The Future of Attorney Advertising and the Interaction Between Marketing and Liability

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and  
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Many observers would proclaim that there has been a revolution in attorneys' opportunities to market their services in the past decade. Focusing solely on the yellow pages and late night television programming, this assessment might have some validity. Taking advantage of recent Supreme Court cases overturning decades of prohibition, the legal profession is increasingly aware of the potential use of advertising as a marketing tool.

The explosion of legal advertising constitutes a significant change, but it overstates the case to label it a revolution. While it would be equally unfair to trivialize its importance given the significant constitutional litigation involved, this change must be kept in perspective. Advertising is merely one method, albeit a highly visible one, by which attorneys market their services to obtain new clients. The significance of other changes in

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1. Of course, the attorney-client relationship itself has obvious marketing attributes. By treating clients well and hopefully obtaining good results, attorneys can maximize the probability of maintaining their existing client base. They may also be able to capitalize on their successes with existing clients to make new client contacts. Taking advantage of marketing opportunities with existing clients, however, does not usually pose any significant constitutional or regulatory concerns. Most states' disciplinary rules permit attorneys to discuss legal affairs with their existing clients that may include the topic of additional services to be performed. See Model Code of Professional Responsibility EC 2-4 (1981). Very few
the nature and form of attorney marketing, most notably the trend towards specialization, may well surpass the recognition of attorneys' constitutional right to advertise.

The genesis of the trend towards specialization is not clear. Most would attribute the move to the increasing complexity of the legal environment. This answer is only partially accurate. The decision to claim expertise or identify an area of specialization, or even to suggest that fact, is often a marketing decision by the attorney. Attorneys find that they are likely to obtain more business, or at least be able to charge a higher rate, if they are perceived by their clients as specialists.

Interestingly, it is not clear whether the market for legal services is in fact becoming more specialized or whether attorneys are simply convincing clients that it is more specialized. On the one hand, it could be that potential clients are now more concerned with specific areas of legal practice, and attorneys have reacted by marketing themselves accordingly. On the other hand, attorneys may have made the marketing decision to specialize independently and then actively courted clients by convincing them that they need a specialist. The important point is not which scenario is correct, but to recognize the enormity of the trend and its necessary relationship to marketing.

An attorney's marketing efforts often function as a crucial factor in the attorney-client relationship. Marketing frequently defines the client's expectations about the engagement. The failure to fulfill those expectations may influence a client's decision whether to assert some type of claim against the attorney. Accordingly, it is important for each attorney to be aware of the existing limits on attorney advertising in order to take advantage of marketing opportunities as well as to structure marketing efforts to limit potential disciplinary or malpractice exposure. This task requires at least a passing knowledge of the applicable constitutional and regulatory principles, the significant areas of unsettled law, and the interaction of marketing with potential liability.

I. THE PRESENT STATUS OF THE ATTORNEYS' 'RIGHT' TO ADVERTISE

All attorneys are aware that the legal principles defining their ability to advertise have recently undergone great change. Prior to the United States Supreme Court decision in Bates v. State Bar,\(^2\) commercial advertising by attorneys was largely prohibited.\(^3\) Since 1977, the Supreme

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3. Prior to the twentieth century, the common law largely governed attorney advertising. In 1908, the ABA approved a general ban on attorney advertising as part of the Canons of
Court has issued three opinions establishing a limited constitutional right for attorneys to advertise. In Bates, the Court established that the first amendment affords attorneys the right to engage in 'truthful' advertising relating to the provision of routine legal services.4 The Court further described and confirmed this right in In re R.M.J.5 and, more recently, in Zauderer v. Office of Disciplinary Counsel of the Supreme Court.6

The Supreme Court's philosophical thrust is simple enough, although there are subtleties that should not be overlooked. At this point in the development, there is no reason to recount the facts of the earlier cases; the development has spurred numerous law review articles that adequately canvas the basic constitutional issues.7 The concern in this Article is not so much with the doctrine as set forth in the Bates trilogy as with its effect on the legal profession.

The key point from Bates is that the Supreme Court largely ignored the ill-defined notions of dignity and professionalism in favor of the dissemination of truthful, objective information that hopefully would be useful to potential consumers. While Bates was a vitally important first step, it does not address the more difficult marketing issues faced by attorneys today.

