> The Iowa Supreme Court, while not finding that the commercials were "deceitful," agreed with the committee that "the public could well be misled by them."<sup>155</sup>

The foregoing illustrates the labyrinth of overlapping restric-

151 *Zauderer*, 105 S. Ct. at 2276 n.9.

152 105 S. Ct. 2693 (1985).

153 Self-laudatory claims are prohibited by the Iowa Code of Professional Responsibility DR 2-101(A) (1980). See *Humphrey v. Committee on Professional Ethics*, 355 N.W.2d 565, 568 (Iowa 1984), *vacated*, 105 S. Ct. 2693 (1985).

154 The lawyers' advertisements did not explicitly claim any expertise. They said, "If you are injured through the negligence of others, call the law firm of . . . Cases involving auto accidents, work comp, serious personal injury and wrongful death handled on a percentage basis." 355 N.W.2d at 566. The state argued that the firm thereby represented itself as experienced, and that the actual trial experience of the firm members did not match the representation. Attorney Humphrey "had tried six cases, the nature of which are unknown, all while under the supervision of another . . . law firm." *Id.* at 570. Another attorney of the three in the firm had tried only one case with Humphrey. *Id.*

155 *Id.* at 570. The court did not specifically say how the public could be misled and exactly what in the advertisements was "inherently likely to deceive." *Id.* The decision was based entirely upon the untested assumption that there are "special problems" relating to lawyer electronic media advertising. *Id.* However, the court never identified these special problems, nor did it say how they were relevant to some of the questions before it, such as whether the firm members held themselves out as specialists and whether they misled the public into believing that litigation is a cost-free venture. Ultimately, the court seemed to rest its conclusion that the television commercials were misleading on the ground that their content was "promotional" and not informational. *Id.* at 570-71. However, it never analyzed the content of the ads in such a manner. Indeed, the view that the commercials were not informational is most debatable. Clearly, they would help the public identify potential legal problems and understand the importance of early consultation with a lawyer.

tions which lawyer statements regarding areas of practice must avoid. Cases like *Humphrey* also illustrate the fuzziness of the rules and the ad hoc manner in which they are applied. Furthermore, it is not yet clear what impact *Zauderer* will have on this area of regulation. However, it is clear that a firm that desires to produce a firm brochure or letter to be sent to prospective clients or business forwarders must be cautious in describing its members' areas of practice and experience. There can be no doubt that this is important information.<sup>156</sup> But local disciplinary rules may forbid the use of the terms "limits practice to" and "concentrates practice in."<sup>157</sup> Furthermore, any statement of fields of practice may require accompanying disclaimers of expertise. And if the lawyer is a bar-certified specialist, any announcement of the fact will have to be done in a prescribed manner. However, in jurisdictions whose code is still modeled after the ABA's Model Code, where only limited biographical information is permitted by DR 2-101(B), there is little doubt after *R.M.J.* that this provision is unconstitutional in its restrictiveness.

Beyond these formalities, problems of interpretation arise regarding lawyers' public communications about themselves. Questions about the attorney's competence may arise if too many areas of practice are advertised, whereas too few may imply specialization. A claim of a substantial practice in a given field may provoke a demand that the claim be verified. Verifiability may limit all truthful statements.

## 7. Statements Regarding Fees

Because *Bates* held that information about the fees charged for routine legal services was constitutionally protected, most lawyer advertising following *Bates* has tended to mimic the "tombstone" advertisement approved there. As a result, statements concerning fees have been the one aspect of lawyer advertising most heavily scrutinized by state ethics panels and courts.

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156 See Morgan, *supra* note 7, at 60-61 ("[A]void the mistake of preparing an impressive-looking brochure . . . that does nothing more than describe your firm's areas of practice. These have little effect in differentiating your firm from its competitors. . . . Demonstrated competence and expertise are essential."). See also Murdock, *supra* note 65, at 675; Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980) (listing areas of practice is valuable information for the general public).

157 An example of how a firm brochure may inadvertently violate this prohibition can be seen in the sample brochure contained in 23 LAW OFF. ECON. & MGMT. 64-72 (1982). At one place in the brochure it states, "Our firm *concentrates* in five areas of practice" (emphasis added), and then goes on to list and give detailed information about them. *Id.* at 68. In its biographical sketches of the firms' associates, it lists each associate's "areas of concentration." *Id.* at 72. Other language which could be said to hold members of the firm out as specialists can be found in the more detailed descriptions of the partners, where one is described as having "special knowledge" in two fields of law. *Id.* at 71.



Following the *Bates* case, the ABA's two proposed amendments to the advertising rules both contained extensive provisions regulating fee information.<sup>158</sup> The ABA did not carry these provisions forward in the Model Rules, satisfied, no doubt, that the general proscription against misleading and false statements would suffice. The states have varied in whether to adopt specific rules on fees.<sup>159</sup> Despite the rules' specificity, advertising lawyers constantly ran afoul of them.

This has been especially true with advertisements by personal injury plaintiffs' firms concerning contingent fees. Most jurisdictions require that statements of contingent fee rates must disclose whether the percentages are computed before or after litigation costs, which the client must pay, have been deducted from the amount recovered through the lawyer's efforts.<sup>160</sup> The Model Code

158 MODEL CODE DR 2-101(B) Proposal A permitted the following fee information: (20) Fee for an initial consultation; (21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services; (22) Contingent fee rates . . . provided that the statement discloses whether percentages are computed before or after deduction of costs; (23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged . . . ; (24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client . . . ; (25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged. . . .

MODEL CODE, *supra* note 48, DR 2-101(B) (Proposal A). Proposal B forbade all fee information except as follows:

- (a) A statement of the fee for initial consultation; (b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive; (c) A statement of the range of fees for specifically described legal service, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive; (d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter; (e) The availability of credit arrangements; and (f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive.

MODEL CODE, *supra* note 48, DR 2-101(B)(6) (Proposal B). The language of Proposal B has been recently adopted by Florida and New Jersey.

159 States recently amending their advertising rules have varied in whether they have retained specific rules regarding fee information. For example, Texas and Missouri omitted these rules, whereas New Jersey and Florida did not.

160 See MODEL RULES, *supra* note 17, DR 2-101(B)(22). MODEL CODE, *supra* note 3, DR 5-103(B) states: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation including court costs . . . , provided the client remains ultimately liable for such expenses." Note, however, that the

does not make clear, however, whether any advertisement of a contingent fee must also include the actual percentage rate to be charged, and if not, whether the disclosure regarding costs must be included nevertheless.<sup>161</sup> Perhaps as a result, lawyers have published, and have been disciplined for, ads announcing that the fee is contingent but without giving the rates.<sup>162</sup> Other advertisements have stated, "No fees unless successful,"<sup>163</sup> and "You don't need money to have a lawyer,"<sup>164</sup> without noting the client's responsibility to pay costs. In not mentioning rates or that the client ultimately will have to reimburse the attorney for expenses regardless of the success of the case, these ads were held to be misleading.<sup>165</sup>

The most common problem with fee information is lack of specificity. Vagueness regarding the amount of the fee charged, who is eligible for reduced fees, and how long special rates are available is often found to be misleading. The advertised statement, "Reduced fees available," was found to be misleading absent a description of the variables which determine when fees would be reduced.<sup>166</sup> The same was held true where a lawyer offered fees "as low as" a certain rate.<sup>167</sup> Although the Supreme Court found no problem with a claim of "very reasonable prices" in the *Bates* advertisement, that advertisement listed the fees for each service mentioned.<sup>168</sup> The public was able to compare rates and test their

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Model Rules, *supra* note 17, Rule 1.8(e)(1) allows repayment of court costs and litigation expenses to be contingent upon the outcome of the case.

161 The Supreme Court, in *Zauderer*, 105 S. Ct. at 2283 n.15, noted the ambiguity of DR 2-101(b)(22), which had been adopted by Ohio. This provision permits "contingent fee rates . . . provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses." *Zauderer's* ad stated that "if there is no recovery, no legal fees are owed by our clients." *Id.* The State Bar found this claim to be deceptive because it left the impression that if there was no recovery, the client would owe nothing, not even litigation expenses. See note 160 *supra*. The Ohio Supreme Court suggested that the actual contingent fee rate must also be disclosed. 105 S. Ct. at 2283. Given the United States Supreme Court's acceptance as "self-evident" that the public would be misled by *Zauderer's* failure to distinguish between "fees" and "costs," it would seem that any mention of a contingent fee should include this information regardless of whether a specific rate is also given. Whether rates must always be specified whenever the availability of a contingent fee is advertised is unresolved.

162 *Compare Zauderer*, 10 Ohio St. 3d at 48, 461 N.E.2d at 886 with *In re Appert*, 315 N.W.2d at 210.

163 N.Y.C. Op. 81-56 (undated), *supra* note 125, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6325.

164 Ill. Op. 689 (1980), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3003.

165 See notes 163-64 *supra* and accompanying text.

166 D.C. Op. 121 (1983), *supra* note 70, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2307.

167 Ill. Op. 669 (1980), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3002.

168 *Bates*, 433 U.S. at 381.

reasonableness.<sup>169</sup> Advertisements which promise, for example, only a "minimal consulting fee,"<sup>170</sup> and "reasonable rates" for "senior citizens,"<sup>171</sup> can only leave the public guessing as to who qualifies as a "senior citizen," and exactly how much a "minimal" or "reasonable" fee is.<sup>172</sup>

The bottom line on fee information is a simple one: the information must be complete and accurate.<sup>173</sup> This one aspect of lawyer advertising, above all others, is capable of being factual and definitive, without the injection of opinion or puffery. If lawyers wish to engage in price advertising, they cannot cut corners by reducing the information to an eye-catching phrase or an unexplained possibility. Anything which smacks of hucksterism will draw scrutiny. And the scrutiny will be made through the eyes of the most ignorant, gullible, and vulnerable members of the public.

## 8. Logos, Illustrations, Pictures

In the 1977 *Bates* decision, the Supreme Court approved an attorney's advertisement which contained the logo of the scales of justice.<sup>174</sup> Perhaps for that reason, the amendments to the ABA Model Code of Professional Responsibility following *Bates* did not specifically address the use of illustrations, logos, and pictures in lawyer advertising. But their absence among the twenty-five kinds of information permitted by DR 2-101(B) implied disapproval.<sup>175</sup> Moreover, the Model Code required all forms of advertising to be "presented in a dignified manner."<sup>176</sup> Any use of logos and illus-

169 *Id.*

170 Mich. Op. CI-567 (1980), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4811.

171 See Ill. Op. 695 (1980), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3004.

172 See also Committee on Professional Ethics of the Bar Ass'n of Nassau County Op. 83-2 (1983) [hereinafter cited as Nassau County Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6205 (free consultation described as a "\$35.00 value" is misleading as to whether a consultation of undetermined length is free, or only a portion of the consultation up to and including a "\$35.00 value" is free); Mich. Op. CI-688 (1981), *supra* note 57, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4831.

173 See D.C. Op. 91 (1980), *supra* note 70, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2301.

174 *Bates*, 433 U.S. at 392 app.

175 MODEL CODE, *supra* note 3, DR 2-101(B). The Ethical Considerations were hostile to any advertising that was not strictly factual. EC 2-8 said, in part: "Advertisements and public communications [by lawyers] . . . should be formulated to convey only information that is necessary to make an appropriate selection [of counsel]." EC 2-10 counseled lawyers to "strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel." The ABA's Proposal B also made no explicit reference to drawings, logos, and pictures, but did prohibit any "garish or sensational . . . format." MODEL CODE, *supra* note 48, DR 2-101(C)(6).

176 MODEL CODE, *supra* note 3, DR 2-101(B).

trations was widely believed to be an undignified, unprofessional form of hucksterism.<sup>177</sup> Thus, despite the presence of the logo in the *Bates* ad, several states adopted advertising restrictions which explicitly prevented lawyers from using anything but the printed word.<sup>178</sup>

The justifications for prohibiting logos, illustrations, and pictures were that they were inherently undignified, potentially deceptive, and merely promotional in nature. That is, they were believed to have no informational content and were designed only to "attract clients."<sup>179</sup> Because it was believed that the only legitimate purpose of legal advertising was to dispense information to an information-starved public, and because this could be done adequately with words alone, the purpose behind the use of drawings and pictures could only be to manipulate the public into selecting a lawyer for wrong reasons.<sup>180</sup>

Attacks upon this restriction met with little success until the Supreme Court decided *Zauderer* in 1985.<sup>181</sup> *Zauderer's* newspaper advertisement included a drawing of the Dalkon Shield intrauterine device. The Ohio version of DR 2-101(B) prohibited the use of all drawings, illustrations, and pictures, except the scales of justice, in attorney advertising. *Zauderer's* challenge to this restriction was beaten back by the Ohio Supreme Court on the ground that illustrations and drawings in general "may be misleading" and there-

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177 See e.g., *Bishop v. Committee on Professional Ethics and Conduct*, 521 F. Supp. 1219, 1226 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

178 L. Andrews reported in *BIRTH OF A SALESMAN*, *supra* note 21, at 56, that as late as 1980 at least eight states prohibited logos. For example, Georgia's Standard 5(B) requires lawyers' advertisements to be "displayed in a dignified manner, without photographic, pictorial or other graphic illustrations, and being limited to black upon white [and] . . . in type size not larger than one-half centimeter . . . in height." Oklahoma's version of DR 2-101 bans the use of "any signs, symbols or pictures, and limits the size of advertisements to a maximum of ten square inches. OKLAHOMA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(I), (G) (1978), reprinted in STATE CODES, *supra* note 52, at 125L.

179 Iowa and several other states retain the portion of the pre-*Bates* Model Code which prohibited "any form of public communications, calculated to attract clients, which contains any information not . . . specifically permitted." STATE CODES, *supra* note 52, at 76L (Iowa Code). See also *In re Burgess*, 279 S.C. 44, 302 S.E.2d 325 (1983); *Eaton v. Supreme Court*, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied*, 450 U.S. 966 (1981). In *Bishop*, 521 F. Supp. 1219, the court accepted the testimony of a state's expert witness insofar as he postulated that most advertising content is divided into two kinds, informational and promotional. The former was said to be factual and operates on the conscious level, while the latter is persuasive and operates on the unconscious level. *Id.* at 1224. The court found that logos, drawings, colors, sounds, and modifying words were promotional in nature and, therefore, potentially misleading. *Id.* at 1226.

180 N.J. RULES, *supra* note 57, Rule 7.2, prohibit "drawing, animations, dramatizations, music or lyrics." The comment to the rule says, "These devices would add little, if any, consumer-useful information to a communication, and are more likely to attract clients for reasons other than those that are relevant to the selection of appropriate counsel."

181 *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985).

fore may be banned altogether.<sup>182</sup> The United States Supreme Court disagreed. Significantly, it held that illustrations and pictures "serve important communicative functions" by attracting the audience's attention and by imparting information.<sup>183</sup> Zauderer's IUD drawing was a perfect example. It caught the reader's eye and graphically conveyed accurate information by depicting the device to which the advertiser was referring. The Court held that illustrations and pictures were not inherently misleading or deceptive and were entitled to first amendment protection.<sup>184</sup> This meant the state had to demonstrate that the ban on these devices advanced a substantial governmental interest and that a total prohibition was the least restrictive means available.<sup>185</sup>

The Court then proceeded to dismantle the claim that drawings are prohibited because they are undignified. It conceded that the state has a legitimate interest in maintaining the dignity of attorneys, but expressed doubt that that interest extended to public communications, as opposed to courtroom conduct, for example.<sup>186</sup> Even if a state interest in dignified public communications does exist, the Court did not believe that it was substantial enough to justify a complete ban.<sup>187</sup> Additionally, the Court expressed doubt that the use of undignified drawings and illustrations could ever become so pervasive a problem that a total prohibition would be justified. The mere possibility, said the Court, that some members of the public or the bar might find some kinds of advertising offensive or undignified does not justify suppressing it.<sup>188</sup>

The State's second argument against the use of drawings paralleled its attack on advertising which offered advice to persons with a specific legal problem. It met the same fate. The State contended that because graphics could subconsciously confuse, mislead, and manipulate, and because the subconscious effects of these devices are so difficult to detect, only a total proscription could protect the public.<sup>189</sup> The Court was appropriately skeptical of these unsupported assertions.<sup>190</sup> It held that the mere possibility of deception and manipulation under some hypothetical circumstances clearly

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182 The Ohio court did not find Zauderer's illustration to be misleading. Nevertheless, it said, "A potential client peering at a lawyer advertisement may be misled or confused by the expressed words, by an illustration or drawing, or by a combination of both." *Office of Disciplinary Counsel v. Zauderer*, 10 Ohio St. 3d 44, 47-48, 461 N.E.2d 883, 886 (1984), *aff'd in part, rev'd in part*, 105 S. Ct. 2265 (1985).

183 *Zauderer*, 105 S. Ct. at 2280.

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.* at 2280-81.

190 *Id.* at 2281 ("We are not convinced.").

not present in the case before it did not justify a broad prophylactic rule. The states would have to police misleading graphics on a case-by-case basis.<sup>191</sup>

*Zauderer* has undercut all of the justifications for prohibiting drawings, logos, and pictures. Further, state ethics codes which ban any advertising methods or devices on the grounds that they are undignified or only calculated to attract clients must be rewritten.<sup>192</sup> The Supreme Court has finally acknowledged the obvious: a major purpose of all advertising is to attract customers. Therefore, attention-getting devices are legitimate adjuncts of protected commercial speech. The only ground remaining for objecting to a graphic device in an advertisement is that it is misleading.

It is difficult to anticipate what kinds of illustrations, pictures, and logos would be subject to sanction as misleading or false. As the Supreme Court noted in *Zauderer*, advertisements for professional services are probably less amenable to misleading or false illustrations than product advertisements.<sup>193</sup> But certainly the clearest example of a deceptive graphic would be the use of a logo which bears a close resemblance to that of another organization. If a reasonable member of the public could mistakenly believe that the advertising lawyer was associated in some way with the other organization, then use of the logo may be prohibited, or the bar might require a disclaimer of affiliation in the ad.

Some other potential pitfalls for pictures, illustrations, and logos may lie in the widespread prohibitions against quality claims, creating unjustified expectations, and comparing lawyers' services. These blanket prohibitions may be difficult to justify under the test established by the Supreme Court. Nevertheless, until the Court places professional service advertising on a par with product advertising, the careful attorney should take these restrictions as warning buoys marking the kinds of potential deception to which the bar is uniquely sensitive.

## 9. Music, Lyrics, Dramatizations

The concerns which prompted the bar's ban on drawings, pictures, and symbols in print ads are magnified many fold when the bar considers the use of animations, music, jingles, and dramatizations in the electronic media. In fact, radio and television advertising alone have been seen by the bar as presenting "special problems."<sup>194</sup> The Proposal A version of the Model Code adopted

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191 *Id.*

192 *See, e.g.,* N.J. RULES, *supra* note 57, Rule 7.2.

193 *Zauderer*, 105 S. Ct. at 2279 & n.12.

194 *See, e.g.,* *Bates*, 433 U.S. at 384 ("the special problems of advertising on the electronic broadcast media will warrant special consideration"); *Humphrey*, 355 N.W.2d at 569-70.

in 1977 allowed radio but not television advertising. The following year, television was added to the list of permitted advertising outlets, but several states continued to resist.<sup>195</sup> Some of the states which relented on the use of radio and television restricted their utilization so that only the equivalent of a print media advertisement could be communicated.<sup>196</sup>

The special concerns surrounding the use of jingles and dramatizations in the broadcast media are recounted in *Committee on Professional Ethics and Conduct v. Humphrey*.<sup>197</sup> In this case, the court beat back an attack upon Iowa's rule against the use of background sound, visual displays, and more than a single, nondramatic voice.<sup>198</sup> The court viewed the broadcast media as "uniquely pervasive or intrusive,"<sup>199</sup> and these techniques as "potentially misleading."<sup>200</sup> The court stated that dramatizations and background sounds are "tools which would manipulate the viewer's mind and will."<sup>201</sup> As such, they do not inform the public and, according to the court, are not within the protections of the first amendment recognized in *Bates*.<sup>202</sup>

As with illustrations, pictures, and symbols, the ABA Model Rules of Professional Conduct do not ban the use of music and dramatizations in the broadcast media.<sup>203</sup> In the short period between the ABA's adoption of the Model Rules and Supreme Court's decision in *Zauderer*,<sup>204</sup> only three states, Arizona, New Jersey, and Missouri, had revamped their advertising rules. Significantly, they differed sharply over the utilization of standard radio and television

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195 L. Andrew's 1980 study in BIRTH OF A SALESMAN, *supra* note 21, lists ten states which continued to prohibit both radio and television advertisements, and two which banned only TV ads. *Id.* at 136-45. Following a number of successful attacks on such prohibitions, see e.g., *Grievance Comm. v. Trantolo*, 192 Conn. 27, 470 A.2d 228 (1984), and the amendment of several state codes, few if any states now prohibit all electronic media advertising.