The decision in R.M.J., the second of the Supreme Court decisions, is more important for analyzing future legal advertising disputes. In R.M.J., a Missouri attorney placed a newspaper advertisement setting forth a number of areas of practice in which he engaged using his own terms to describe those areas.8 As phrased, the descriptions did not correspond to the exclusive list of designated areas of practice permitted by the Missouri Advisory Committee's regulations. The Advisory Committee brought disciplinary proceedings against the attorney primarily for including information other than that allowed by the regulations.9

With respect to listing areas of practice, the Court found that there was no evidence in the record that the attorney's listings were misleading in any way. Accordingly, Missouri could not require that the attorney use

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Professional Ethics. The ABA's wording of the prohibition underwent various grammatical revisions, although the effect of the restrictions basically remained unchanged until Bates. See generally H. DRINKER, LEGAL ETHICS 210-19 (1953); L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1-8 (1980).

4. 433 U.S. at 365, 383.
8. 455 U.S. at 196.
9. Id. at 197-98.
only the specific descriptions set forth in the rule absent some showing of deception.10 Concerning the other regulations at issue, the Court repeatedly suggested that, if appropriate findings by the Missouri Supreme Court had been made, the regulations could be upheld. On the record as it stood, however, there was no indication that the State had attempted to find less restrictive alternatives.11 Given this ambivalence, R.M.J. is a difficult precedent to apply, and indeed, can be cited by either side in most disputes about the constitutionality of any regulation of attorney advertising.

After Bates and R.M.J., two potentially significant limitations lurked about that, if given broad application, would have seriously undercut the significance of these cases. First, the Supreme Court, as it made clear in Ohralik v. Ohio State Bar Association,12 had not overridden all areas of historical state regulation, particularly the traditional prohibition of personal solicitation.13 Second, the Supreme Court had not approved anything but the advertising of truthful, objective information to potential customers about the attorney's qualifications and fees regarding routine legal services.14 Neither Bates nor R.M.J. presented a dispute concerning the more provocative issue of attorneys focusing their marketing efforts on specific potential clients or utilizing 'creative' forms of advertising going beyond information concerning the attorney's routine services.

Limitation on personal solicitation has not generated any substantial debate given the Supreme Court's decision in Ohralik, although arguably it should.15 The second significant potential limitation, the use of non-

10. Id. at 205.
11. Id. at 203, 205-07.
12. 436 U.S. 447 (1978). State courts continue to limit attorney marketing efforts by labelling them as 'solicitations,' thus, managing to fall within at least the grammatical confines of Ohralik. See, e.g., Allison v. Louisiana State Bar Ass'n, 382 So. 2d 489 (La. 1978).
The Supreme Court has recognized a limited exception to the prohibition on direct solicitation in certain public law cases. See In re Primus, 436 U.S. 412 (1978). The contrast between Ohralik and Primus, once perceived as a major issue, in fact, is minor. The primary concerns in attorney marketing relate to nonpersonal contacts involving the private law context, thus rendering the Ohralik-Primus dichotomy largely irrelevant.
13. 436 U.S. at 462, 468.
14. Id. at 448-49.
15. Conceptually, personal discussions or solicitations are simply another form of marketing; however, no court has yet afforded any constitutional protections to an attorney's personal contact with potential clients. See, e.g., Attorney Grievance Comm'n v. Weiss, 300 Md. 306, 477 A.2d 1190 (1984). It is difficult, however, to reconcile the total prohibition of personal contact with the principles enunciated in Bates and R.M.J. Attorneys are likely to initiate in-person discussions with those in need of legal services who are often without substantial knowledge about available legal resources. Nonetheless, the historical concerns with overreaching and the impossibility of effectively monitoring direct meetings with potential clients supports this prohibition, although perhaps only in the context of personal injury victims or other situations in which the potential clients are predictably unsophistica-
traditional or 'creative' advertising, has been the subject of some discussion in the courts,\textsuperscript{16} but with little detailed examination.

The Supreme Court's recent decision in \textit{Zauderer}, however, expressly considered an attorney's use of creative advertising and is, therefore, significant in understanding the contours of the attorney's right to advertise. Besides \textit{Zauderer}, it is also important to understand the approach taken by the American Bar Association (ABA) in the recently enacted Model Rules of Professional Conduct (Model Rules).\textsuperscript{17} By examining \textit{Zauderer} and the Model Rules, we can identify the significant marketing issues that remain to be addressed and then assess the relationship between attorney marketing and potential malpractice liability.