196 Iowa's version of DR 2-101(B), *reprinted in Humphrey*, 355 N.W.2d at 568-69, restricts broadcast media advertising to the following:

The same information [allowed in print advertising], in words and numbers only, articulated by a single non-dramatic noise, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only in the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner . . . .

197 355 N.W.2d 565 (Iowa 1984), *vacated*, 105 S. Ct. 2693 (1985).

198 IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980), *reprinted in Humphrey*, 355 N.W.2d at 568-69.

199 355 N.W.2d at 569.

200 *Id.* at 570.

201 *Id.* at 571.

202 *Id.*

203 See MODEL RULES, *supra* note 17, Rule 7.2.

204 105 S. Ct. 2265 (1985).

advertising techniques. New Jersey prohibits "animations, dramatization, music or lyrics" as being irrelevant to the purpose of lawyer advertising, the education of the public.<sup>205</sup> On the other hand, the Arizona and Missouri rules permit these devices,<sup>206</sup> including simulations about the lawyer and her practice, as long as they are explicitly identified as simulations.<sup>207</sup>

Although the use of music, jingles, or dramatizations was not in issue in the *Zauderer* case,<sup>208</sup> that decision has seriously undercut state prohibitions in this area because the justifications for these prophylactic rules are essentially the same as those offered to support bans on illustrations and pictures. After *Zauderer*, a state could justify the total abolition of these devices only by a clear demonstration of one of the following propositions: (1) that the utilization of these advertising techniques in the electronic media creates the same degree of risks of overreaching and coercion that are created by in-person solicitation;<sup>209</sup> (2) that there has been a history of recurring abuses of these techniques, which demonstrates a propensity to mislead and deceive the public;<sup>210</sup> or (3) that a blanket prohibition is the least restrictive means available for advancing a substantial state interest in regulating the use of these techniques.<sup>211</sup>

Given that the burden of proof is on the state,<sup>212</sup> it seems doubtful that a state could muster sufficient evidence to support any one of these propositions. Although there may be some evidence to support the contention that electronic media advertising may overly influence children, it is hard to imagine that the Court could be convinced that television jingles and animations could overreach an adult viewer. A history of recurring abuses could not exist yet with regard to use of these techniques by lawyers in the electronic media. And the fact that we swim daily through a sea of advertising jingles, music, animations, and dramatizations bespeaks a society, and an FTC, inured to their use and largely unconcerned about their effects.

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205 N.J. RULES, *supra* note 57, Rule 7.2.

206 1 CURRENT REPORTS, *supra* note 14, at 381, 445-46.

207 *Id.* at 381 (Mo. DR 2-101).

208 105 S. Ct. 2265.

209 *Id.* at 2277 ("in-person solicitation by a lawyer, we concluded [in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 477 (1978)] was a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud . . . [and] justified a prophylactic rule . . . but . . . 'does not stand on a par with truthful advertising about the availability and terms of routine legal services.'").

210 *In re R.M.J.*, 455 U.S. 191, 203, 207 (1982) (state may ban use of trade names by optometrists where experience demonstrated that the names were often used in a deceptive manner) (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

211 *Zauderer*, 105 S. Ct. at 2280.

212 *Id.*



The *Zauderer* decision has cast grave doubt on the proposition that the state has a substantial interest in preserving the dignity of the legal profession's public communications.<sup>213</sup> The only remaining potential state interest could be to protect the public from being deceived. But even granting that these advertising gimmicks are capable of being deceptive, misleading, and false, this fact alone does not justify a blanket prohibition. As with drawings in *Zauderer*, there is no reason why the state could not police jingles, animations, and dramatizations on a case-by-case basis.<sup>214</sup> Disclaimers and disclosure statements could be required to correct some misleading potential. In short, shibboleths founded on untested assumptions will no longer suffice to justify these restrictions. The test is clear, and it is highly doubtful that these prohibitions can past muster.

### B. *Promotional vs. Informational Advertising*

It has been noted that several courts and state ethics committees have distinguished between the informational content of lawyer advertising and its promotional aspects.<sup>215</sup> The distinction has been used to determine which parts of lawyer advertising are covered by the first amendment's protections. The key to the distinction lies in the language of the *Bates* case,<sup>216</sup> which, if narrowly read, can be construed as holding that only newspaper advertisements containing factual statements about fees for routine legal services are protected forms of commercial speech.<sup>217</sup> Indeed, some states drafted advertising rules after *Bates* which permitted only this limited information,<sup>218</sup> prohibiting anything that was not a plain, verifiable, factual statement of fees for routine services. Illustrations, music, pictures, endorsements, logos, slogans, and dramatizations are seen as irrelevant to the single, constitutionally protected purpose of lawyer advertising: the education of the lay public regarding the availability and cost of legal services. In effect, these advertising techniques are assumed to be not only devoid of informational content, but also misleading and undignified.

The list of advertising devices which have been called "promotional" includes statements regarding the quality of legal serv-

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213 *Id.* ("we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights").

214 *Id.* at 2281.

215 See notes 179-80 *supra* and accompanying text.

216 *Bates*, 433 U.S. 350.

217 "The issue presently before us is a narrow one. . . . The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which certain routine services will be performed." *Id.* at 366-68 (emphasis in original).

218 L. ANDREWS, *supra* note 21, at 71.

ices,<sup>219</sup> opinions in general,<sup>220</sup> appeals to emotions,<sup>221</sup> characterizations,<sup>222</sup> self-laudatory statements,<sup>223</sup> "puffery,"<sup>224</sup> statements calculated to attract lay clients,<sup>225</sup> as well as jingles, animations, dramatizations, pictures, and drawings.<sup>226</sup> At the heart of the debate is the question of whether these courts and ethics committees are correct in their narrow reading of *Bates*. If they are, then the rules restricting lawyer advertising rest upon the odd premise that lawyers may disseminate information, but they cannot also attempt to attract clients. This seems anomalous at least, and much in the Supreme Court's decisions on commercial speech would seem to refute the proposition that advertising, even by attorneys, must maintain this pristine and selfless purpose to retain its first amendment protections.<sup>227</sup>

The proponents of greater liberality in the rules need not concede that the promotional aspects of attorney advertising have no

219 *Bishop v. Committee on Professional Ethics*, 521 F. Supp. 1219, 1225 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982).

220 521 F. Supp. at 1227.

221 *Id.* at 1225.

222 *Id.* at 1226.

223 *Humphrey*, 355 N.W.2d at 570.

224 *Bishop*, 521 F. Supp. at 1228-29.

225 *In re Burgess*, 279 S.C. 44, 46, 32 S.E.2d 325, 326 (1983); *Eaton v. Supreme Court*, 270 Ark. 573, 581, 607 S.W.2d 55, 59 (1980), *cert. denied*, 450 U.S. 966 (1981).

226 *Bishop*, 521 F. Supp. at 1226; *Humphrey*, 355 N.W.2d at 571.

227 In the case that awarded first amendment protection to commercial speech, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the Court commented:

It is clear . . . that speech does not lose its First Amendment protection because money is spent to project it, as is a paid advertisement. . . . Our question is whether speech which does "no more than propose a commercial transaction," . . . lacks all protection. Our answer is that it [does] not. . . . [W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. . . . Moreover, . . . no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn.

*Id.* at 761-65.

In *Central Hudson Gas & Elec. v. Public Serv. Corp.*, 447 U.S. 557, 561 (1980), the Court characterized protected commercial speech as no more than "expression[s] related solely to the economic interests of the speaker and its audience." It also made the point that it is unlikely that businesses would pay the costs of promotional advertising that is of no use or interest to consumers. *Id.* See notes 85 and 138 *supra* for a discussion of *Central Hudson Gas*. The Court, in *In re R.M.J.*, 455 U.S. 191 (1982), held that the lawyer's conduct there could not be prohibited notwithstanding the fact that "[b]y describing his services and qualifications, [his] sole purpose was to encourage members of the public to engage him for personal profit." *Id.* at 204 n.17. The Court also commented on R.M.J.'s use of the "relatively uninformative fact" of his admittance before the bar of the United States Supreme Court. *Id.* at 205. However, notwithstanding its "unformativeness," its potential deceptiveness, and its "bad taste," *id.*, the Court held that banning this fact was improper given that there was no evidence in the record establishing that it was misleading. *Id.* at 206. Finally, the Court noted in *Zauderer*, 105 S. Ct. at 2280, that advertising techniques which serve to attract the public's attention serve an important communicative function.

value beyond the attraction of clients to the advertising lawyer. Good arguments can be made that these techniques are of value to consumers.<sup>228</sup> It takes little expertise in media marketing of professional services to see that dramatizations of typical legal problems of unsophisticated lay persons could be the best way of helping the public to recognize them.<sup>229</sup> And if the public is sorely in need of recommendations of quality legal services to compensate for its lack of familiarity with professional reputations in today's large cities, how can the bar prohibit genuine client endorsements?<sup>230</sup> How is it that the lay public can be allowed to be exposed to competitive advertising by, for example, large stock broker firms, banks, and insurance companies without the FTC experiencing the same paternalistic concerns? Do not these professionals offer services, as opposed to goods? Other than hunch and speculation driven by a desire to deny that the legal profession is a business, what supports the contention that the differences between goods and professional services require different advertising rules?<sup>231</sup> Many jurisdictions have recognized that these dichotomies cannot be maintained. They, like the ABA, understand that the only restraints on lawyer advertising necessary from the public's point of view are the prohibitions on false and misleading statements.<sup>232</sup> It is probably just a matter of time before this view will prevail, but how much time and how many court rebukes it will take cannot be predicted.

### C. *Restrictions on Undignified, Garish Advertising*

Several states still ban undignified or garish lawyer advertising.<sup>233</sup> At the core of these restrictions is a desire by the organized bar to maintain its concept of "professional standards."<sup>234</sup> The ABA Model Rules take the position that the manner of advertising

228 See notes 64-67, 86, 103, 111, and 155 *supra* and accompanying text.

229 Cf. *Humphrey*, 355 N.W.2d at 572 (Larson, J., dissenting).

230 See text accompanying notes 91-97 *supra*.

231 Regarding the alleged need for disparate treatment of advertising of goods as opposed to services, see text accompanying notes 31-37 *supra*. As for the effects of the difference between goods and services upon the consumer's view toward their advertisement, the studies cited in Hazard, *supra* note 8, indicate that when consumers seek services, they trust and rely on advertising less than when they are seeking to purchase goods. This would lead to the conclusion that in the case of services, the advertising audience is less susceptible to being deceived.

232 MODEL RULES, *supra* note 17, Rule 7.1.

233 See, e.g., FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(C)(6) (1984) [hereinafter cited as FLA. CODE]; The Florida Bar, 438 So. 2d 371, 372 (Fla. 1983); SOUTH CAROLINA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1980). See also *In re Burgess*, 279 S.C. 44, 46, 302 S.E.2d 325, 326 (1983).

234 See *Spencer v. Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 892 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985); *In re Burgess*, 279 S.C. at 46, 302 S.E.2d at 326; *In re Utah State Bar Petition*, 647 P.2d 991, 993 (Utah 1982); *In re Petition for Rule of Court Governing Lawyer Advertising*, 564 S.W.2d 638, 641, 644 (Tenn. 1978).

is essentially a question of individual taste, and therefore not a fit subject for regulation,<sup>235</sup> even though the Supreme Court left the door open to this kind of regulation when the Rules took effect. The Court stated that lawyer advertising, like all protected speech, was still subject to reasonable time, place, and manner regulations.<sup>236</sup> The Court indicated explicitly that the maintenance of professional standards was a legitimate and substantial state interest which could be weighed in the determination of the validity of a restriction.<sup>237</sup> Moreover, before *Zauderer* was decided in 1985, the Supreme Court twice sustained total bans on a form of commercial speech.<sup>238</sup>

Given this permissive atmosphere, state ethics committees and courts pronounced certain legal advertisements to be impermissibly garish and undignified under state ethics codes. The Illinois Bar advised that advertising a legal seminar with door prizes and refreshments was undignified.<sup>239</sup> An attempt by a New Jersey attorney to place an advertisement in a "supermarket throwaway" otherwise devoted to discount coupons met the same fate.<sup>240</sup> The South Carolina Supreme Court held a print advertisement which began, "STOP FORECLOSURE Repossession, Credit Harassment, Consolidate or Get Out of Debt," violative of the state's ban on advertisements intended to attract clients through showmanship or a garish or undignified format.<sup>241</sup>

A few methods of advertising have received inconsistent treatment from the states. Distributing pens with the law firm's name imprinted on them was dignified enough to be permitted in Illinois,<sup>242</sup> but not in Iowa.<sup>243</sup> Three courts upheld prohibitions against billboards, fliers, handbills, and matchbook cover advertise-

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235 MODEL RULES, *supra* note 17, Rule 7.2 comment.

236 *Bates*, 433 U.S. at 384.

237 *Virginia State Bd. of Pharmacy*, 425 U.S. at 766; *Ohralik*, 436 U.S. at 460; *R.M.J.*, 455 U.S. at 199-200.

238 *Friedman v. Rogers*, 440 U.S. 1 (1978) (trade names); *Ohralik*, 436 U.S. 447 (in-person solicitation of accident victims).

239 Ill. Op. 796 (1983), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3013.

240 Advisory Comm. on Professional Ethics, Sup. Ct. of N.J. Op. 468 (1981) [hereinafter cited as N.J. Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:5803.

241 *In re Burgess*, 279 S.C. at 45, 302 S.E.2d at 325. See also Ill. Op. 689 (1980), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3003 ("Out of money due to the recession?" and "You don't need money to have a lawyer" are undignified and misleading notwithstanding fact that a lawyer is allowed to barter his services.).

242 Ill. Op. 812 (1983), *supra* note 119, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3015.

243 Committee on Professional Ethics and Conduct, Iowa State Bar Ass'n Op. 80-30 (1980) [hereinafter cited as Iowa Op.], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3601.

ments.<sup>244</sup> However, two large city bar ethics panels and the ABA's Model Rules permit the use of billboards.<sup>245</sup> Finally, the state ethics committee of Kentucky delphicly advised an inquiring lawyer that he could sponsor a softball team and place his name and telephone number on the uniforms, provided that it was done in good taste and did not bring the bench and bar into disrepute.<sup>246</sup>

It appears from the Supreme Court's decision in *Zauderer*<sup>247</sup> that the Court has adopted the ABA's position with regard to undignified advertising. In *Zauderer*, Justice White noted that the true gist of the bar's objections to the use of illustrations in lawyer advertising was probably that the bar felt them to be undignified.<sup>248</sup> Addressing directly the question of a standard of "dignity" in lawyer advertising regulations, Justice White made several illuminating statements. First, he noted that no one had claimed that *Zauderer*'s IUD drawing was undignified. This scotched the contention that all such graphic devices are per se undignified in attorney advertising.<sup>249</sup> Secondly, on the question whether the state's admitted interest in maintaining the dignity of the legal profession would justify a prophylactic rule to prevent even the possibility of undignified ads, Justice White doubted that this interest was strong enough to justify a total suppression of protected speech.<sup>250</sup> He referred to a 1977 Supreme Court decision, not involving lawyer advertising, which held that the mere possibility some of the public might find an advertisement embarrassing or offensive would not justify suppressing it.<sup>251</sup> Finally, the Court's opinion in *Zauderer* concluded

244 *Bishop*, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated as moot*, 686 F.2d 1278 (8th Cir. 1982); *In re* Petition for Rules of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978); *In re* Utah State Bar Petition, 647 P.2d 991 (Utah 1982).

245 See Chi. Op. 83-3 (1983), *supra* note 92, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:3203; Philadelphia Bar Ass'n Professional Guidance Comm. Op. 80-48 (undated) [hereinafter cited as Philadelphia Op.], *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:7506. It appears that Model Rule 7.2(a) permits billboard advertising: "[A] lawyer may advertise services through public media, such as . . . outdoor . . . communication not involving solicitation as defined in Rule 7.3." As for handbills, Model Rule 7.2(a) permits advertising "through written communication not involving solicitation as defined in Rule 7.3." MODEL RULES, *supra* note 17. Rule 7.3 excludes from the definition of solicitation "advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter." MODEL RULES, *supra* note 17. It would seem, then, that circulars could be handed out to the public generally so long as persons with specific legal needs are not targeted recipients. See Part VI in text for a discussion of solicitation.

246 Ethics Comm. of the Ky. Bar Ass'n Op. E-267 (1983) [hereinafter cited as Ky. Op.], *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:3907.

247 105 S. Ct. 2265.

248 *Id.* at 2280.

249 *Id.*

250 *Id.*

251 *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraceptive devices). In fact, in 1983, the Supreme Court held that the mailing to private residences of advertising brochures promoting the use of condoms to prevent venereal disease could not be prohib-

that the bar had no greater standing to complain about tasteless or offensive advertising than the public. The fact that some members of the bar find Zauderer's advertisement beneath their dignity was not grounds for suppressing it.<sup>252</sup>

The position of the Supreme Court is now relatively clear. If an advertisement is not misleading, it is protected by the first amendment and presumptively permissible. The fact the an advertisement is in poor taste will not rebut that presumption. Therefore, good taste and dignity are no longer permissible requirements for lawyer advertisements.

### III. Promoting Referrals

We now pass from the marketing techniques which relate primarily to advertising<sup>253</sup> to consider other strategies. One of the most important business getting devices recommended by marketing experts is the promotion of referrals.<sup>254</sup> Of course, this is not news to lawyers. Much of the business attracting activity by attorneys always has been devoted to increasing their notariety among businesspersons and other attorneys for the sole purpose of having them steer clients in their direction.<sup>255</sup> The traditional techniques for increasing one's visibility have been entertaining, writing, speaking publicly, participating in political, bar association, and civic activities, and publishing client newsletters. Even more recently, the use of advertising and the mailing of firm brochures and solicitation letters directly to prospective client forwarders have become possible. Beyond this lies participation in sophisticated group advertising and referral businesses for lawyers. But even in this age of lawyer advertising, many of the old rules against certain types of referral activities and arrangements remain unchanged. In fact, several restrictions may affect referral promoting schemes.

A client referral involves the conduct of a third party business forwarder, such as another lawyer, a business associate, a social ac-

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ited on the grounds of offensiveness. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). See also *Consolidated Edison Co. v. Public Serv. Comm'n*, 477 U.S. 530 (1980).

252 105 S. Ct. at 2280. In a slightly different context, the Court noted that "[a]lthough some sensitive souls may have found [Zauderer's] . . . advertisement in poor taste, it can hardly be said to have invaded the privacy of those who read it." *Id.* at 2277. The point is that those offended by the lawyer's newspaper advertisement can simply avert their eyes.

253 Direct mail advertising and solicitation is treated in the text accompanying notes 395-440 *infra*.

254 Smock, *supra* note 7, at 1434 ("Lawyers have long known that client referrals are probably the most effective means of obtaining new work."); Winter, *supra* note 7.

255 See generally S. GILLERS, I'D RATHER DO IT MYSELF—HOW TO SET UP YOUR OWN LAW FIRM (1980); V. MORIN, HOW TO MAKE MONEY PRACTICING LAW (1977); G. SINGER, HOW TO GO DIRECTLY INTO SOLO PRACTICE WITHOUT MISSING A MEAL (1976); H. SELIGSON, BUILDING A LAW PRACTICE (1964); J. TRACY, THE SUCCESSFUL PRACTICE OF LAW (1947).

quaintance, a present or past client, or a relative.<sup>256</sup> The lawyer who receives client referrals from a third party is, of course, free to accept or reject the referred potential client as she wishes.<sup>257</sup> The ethical restrictions center on why the referral was made, not that they were made at all. If the referring party recommended the attorney voluntarily and for disinterested reasons, either because the referrer believed that the attorney is able and appropriate or simply because the attorney is a friend or relative, the lawyer may properly accept the new client.<sup>258</sup> However, if the referral is made because the lawyer requested it, or because the referring agent has or will receive something of value in return, then the referral may be improper and the attorney may not be able to accept it under many state ethics codes.<sup>259</sup>

### A. *Paying For or Requesting Client Referrals*

Traditionally, lawyers were not allowed to seek clients directly through solicitation or advertising, and they were also prevented from circumventing these rules by employing third persons to do the prohibited acts.<sup>260</sup> The ABA Model Code of Professional Responsibility proscribed even requests by a lawyer that other persons or organizations recommend or promote the use of her services to others.<sup>261</sup> A lawyer was also prohibited from giving anything of value to another to recommend or secure her employment for legal services.<sup>262</sup>

An exception to these restrictions was necessary after the *Bates* case approved attorney advertising. Obviously, a lawyer was now free to compensate someone to publicize the advertising permitted by *Bates*.<sup>263</sup> However, the Model Code, even as late as the 1982

<sup>256</sup> Lawyer referral services, both for profit and nonprofit, are treated in the text accompanying notes 275-79 *infra*.

<sup>257</sup> EC 2-8: "[Regarding the selection of a lawyer by a layperson] [a]dvice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers— . . . may be helpful." EC 2-26: "A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client." MODEL CODE, *supra* note 3.

<sup>258</sup> *In re Appert*, 315 N.W.2d 204 (Minn. 1981); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1459 (1980) [hereinafter cited as ABA Informal Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:304; S.C. Op. 82-9 (1982), *supra* note 88, summarized in 1 CURRENT REPORTS, *supra* note 14, at 279.

<sup>259</sup> MODEL CODE, *supra* note 3, DR 2-103(B), (C), (E).

<sup>260</sup> MODEL CODE, *supra* note 3, DR 1-102(A)(2), 2-103(E); MODEL RULES, *supra* note 17, Rule 8.4(a).

<sup>261</sup> MODEL CODE, *supra* note 3, DR 2-103(C); ABA Informal Op. 1459 (1980), *supra* note 258 (proper for a law firm to accept referrals of clients where the firm does not represent the referrers, there is no arrangement for reciprocal referrals, and the firm has not requested the referrals).

<sup>262</sup> MODEL CODE, *supra* note 3, DR 2-103(B).

<sup>263</sup> The post-*Bates* Model Code never explicitly said this, but it was necessarily inferred by the Model Rules. See MODEL RULES, *supra* note 17, Rule 7.2(c).

final version, continued to prohibit lawyers from requesting or paying others to recommend their professional employment in a non-advertising context.<sup>264</sup> Most states follow this version of the ABA Code. Therefore, under many state ethics rules, a lawyer may not in person, by mail, or otherwise request another to forward business to the lawyer.<sup>265</sup> However, the ABA's Model Rules of Professional Conduct do not contain an analogous provision. Thus, in states that adopt the Model Rules, lawyers will be free to request referrals, subject to restrictions relating to the potential conflicts of interest which could inhere in third party referral arrangements.<sup>266</sup>

Under almost every state ethics code, a lawyer cannot give or promise something of value to another in return for forwarding business.<sup>267</sup> This prohibition has been continued in the Model Rules.<sup>268</sup> "Something of value" has been interpreted to include reciprocal referrals.<sup>269</sup> Therefore, an attorney may not agree with a business acquaintance to refer clients to her in return for referrals from the acquaintance.<sup>270</sup> "Something of value" would also include the performance of legal services for a reduced rate in exchange for referrals. Therefore, a lawyer cannot agree to draft wills at no charge for a bank's client in exchange for referrals from the

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264 MODEL CODE, *supra* note 3, DR 2-103(B), (C).

265 See, e.g., Mich. Op. CI-512 (1980), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4803 (clerics); Mich. Op. CI-642 (1981), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4824 (insurance agents); Mich. Op. CI-801 (1982), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4847 (doctors); Mich. Op. CI-570 (1980), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4812 (marriage counselors). See also ABA Informal Op. 1456 (1980), *supra* note 258 (lawyer cannot request other lawyers to send unwanted clients to her).

266 See text accompanying notes 280-88 *infra* for a discussion of the conflict of interest inherent in the solicitation of third party referrals.

267 See Chicago Op. 82-3 (1982), *supra* note 92, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3202; Conn. Informal Op. 82-19 (1982), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2057; Advisory Comm. of the Neb. State Bar Ass'n Op. 81-12 (undated) [hereinafter cited as Neb. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5503; Ethics Comm. of the Los Angeles City Bar Ass'n Formal Op. 413 (1983) [hereinafter cited as L.A. Formal Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:1709; Ethics Comm., N.C. State Bar Ass'n Op. 289 (1981) [hereinafter cited as N.C. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6604; ABA Informal Op. 1459 (1980), *supra* note 258; ABA Informal Op. 1456 (1980), *supra* note 258. An exception to this prohibition is found in DR 2-103(B) and (D), where the lawyer may pay the usual and reasonable fees or dues charged by any organization from whom a lawyer is permitted to accept a referral, such as lawyer referral services sponsored by the bar. MODEL CODE, *supra* note 3. Another exception exists in those few states, such as Texas and Massachusetts, which, contrary to the Model Code, permit referral fees between lawyers. See TEXAS CODE, *supra* note 51, DR 2-107(A)(3).

268 MODEL RULES, *supra* note 17, Rule 7.2(c).

269 ABA Informal Op. 1459 (1980), *supra* note 258; ABA Informal Op. 1456 (1980), *supra* note 258; Conn. Informal Op. 82-19 (1982), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2057.

270 Ore. Op. 439 (1980), *supra* note 104, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:7102.



bank.<sup>271</sup>

Several concerns undergird the ban on requesting or compensating a third party to recommend a lawyer's employment. The first is simply that a lawyer should not be allowed to have another do what she cannot do herself. Lawyers cannot, in most states, directly solicit potential clients. The dangers of overreaching inherent in direct solicitation by attorneys<sup>272</sup> are not ameliorated by the intervention of a third party where the third party is beholden to the lawyer or has something to gain from the referral. Hence the ban on "cappers" who earn their living referring accident victims to lawyers.<sup>273</sup> The second concern with compensated referrals is that the self-interested reason for the referral may not be disclosed to the potential client. The prospective client may be misled into thinking that the lawyer's services are being recommended because the referrer believes that the lawyer is competent to handle the client's problem, rather than because the referrer will receive a quid pro quo.<sup>274</sup>

### B. *Lay Intermediaries*

There are, however, potential referrers of legal business who are not beholden to any particular lawyer and may act as a neutral buffer between the lawyer and the potential client who is in need of legal services and a referral.<sup>275</sup> Or, the compensatory arrangement between the referring agency and the lawyer may be disclosed, such as in the case of a for-profit lawyer referral service which makes no claims of expertise on behalf of the lawyers to whom the clients are referred. What concerns does the bar have in such situations? They revolve around the use of what the bar has called "lay in-

<sup>271</sup> Neb. Op. 81-12 (undated), *supra* note 267, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5503; Chicago Op. 82-3 (1982), *supra* note 92, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3202. See also Standing Comm. on Professional Responsibility, State Bar of California Formal Op. 1983-75 [hereinafter cited as Cal. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:1606 (lawyer may not offer discounted legal fees to clients referred to lawyer by solicited real estate brokers).

<sup>272</sup> See *Ohralik*, 436 U.S. 447.

<sup>273</sup> See, e.g., *Louisiana State Bar Ass'n v. Beard*, 374 So. 2d 1179 (La. 1979); *In re Arnoff*, 22 Cal. 3d 740, 586 P.2d 960, 150 Cal. Rptr. 479 (1978); cases cited in Annot., 5 A.L.R.4th 866, 901-07 (1981).

<sup>274</sup> Mich. Op. CI-570 (1980), *supra* note 57, summarized in LAWYERS' MANUAL, *supra* note 10, at 801:4812; Ore. Op. 439 (1980), *supra* note 104, summarized in LAWYERS' MANUAL, *supra* note 10, at 810:7102.

<sup>275</sup> In *State Bar Grievance Adm'r v. Jaques*, 407 Mich. 26, 38, 281 N.W.2d 469, 470 (1979), a lawyer asked a union representative to recommend his services to the victims of a tunnel explosion. The court held that this action was not improper because the union official "served as a buffer between the attorney and prospective clients thus alleviating the potential for overreaching and undue influence." *Id.*

termediaries.”<sup>276</sup> The potential problems stemming from the interjection of a lay person or organization between a lawyer and her client involve the compromising of the lawyer’s independent professional judgment, the assisting in the unauthorized practice of law, the splitting of legal fees with a nonlawyer, the disclosure of confidential information, and diluting the lawyer’s loyalty to the client by introducing a possibly conflicting concern for the lay intermediary’s interests.<sup>277</sup>

Largely because of these perceived problems, the Model Code did not allow lay organizations, with exceptions for legal aid offices and associations such as labor unions, to refer the public to lawyers unless they were nonprofit, and bar sponsored or approved referral services.<sup>278</sup> Thus, state ethics panels routinely disapprove of referral arrangements where the referrer is not approved by a bar association.<sup>279</sup>

## 1. Independent Professional Judgment

The Disciplinary Rule which permits certain organizations to refer lawyers to the public specifically requires that the participating lawyers remain free to exercise their “independent professional judgment” on behalf of their client.<sup>280</sup> This, of course, is merely a restatement of the lawyer’s primary duty of loyalty expressed in Ethical Consideration 5-1:

The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty.<sup>281</sup>

Disciplinary Rule 5-107(B) prohibits a lawyer from allowing “a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.”<sup>282</sup> Therefore, in any situation in

276 See generally AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 85-88 (1979) [hereinafter cited as ANNOTATED CODE].

277 See MODEL CODE, *supra* note 3, EC 2-33, 5-21, 5-23, 5-24; ABA Informal Op. 1463 (1981), *supra* note 258, summarized in LAWYER’S MANUAL, *supra* note 10, at 801:308; L.A. Formal Op. 413 (1983), *supra* note 267, summarized in LAWYER’S MANUAL, *supra* note 10, at 801:1709.

278 MODEL CODE, *supra* note 3, DR 2-103(C), (D).

279 See, e.g., Mich. Op. CI-811 (1983), *supra* note 57, summarized in LAWYER’S MANUAL, *supra* note 10, at 801:4858; N.J. Op. 481 (1981), *supra* note 240, summarized in LAWYER’S MANUAL, *supra* note 10, at 801:7905; State Bar of New Mexico Advisory Comm. Op. 1983-1, summarized in LAWYER’S MANUAL, *supra* note 10, at 801:6001; see text accompanying notes 295-306 *infra*.

280 MODEL CODE, *supra* note 3, DR 2-103(C)(2)(b), 2-103(D).

281 MODEL CODE, *supra* note 3, EC 5-1.

282 MODEL CODE, *supra* note 3, DR 5-107(B).

which a client comes to a lawyer for professional services by way of a referral from a third party, the third party cannot dictate how that client will be represented.<sup>283</sup>

## 2. Who is the Client?

Another concern arising from the use of lay intermediaries has to do with identifying the client to whom the lawyer's undivided loyalty is owed. When lay intermediaries are introduced, the client's identity may become unclear. ABA Informal Opinion 1463 provides a good example of a sophisticated referral arrangement in which the true client was not properly identified.<sup>284</sup> A law firm was hired to do research and analysis for a consulting organization which provided information and advice to governmental entities on labor-management relations matters. The organization rendered assistance to any governmental employer, but at a reduced cost to those who joined the organization. The organization was non-profit. The consulting organization and the inquiring law firm proposed to enter into the following arrangement:

a. The organization would make known to its members that it had hired the law firm to assist it, and that the law firm's services were available generally to the members.

b. At its discretion, the organization would request the firm to assist it in rendering aid to the organization's members by doing research and giving legal advice. The organization would not control the manner in which the firm conducted its research and analysis. The firm's legal work would be transmitted directly to the organization.

c. The organization would then relay the law firm's research to the requesting member after adding to it any further information gained through the work of its own staff.

d. Any information transmitted to the member from the law firm via the organization would be clearly identified as such, and kept separate from information provided by the organization's staff.<sup>285</sup> The organization would instruct the member that the information provided is not necessarily comprehensive, but only supplementary to the member's own efforts.

e. Unless independently hired by a member, the law firm would never communicate directly with the member, and the law

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<sup>283</sup> *Id.*; Conn. Informal Op. 82-19 (1982), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2057. However, organizations which utilize the legal process to further activities protected by the first amendment, such as the NAACP, are an exception to this rule. *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>284</sup> ABA Informal Op. 1463 (1981), *supra* note 258, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:308.

<sup>285</sup> This was done, no doubt, in order to keep the consulting organization from being open to the charge of the unauthorized practice of law.

firm would consider the organization, not the member, to be its client.

f. The organization will not otherwise refer clients to the law firm.

g. For its services, the organization would charge its members an amount which included the costs of the law firm's efforts. Only the organization would pay the law firm, and the organization alone would have control over how much the members would be charged.

h. A member would be able to request that the law firm undertake additional services for it alone. If the firm accepted, the lawyer-client relationship thus created would not involve the organization.

The ABA's Standing Committee on Ethics and Professional Responsibility approved of all but one aspect of this arrangement under DR 2-103(D) and DR 5-107. These rules cover the requirements that must be met before a lawyer may represent members of a nonprofit organization where the organization recommends, employs, or pays the lawyer to provide legal services. The arrangement between the inquiring law firm and the consulting organization stipulated that when assisting the organization in rendering aid to its members, the organization, not the member, was the client. Thus, the law firm could argue that DR 2-103(D) did not apply because it was not representing the members of the nonprofit organization. However, the ABA Committee took exception to this stipulation. It read DR 2-103(D)(4)(d)<sup>286</sup> to say that if the lawyer's legal services are ultimately furnished to the organization's member, then the lawyer's client is the member, and not the organization. Therefore, the proposed arrangement was defective in this regard unless amended to provide that the law firm's client was the member being assisted by the consultant with the law firm's aid.<sup>287</sup>

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286 The relevant parts of this DR read as follows:

A lawyer . . . or his firm may be recommended, . . . paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services . . . or his firm . . . (4) Any bona fide organization that recommends, furnishes or pays for legal services to its members . . . provided the following conditions are satisfied: . . . (d) The member . . . to whom the legal services are furnished, and not the organization, is recognized as the client of the lawyer in the matter.

MODEL CODE, *supra* note 3, DR 2-103(D)(4)(d).

287 This is a questionable finding unless it is compelled by the fact that otherwise the organization would be engaged in the unauthorized practice of law. See ABA Informal Op. 1264 (1973), *supra* note 258. It seems to be an application of the union open panel or NAACP lawyer model to an inapposite situation. The members of the consulting organization's group do not come to it seeking representation, but only legal and other advice. There also seems to be little danger of a conflict of interests between the organization and a member. Certainly all that should have been required by the ABA ethics panel was that the organization clearly inform those who sought its consulting service that the law firm represents the organization only and that the members should look to other counsel for representation. If the member wished to retain the organization's lawyers, then the organization

Informal Opinion 1463 went on to note that if the law firm simultaneously represented several members of the organization and the organization itself, it would have to be wary of DR 5-105 regarding potential conflicts of interests arising from the representation of multiple clients. If the law firm represented conflicting, inconsistent, diverse, or other differing client interests which affected its independent professional judgment or loyalty to any other client, the firm must withdraw unless it is obvious that it can adequately represent the interests of each client who must consent to the continued representation after full disclosure of the conflict.<sup>288</sup>

### 3. Unauthorized Practice of Law

The other way in which the law firm-consulting organization arrangement reviewed in Informal Opinion 1463 might be deficient, the Committee noted, was that it might violate state laws against the unauthorized practice of law. The Model Code does not define what the unauthorized practice of law is. Generally, it is a matter of state law and, therefore, the Committee is not capable of rendering an opinion on the question. However, because DR 3-101(A) prohibits a lawyer from aiding in the unauthorized practice of law, the Committee reminded the inquiring law firm to check the pertinent state law before entering into the arrangement.<sup>289</sup>

Finally, the Committee found that the arrangement considered in Informal Opinion 1463 did comply with the Model Code of Professional Responsibility in some ways. The organization was not created or promoted primarily to provide financial or other benefits for the law firm,<sup>290</sup> nor did the organization derive a profit from the rendition of legal services.<sup>291</sup> Further, the organization did not interfere with the exercise of the law firm's independent professional judgment.<sup>292</sup>

### 4. Splitting Legal Fees With Nonlawyers

Lastly, the arrangement did not violate the prohibition against

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could cease to be the client and the firm would deal only with the member in connection with the specific matter.

288 MODEL CODE, *supra* note 3, DR 5-105(A)-(C).

289 *See, e.g.*, *Thompson v. Chemical Bank*, 84 Misc. 2d 721, 375 N.Y.S.2d 729 (Civ. Ct. 1975) (bank engaged in unauthorized practice of law where it offers its customers legal services for which it charged a fee that was greater than the amount it paid its salaried in-house counsel); ABA Informal Op. 1264 (1973), *supra* note 258 (lawyer may not participate in the work of a for-profit corporation owned by lay persons which supplies legal research services to lawyers when the corporation acts as the consultant).

290 MODEL CODE, *supra* note 3, DR 2-103(D)(4)(b)-(c).

291 *Id.* at DR 2-103(D)(4).

292 *Id.* at DR 2-103(D); DR 5-107(B).

splitting lawyer's fees with a nonlawyer.<sup>293</sup> The Committee noted that the organization charged its members for its services, including those provided in the particular case by the law firm. However, the organization was nonprofit, and charged only to the extent necessary to cover the administrative costs of the program. This is permitted without violating the fee splitting ban.<sup>294</sup>

## 5. For-Profit Referral Services

The question arises whether a lawyer may operate or participate in a for-profit lawyer referral business. The high cost of advertising has prompted some lawyers to engage in collective advertising arrangements designed to spread the cost among several lawyers.<sup>295</sup> Often collective advertising arrangements look like traditionally bar-sponsored lawyer referral services. The advertising may not identify any one lawyer by name. Thus, whoever responds to the joint advertisement must be put in touch with one of the sponsoring lawyers. In other cases, private commercial entities sell these services to lawyers. In exchange for advertising and referral of potential clients by the referral service, the lawyers may be charged either a flat fee based upon the cost of the group advertis-

<sup>293</sup> *Id.* at DR 3-102(A).

<sup>294</sup> See ABA Informal Op. 544 (1962), *supra* note 258 (where the attorney is a salaried in-house counsel for a lay institution, the institution may not charge its customers attorney fees "not related" to the attorney's salary); ABA Informal Op. 1451 (1980), *supra* note 258 (salaried in-house counsel for bank); ABA Informal Op. 1409 (1978), *supra* note 258 (retention of 25% of premiums for a prepaid legal services plan by the lay corporate administrator); Committee on Rules of Professional Conduct, State Bar of Arizona Op. 85-3 (1985) [hereinafter cited as Ariz. Op.], *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:1324 (lawyer may not pay to a for-profit corporation a portion of fees generated from clients referred to lawyer by the corporation); L.A. Formal Op. 431 (1984), *supra* note 267, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:1713 (law firm may not be retained by a business to represent entertainers managed by the business where the business charges the entertainers 20% over the law firm's hourly rate); Wis. Op. E-84-17 (1984), *supra* note 88, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:9114 (lawyer may not arrange for referrals from an insurance company in exchange for a percent of the fees generated thereby); Kan. Op. 82-41 (1983), *supra* note 117, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:3812 (lawyer who is an executive of a management consulting firm may not represent the firm's clients in negotiations because it would constitute the practice of law by, and the division of legal fees with, nonlawyers); Legal Ethics Comm., Indiana State Bar Op. 4 (1980), *supra* note 198, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:3301 (lawyer cannot share with advertising firm the fees generated by the firm's advertisements); Va. State Bar Council Op. 503 (1983) [hereinafter cited as Va. Op.], *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:8815 (lawyer may not participate in a corporation comprised of nonlawyers where the corporation requests the lawyer to render legal assistance to others and charges for the services).

<sup>295</sup> See King, *What Works, What Doesn't, in Advertising*, A.B.A. J., Apr. 1985, at 54; N.C. Op. 359 (1984), *supra* note 267, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:6615 (a group of lawyers may collectively finance and operate a private referral service which advertises the availability of legal services and refers persons to the participating lawyers provided it is nonprofit, its ads indicate that it is privately operated, and a list of participating lawyers is available on request).

ing or a percentage of the fees generated by the referred clients.<sup>296</sup> Some of these commercial referral services publish what may be called generic legal advertisements designed to alert the public to pervasive legal problems.<sup>297</sup> Or they may simply advertise free referral services, the way bar associations traditionally have done, without advertising specific services or individually named attorneys.<sup>298</sup> This latter practice may violate some bar advertising rules which require that legal advertisements contain the name of a lawyer who is licensed to practice in the state where the advertisement appears and who will be responsible for the performance of the legal services.<sup>299</sup>

Apart from this advertising problem, the ABA Model Code has no provision permitting lawyers to operate or utilize commercial referral services. Disciplinary Rule 2-103(B) states that a lawyer may not compensate another to recommend or secure the lawyer's employment except "that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)."<sup>300</sup> That subsection lists legal aid and public defender offices, military legal assistance offices, and "lawyer referral service[s] operated, sponsored, or approved by a bar association."<sup>301</sup> Referral services not approved or sponsored by a qualified bar association must meet the requirements of DR 2-103(D)(1)-(4). The only reference to "for-profit" organizations which recommend or promote the use of a lawyer's services is found in DR 2-103(D)(4)(a). However, this section of the Model Code addresses organizations

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296 Frank, *An Eye On Ads*, A.B.A. J., June 1984, at 30, describes a legal advertising "cooperative" run by a lawyer in Massachusetts. The lawyer's firm places the ads, screens the calls which come in on the advertised toll-free number, and refers most of them to one of the twenty-five law firms in the region who contribute to an advertising fund. The advertising lawyer keeps about one-third of the cases and splits the fees of forwarded cases. It should be noted that Massachusetts is one of the few states which permits client forwarding fees. The article reports that ABA "staffpersons" said that the ethical status of this kind of for-profit referral service "remains in question under the Model Rules." *Id.* at 31.

297 For example, one law marketing service proposes to run a series of magazine advertisements entitled, "Know Your Legal Rights," relating to various types of personal injury claims. (Material on file with the author.)

298 For example, Lawyer Data, Inc. promises to underwrite broadcast and print advertisements on legal topics and to advertise its free lawyer referral service to the public. For the opportunity to be one of the ten lawyers referred to every inquiring consumer, a lawyer must pay Lawyer Data \$3500 a year. The consumer receives ten lawyers' resumes which indicate the qualifications, experience, and credit arrangements of each. Each lawyer may designate five areas of practice in which she desires referrals. (Materials on file with the author.)

299 See, e.g., TEXAS CODE, *supra* note 51, DR 2-101(B): "A lawyer who publishes, or broadcasts with regard to any area of the law in which he practices must, with respect to each area of the law so advertised, publish or broadcast the name of the lawyer, licensed to practice law in Texas, who shall be responsible for the performance of the legal service in the area of law so advertised."

300 MODEL CODE, *supra* note 3, DR 2-103(B).

301 MODEL CODE, *supra* note 3, DR 2-103(D)(3).

and businesses which recommend, furnish, or pay for legal services for their members, employees, or beneficiaries. Commercial lawyer referral services are not among these kinds of organizations because the referred potential clients are not members, employees, or beneficiaries of the referring entity. Therefore, unless they are approved by a bar association per DR 2-103(D)(3), operating or using such for-profit referral businesses are forbidden by implication.<sup>302</sup>

While the ABA's Model Rules of Professional Conduct abandon the requirement of bar approval for private referral services, the Code's implicit ban on for-profit referral services was not made much more explicit. Rule 7.2(c) states that a lawyer may not give anything of value to anyone for recommending the lawyer's services except the costs of advertising permitted by the Model Rules, and the "usual charges of a not-for-profit lawyer referral service or other legal service organization."<sup>303</sup> The comment to this Rule, entitled "Paying Others to Recommend a Lawyer," elaborates slightly on the phrase "other legal service organization." It states, "This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices."<sup>304</sup>

The comment seems to sanction lawyer cooperation with only two kinds of recommending entities, either nonprofit legal aid agencies, or legal assistance plans which are provided as an incidental benefit of membership in or employment with an organization not founded primarily for the purpose of providing legal services. If this interpretation is correct, then the Model Rules continue to

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302 See Lee, *Lawyer Referral Services: A Regulatory Wasteland*, 37 Sw. L.J. 1099, 1118-20 (1984); ABA Informal Op. 1510 (1985), *supra* note 258, *summarized in* 1 CURRENT REPORTS, *supra* note 14, at 662; Ariz. Op. 85-3 (1985), *supra* note 294, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:1324 (Code requires referral services to operate on a not-for-profit basis); Idaho State Bar Comm. on Ethics Formal Op. 114 (1983), *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:2903 (same); Committee on Ethics of the Md. State Bar Ass'n Op. 83-29 (1982) [hereinafter cited as Md. Op.], *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:4326 (whether a lawyer may accept referrals for a credit counseling company which charges its customers \$250 for referring them to a lawyer depends upon whether the organization meets the requirements for a qualified lawyer referral service in DR 2-103); Mich. Op. CI-862 (1983), *supra* note 57, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:4855 (a lawyer may not operate in a referral service where subscribing lawyers pay a fee to the service unless it is sponsored, operated, or approved by a bar association); N.J. Op. 481 (1981), *supra* note 240, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:5805 (lawyers cannot participate in a referral service sponsored by a for-profit corporation engaged in an advertising program for in-state attorneys who pay a fee initially and an additional monthly fee based upon the volume of referrals); S.C. Op. 84-6 (1984), *supra* note 88, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:7905 (unless approved by the bar, a lawyer may not participate in a free referral service offered by a for-profit magazine publisher).

303 MODEL RULES, *supra* note 17, Rule 7.2(c).

304 *Id.* at Rule 7.2(c) comment.



prohibit for-profit referral services.<sup>305</sup>

In summary, the involvement of "lay intermediaries" in the procurement and representation of clients brings to bear several considerations. Identification of the client and of potential conflicts of interests is crucial where more than one client is represented. The intermediary must not infringe on the lawyer's exercise of independent judgment on behalf of the client. The client-seeking organization must have been created for purposes other than to funnel clients to the lawyer. The organization must be nonprofit,<sup>306</sup> and under the Model Code it must be bar approved. The lawyer must not aid a nonlawyer in the practice of law contrary to state law. And the lawyer or law firm may not share its legal fees with nonlawyers.

#### IV. Promoting Media Exposure

Law firm marketing essentially is an attempt to increase a firm's visibility among all or certain targeted legal services consumers. The public relations experts advise firms to select the areas of law in which they wish to practice, develop an image of competence in those fields, and then expose that image to the relevant law users and business forwarders in a target community.<sup>307</sup> One way of placing that image of competence before the public is to get the firm's name constantly into the media in connection with news items relating to the firm's area of expertise. The goal, of course, is to have the public automatically associate the firm's name with a particular type of legal problem and vice versa. The major methods of obtaining media exposure are press releases, writing for newspapers and magazines, and appearing on radio and television. A related technique is offering or participating in seminars designed to educate the public or other attorneys.<sup>308</sup>

305 Lee, *supra* note 302, at 1120-21; ABA Informal Op. 85-1510, *supra* note 302, held that under the Model Rules a corporation could offer a free private lawyer referral service to those who pay \$75 for a "membership" card. See also N.C. Op. 359, *supra* note 295.

306 The exceptions to the requirement that the organization be nonprofit relate to group legal service plans and insurance companies. See MODEL CODE, *supra* note 3, DR 2-103 (D)(4)(a). A lawyer may be recommended to the members or beneficiaries of an organization, provided that it:

is so organized and operated that no profit is derived by it for the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

*Id.* See generally ANNOTATED CODE, *supra* note 276, at 70-77.

307 See C. GILSON, L. CAWLET & W. SCHMIDT, HOW TO MARKET YOUR LAW PRACTICE 218 (1979) [hereinafter cited as C. GILSON]; Smock, *supra* note 7.

308 This latter form of publicity will be treated in a later section of this article. See text accompanying notes 353-73 *infra*.

### A. *Being in the News*

Lawyers sometimes find themselves in the middle of topical, if not controversial, matters in which news organizations have an interest. Attorneys who represent clients involved in newsworthy litigation such as celebrity divorces, notorious murder cases, important and hostile corporate takeover attempts, and defamation cases between famous persons and national news organizations, to name only a few, are constantly sought out by news reporters for interviews. Of course, the Model Code of Professional Responsibility and the Model Rules of Professional Conduct contain important restrictions on what lawyers involved in civil and criminal litigation may say publicly about ongoing cases.<sup>309</sup> And, of course, any attorney must respect the confidentiality of client information at all times.<sup>310</sup> However, these topics are not within the scope of this article. It is sufficient to note that within those limitations, a lawyer is free to identify herself as an attorney and her relationship to the case in any publicity resulting from a matter the attorney is presently handling.<sup>311</sup>

### B. *News Releases*

The more pertinent question in the context of law practice marketing is whether the lawyer must wait for the news media to come to her, or whether the attorney may initiate media contact. In other words, may the lawyer draw media attention to matters she is handling? A lawyer-generated news release is a public communication. Therefore, it is governed by the same standards which control lawyer advertising, and cannot be false, fraudulent, misleading, deceptive, self-laudatory, or unfair.<sup>312</sup> In short, it must be factual. Beyond this, there are no explicit restrictions on the issuance of news releases.<sup>313</sup> The rule prohibiting a lawyer from compensating representatives of the news media for providing publicity may be relevant at this point.<sup>314</sup> The rationale for this prohibition is not

309 See MODEL CODE, *supra* note 3, DR 7-107; MODEL RULES, *supra* note 17, Rule 3.6.

310 See MODEL CODE, *supra* note 3, DR 4-101; MODEL RULES, *supra* note 17, Rule 1.6.

311 Iowa Op. 80-37 (1980), *supra* note 243, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3602 (lawyer may consent to the use of her name in a television program based upon litigation she handled).

312 MODEL CODE, *supra* note 3, DR 2-101(A).

313 Ill. Op. 763 (1982), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3010-11 (code does not prohibit news releases by lawyers of their attendance at legal seminars). While it could be argued in states that retain the "permissible statements" of the Model Code, *supra* note 3, that news releases are improper if they contain any information not permitted by DR 2-101(B), the constitutionality of this has been undermined by *In re R.M.J.*, 455 U.S. 191 (1983). Nevertheless, news releases still may be prohibitible as self-laudatory in some states. See, e.g., Neb. Op. 80-2 (undated), *supra* note 267, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5501.

314 MODEL CODE, *supra* note 3, DR 2-101(I): "A lawyer shall not compensate or give any

difficult to see. Regular commercial advertising is understood by all to have been purchased by the advertiser. However, a "news item" is not so understood, and the public is deceived if the "news item" has been purchased. The deception is that the public will think that the news organization made an independent judgment that the matter was newsworthy when in fact it did not.<sup>315</sup>

Unlike the Model Code, the Model Rules do not explicitly prohibit giving anything of value to a news media representative in return for publicity. Model Rule 7.2(c) prohibits a lawyer from giving anything of value in return for being recommended for employment. Publishing a news release containing information about a law firm or one of its cases or clients is not literally "recommending the lawyer's services" contrary to Rule 7.2. However, the misleading aspects of a paid-for news item, mentioned above, would result in the prohibition of the practice under the Model Rules' ban on misleading communications.<sup>316</sup>

The traditional anti-advertising philosophy of the legal profession influences its view of the legitimacy of news releases. The Ethical Considerations of the ABA Model Code clearly evince the sentiment that the single legitimating purpose of lawyer advertising is to educate and inform the public. All activity likely to bring a lawyer incidental publicity must not be motivated by the desire for publicity or other personal benefit.<sup>317</sup> This, however, is the primary reason why public relations experts advise the use of attention-getting devices such as news releases.<sup>318</sup> Some authorities have accepted the obvious and held that as long as the news release meets the advertising standards of the jurisdiction, this form of publicity seeking is permissible.<sup>319</sup> It is difficult to argue that even self-serving news releases would not be valuable to the public in helping to identify and select appropriate counsel. The catalog of fears proffered to justify the prohibition of news releases are the same well worn arguments against all lawyer advertising that the Supreme Court rejected in *Bates*.<sup>320</sup> Eventually, the profession will have to

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thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item."

315 N.Y.C. Op. 80-34 (undated), *supra* note 125, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6309.

316 It also could be argued that a paid-for news item which failed to disclose that fact omits a material fact necessary to make the communication not misleading. It would thus violate Rule 7.1(a).

317 See text accompanying notes 179-80 *supra* regarding the rather prevalent belief in the legal profession that lawyer advertising should not be designed or motivated to "attract clients."

318 See, e.g., C. GILSON, *supra* note 307, at 223-25.

319 N.Y.C. Op. 80-34 (undated), *supra* note 125, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6309.

320 The justifications for prohibiting lawyer advertising considered in *Bates* were as fol-

accept the fact that lawyers advertise primarily to attract clients, and only coincidentally to inform the public. It is simply unrealistic to expect that attorneys will spend their hard-earned money to advertise for purely altruistic purposes. Attorneys advertise primarily to benefit themselves professionally, and official bar rhetoric which demands that the primary motivations of advertising attorneys be perfectly aligned with the benefits that the public receives from that advertising is pure window dressing, if not delusional in nature. Any publicity-seeking activity by lawyers, if not harmful to the public, should be allowed.<sup>321</sup>

### C. *Creating Publicity*

The question of the permissibility of news releases can be further refined by asking whether it is proper for an attorney to create the incident or information which is transmitted to news organizations for publication. Certainly lawyers have never just waited for something to occur in their practice before seeking news coverage. Lawyers have always engaged in publicly visible activities, whether civic, charitable, political, or social, on their own initiative. Although this kind of activity may be viewed cynically by some as a form of indirect advertising, it is not impermissible. Nor should there be anything wrong with other methods of creating publicity for one's law practice. As long as there is no impropriety in the production or publicizing of the incident, and as long as it is not harmful to the public, it should not be prohibited.<sup>322</sup>

A good example of how a law firm might create a "media" event is to hold a firm-sponsored seminar.<sup>323</sup> A firm may decide to underwrite, advertise, administer, and participate in a legal seminar designed for the chief executive officers or in-house counsel of potential business clients or client forwarders. The primary purpose of the seminar may be to impress the attendees with the firm's competence in a particular field of law and to obtain their business.<sup>324</sup> It would seem to make little difference whether the law firm sought

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lows: (1) the adverse effect on professionalism; (2) the inherently misleading nature of attorney advertising; (3) the adverse effect on the administration of justice; (4) the undesirable economic effects; (5) the adverse effect on the quality of service; and (6) the difficulties of enforcement. *Bates*, 433 U.S. at 368-79.

321 The legal profession is rather short-sighted in this regard. Citations are unnecessary for the proposition that the profession is not held in high esteem by the public. Press releases which announce the participation of local lawyers in civic and charitable activities could help overcome the image that lawyers do not share enough of the civic responsibilities in their communities.

322 N.Y.C. Op. 80-34 (undated), *supra* note 125, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6309.

323 See text accompanying notes 353-73 *infra* for a further discussion of seminars.

324 See C. GILSON, *supra* note 307, at 229; Smock, *supra* note 7, at 1436. See also ABA Informal Op. 1489 (1982), note 325 *infra*.

to publicize its seminar through newspaper ads, mailed invitations, news releases, or all three methods. And yet, the event would not have occurred unless it was created by the firm. It would be hypocritical for the profession to allow this seminar only when the sponsoring firm denied its motivation to attract clients and claimed that its primary purpose was to educate the business community.<sup>325</sup>

#### D. *Writing and Broadcast Media Appearances*

As a general principle, the profession urges its members to help educate the public regarding legal problems and the legal system.<sup>326</sup> Participation in civic programs, seminars, and lectures designed to assist the public in recognizing legal problems, as well as the preparation of professional articles for lay publications, is encouraged as being among the highest duties of an attorney. However, the profession has at least officially frowned upon these activities when engaged in "to obtain publicity for particular lawyers."<sup>327</sup> Nevertheless, these same activities are recommended by public relations advisers as favored techniques for increasing a lawyer's exposure to potential clients and client forwarders.<sup>328</sup> These activities traditionally have included speaking publicly and writing on legal matters in newspapers and magazines. There is now the analogous activity of appearing on television and radio shows as a regular or occasional guest "legal expert" to discuss law-related topics.<sup>329</sup> Likewise, columns written for newspapers or periodicals may be occasional or regular.<sup>330</sup> Finally, there is the publication of

325 In ABA Informal Op. 1489 (1982), *supra* note 258, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:336, the ethics committee approved a proposed law firm seminar on "qualified" retirement plans offered to accounting and insurance professionals who also served the firm's clients. The inquiring law firm felt constrained to claim that its "primary purpose . . . would be to provide information which will enable the best overall representation of its current client." However, in a refreshing fit of candor, the firm acknowledged that "referrals of new clients to the firm may be generated when other professions also recognize the benefits of the new procedures which will be discussed at the seminar." Does anyone really believe that the former rather than the latter purpose motivated the firm to expend so much of its time and energy? It should not make any difference which is the firm's "primary" purpose. See text accompanying notes 353-70 *infra*.

326 *MODEL CODE*, *supra* note 3, EC 2-1, 2-2.

327 *Id.* at EC 2-2. Cf. *Belli v. State Bar*, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974).

328 Davidson, *Writing and Using Articles*, 26 *LAW OFF. ECON. & MGMT.* 201 (1985). See also articles cited in note 324 *supra*.

329 See text accompanying notes 342-49 *infra*.

330 For example, an advertisement for a law practice marketing seminar entitled "Marketing Secrets Revealed," offered by attorney Lawrence Korn, appeared in *TRIAL*, Oct. 1984, at 25. In his ad, Mr. Korn claims that "you will learn how to obtain thousands of dollars worth of free publicity. [The seminar] will show you how to create your own newspaper column that can generate community awareness and enhance your image as an experienced attorney." *Id.* According to Mr. Korn, his "Ask the Lawyer" newspaper column has appeared in sixty-five newspapers in southeastern Michigan. *Id.*

what looks like a feature article or public interest column on the law, but is really a paid legal advertisement. These articles may be authored by the named attorney or by a lawyer who produces "canned" columns on legal topics and sells them nationally.<sup>331</sup>

There are, no doubt, many lawyers who engage in these speaking and writing activities out of a desire to educate the public or the profession. However, there are also many attorneys who do these things to further their own professional reputations and thereby attract clients either directly or through referrals.<sup>332</sup> Recognizing perhaps the difficulty of proving a lawyer's motivations when speaking or writing publicly, the Model Rules of Professional Conduct do not contain provisions relating to these activities other than the rules relating to advertising. Therefore, only the rules against false and misleading information apply, unless a jurisdiction has retained the proscriptions on "undignified" and "self-laudatory" statements.<sup>333</sup> However, it is likely that the word "misleading" will be broadly interpreted when the public comments of lawyers, either written or spoken, are scrutinized under the Model Rules. No doubt, the guidelines that were worked out under the Model Code will remain intact. A description of some of those guidelines follows.

## 1. Feature Articles

Disciplinary Rule 2-104(A)(4) stated that a lawyer may speak or write on legal topics "so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice."<sup>334</sup> The first caveat was based upon the Model Code's disallowance of solicitation and self-laudatory state-

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<sup>331</sup> ABA Informal Op. 1464 (1980), *supra* note 258, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:311, approved the advertising of a lawyer's "canned" law column subscription service after determining that it would be proper for attorneys to subscribe to the service. The committee's only objection to the use of "canned" newspaper columns on law-related topics purchased from the service was that it would be false and misleading and in contravention of DR 2-101(A) if the purchasing attorney represented that she wrote the article. Otherwise, the committee found no fault with the purchasing attorney's placement of the article together with information identifying the attorney and her practice, as long as the advertisement was dignified and not false, misleading, self-laudatory, deceptive, or unfair.

<sup>332</sup> Speaking and writing for the profession and the public is always mentioned as a valuable "public relations" strategy for lawyers. S. GILLERS, *supra* note 255, at 61; H. SELIGSON, *supra* note 255, at 19; Santangelo, *supra* note 7, at 44; Smock, *supra* note 7, at 1436; Winter, *supra* note 7, at 56.

<sup>333</sup> See ABA Informal Op. 1464 (1980), *supra* note 258, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:311 (lawyer advertisement by means of "canned" law articles in newspapers was approved even though it was assumed that the motivation of the advertising attorney was the promotion of her professional employment by readers).

<sup>334</sup> MODEL CODE, *supra* note 3, DR 2-104(A)(4).

ments.<sup>335</sup> Furthermore, personal publicity was to be strictly confined to the modes and content permitted by DR 2-101(B). The second caveat, regarding individual advice, arose from the concern that individualized legal advice cannot be rendered adequately via the print media or from a lecture podium. Competent legal assistance is not possible until the person with the legal problem fully discusses the peculiar circumstances of her case with the attorney.<sup>336</sup> When a lawyer recommends a solution to a legal problem to a general listening or reading audience, members of the audience may be misled into believing that the recommended solution applies equally to their individual problems which may be similar in appearance only.<sup>337</sup> Thus, it is generally advised that speakers and writers on legal problems must caution their audience not to attempt to solve individual problems on the basis of the information supplied.<sup>338</sup>

The ABA's DR 2-101(H)(5) permitted a "limited and dignified identification of a lawyer as a lawyer as well as by name . . . on . . . legal publications." This has been interpreted as permitting a lawyer to identify both herself and her firm in a column on legal topics written for a business magazine.<sup>339</sup> However, it has been held improper for an attorney to request the readers of her newspaper column to direct specific questions to her office.<sup>340</sup> Absent this direct solicitation of clients, it is perfectly proper for an attorney who writes or speaks on legal matters to accept as a client someone who came to her as a result of hearing the lawyer or reading her work.<sup>341</sup>

335 MODEL CODE, *supra* note 3, EC 2-2, 2-8.

336 See N.Y.C. Op. 80-8 (undated), *supra* note 125, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6303-04.

337 MODEL CODE, *supra* note 3, EC 2-5: "[S]light changes in the fact situations may require a material variance in the applicable advice; [thus] the public may be [misled] and misadvised."

338 *Id.* Mich. Op. CI-797 (1982), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4847, "suggests" that the attorney-author of a newspaper column on general legal topics attach thereto a disclaimer stating that "the advice given is general and readers should direct specific inquiries to their own attorneys." The same ethics opinion held that the author of the column could not request readers to direct their questions to the author's law office. See also Ethics Comm. of the State Bar of Montana Op. 14 (1980) [hereinafter cited as Mont. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5402; Va. Informal Op. 410 (1983), *supra* note 294, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:8805.

339 N.J. Op. 477 (1981), *supra* note 240, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5804. See also ABA Informal Op. 1464 (1980), *supra* note 258, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:311; Mont. Op. 14 (1980), *supra* note 338, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5402; Ill. Op. 763 (1982), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3010.

340 Mich. Op. CI-797 (1982), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4847.

341 "Without affecting his right to accept employment, a lawyer may speak publicly or

## 2. Broadcast Media Appearances

Many of the concerns and restrictions which pertain to writing and lecturing on legal matters apply equally to radio and television appearances by lawyers. Thus, a New Jersey ethics panel advised that, while a lawyer may appear as a guest panelist on a television program and answer legal questions from the audience, the lawyer must advise the audience that the answers given are not a complete analysis and that further legal advice should be sought.<sup>342</sup> However, the ethics opinion went on to hold that the additional advice could not be supplied by the appearing attorney. It reasoned that because the only legitimate purpose of such an appearance would be to promote the public's understanding of the law, the lawyer may not benefit from it. Thus, the attorney could not be retained by one member of the audience.<sup>343</sup>

An Oregon ethics committee advised that a lawyer may appear on a weekly television show and give five minute lectures on a general legal topic.<sup>344</sup> The committee went on to say that the attorney may identify himself, but not his law firm, because to do so would amount to impermissible solicitation and improper advertising. The attorney was prohibited from emphasizing his own professional experience or reputation on the air. The panel concluded that because a television appearance which met these guidelines was permissible advertising, the lawyer could accept employment generated by it. It should be noted that in this latter case, as distinct from the New Jersey case, the lawyer was not directly addressing problems raised by members of the audience. Therefore, there was little danger of direct in-person solicitation by the attorney.<sup>345</sup>

Appearing on the broadcast media to discuss a legal topic of current public interest, such as bankruptcy, could violate the restrictions on holding oneself out as a specialist.<sup>346</sup> A lawyer who is

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write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice." MODEL CODE, *supra* note 3, DR 2-104(A)(4).

342 N.J. Op. 481 (1981), *supra* note 240, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5805.

343 *Id.* See also N.Y.C. Op. 80-8 (undated), *supra* note 125, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6303 (radio); Legal Ethics Comm. of the Dallas Bar Ass'n Op. 1980-5, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:8402.

344 Ore. Op. 465 (1981), *supra* note 104, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:7108.

345 Conn. Informal Op. 82-13 (1981), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2056, made the point that where a lawyer was the host of a radio talk show pertaining to the law, any advertisements for the host's law firm should not include the host's voice or laudatory statements or endorsements of the host-lawyer. Apparently, the committee felt that it would be an unfair advantage for the host's law firm to be able to "trade on" the host's popularity as a radio personality.

346 See Miss. Op. 74 (1982), *supra* note 87, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5103; MODEL CODE, *supra* note 3, DR 2-105(A): "A lawyer shall not hold himself out



to appear on a news program should take appropriate precautions to avoid being introduced as a specialist, unless she is certified as such by the bar. If she is certified, she should be introduced only in terms of the mandatory certification language, if any, adopted in that jurisdiction. If the attorney is not certified, or the jurisdiction has no certification procedures, it would be prudent for the attorney to be introduced only as one who "practices" in the field of law under discussion.<sup>347</sup>

Finally, where a jurisdiction permits television and radio advertising, it is often permissible for a lawyer to broadcast a short talk on a general legal topic and identify herself and the location of her office.<sup>348</sup> These bear a strong resemblance to the "canned" legal newspaper column, because they appear to be public service announcements when they are really paid advertisements. Of course, the permissibility of these kinds of advertisements in any jurisdiction depends on how strictly radio and television advertisements are regulated.<sup>349</sup>

### 3. Endorsement of Commercial Products

In 1974, attorney Melvin Belli was suspended from the practice of law for sending out press releases announcing his annual tort seminar and for endorsing a brand of scotch whiskey in a magazine advertisement.<sup>350</sup> Today, one can turn on the television and see attorney Louis Nizer rhapsodizing about a nationwide courier service. However, it should not be assumed that the *Bates* decision caused a formerly prohibited practice to become permissible. In 1982, the Ethics Committee of the Mississippi State Bar ruled that a law firm could not permit the use of its name in a business journal ad placed by an office equipment supplier showing that the law firm

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publicly as a specialist, as practicing in certain areas of law or as limiting his practice . . . ,” except as prescribed by the rules of the bar authority, if any, governing specialization.

347 But being introduced as a lawyer who "practices" in a certain area of the law appears to violate DR 2-105(A)(2) if the lawyer is not officially certified as a specialist or if there is no certification available in the given field. MODEL CODE, *supra* note 3, DR 2-105(A)(2) states: "A lawyer who publicly discloses fields of law in which the lawyer . . . practices . . . shall do so by using designations . . . authorized . . . by [the agency having jurisdiction of the subject under state law]." This rule is a ridiculous quibble. To say that one "practices" in a field of law, if true, is not misleading and makes the least possible claim of specialization, if at all. Sensibly, the Model Rules jettison this restriction: "A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law." MODEL RULES, *supra* note 17, at Rule 7.4.

348 Iowa Op. 82-6 (1983), *supra* note 243, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3609; Kan. Op. 83-14 (1983), *supra* note 117, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3815.

349 See text accompanying notes 194-214 *supra*.

350 *Belli v. State Bar*, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974).

was a customer.<sup>351</sup> The Committee noted that this situation did not fit within any of the exceptions to the general prohibition against law firm publicity. On the other hand, in the same year, the Ethics Committee of the Kentucky Bar held that a lawyer may publicly endorse commercial products, provided that the advertisements are professional, dignified, and contain no self-laudatory statements.<sup>352</sup>

The difference of opinion between Kentucky and Mississippi may turn on whether the specific code provision on lawyer advertising is couched in terms of prohibiting, except as permitted, a lawyer from publicizing herself or her firm, or in terms of advertising her services. Endorsing products may be seen as seeking publicity, but not as advertising legal services. The permissibility of product endorsements may also hinge on whether the state code in question adopts a "safe harbor" laundry-list approach toward permitted advertising as opposed to the open-ended approach which permits all but false and misleading advertising. Because the ABA Model Rules adopt the latter position and omit the ban on self-laudation, it would seem to allow product endorsements by lawyers.

#### E. *Speaking at Seminars and Conferences*

As previously mentioned, a recommended method of attaining increased visibility in a chosen legal field is to speak at seminars and conferences. On these occasions, speakers have a prime opportunity to impress attending consumers of legal services and client-referring lawyers with their erudition, if not just with their names and faces.<sup>353</sup> The Model Code of Professional Responsibility, in its zeal to encourage lawyers to assist in educating the public about the law, fosters such activity by removing a large disincentive. The Model Code permits an attorney to accept employment resulting

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351 Miss. Op. 77 (1982), *supra* note 87, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:5104.

352 Ky. Op. E-260 (1982), *supra* note 246, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3906.

353 [The marketing company's] strategic planning division helps law firms "target new market segments" . . . [by identifying] companies in a geographical area that do business in a lawyer's area of expertise. It then will contact a particular company to learn its needs, who its current counsel are and whether they would benefit by attending a law firm seminar in a particular area of interest to the company. Winter, *supra* note 7, at 57.

An example of an attempt by a law firm to establish itself as a nationally recognized specialist in mass tort litigation by the use of seminars can be seen in the legal newspaper advertisements by the Minneapolis firm of Robins, Zelle, Larson & Kaplin. The full page ad in *The National Law Journal* of September 24, 1984, at page 59, entitled, "The Bomb In The Boardroom," offered "an incredibly stimulating and invaluable experience" for lawyers interested in learning how to handle litigation involving defective products, harmful chemicals, and toxic wastes. Robins, Zelle modestly noted in this ad that, "[W]e've had considerable experience in mass tort litigation, [b]ut we certainly don't have all the answers."

from public speaking engagements as long as the lawyer did not "emphasize his own professional experience [or] . . . give individual advice."<sup>354</sup> Accepting employment under this circumstance does not violate the ban on accepting employment from one to whom the lawyer has given unsolicited, in-person legal advice.<sup>355</sup>

The ABA's Standing Committee on Ethics and Professional Responsibility ruled in a 1982 informal opinion<sup>356</sup> that a law firm could conduct a seminar for accountants and insurance professionals who also served the firm's current clients. Although the firm candidly admitted that referrals of new clients to the firm might result from giving the seminar, the Committee said that the seminar would be proper as long as the firm did not use it as an opportunity to solicit employment directly, and the firm neither had nor contemplated any financial or reciprocal referral arrangements with the speakers or attendees. Several state ethics committees have reached the same conclusion as the ABA Committee.<sup>357</sup>

Ohio, on the other hand, reached a contrary result regarding the propriety of a law firm accepting employment from prospective clients as a result of holding a seminar. Ohio's version of DR 2-104(A)(2) closely resembles the ABA counterpart. This provision prohibits a lawyer from accepting employment from a layperson to whom he has given unsolicited legal advice except where that employment "results from his participation in activities designed to educate laymen . . . if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D)."<sup>358</sup> The offices and organizations enumerated in DR 2-103 do not include a private, for-profit law firm. Therefore, the Ohio Committee on Legal Ethics and Professional Conduct held that a law firm

354 MODEL CODE, *supra* note 3, DR 2-104(A)(4). See note 341 *supra*.

355 MODEL CODE, *supra* note 3, DR 2-104(A).

356 ABA Informal Op. 1489 (1982), *supra* note 258, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:336.

357 For example, a Massachusetts ethics opinion advised that a lawyer may provide a seminar for local union members on Workers' Compensation Law even where the intent of the seminar was to generate business for the lawyer. As long as neither the lawyer nor anyone on his behalf recommended employment of the lawyer, and if the seminar and its advertising contained no deception, the offering of and participating in the seminar by the lawyer was not improper. Ethics Comm. of the Mass. Bar Ass'n Op. 83-4 (1983) [hereinafter cited as Mass. Op.], summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4607. See also Chicago Op. 82-1 (1982), *supra* note 92, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3202; Conn. Informal Op. 84-8 (1984), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2064; Ill. Op. 727 (1981), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3007; Advisory Comm., Mo. Bar Admin. Informal Op. 5 (1980), summarized in LAWYER'S MANUAL, *supra* note 10, at 801:5251; Md. Op. 81-36 (1981), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4309. *But cf.* Ill. Op. 679 (1982), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3003 (lawyer attending union meetings to answer questions on any topic in anticipation of future employment therefrom is engaged in unlawful solicitation).

358 OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A)(2) (1975).

which participates in a legal education seminar may not accept employment from attendees who are not clients, former clients, friends, or relatives.<sup>359</sup>

Given the nearly identical language of the Ohio and the ABA Model Code provisions on this point, the question arises how the ABA and Ohio Committees could have reached opposite conclusions. In Informal Opinion 1489, the ABA Committee completely ignored DR 2-104(A)(2). Indeed, that code provision was not even cited in the opinion. The ABA Committee began by acknowledging that, "A law firm could not properly have served as the sole sponsor of a seminar program for laymen under the original version of the Model Code." This conclusion was reached, however, not by looking at DR 2-104, but by examining the history of Ethical Consideration 2-2. The original version of EC 2-2 urged participation in legal education programs for the public by lawyers "acting under proper auspices."<sup>360</sup> The Committee then noted that in 1977, in response to the *Bates* decision, EC 2-2 was amended to delete the "under proper auspices" phrase. However, the Committee failed to note that the parallel Disciplinary Rule, DR 2-104(A)(2), had not been amended, and continued to require that the educational activities giving rise to the employment of the lawyer be "conducted or sponsored by a qualified legal assistance organization."<sup>361</sup> Nevertheless, the Committee concluded that the amendment to EC 2-2 meant that since 1977, "a bona fide educational program may be conducted by a lawyer or law firm without the requirement that an outside sponsor be obtained for the program."<sup>362</sup>

It may be argued that the ABA Committee did not need to refer to DR 2-104 because it was focusing only on whether a law firm may be the sole sponsor of a legal seminar, rather than whether the firm may accept employment offers resulting from it. The seminar was not designed to attract an audience of prospective lay clients, but of potential business forwarders.<sup>363</sup> Therefore, since the firm was not giving unsolicited legal advice to lay persons who might

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359 Comm. on Legal Ethics and Professional Conduct, Ohio St. Bar Ass'n Op. 36 (1981), summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:6801. Under the language of DR 2-104(A)(1), a lawyer may offer in-person, unsolicited advice to, and accept employment from "a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." MODEL CODE, *supra* note 3.

360 MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-2 (1969).

361 MODEL CODE, *supra* note 3, DR 2-104(A)(2). The phrase "qualified legal assistance organization" is defined in the unnumbered "Definitions" section of the Model Code as "one of the four types listed in DR 2-103(D)(1)-(4), inclusive, that meets all the requirements thereof." MODEL CODE, *supra* note 3. A private law firm would not qualify under DR 2-103(D).

362 ABA Informal Op. 1489 (1982), *supra* note 258.

363 The inquiring law firm acknowledged that "referrals of new clients to the firm may be generated" by the seminar. *Id.*

seek to employ it, it was not prohibited by DR 2-104(A) from accepting referrals. And because the law firm did not intend to directly solicit referrals at the seminar, it would not violate DR 2-103(C) which prohibited lawyers from requesting others to recommend their employment. While this argument may be logical, it is not convincing given the plain language of DR 2-104(A)(2).

Nevertheless, Informal Opinion 1489 stands as the ABA's final word on this subject under the Model Code, and it signals the acceptance of law-firm sponsored legal seminars for persons other than clients and other lawyers. This position has been accepted in some of the states.<sup>364</sup>

Under the Model Rules, a lawyer may not engage in in-person solicitation of anyone, except family members and former clients, if a significant motive is the lawyer's pecuniary gain.<sup>365</sup> The commentary to Model Rule 7.3, which prohibits solicitation, implies that addressing a lay audience at a seminar is not solicitation.<sup>366</sup> The comment is replete with descriptions of prohibited solicitation as being "a direct interpersonal encounter," "direct private contact," and the "private importuning" of professional employment. However, this is not to say that a lawyer may directly and explicitly solicit clients from the podium at a conference. This could amount to solicitation by in-person contact where the audience includes prospective clients and a significant motive for the solicitation is the lawyer's pecuniary gain. Although such a situation may not be, to quote the comment again, "fraught with the possibility of undue influence, intimidation, and over-reaching," any such blatant behavior would, no doubt, catch the interest of the local bar disciplinary committee.<sup>367</sup>

It should be noted at this point, however, that the Model Rules have eliminated the Model Code's prohibition of lawyers "requesting" third parties, as opposed to compensating them, to recommend their employment to others.<sup>368</sup> And the Model Rule against

<sup>364</sup> See note 357 *supra*.

<sup>365</sup> MODEL RULES, *supra* note 17, Rule 7.3.

<sup>366</sup> Of course, the speaker may not make any false or misleading statements, or hold herself out as a specialist, except as permitted. See MODEL RULES, *supra* note 17, Rule 7.4.

<sup>367</sup> Compare Mass. Op. 83-4 (1983), *supra* note 357, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4607 with Ill. Op. 679 (1982), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3003, where the Illinois committee advised that a lawyer could not attend union meetings to answer member's questions on legal matters because the lawyer would be initiating in-person contact with prospective clients motivated by his own pecuniary interest. A later Connecticut ethics opinion stated that persons who voluntarily attend a public seminar on legal topics given by lawyers are soliciting legal advice from the seminar speakers. Therefore, the opinion concluded, the lawyers could offer a seminar on bankruptcy for the general public and accept employment from anyone who attends. Conn. Informal Op. 84-8 (1984), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2064.

<sup>368</sup> MODEL CODE, *supra* note 3, DR 2-103(C).

solicitation applies only to the direct solicitation of "prospective clients."<sup>369</sup> There does not appear to be any prohibition in the Rules of direct, in-person solicitation of client referrals from potential business forwarders such as other lawyers and business acquaintances who have clients in need of legal services. Under the Model Rules, therefore, lawyers holding seminars directed only to these kinds of professionals may be quite explicit in their requests for referrals.<sup>370</sup>

### 1. Advertising Legal Seminars

Bar committees have advised that a law firm interested in sponsoring a seminar may solicit expressions of interest in the seminar by mail.<sup>371</sup> Presumably, the firm at a minimum may advertise the seminar in the same ways in which a lawyer may advertise her own services. All of the restrictions which apply to lawyer advertising in general also apply to the advertising of a legal conference or seminar. Therefore, if the rules on lawyer advertising preclude undignified formats or self-laudatory statements, seminar ads must hew to those standards.<sup>372</sup> Of course, the advertisements may not contain false or deceptive claims.<sup>373</sup> Finally, seminar brochures containing biographical sketches of the seminar faculty must conform with the rules regarding the holding out of a lawyer as a specialist or expert.

## V. Civic Activities

The traditional position of the legal profession toward its members' participation in civic activities, and its response to those who suggest that such activities are merely a form of indirect advertising, is best stated by Henry Drinker in his famous book on legal ethics.<sup>374</sup>

When a lawyer has the opportunity to perform a service to the community which will place him in the public eye, he need not hesitate to seek or accept it because if successful he will appear frequently in the news papers, and will enlarge his circle of friends and acquaintances and thus attract new clients. . . . Where publicity is the normal by-product of able and effective

369 MODEL RULES, *supra* note 17, Rule 7.3.

370 However, for a discussion of the potential conflict of interests problems which may inhere in the solicitation of referrals, see text accompanying notes 458-80 *infra*.

371 Chicago Op. 82-1 (1982), *supra* note 92, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3202; Ill. Op. 727 (1981), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3007.

372 Ill. Op. 796 (1983), *supra* note 119, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3013, advised that advertising door prizes and free refreshments to those who attended a legal seminar was not dignified.

373 Mass. Op. 83-4 (1983), *supra* note 357, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4607.

374 H. DRINKER, LEGAL ETHICS (1953).

service, whether of a professional or non-professional character, this is a kind of "advertisement" which is entirely right and proper. Clients naturally gravitate to a lawyer who has successfully represented their friends or who has obtained the confidence of the community by effective public service.<sup>375</sup>

This recognized, and sanctioned, potential of civic work to attract new legal clients is, of course, one major reason why lawyers do it,<sup>376</sup> and the only reason why public relations experts advise that lawyers spend time doing it.<sup>377</sup> It is well known that law firms often have partners who are socially prominent due to their civic, charitable, or political activities. They may do little legal work; their job is to bring in new clients. They are the "rainmakers," and any law firm's credo includes the beatitude, "Blessed are the rainmakers, for they shall bring prosperity."

The view expressed by Henry Drinker in 1954 has not changed. Disciplinary Rule 2-101(H) of the Model Code of Professional Responsibility permits a lawyer who is a director or officer of a "business, civic, professional, or political organization" to be identified as a lawyer in public reports or announcements by the organization. It was ruled in ABA Informal Opinion 1488<sup>378</sup> that a lawyer may use his law firm stationery in connection with charitable work.<sup>379</sup> For those looking for ways of increasing law firm visibility, the question is how far a lawyer or firm may properly go to publicize its pro bono civic work.<sup>380</sup>

Although the Ethical Considerations of Canon 2 do not directly address publicity in connection with noneducational civic work, their tone implies that a lawyer should never seek personal aggrandizement from such activity.<sup>381</sup> However, ABA Informal Opinion 1490<sup>382</sup> overruled prior contrary opinions when it held that a publication of general circulation could list the names of law-

<sup>375</sup> *Id.* at 218.

<sup>376</sup> In Saltman and Herman, *A Client Development Checklist*, A.B.A. J., Jan. 1985, at 80, the following client development "ideas" are presented: join a civic organization; become active in a charitable organization in your community; attend a PTA meeting and speak about an issue being debated; attend a local board of health meeting to voice your praise and support; and offer to be a member of a board or committee in your town. See also authorities cited in note 7 *supra*.

<sup>377</sup> See V. MORIN, *HOW TO MAKE MONEY PRACTICING LAW* 24 (1977); J. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* 5-7 (1947).

<sup>378</sup> Issued on Jan. 25, 1982, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:335.

<sup>379</sup> *Accord* Md. Op. 81-78 (1981), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4313.

<sup>380</sup> See text accompanying notes 312-21 *supra* for a discussion of news releases.

<sup>381</sup> "[P]articipation in . . . civic programs should be motivated by a desire to educate the public . . . rather than to obtain publicity for particular lawyers." MODEL CODE, *supra* note 3, EC 2-2. H. DRINKER, *supra* note 374, at 218: "What is wrong is for the lawyer to augment by artificial stimulus the publicity normally resulting from what he does [in service to the community], seeing to it that his successes are broadcast and magnified."

<sup>382</sup> Issued on Jan. 25, 1982, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:338.

yers and law firms which had contributed to a charity. Similarly, a 1981 Iowa ethics opinion permitted the identification of a law firm as a sponsor of a public television broadcast.<sup>383</sup> These opinions are difficult to reconcile with Ethical Considerations 2-2 and 2-3.

The ABA's Model Rules have no provisions or commentary which address indirect advertising resulting from civic and political activity. It can be argued that the standards of Rule 7.2 governing lawyer advertising do not apply to publicity arising from nonprofessional activity. The Rule applies only to advertisements of the lawyer's legal services. But Rule 7.1 applies more broadly, and under it, a lawyer cannot permit a false or misleading "communication" to be made about herself.<sup>384</sup> With the Model Rules' omission of the Model Code's ban on self-laudatory and undignified public statements, however, there would seem to be no reason why a law firm could not issue news releases about its members' civic activities. Of course, while engaged in civic activities, an attorney must comply with the ethical rules regarding direct solicitation.

## VI. Direct Solicitation of Prospective Clients

As lawyers thrust themselves into situations inviting contact with prospective clients, they are required to tread a fine line between "rainmaking" and impermissible solicitation. On one side of that line is the long-standing and continuing ban on seeking professional employment directly and personally from potential clients.<sup>385</sup> On the other side is the rainmaker's "art" of moving a new acquaintance from the introductory handshake, to setting up an appointment to discuss the acquaintance's nagging legal problem.<sup>386</sup> A lawyer is not required to conceal the fact that she is a lawyer as she moves through her daily activities. Nor is a lawyer prohibited from accepting as clients persons who, on learning that they have met a lawyer, initiate queries about their legal problems. The Code does prohibit the acceptance of employment from a layperson to whom the lawyer has given "in-person unsolicited [legal] advice,"<sup>387</sup> and the lawyer's recommendation of self-employment to a layperson

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383 Iowa Op. 81-36 (1981), *supra* note 243, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:3608.

384 Rule 7.1, in part, reads: "A lawyer shall not make false or misleading communications about the lawyer or the lawyer's services." *MODEL RULES*, *supra* note 17.

385 See *MODEL CODE*, *supra* note 3, DR 2-103(A), 2-104(A); *MODEL RULES*, *supra* note 17, Rule 7.3.

386 What rainmakers do so well is move a conversation with a prospective client quickly to the next step: setting a date for a meeting with the other person. A lawyer can request the person's business card and offer to make a follow-up call or can suggest to "get together next Monday" without crossing the ethical line into solicitation.

Smock, *supra* note 7, at 1434.

387 *MODEL CODE*, *supra* note 3, DR 2-104(A).



“who has not sought his advice regarding employment of a lawyer.”<sup>388</sup> Thus, if legal advice is solicited by the layperson, or the layperson seeks the lawyer’s advice about obtaining legal services, even at a cocktail party, the lawyer may offer her services and accept any resulting employment.

Under the Model Rules of Professional Conduct, a lawyer may not solicit employment “by mail, in-person or otherwise”<sup>389</sup> from a prospective client with whom the lawyer has no family ties or who is not a former client.<sup>390</sup> The Rules have no provisions identical to DR 2-103(A) and 2-104(A), but it may be assumed that the term “solicit” as used in Model Rule 7.3 would not preclude what was permitted under the Model Code. It would be proper under the Rules for a lawyer to offer her professional services to a layperson who had sought the lawyer’s advice on a legal matter or on the selection of a lawyer. But under both the new Rules and the superceded Code, an attorney may not initiate discussion with a layperson regarding whether the layperson should hire the attorney to represent her.<sup>391</sup>

#### A. “Cold Calls”

The continued ban on solicitation of prospective clients by lawyers, and the failure of the Code or the Rules to exempt businesses from this ban, calls into question one of the marketing techniques discussed in the recent literature. This is the “cold call.”<sup>392</sup> It is discussed, but not often recommended. However, the reason given for this failure to recommend the cold call on prospective clients has nothing to do with its ethical dubiousness. Rather, its effectiveness is doubted.<sup>393</sup> In any event, there can be little justification for

388 MODEL CODE, *supra* note 3, DR 2-103(A).

389 MODEL RULES, *supra* note 17, Rule 7.3.

390 This is one of the few areas where the Rules are stricter than the Code. The Code permitted a lawyer to give unsolicited advice to, and accept resulting employment from, “a close friend” also. MODEL CODE, *supra* note 3, DR 2-104(A)(1). Rule 7.3 omits “friends” from the list of those who may be directly solicited by a lawyer. MODEL RULES, *supra* note 17.

391 When the lawyer-initiated contact and solicitation are in-person, it is clearly prohibited by the Code and Rules. However, when the contact is by mail, the answer is a bit troublesome. *See* text accompanying notes 397-440 *infra*. There should be a distinction made between the in-person solicitation of laypersons who are vulnerable or naive about the law and legal services and the personal solicitation of businesspersons experienced in dealing with lawyers. This distinction is beginning to gain adherents in the context of direct mail solicitation. *See* text accompanying notes 477-79 *infra*. There seems to be little danger of attorney overreaching where the lawyer visits a business office and makes a sales pitch to the executive in charge.

392 The author has never seen a definition of the “cold call,” but it seems to refer to the practice of calling on a prospective client with whom the lawyer has had no previous contact. The call could be in person or by telephone. *See* note 393 *infra*.

393 Morgan, *supra* note 7, at 60: “Creating the opportunity to present the capabilities of your firm to a potential client is probably the most difficult step in the process.” The cold

the cold call under the Code or the Rules. Whether the contact with the previously unrepresented businessperson is made by telephone or in-person, the contact is clearly improper where the lawyer initiates the contact for the purpose of obtaining employment which could result in the lawyer's pecuniary gain.<sup>394</sup> However, under the Model Rules and the developing law surrounding the use of direct mail solicitation, lawyers may be able to initiate employment-seeking contacts with potential clients by mail where the employment sought does not relate to a specific occurrence which has created an immediate need for services of the kind the lawyer offers to provide.

### B. *Direct Mail Solicitation*

Perhaps the fiercest battle on the professional ethics scene today concerns whether lawyer advertisements and more direct forms of solicitation may be mailed to targeted groups of individuals. Many state ethics codes, based upon the ABA's Model Code, contain no reference to advertising by mail. The version of DR 2-101(B) in existence when the Code was superceded by the Model Rules allowed a lawyer to "publish [the permitted information] . . . in print media" distributed in the geographical area where the law-

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call is unlikely to interest a busy corporate counsel who receives many of these approaches. The potential ethical problems associated with cold calls are mentioned in Winter, *supra* note 7, at 58:

Using third-party referral sources can be a successful technique for making rain, and it avoids the ethical problems that might arise were an attorney to make direct contact with the potential client. "We don't do cold calls because of the ethical problems related to it and because they're usually not received well," said Calkins, Kramer's [John] Tipton.

394 The Code does not mention telephone contacts. However, the Model Rules equate them with in-person contact. MODEL RULES, *supra* note 17, Rule 7.3. State ethics opinions have reached the same result. See, e.g., Md. Op. 83-93 (1983), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4333; N.Y.C. Op. 80-44 (undated), *supra* note 125, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6311; Philadelphia Op. 81-68 (undated), *supra* note 245, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:7518; Wis. Op. E-83-16 (1983), *supra* note 88, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:9110; Woll v. Kelley, 116 Mich. App. 791, 323 N.W.2d 560 (1982). A Maryland lawyer inquired of her bar's ethics committee whether it would be proper to use "tele-robotics," whereby a computer would dial every telephone number within the vicinity of her office and deliver a recorded twenty-second message informing the listeners of the location of the law office and offering brochures on various legal topics. The computer would ask interested listeners to leave their name, address, and telephone number. The committee concluded that this was closer to direct mail advertising than to in-person solicitation and permitted it to the extent that they permitted direct mail advertising, but noted that tele-robotics may be more intrusive than mail. Md. Op. 85-17 (1984), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4350. It should be noted that at least four jurisdictions now allow direct solicitation of prospective clients under limited circumstances. They are the District of Columbia, New Jersey, North Carolina, and Virginia. See, e.g., N.J. RULES, *supra* note 57, Rule 7.3; VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (1983) [hereinafter cited as VA. CODE]. Thus, in these jurisdictions, telephone contacts would be permitted to the same extent.

yer works or resides.<sup>395</sup> "Print media" was obviously a reference to newspapers and magazines. Disciplinary Rule 2-103(A) prohibited a lawyer from recommending employment of herself to one who had not sought her advice except as authorized by DR 2-101(B). The only Code provision which mentioned distributing information by mail was DR 2-102(A)(2). It limited those matters which could be mailed to "brief professional announcement card[s] stating new or changed associations or addresses, change of firm name, or similar matters."<sup>396</sup> These cards could be mailed only to lawyers, clients, former clients, personal friends, and relatives. Therefore, even after the Model Code of Professional Responsibility was amended to comply with the *Bates* decision, lawyers were left in the anomolous position of being able to publish the information permitted by DR 2-101(B) in a newspaper, but not being allowed to mass mail that same advertisement to neighboring residences and businesses.

It is clear that much of the opposition to direct mail advertising was, and still remains, based on the view that contacting a prospective client by mail is the equivalent of in-person solicitation.<sup>397</sup> In 1978, however, the United States Supreme Court decided *Ohralik v. Ohio State Bar Association*,<sup>398</sup> which articulated the dangers that justified the prohibition of in-person solicitation. This focusing on in-person solicitation had the effect of bringing into sharp contrast the fundamental differences between direct mail and in-person solicitation. After *Ohralik*, it became clear to many states that mailing of lawyer advertisements carried few of the dangers that accompanied in-person contacts.

In the *Ohralik* case, an attorney was disciplined for visiting two automobile accident victims shortly after the incident and successfully persuading them to hire him to represent them. One eighteen-year-old woman victim was alone in the hospital when Ohralik visited her. He approached the other woman at her home although she had not invited him to speak to her.<sup>399</sup> The Court held that the states had a legitimate interest in protecting the public from transactions where there is a danger of fraud, undue influence, intimidation, overreaching, or other vexatious conduct.<sup>400</sup> The Court concluded that the in-person solicitation of laypersons

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395 MODEL CODE, *supra* note 3, DR 2-101(B).

396 MODEL CODE, *supra* note 3, DR 2-102(A)(2).

397 *Allison v. Louisiana State Bar Ass'n*, 362 So. 2d 489 (La. 1978); *Florida Bar v. Schreiber*, 407 So. 2d 595 (Fla. 1981), *vacated*, 420 So. 2d 599 (Fla. 1982); *Ariz. Op. 83-20* (1983), *supra* note 294, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:1319; *S.C. Op. 83-09* (1983), *supra* note 88, *summarized in* 1 CURRENT REPORTS, *supra* note 14, at 279.

398 436 U.S. 447 (1978).

399 *Id.* at 449-51.

400 *Id.* at 462.

by lawyers presented many of these dangers. It pitted a lawyer trained in persuasion against a layperson in a situation which "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."<sup>401</sup> In this face-to-face encounter, the Court continued, "there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual."<sup>402</sup> In ruling that the state may properly institute a prophylactic prohibition on in-person solicitation,<sup>403</sup> the Court took particular notice of the fact that the persons solicited by *Ohralik* were "unsophisticated, injured, or distressed laypersons."<sup>404</sup>

*Ohralik* can be read narrowly to mean that states may ban only the in-person solicitation of unsophisticated, injured, or distressed laypersons because they are particularly vulnerable to the blandishments of trained advocates. This reading would permit, however, the in-person solicitation of undistressed, sophisticated businesspersons, and perhaps all non-vulnerable laypersons. It is argued, however, that the dangers arising from the lack of time to reflect and seek other advice inheres in a face-to-face encounter, regardless of who is being solicited. Consequently, *Ohralik* is read more broadly to mean that all in-person solicitations are prohibitable no matter who the prospective client is or what her mental or physical condition may be. This latter meaning is the most widely held and reflects the position of the ABA's Model Rules of Professional Conduct.<sup>405</sup>

But what if the solicitation does not involve a face-to-face encounter between the lawyer and the potential client? What if the solicitation of employment is mailed to the layperson's home or business? The pressure for an immediate response, the lack of time to reflect and reconsider the offer after seeking other advice, the potential for intimidation and overreaching, and the inability of others to intervene are greatly reduced, if not absent. Thus, mailed

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401 *Id.* at 457.

402 *Id.*

403 The Court held that no actual overreaching or injury need be shown to justify the prohibition and the imposition of punishment for its violation. The state interests in eliminating situations which are "inherently conducive to overreaching and other forms of misconduct," 436 U.S. at 464, outweigh the public's interest in obtaining information about legal rights in this manner. *Id.* at 464-68.

404 *Id.* at 465. *Ohralik* conceded in his brief that "solicitation that is superimposed upon the physically or mentally ill patient, or upon an accident victim unable to manage his legal affairs, obviously injures the best interests of such a client." *Id.* at 466 n.27.

405 MODEL RULES, *supra* note 17, Rule 7.3, reads in part: "A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person, or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." See text accompanying notes 389-91 *supra*.

solicitations should not be prohibited altogether as in-person contacts may be. Or so it would seem. Nevertheless, several courts have held that direct mail advertising is prohibitable by the states on the same basis as in-person solicitation.<sup>406</sup> This questionable position seems to be the minority rule, however, and should wither on the vine following the United States Supreme Court opinion in *In re R.M.J.*<sup>407</sup>

The Missouri attorney in *R.M.J.* had just opened a solo practice and mailed an announcement of that fact to persons in his community. Some of the addressees were not among those to whom the state code of ethics permitted professional announcements to be sent. Like the ABA Model Code, Missouri's code permitted announcements to be sent only to "lawyers, clients, former clients, personal friends, and relatives."<sup>408</sup> The Court reversed the Missouri Supreme Court's finding that the lawyer was properly subject to discipline for these mailings. In an opinion by Justice Powell, the absolute prohibition of mailings to persons other than those listed was held to be too restrictive toward constitutionally protected commercial speech. The Court noted that there were several less restrictive paths open to the state and that there was no indication in the record that they had been tried and failed.<sup>409</sup> In particular, the state could have attempted to ameliorate the dangers of direct mail advertising by requiring, for example, the filing of a copy of all mailings with the state ethics committee. In *R.M.J.*, the state argued that a mailing from an attorney would be frightening to the public unaccustomed to receiving letters from law offices. The Court responded, "If indeed this is likely, the lawyer could be required to stamp 'This is an Advertisement' on the envelope."<sup>410</sup>

In support of the position that residential mailings are not subject to the same prophylactic prohibitions as in-person contacts, the Court cited *Consolidated Edison Co. v. Public Service Commission*.<sup>411</sup> In that case, the utility had been prohibited from including with its bills inserts which promoted the use of nuclear energy. The Commission ruled that the public was a captive audience whose privacy was violated by receiving inserts whose content may be objectionable to the recipients. The New York Court of Appeals upheld the ban as a reasonable "time, place and manner" restriction on com-

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406 See note 397 *supra*.

407 455 U.S. 191 (1982).

408 MISSOURI CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(A)(2) (1978).

409 455 U.S. at 206; see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (discussed in note 85 *supra*).

410 455 U.S. at 206 n.20. The 1985 Arizona, Arkansas, and Delaware disciplinary rules have followed this suggestion and require all written solicitations of business to be labeled as advertising. 1 CURRENT REPORTS, *supra* note 14, at 446, 961, 1126.

411 447 U.S. 530 (1980).

mercial speech.<sup>412</sup> The Supreme Court reversed, holding that substantial privacy interests were not being invaded in an "essentially intolerable manner" because the recipients could avoid the objectionable speech "simply by transferring the bill insert from envelope to wastebasket."<sup>413</sup> In a footnote, the Court pointed out that although there are special privacy rights associated with a person's home, "the arrival of a billing envelope is hardly as intrusive as the visit of a door-to-door solicitor."<sup>414</sup>

Finally, any state restriction on the mailing of lawyer advertisements must be examined in light of the United States Supreme Court's opinion in *Bolger v. Youngs Drug Products Corp.*<sup>415</sup> There the Court struck down a postal law which prohibited the mailing of unsolicited advertisements for contraceptives. Against the argument that the government may protect the public from potentially offensive materials, the Court held that offensiveness could not validate the suppression of speech protected by the first amendment.<sup>416</sup> Justice Marshall, writing for the Court, stated: "[T]he 'short, though regular journey from the mail box to trash can . . . is an acceptable burden [on postal patrons], at least so far as the Constitution is concerned.'<sup>417</sup>

The constitutional dubiousness of any ban on all lawyer advertising by mail has forced the courts and drafters of ethics codes to seek a better justified set of limitations. For many the source of those limitations are found in the narrow reading of the *Ohralik* case, and its focus upon "vulnerable" recipients.<sup>418</sup> The primary differences between the most recently adopted advertising regulations lay in their view of who falls within that vulnerable group which may not be contacted by mail. The Model Rules of Professional Conduct adopted the narrowest and, perhaps, the least defensible definition. Under Model Rule 7.3, prohibited solicitation is defined as including "contact . . . by letter or other writing . . . directed to a specific recipient."<sup>419</sup>

In an unnecessarily confusing extension of the same sentence, the Rule proceeds to carve out an exception to the prohibition. However, in doing so, it appears to further qualify the circumstances in which mailings are *improper*, rather than specify when mailings are proper. The remainder of the sentence reads: "[Pro-

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412 47 N.Y.2d 94, 107, 390 N.E.2d 749, 755-56, 417 N.Y.S.2d 30, 37 (1979).

413 447 U.S. at 541-42.

414 *Id.* at 542 n.11.

415 463 U.S. 60 (1983).

416 *Id.* at 71-72.

417 *Id.* at 72 (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *summarily aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)).

418 See text accompanying notes 398-405 *supra*.

419 MODEL RULES, *supra* note 17, Rule 7.3.

hibited solicitation] does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such useful."<sup>420</sup>

Model Rule 7.3 is not a model of clarity.<sup>421</sup> It appears to prohibit a mailed solicitation of employment "directed to a specific recipient" regardless of whether the recipient is in any kind of vulnerable condition. However, "letters addressed or advertising circulars distributed generally" may be mailed to persons who, because of their situations, might "in general" find the lawyer's services useful, but only if they are not known to be in particular need of legal services. The first problem with the rule is that the word "generally" is ambiguously placed. One cannot determine whether it describes both "letters addressed" and "circulars distributed" or only the latter phrase. Reading "generally" to modify both letters and circulars makes little sense. What are "letters addressed . . . generally to persons"? How do they differ from prohibited "letter[s] . . . directed to a specific recipient"? What is proper surely cannot turn on the distinction between mailings which are addressed to "occupant" and those which are addressed to specific persons.

The official commentary to Rule 7.3 does not speak in terms of the numbers of letters sent or the specificity of the addresses. Rather, it differentiates mailings on the basis of their content. The distinction between "general" mailings on one hand, and "specific" or "targeted" mailings on the other, according to the comment, lies in whether they "speak to a specific matter," that is, whether "the representations made in [the] mailings are . . . general rather than tailored . . . [to] a specific legal matter or incident."<sup>422</sup> Of course,

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420 *Id.*

421 The entire second sentence of Rule 7.3 reads:

The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

422 The pertinent paragraph of the comment reads in full:

General mailings not speaking to a specific matter do not pose the same danger of abuse as targeted mailings, and therefore are not prohibited by this Rule. The representations made in such mailings are necessarily general rather than tailored, less importuning than informative. They are addressed to recipients unlikely to be specially vulnerable at the time, hence who are likely to be more skeptical about unsubstantiated claims. General mailings not addressed to recipients involved in a specific legal matter or incident, therefore, more closely resemble permissible advertising rather than prohibited solicitation.

MODEL RULES, *supra* note 17, Rule 7.3 comment.

the root of this distinction is found in the *Ohralik* rationale for prohibiting in-person solicitation. Persons in immediate need of specific legal services because of some incident in their personal or business lives may be vulnerable and should be shielded from the importunings of trained advocates who are motivated by a desire for "a piece of the action." On the other hand, mailings addressed to persons not involved in a specific legal matter "more closely resemble permissible advertising rather than prohibited solicitation."<sup>423</sup>

Therefore, the Rule is easily misread. Apparently, it does not mean that all written solicitations are improper unless they are "generally" mailed or distributed. What is prohibited are mailings to specific individuals, regardless of the number, where the content of the material refers to a specific legal matter arising out of a particular incident. This restriction applies only where the recipient is "known" to need legal services of the kind provided by the lawyer. At this point the Rule refines the concept of who is "in need of legal services." It excludes from this group those who are "so situated that they might in general find such [services] useful." Of course, if anyone of this latter group is "known" to be in immediate need of the kind of services offered, then they are off limits.

Under this reading of the Rule, a lawyer could mail every female postal patron in her city a letter asking whether she had used the Dalkon Shield IUD and suggesting that, if any had, she may have a right to sue the manufacturer. The lawyer in this case could argue that although the letter related to a specific legal matter, Rule 7.3 was not violated because she did not *know* that any of the recipients were in need of legal services of the kind she was offering.<sup>424</sup> This is not an unreasonable result given that an advertisement simi-

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<sup>423</sup> *Id.*

<sup>424</sup> See Tex. Op. 414 (1984), *supra* note 142, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:8304, regarding the meaning of Texas DR 2-103(D)(1), which prohibits sending a written communication to a prospective client if the lawyer "knows or reasonably should know" that the recipient could not exercise reasonable judgment in employing a lawyer. The committee interpreted this provision to mean that "a lawyer would in most circumstances violate this requirement by carrying out a personalized direct-mail campaign because the lawyer normally should know that some of the recipients would be persons not capable of exercising reasonable judgment . . . even though the lawyer could not reasonably know which of the recipients would be in that category." Thus, the committee concluded, solicitation by means of direct mail of personalized letters is permitted only if "the lawyer takes all necessary steps to prevent the personalized direct-mail solicitation from going to any person that could not exercise reasonable judgment in employing a lawyer." By "personalized letters," the committee meant letters personalized for each recipient and not brochures and circulars which are mass produced for distribution to many persons. Tex. Op. 420 (1984), *supra* note 142. This distinction appears to be the one that Model Rule 7.3 tries to make.



lar to the letter *supra* could be published in the newspaper.<sup>425</sup>

Several of the states which have amended their advertising regulations to address the direct mail solicitation question have drawn a larger and more realistic definition of the vulnerable class to whom mailings may not be sent. Rather than confining that group to those in need of specific legal services of the kind offered by the lawyer, they have included potential clients who the lawyer knows or reasonably should know are not able for any reason to exercise reasonable judgment in employing a lawyer.<sup>426</sup> This "ability to exercise reasonable judgment" standard would encompass vulnerability caused by any physical, emotional, or mental condition.<sup>427</sup> Others have adopted the Model Rules' "particular need for legal services" standard,<sup>428</sup> while New Jersey has incorporated both standards in its new rules.<sup>429</sup>

Because many of these new anti-solicitation rules apply by their

425 *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985); *In re Appert*, 315 N.W.2d 204 (Minn. 1981).

426 *See, e.g.*, TEXAS CODE, *supra* note 51, DR 2-103(D)(1) (discussed at note 424 *supra*); ILLINOIS RULES OF PROFESSIONAL CONDUCT Rule 2-103(c)(1), *amended effective July 1, 1984* ("In no event may a lawyer initiate a contact with a prospective client if the lawyer reasonably should know that the physical, emotional, or mental state of the person solicited is such that the person could not exercise reasonable judgment in employing a lawyer. . . .") [hereinafter cited as ILL. RULES]; N.J. RULES, *supra* note 57, Rule 7.3(b)(1); ILL. RULES, *supra*, Rule 2-103(c)(1) (1980); VA. CODE, *supra* note 394, DR 2-103 (A)(2); MISSOURI RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1986) [hereinafter cited as MO. RULES], *summarized in 1 CURRENT REPORTS, supra* note 14, at 924.

427 *See, e.g.*, TEXAS CODE, *supra* note 51, DR 2-103(D)(1); ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(c)(1) (1980) [hereinafter cited as ILL. CODE]; Md. Op. 81-21 (1981), *supra* note 302, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:4307; Mo. RULES, *supra* note 426, Rule 7.3; MONTANA RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1985), *summarized in 1 CURRENT REPORTS, supra* note 14, at 855; NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1986), *summarized in 2 CURRENT REPORTS, supra* note 14, at 14.

In the Proposed Final Draft of the ABA's Model Rules of Professional Conduct (May 30, 1981), Rule 7.3(b) stated:

A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if: (1) The lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer . . . .

This provision was deleted. A slightly different standard has been adopted by some states. Couched in terms derived directly from *Ohralik*, it prohibits the solicitation of employment by personal contact under circumstances which create the risk of "overreaching" or "undue influence" by the lawyer. *See* Maine Rule 3.9(f); N.C. Op. 348 (1984), *supra* note 267, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:6613. This standard undoubtedly would cover all those situations reached by the "reasonable judgment" standard.

428 *See* San Diego Co. Bar Ass'n Legal Ethics and Unlawful Practices Comm. Op. 1983-5, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:1802; Mich. Op. CI-837 (1982), *supra* note 57, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:4852; Cal. Op. 1980-54, *supra* note 271, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:1601.

429 *See* N.J. RULES, *supra* note 57, Rule 7.3(b)(1), (4); FLA. CODE, *supra* note 233, DR 2-104(B)(2)(c), (e); ILL. CODE, *supra* note 427, DR 2-103(c)(1), (3); Md. Op. 84-12 (1984), *supra* note 302, *summarized in LAWYER'S MANUAL, supra* note 10, at 801:4334.

terms only to mail contact with vulnerable "prospective clients," they do not prevent contact with the family members of an accident victim who are not themselves "prospective clients."<sup>430</sup> For the same reason, the narrow focus of the anti-solicitation rules makes them inapplicable to both the direct mail and in-person solicitation of referrals from third party business forwarders who are not "prospective clients." Client forwarders are not usually in need of legal services of the kind offered by the soliciting lawyer, or at least the lawyer does not "know" of that fact. Therefore, under the Model Rules, a lawyer may directly solicit referrals from third parties as long as she does not offer anything of value in exchange for them.

A few states still prohibit all direct mail solicitation.<sup>431</sup> However, a small number permit even accident victims to be contacted by mail.<sup>432</sup> The question with which courts and ethics panels have been grappling is when certain recipients of mailed advertisements are sufficiently "in need" of legal services to warrant them being declared an off-limits vulnerable group. The ethics opinions are hard to reconcile. For example, one ethics panel ruled that a lawyer cannot offer his services by mail to home owners who are presently engaged in selling their homes.<sup>433</sup> Another panel in the same state ruled that a lawyer may send a letter to the owners of property

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430 A defender of the Model Rules could argue that the family of an accident victim would be off-limits to direct mail solicitation under Rule 7.3 because it is couched in terms of solicitations "directed to a specific recipient." See note 421 *supra* and accompanying text. However, like the Illinois and New Jersey rules, Model Rule 7.3 also specifically refers to solicitation of employment "from a prospective client." In fact, the Rule is captioned "Direct Contact With Prospective Clients." Florida has adopted a provision which remedies this shortcoming. Fla. DR 2-104(B)(2)(e) states: "A lawyer shall not send . . . a written communication to a prospective client for the purpose of obtaining professional employment if . . . [t]he communication is prompted by a specific occurrence affecting the person to whom the communication is directed, or a member of his family, in a manner distinct from the effect on the general public." The Florida Bar, 438 So. 2d 371, 373-74 (Fla. 1983).

431 See, e.g., Florida Bar v. Schreiber, 407 So. 2d 595 (Fla. 1981), *vacated*, 420 So. 2d 599 (Fla. 1982); Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489 (La. 1978); S.C. Op. 83-09 (1983), *supra* note 88, *summarized in* 1 CURRENT REPORTS, *supra* note 14, at 279.

432 See Va. Op. 508 (1983), *supra* note 294, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:8815 (attorney may contact an automobile accident victim by mail as long as the correspondence contains no false, fraudulent, misleading, or deceptive statement); *In re Von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 105 S. Ct. 2701 (1985) (letters to hotel skywalk collapse victims may be "unseemly" and "offensive" but not prohibitable except insofar as they are misleading); Mo. RULES, *supra* note 426, Rule 7.3, *summarized in* 1 CURRENT REPORTS, *supra* note 14, at 924 (allowing mail solicitation relating to a specific event); MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1985), *summarized in* 1 CURRENT REPORTS, *supra* note 14, at 882 (same). *But see* Conn. Informal Op. 82-18 (1982), *supra* note 14, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:2057; N.C. Op. 348 (1984), *supra* note 267, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:6613; Md. Op. 83-52 (1984), *supra* note 302, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:4328.

433 See Nassau County Op. 82-4 (1982), *supra* note 172, *summarized in* LAWYER'S MANUAL, *supra* note 10, at 801:6204. See also *State v. Moses*, 231 Kan. 243, 642 P.2d 1004 (1982).

listed in a real estate guide.<sup>434</sup> The committee charged with issuing ethics opinions for the Chicago Bar Association held that a lawyer may send mailgrams offering to assist persons against whom mortgage foreclosure proceedings had been instituted.<sup>435</sup> Similarly, a Connecticut informal opinion approved a mailing by a lawyer to owners of property that had been attached by creditors, where the lawyer mentioned the bankruptcy laws and suggested that the recipients discuss their problems with an attorney.<sup>436</sup> A Maryland ethics opinion allowed a lawyer to mail a letter soliciting employment to the residents of a housing development which was being converted into a condominium.<sup>437</sup> However, that same year the same Maryland panel prohibited a lawyer, who practiced both in Maryland and the District of Columbia, from sending a letter to Maryland residents charged with minor offenses in the District.<sup>438</sup>

Several state ethics panels have upheld mailings from lawyers to potential clients who, in the words of Model Rule 7.3, "are so situated that they might in general find such services useful."<sup>439</sup> The key finding in these cases has been that the solicitation of legal employment did not relate to a particular incident which occasioned the need for the legal services offered. In these states and under the Model Rules, a lawyer may directly solicit employment from a prospective lay client where the lawyer's services are the kind that the potential client, because of the nature of its business, for example, would naturally use from time to time.<sup>440</sup>

### C. *Soliciting Persons Presently Represented by Counsel*

Marketing consultants note that some corporate clients are "fickle" in their relationships with outside counsel, and may be

434 N.Y.C. Op. 80-15 (undated), *supra* note 125, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6304.

435 Chi. Informal Op. 81-1 (1981), *supra* note 92, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:3202.

436 Conn. Informal Op. 83-15 (1983), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2060. See also Conn. Informal Op. 83-9 (1983), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2059.

437 Md. Op. 81-27 (1981), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4308.

438 Md. Op. 80-61 (1980), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4304. See also *In re Frank*, 440 N.E.2d 676 (Ind. 1982).

439 ABA Informal Op. 1504 (1984), *supra* note 258, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:354 (in-house counsel of targeted businesses); Conn. Informal Op. 83-9 (1983), *supra* note 14, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:2059 (home buyers); Mich. Op. CI-961 (1983), *supra* note 57, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4872 (targeted insurance and banking institutions); Wis. Op. E-83-2 (1983), *supra* note 88, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:9108 (prospective commercial clients).

440 See Md. Op. 83-93 (1983), *supra* note 302, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:4333 (proper for lawyer to send letters to corporations setting forth the lawyer's expertise in obtaining visas).

good targets for attempts to dislodge them from their present outside counsel.<sup>441</sup> Should law practice marketers be concerned whether targeted prospective clients are already regularly represented by counsel in the same legal field? Does this fact render the potential client unapproachable? Although the subject is infrequently raised, there are reasons, some ethical and some legal, why law practice builders should pause to consider the matter.

The ABA Model Code does not specifically prohibit interference with an ongoing attorney client relationship.<sup>442</sup> It was always assumed, no doubt, that any attempt to lure a client away from another lawyer would fall under the ban on solicitation. However, given the relaxation of the rules against solicitation of lay clients, the issue is no longer moot.

The major post-*Bates* case treating this issue is *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*.<sup>443</sup> The Adler law firm sought an injunction to prevent several former associates of the firm from contacting firm clients and informing them that the associates were creating a separate partnership. The associates had initiated telephone and in-person contacts with firm clients on whose cases they had worked. These contacts were followed up by mailings which contained form letters that the clients could use to discharge the Adler firm and name Epstein as counsel.<sup>444</sup> The Pennsylvania Supreme Court held that the associates strayed beyond the bounds of permissible advertising under *Bates* into prohibited solicitation under *Ohralik*. Epstein's conduct, according to the court, frustrated rather than advanced the clients' informed and reliable decision-making.<sup>445</sup> The court was heavily influenced by the fact that Epstein's judgment was clouded by his own pecuniary interests.<sup>446</sup> The court failed to recognize, however, that all attempts to attract clients, by whatever method, are permeated with the lawyer's self-interest. This is unavoidable. Moreover, the decision failed to distinguish the traditional practice, permitted by DR 2-102(A)(2),

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441 Winter, *supra* note 7, at 57.

442 Some lawyers may view client stealing as "morally reprehensible conduct" within the meaning of EC 1-5, or as "conduct involving moral turpitude" under DR 1-102(A)(3), but just as likely, other lawyers view it as simply playing "hardball" in the increasingly competitive market for legal clients. See note 441 *supra* and accompanying text.

443 482 Pa. 416, 393 A.2d 1175 (1978).

444 *Id.* at 421, 393 A.2d at 1177-78.

445 *Id.* at 427, 393 A.2d at 1181 (citing *Ohralik* and EC 2-10 which states that attorney advertising should "facilitate informed selection of lawyers").

446 The court stated:

Appellees' concern for their line of credit and the success of their new law firm gave them an immediate, personally created financial interest in the clients' decisions. In this atmosphere, appellees' contacts posed too great a risk that clients would not have the opportunity to make a careful, informed decision.

*Id.* at 428, 393 A.2d at 1181.

whereby departing associates mail notices to present and former clients announcing new or changed professional associations. The case would have been more cleanly decided if it rested upon the prohibited nature of the in-person client contacts initiated by the associates.

While the ethical propriety of the Adler associates' conduct might be debated,<sup>447</sup> the Pennsylvania Supreme Court's opinion decided an equally important point of substantive law. The injunction sought by the firm against its former associates was predicated upon a claim of tortious interference with the contractual relationships between the firm and its clients. After holding that contacting the firm's clients was not constitutionally protected commercial speech under *Bates*, the court went on to hold that the associates were intentionally and improperly interfering with the firm's contractual agreements. The court analyzed the Restatement (Second) of Torts Sections 766<sup>448</sup> and 767<sup>449</sup> and concluded that nothing in either society's or the profession's "rules of game" sanctioned the associates' conduct.<sup>450</sup> The injunction was upheld.

The ABA's Model Rules of Professional Conduct contain no provision directly applicable to the question of whether a presently represented person may be solicited by another lawyer. It could be inferred from this that the possibility of interfering with an ongoing attorney-client relationship need not concern the lawyer who advertises by mail. Rule 7.3 permits an attorney, without qualification, to mail letters or advertising circulars to those not known to have a specific need for her services, but who are so situated that they might in general find the lawyer's services useful. In other words, the Rule places no obligation upon the advertising attorney to

447 The intermediate appellate court in *Adler* had held the associates' conduct was a legitimate form of distributing information concerning the employment of a lawyer and dissolved the injunction. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 252 Pa. Super. 553, 382 A.2d 1226 (1977). See also *Adler*, 482 Pa. at 440, 393 A.2d at 1187 (Mandarino, J., dissenting).

448 "Intentional Interference with Performance of Contract by Third Person[.]" One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other." *Id.* at 431, 393 A.2d at 1183 (citing § 766 of the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 23, 1977)) (emphasis in original).

449 In determining whether an actor's conduct in intentionally interfering with an existing contract . . . of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the proximity or remoteness of the actor's conduct to the interference, and (f) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS § 767 (Tent Draft No. 14, 1977).

450 The court quoted F. HARPER & F. JAMES, THE LAW OF TORTS §§ 6.12, .13 (1956), and drew on DR 2-103(A), which prohibits recommending the employment of oneself as a lawyer, for support for the notion that neither our society nor our profession has sanctioned conduct like the associates' in that case. *Adler*, 482 Pa. at 432, 393 A.2d at 1184.

avoid mailing such matters to those who may be presently represented by counsel. Note, however, that regardless of whether the recipients of the mailing are known to be represented, all mailed matters must comply with Rule 7.1. Rule 7.1(c) prohibits a lawyer from comparing the lawyer's services with another lawyer's services, unless the comparison can be factually substantiated.

It appears that some states may address this issue directly when they reconsider their advertising rules. At least Florida<sup>451</sup> and Arizona have done so. Arizona's new ethics rules, effective February 1, 1985, modify ABA Model Rule 7.2 by prohibiting a written communication from a lawyer if it concerns a specific matter and the lawyer should know that the person is represented by a lawyer in that matter.<sup>452</sup> This narrow rule would not prohibit the interloping firm from attempting to lure a corporation away from its current outside counsel in order to represent it generally in a particular field of practice, as opposed to a particular case. In this situation, it appears that the rules regarding solicitation circumscribe only the methods by which a "fickle" corporate client may be seduced away from its counsel, and the law of torts, not ethics, determines whether it can be done at all.

#### D. *Solicitation of Lawyers vs. Laypersons*

Lawyers solicit employment from other lawyers in two ways. The solicited attorney may be the prospective client, or a potential client forwarder. The latter situation has been treated in this article under the heading of soliciting referrals.<sup>453</sup> But if the situation is the former, is there any greater allowance made for the fact that the prospective client is not a naive layperson? The ABA Model Code prohibits an attorney from recommending her services or suggesting the need of legal services in person "to a layperson."<sup>454</sup> The limited mail contact with other lawyers permitted by DR 2-102(A)(2) refers only to professional announcements and is only pertinent to the situation where the lawyer is seeking to inform the profession, clients, and friends of her new professional situation. Thus, it can be argued that the Model Code does not prohibit the in-person or mailed solicitation of lawyers as clients.

451 The Florida Bar, 438 So. 2d 371, 374 (Fla. 1983).

452 ARIZONA RULES OF PROFESSIONAL CONDUCT Rule 7.2(f) (1985), summarized in 1 CURRENT REPORTS, *supra* note 14, at 445, 446. The amended Florida DR 2-104(B)(2)(a) is identical. See The Florida Bar, 438 So. 2d 371, 374 (Fla. 1983). The Minnesota Supreme Court in *In re Appert*, 315 N.W.2d 204, 215 (Minn. 1981), while holding proper the mailing of brochures concerning the Dalkon Shield IUD, noted, "Conduct that the advertising attorney knows or should know is an interference with an existing professional relationship is prohibited." *Id.* at 214. The court cited no authority for this proposition.

453 See text accompanying notes 458-80 *infra*.

454 MODEL CODE, *supra* note 3, DR 2-103(A), 2-104(A).

The Model Rules prohibit the in-person solicitation of employment for gain of "a prospective client."<sup>455</sup> This would apparently include potential clients who are also lawyers. The same rule also makes no distinction between lawyers and nonlawyers when the solicitation of employment is by mail. If the solicitee is in present need of the kind of legal services offered, the solicitation is improper regardless of whom the solicitee is. This is a questionable position. The entire rationale for prohibiting direct solicitation is to prevent the potential overreaching and undue influence that may be exerted by a trained advocate upon an untutored and vulnerable layperson. A solicited lawyer is ordinarily capable of analyzing the representations and background of the soliciting lawyer as well as the potential benefits of utilizing the lawyer's services. In fact, this position has been espoused by the ABA's Standing Committee on Ethics and Professional Responsibility in Informal Opinion 84-1504.<sup>456</sup> There, the Committee addressed whether a lawyer who was returning to private practice after working for a government regulatory commission could send letters to the in-house counsel of companies subject to the commission's regulations. The lawyer's letter would mention the many laws and regulations which affect the recipients' companies, give some biographical data about the lawyer, and offer his services as a consultant. In this case, the solicited lawyers were the agents of the prospective clients, and may or may not have had the final authority to hire consulting attorneys. The Committee advised that regardless of whether the solicited in-house counsel were viewed as prospective clients or only as representatives of the prospective clients, the potential harms of direct solicitation were absent where the person solicited was also an attorney.<sup>457</sup>

State codes of ethics do not distinguish between the solicitation of laypersons, lawyers as clients or client representatives, and legally sophisticated businesspersons. While holding only that

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455 MODEL RULES, *supra* note 17, Rule 7.3.

456 ABA Informal Op. 1504 (1984), *supra* note 258, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:354.

457 This same conclusion was reached by the California Standing Comm. on Professional Responsibility and Conduct. Cal. Op. 1981-61, *supra* note 271, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:1602. See also Professional Ethics and Grievance Comm. of the Columbus (Ohio) Bar Ass'n Op. 5 (undated), summarized in LAWYER'S MANUAL, *supra* note 10, at 801:6902 (lawyer may contact corporate counsel in an effort to secure employment in products liability cases if the communication is dignified, contains no representation of expertise, and is not distributed more than once a year); Wis. Op. E-83-2 (1983), *supra* note 88, summarized in LAWYER'S MANUAL, *supra* note 10, at 801:9100 (lawyer may mail solicitations to businesses; concerns regarding targeted direct mail are reduced when recipient is a sophisticated businessperson); *Spencer v. Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 892 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985).

legal employment may be solicited from in-house counsel by mail, ABA Informal Opinion 84-1504 lends strong support to the proposition that in-house counsel may be directly solicited for employment either in person or by telephone.

### E. *Soliciting Referrals by Mail*

Most of the jurisdictions which permit direct mail advertising do not distinguish between the recipients who are prospective clients and those who are potential business forwarders. However, a few jurisdictions have perceived problems peculiar to the solicitation of referrals from third parties by mail. In *Koffler v. Joint Bar Association*,<sup>458</sup> lawyers had sent letters to both individual property owners and real estate brokers, announcing their availability to handle real estate transactions. In focusing on the constitutional question whether the bar could prohibit all direct mail advertising by lawyers, the New York Court of Appeals put aside the issue of soliciting referrals due to an inadequately developed record below.<sup>459</sup> However, the court noted in passing that soliciting third party referrals necessarily involves the eventual in-person solicitation of prospective clients by the third party intermediary, and therefore may promote the kind of conduct proscribed by *Ohralik*.<sup>460</sup>

The propriety of soliciting third party referrals by mail was addressed directly by the New York Court of Appeals in *In re Greene*.<sup>461</sup> There the disciplined lawyer mailed a thousand fliers to real estate brokers offering to represent the brokers' clients in all real property transactions for a flat fee. The court noted that state law banned the solicitation of legal business by any person or one acting on his behalf.<sup>462</sup> In deciding whether this law could withstand constitutional scrutiny, the court assessed the state interests involved in prohibiting third party solicitation. It focused upon two aspects of this conduct. First, the lawyer was attempting to cause the in-person recommendation of his services by the broker. This implicated the entire range of dangers recognized in *Ohralik*. Moreover, the state had an interest in protecting the public from commercial transactions involving hidden and potentially detrimental conflicts of interests. The court perceived several ways in which a lawyer's

458 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980), *cert. denied*, 450 U.S. 1026 (1981).

459 51 N.Y.2d at 144-45, 412 N.E.2d at 930, 432 N.Y.S.2d at 874.

460 *Id.* at 144 n.2, 412 N.E.2d at 930 n.2, 432 N.Y.S.2d at 874 n.2.

461 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), *cert. denied*, 455 U.S. 1035 (1982). See note 464 *infra*.

462 54 N.Y.2d at 123, 429 N.E.2d at 392, 444 N.Y.S.2d at 885.



loyalty to his client could be harmed by solicited recommendations from brokers.

The possibility that the lawyer's view of marketability of title may be colored by his knowledge that the referring broker normally will receive no commission unless title closes, the improbability that the attorney will negotiate to the lowest possible level the commission to be paid to the broker who is an important source of business for him (or suggest to the client that he do so), the probability that the lawyer will not examine with the same independence that he otherwise would the puffery that the broker has indulged in to bring about the sale are examples of the conflict potential to be protected against.<sup>463</sup>

The New York Court of Appeals then examined whether any restrictions on third party solicitation short of a total ban would be ineffective. It pointed out that a requirement of filing all mailed material with the bar's overseeing agency would afford no protection to prospective clients faced with in-person solicitation by brokers.<sup>464</sup>

Bar oversight of third party mailings was deemed feasible by the Supreme Court of Kentucky in *Kentucky Bar Association v. Stuart*,<sup>465</sup> where the court held that letters to realtors were more akin to *Bates*-style advertising than *Ohralik*-style solicitation. Therefore, the court held that this form of advertising could not be prohibited unless the state demonstrated that substantial interests could not be protected by less stringent measures. Although the court may have been correct that prescreening of referral solicitation letters by the bar would provide adequate protection against overreaching and deception by the lawyer, the court overlooked the observation of the New York court that the lawyer was recruiting a lay intermediary to do his in-person solicitation for him. Prescreening of the letters by the bar would provide no protection for the public against the intermediary. As discussed earlier,<sup>466</sup> many state codes prohibit a lawyer from requesting that a third party recom-

463 54 N.Y.2d at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889.

464 *Id.* The Court of Appeals adhered to the *Greene* decision in *In re Alessi*, 60 N.Y.2d 229, 457 N.E.2d 682, 469 N.Y.S.2d 577 (1983), *cert. denied*, 104 S. Ct. 1599 (1984). *Greene* was followed in a Tennessee Ethics Committee opinion which prohibited a lawyer from sending fliers to accountants requesting them to recommend the lawyer as a tax advisor to the accountants' clients. Ethics Comm., Bd. of Professional Responsibility of the Sup. Ct. of Tennessee Op. 84-F-78 (1984) [hereinafter cited as *Tenn. Op.*], summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:8114. See also *Md. Op.* 85-20 (1984), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4351 (attorney cannot send letters to physicians requesting them to refer patients to him). *Greene* was denied certiorari by the Supreme Court, although Justices Brennan, White, Blackmun, and Powell voted to grant certiorari and vacate the judgment in light of the *R.M.J.* decision. 455 U.S. 1035 (1982).

465 568 S.W.2d 933 (Ky. 1978).

466 See text accompanying notes 260-62 *supra*.

mend the lawyer's services to prospective clients.<sup>467</sup> Under the ABA's Model Rules, there is no longer a direct ban on "requesting" another to recommend the lawyer's services, but it may be prohibited nevertheless. Rule 7.3 prohibits direct in-person solicitation of potential clients. Rule 8.4(a) makes it unprofessional conduct to "violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another."<sup>468</sup> This would appear to prohibit the promotion of in-person solicitation of clients by third parties.<sup>469</sup>

Does *Greene* undermine the legitimacy of all requests to third parties for uncompensated referrals? Probably not. At least three courts<sup>470</sup> and one state ethics committee<sup>471</sup> have permitted mailings designed to prompt third persons to refer clients to lawyers. The key element in *Greene* was that the situation created the potential for the lawyer to develop loyalties to both the client and the broker, and that their interests might diverge at times. However, in some solicitation of referral situations, potential conflicts of interest will not arise. *In re Jaques*<sup>472</sup> provides an example. Attorney Jaques asked a union representative to recommend his services to the victims of a tunnel explosion. The lawyer was held not to have violated the ethics code. His conduct was not seen as fraudulent, overreaching, intimidating, or otherwise vexatious because he approached the union business agent rather than a victim or a family member. The union representative was not an agent or "runner" for the lawyer but, ostensibly, a representative of union members with potential claims. Said the court, "Under these circumstances, the union agent served as a buffer between the attorney and prospective clients thus alleviating the potential for overreaching and undue influence."<sup>473</sup>

The point of cases such as *Jaques* and *Stuart*<sup>474</sup> is that real estate

467 MODEL CODE, *supra* note 3, DR 2-103(C).

468 MODEL RULES, *supra* note 17, Rule 8.4(a).

469 The analogue of Model Rule 8.4(a) in the Code is DR 1-102(a)(2). Thus, even without DR 2-103(C), most codes of professional responsibility would not permit the solicitation of referrals from third parties as long as in-person solicitation is prohibited.

470 *Grievance Comm. v. Trantolo*, 92 Conn. 27, 470 A.2d 235 (1984); *In re Jaques*, 407 Mich. 26, 281 N.W.2d 469 (1979); *Kentucky Bar Ass'n v. Stuart*, 568 S.W.2d 933 (Ky. 1978).

471 See Md. Op. 81-34 (1980), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4309 (mailing letters to every realtor is permitted); Md. Op. 84-104 (1984), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4347 (proper to send letters to other attorneys soliciting appellate work); but see Md. Op. 85-20 (1984), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4351 (lawyer may not send letters to neighborhood physicians informing them of the nature of his practice and requesting them to give his name to patients).

472 407 Mich. 26, 281 N.W.2d 469 (1979).

473 *Id.* at 27, 281 N.W.2d at 470.

474 See note 470 *supra*.

brokers, for example, could be made aware of the cost and availability of a lawyer's services through regular advertising channels and recommend that lawyer's services to her client without any questions being raised. There seems to be little difference if the broker learned of the attorney's services by means of a letter, as long as the attorney does not offer anything of value to the broker other than the opportunity to please her clients with fast, competent, and economical legal work. Helping the broker to satisfy clients does not turn the broker into a runner for the lawyer. Furthermore, the broker is going to recommend an attorney to her client anyway. The lawyer's letter did not cause an in-person recommendation where one otherwise would have never occurred.

The New York Court of Appeals worried, however, about the possibility of a long-term relationship developing between the lawyer and the broker, a course of dealing which might put the lawyer in the broker's debt. Would not the lawyer in such a case be overly anxious to please the broker, even at the client's expense, in order to continue the profitable arrangement? The answer could be yes,<sup>475</sup> but only where the lawyer's actions in representing their joint client could somehow harm the broker's interests. Absent this possibility, the New York court's concerns lose substance.<sup>476</sup>

Finally, other courts and ethics panels have largely ignored the concerns expressed about third party solicitation by mail in *Greene*. As of this writing, no new cases other than the same court's reiteration of the *Greene* holding and rationale in *Alessi v. Committee on Professional Standards*<sup>477</sup> have been found which follow *Greene*.<sup>478</sup> Whether by hobnobbing at the club, writing and lecturing, or, after *Bates*, by general media advertising, lawyers have always sought referrals and always will. The danger to the potential client arises only when the referrer has a pecuniary interest in securing the employment of a particular lawyer, or if the lawyer's loyalties are divided between the referrer and the referree. But other jurisdictions have not seen a significant danger of divided loyalties arising from lawyers soliciting referrals from real estate brokers or other poten-

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<sup>475</sup> Judge Fuchsberg who dissented in *Greene*, 54 N.Y.2d at 129, 429 N.E.2d at 396, 444 N.Y.S.2d at 889, and Judges Cooke and Kaye who dissented in *Alessi*, 60 N.Y.2d at 237 and 242, 457 N.E.2d at 687 and 690, 469 N.Y.S.2d at 582 and 585 respectively, argued that the majority's conflict of interest fears were pure speculation for which there was no factual predicate.

<sup>476</sup> See *Spencer v. Justices of the Supreme Court of Pennsylvania*, 579 F. Supp. 880, 890 (E.D. Pa. 1984), *aff'd mem.*, 760 F.2d 261 (3d Cir. 1985) (suggesting that direct mail advertising by lawyers could not be banned absent a finding of overreaching, invasion of privacy, and conflict of interests).

<sup>477</sup> See note 464 *supra*.

<sup>478</sup> The *Trantolo* decision, 192 Conn. 27, 470 A.2d 235, ignored *Greene*. However, *Greene* was cited and followed in *Tenn. Op. 84-F-78* (1984), *supra* note 464, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:8114.

tial business forwarders. It is probably sufficient that lawyers are prohibited from offering anything of value in exchange for referral and from accepting employment where they know that fraud, undue influence, overreaching, or deception was used by the referrer in procuring the employment.<sup>479</sup>

In summary, the solicitation of referrals, either in person or by mail, still is prohibited in states retaining ethics rules modeled after the ABA Model Code. Lawyers cannot solicit in person, nor can they request intermediaries to do it for them. It can be argued that the same dubious restriction holds true under the ABA Model Rules for the same reasons. Even in states which now allow in-person or mailed solicitation of nonvulnerable laypersons, the conflict of interest rationale of the *Greene* case continues to throw a shadow over the solicitation of referrals from third party business forwarders. Even in those states which reject or ignore the reasoning of *Greene*, restrictions still remain on the solicitation of referrals. The solicitee cannot be offered anything of value in exchange for referrals, including reciprocal referrals. Moreover, given the concerns regarding vulnerable potential clients expressed in *Ohralik*, lawyers must avoid seeking referrals from persons who deal directly with prospective clients when they are in a mental, physical, or emotional condition which could render them unduly susceptible to suggestions about securing the services of a lawyer.<sup>480</sup>

## VII. Hiring Public Relations Firms

The American Bar Association Journal noted at least twice in 1984 that an increasing number of law firms were hiring marketing and public relations consultants.<sup>481</sup> Obviously, attorneys are becoming concerned about the increasing competition for legal services and are seeking professional assistance in exploring ways to either expand or focus their practices. However, there are certain principles that must be kept in mind when lawyers consider what marketing experts may do for them.

First, it should be obvious that a lawyer or law firm which hires

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479 See MODEL CODE, *supra* note 3, DR 2-103(B), (E). The Model Rules also prohibit the giving of anything of value to another in return for recommending the lawyer's services. MODEL RULES, *supra* note 17, Rule 7.2(c). However, the Rules do not contain a provision like DR 2-103(E) which prohibits a lawyer from accepting employment when it is at least obvious that the person has come to the lawyer as a result of prohibited conduct. Nevertheless, under Rule 7.3, a lawyer may not contact a prospective client in person to solicit employment, and Rule 8.4(a) prohibits the lawyer from doing so through the acts of another. MODEL RULES, *supra* note 17.

480 See Grievance Comm. v. Trantolo, 192 Conn. 27, 35, 470 A.2d 235, 239 (1984), where it was suggested that regulations could be developed to prohibit the solicitation of referrals from such "sensitive areas" as funeral homes and hospitals.

481 Morgan, *supra* note 7; Reskin, *supra* note 6, at 48.

a lay consultant remains responsible for any ethical violations which result from the consultant's activities.<sup>482</sup> It should also be clear that a consultant may not do whatever the hiring lawyer cannot do.<sup>483</sup> Therefore, a lawyer may not hire an advertising consultant to prepare and distribute statements about the lawyer which are false, misleading or, where prohibited, self-laudatory.<sup>484</sup>

Second, there may be a problem where a lawyer hires a public relations firm to do more than merely advise on various marketing strategies. For example, the recently enacted New Jersey Rules of Professional Conduct note in the commentary to Rule 7.2 on advertising that the prohibition against giving anything of value to one for recommending a lawyer's services would prohibit paying a public relations firm to obtain publicity for a lawyer in news articles or news broadcasts.<sup>485</sup> This comment seems to envision the situation where the PR firm is paid to draw media attention to the firm by distributing news releases or by contacting media personnel directly. Whatever may be said about the correctness or wisdom of this comment, it should raise a warning to employers of public relations consultants.

New York State Bar Opinion 565<sup>486</sup> illustrates other ways in which hiring a marketing firm to actively expand a law practice will run afoul of ethical rules. An attorney proposed to employ a marketing firm to solicit potential clients to whom the lawyer would provide prepaid legal services. The marketing firm would contact organizations which might be interested in such plans. The firm would be paid either a commission or a percentage of the fees

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482 Conn. Informal Op. 82-17 (1982), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2057; *MODEL CODE*, *supra* note 3, EC 3-6; *cf.* *MODEL CODE*, *supra* note 3, DR 4-101(D) (lawyer must take reasonable care to prevent those "whose services are utilized by him from discussing or using confidences or secrets of a client"); *MODEL RULES*, *supra* note 17, Rule 5.3 ("With respect to a nonlawyer . . . retained by . . . a lawyer: (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.").

483 DR 1-102(A)(2) of the Model Code and Rule 8.4(a) of the Model Rules prohibit a lawyer from violating any rule of professional conduct through the acts of another.

484 Md. Op. 81-70 (1981), *supra* note 302, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4312 (an ad company hired by a law firm must avoid the "puffing" typically found in commercial ads); *Belli v. State Bar of California*, 10 Cal. 3d 824, 519 P.2d 575, 112 Cal. Rptr. 527 (1974).

485 This is an extravagant and wholly unnecessary interpretation of the rule. First, in directing the news media's attention to newsworthy people or events within the client law firm, the public relations firm is not recommending the firm's services to anyone. What is properly prohibited by Rule 7.2(c) of the Model Rules and DR 2-103(B) of the Model Code is the giving of anything of value by the public relations firm to a news media representative in order to obtain media coverage. Thus, a member of a public relations firm could not take a newspaper reporter to dinner in an attempt to garner an article about the client law firm.

486 Issued October 1, 1984, summarized in 1 *CURRENT REPORTS*, *supra* note 14, at 510.

billed to the clients which it recruited. The bar committee disapproved of the proposal on two grounds. First, under DR 2-103(B) and (C) the lawyer is forbidden from either requesting or compensating another to recommend his services. The committee was disturbed that the compensation arrangement created a pecuniary incentive for the marketing firm to engage in high pressure or otherwise ethically dubious methods to obtain clients. It also expressed concern over the fact that persons not trained in the ethical traditions of the profession or the legal restrictions surrounding the solicitation of clients were acting for the lawyer. It held that the lawyer could not hire a marketing firm to solicit business for him.

The second ground on which the New York ethics committee found the proposed arrangement deficient was that it involved the sharing of legal fees with nonlawyers in violation of DR 3-102(A).<sup>487</sup> An arrangement such as that proposed in New York State Opinion 565 would also be prohibited under the Model Rules of Professional Conduct.<sup>488</sup>

May a law firm hire a nonlawyer to handle its public relations and advertising work where that person is a full-time employee of the firm rather than an independent contractor? This would be no different than hiring a paralegal assistant, and no doubt perfectly proper. There would be no fee sharing problems if the employee is compensated on a salaried basis.<sup>489</sup> For the reasons expressed in New York State Opinion 565, the employee could not be paid on a commission or percentage of fees collected basis. However, the assistant would always act for the lawyer and the employing attorney would be responsible for any actions of the assistant which violated the professional rules of ethics or statutes of the state. This responsibility includes the duty to train and supervise the assistant.

The responsibilities of the lawyer who employs an assistant or independent contractor have been stated in Model Rule 5.3.<sup>490</sup>

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487 See also Conn. Informal Op. 82-17 (1982), *supra* note 14, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:2057; Mass. Op. 80-11 (1980), *supra* note 357, summarized in *LAWYER'S MANUAL*, *supra* note 10, at 801:4602 (A business corporation hired to market the services of a law firm and compensated on the basis of its performance may not be paid by a division of fees between its nonlawyer owners and the law firm.). See text accompanying notes 293-94 *supra*.

488 MODEL RULES, *supra* note 17, Rule 5.4(a).

489 In fact, the Model Code, as of 1980, permitted nonlawyer employees of the law firm to be included in "a compensation . . . plan, even though the plan is based in whole or in part on a profit-sharing agreement." MODEL CODE, *supra* note 3, DR 3-102(A)(3). See ABA Informal Op. 1440 (1979), *supra* note 258 (Compensation of a lay office administrator by means of a fixed salary plus a percentage of net profits to provide an incentive and reward for services held to be not violative of the fee sharing prohibition as long as the compensation relates to net profits of the firm and not to particular fees involved.).

490 With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is

The Model Code contained a few scattered references to the lawyer's responsibilities for the actions of her employees and assistants, but they were specifically confined to the maintaining of client confidences and the making of extrajudicial statements concerning an ongoing trial or investigation.<sup>491</sup> Model Rule 5.3 is, therefore, a great improvement on the Model Code.<sup>492</sup>

### VIII. Conclusion

The legal profession and American society now stand on the brink of a new era in law practice marketing. Many of the advertising techniques available to the producers of other products and services are becoming available to lawyers. Soon the public will be bombarded with "come-ons" not conceived of ten years ago, as elements of the bar push the advertising standards toward those now applied to nonlegal advertising by the Federal Trade Commission. Under the banner of free commercial speech, forces within the bar have engaged the traditions of the profession in a fierce battle on several fronts. Limitations upon the media through which legal messages may be distributed have been soundly defeated. Restrictions upon the content of lawyers' public communications beyond the false and misleading have been all but surrendered. Prohibitions based upon good taste face certain defeat. The impermissibility of direct mail solicitation has come under heavy attack. Even the age-old ban on in-person solicitation has suffered defections. All across the front, traditional restrictions are, where possible, falling back to new positions from which to defend whatever ground remains.

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compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for the conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES, *supra* note 17, Rule 5.2. The Rule specifically applies to "a nonlawyer . . . retained by . . . a lawyer." This would include consultants who are viewed as independent contractors.

491 MODEL CODE, *supra* note 3, DR 4-101(D), 7-107(J).

492 MODEL RULES, *supra* note 17. Rule 5.3 does not make the lawyer strictly liable for unethical conduct of the nonlawyer. The lawyer must have either ordered or ratified it, or, knowing of the unethical conduct, failed to mitigate or avoid its consequences. However, any lawyer supervising a nonlawyer who acts contrary to the Rules may be found to have violated Rule 5.3's duty to make reasonable efforts to ensure that the nonlawyer's conduct is proper. Although not strictly liable, negligence by the lawyer will suffice. This negligent failure to take measures to prevent unethical conduct by employed or retained nonlawyers will extend to all the partners of the employing law firm. *Id.* at Rule 5.3(a).

Putting aside whether this inexorable flow is to be lauded, lamented, or seen as nothing more than a matter of professional aesthetics, the nature and extent of the change seems fairly clear. Inevitably, the standards which will govern all of lawyer business-getting activity will be those of honesty and fairness. Misleading and false statements, and overreaching conduct will characterize prohibited marketing behavior. But the advertising standards are not yet there in many jurisdictions. Lawyers not wishing to fight restrictions on marketing behavior must pay heed to their local ethics codes.

Because of the uniqueness of the legal profession, other limitations will also apply. Considerations of conflict of interests, the utilization of lay intermediaries, prohibitions against aiding the unauthorized practice of law, and sharing legal fees with nonlawyers may come into play. Nonlawyer marketing experts know little about the profession's restrictions in these areas. The responsibility for ensuring that law practice marketing plans comply with these ethical proscriptions rests squarely with the lawyers. It is incumbent, therefore, upon lawyers who hire marketing advisers to know the problem areas and to keep abreast of the changes that will sweep the profession in the next few years. Lawyers who accept any marketing advice without scrutinizing its ethical propriety, risk wasting money on strategies which must be abandoned for ethical reasons. More importantly, they risk censure from the bar. This article has attempted to familiarize the bar with the ethical aspects of various marketing strategies so that it will be sensitive to its duties when entering this new dimension of law practice.