A. \textit{Zauderer} and Creative Advertising

In \textit{Zauderer}, an attorney placed an advertisement in a number of Ohio newspapers offering his legal services to women who had suffered injuries possibly stemming from their use of a Dalkon Shield intra-uterine device.\textsuperscript{18} The ad noted that the Dalkon Shield had allegedly caused serious injuries in other women and that the attorney was representing women in lawsuits against the manufacturer on a contingency fee basis. The ad also contained an illustration of a Dalkon Shield.\textsuperscript{19}

The Ohio Office of Disciplinary Counsel filed a complaint against Mr. Zauderer charging that the Dalkon Shield ad violated Ohio's disciplinary rule 2-101(B) in part because it improperly used an illustration, was not 'dignified,' and contained information beyond that permitted under the rules.\textsuperscript{20} Following extensive administrative proceedings, the Ohio Supreme Court held that the advertisement violated the applicable disciplinary regulations and that those rules were constitutional.\textsuperscript{21}

Writing for the Court in a divided decision, Justice White held that the Dalkon Shield advertisement was constitutionally protected.\textsuperscript{22} The Court acknowledged that all advertising is "at least implicitly a plea for its audience's custom."\textsuperscript{23} Accordingly, a state's right to prohibit solicitation could not be applied to limit all truthful advertising without rendering \textit{Bates} meaningless. The Court noted that the ad was entirely accurate.

\begin{footnotesize}
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\item See infra pp. 619-21.
\item \textit{Model Rules of Professional Conduct} (1983).
\item 105 S. Ct. at 2271-72.
\item \textit{Id.} at 2271.
\item \textit{Id.} at 2272-73.
\item \textit{Id.} at 2274 (citing \textit{Zauderer}, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984)).
\item 105 S. Ct. at 2276-81.
\item \textit{Id.} at 2276.
\end{enumerate}
\end{footnotesize}
and did not promise success, nor did it claim that Mr. Zauderer had any special expertise in handling such matters. Therefore, the state’s acknowledged power to restrict misleading advertising could not be applied just because the ad was “geared to persons with specific legal problems.” Stated differently, the Court held that the first amendment applies to protect creative advertising designed specifically to reach interested, potential clients with specific legal problems.

Justice White rejected Ohio’s efforts to treat direct advertising as simply another form of prohibited solicitation as in Ohralik. Rather, the Court limited Ohralik to personal solicitations given the special risk in that context with overreaching, invasion of privacy, the exercise of undue influence, and outright fraud. Even though “sensitive souls” might find the Dalkon Shield ad distasteful, it certainly did not invade anyone’s privacy, and because the ad was printed, it lacked any significant coercive power.

The Court also rejected Ohio’s concern that ‘targeted’ marketing campaigns would ‘stir up’ litigation by having persons sue who otherwise would not do so. The Court noted that some perceive litigation as an evil that states are entitled to combat because it “consumes vast quantities of social resources to produce little of tangible value but much discord and unpleasantness.” Nonetheless, since society had chosen litigation as a means for resolving disputes, states could not interfere with citizens’ access to courts by denying them information about their legal rights. If a state fears that advertising will encourage citizens to file frivolous suits, it may create and enforce independent sanctions against either parties or attorneys for initiating vexatious litigation.

The central holding in Zauderer, favoring creative advertising, is an important addition to the attorneys’ constitutional protections afforded marketing efforts; indeed, in terms of its effect on the type of marketing it authorizes, Zauderer is the most significant of the Bates’ trilogy. Given the nature of marketing, this flexibility will be of critical importance. Rather than limiting Bates to information about an attorney’s routine services, Zauderer broadens the constitutional protections to include information about whether the consumer has a legal problem in the first place, a far different informational focus than that involved in Bates or

24. Id.
25. Id. at 2277.
26. Id.
27. Id.
28. Id.
29. Id. at 2277-78.
30. Id. at 2278.
31. Id. at 2279 n.12.
R.M.J. Without the ability to address specific legal problems of potential clients through creative marketing, the constitutional safeguard established in Bates and R.M.J. would have meant little and merely given attorneys the right to conduct ineffective advertising.

B. The Model Code and Attorney Marketing

The second significant factor in analyzing the future of attorney marketing efforts is the position adopted by the ABA in the Model Rules of Professional Conduct. To understand the critical areas of concern in the new Model Rules, some background is useful. Many state disciplinary authorities only begrudgingly accepted Bates. Some seemed more interested in taking advantage of potentially limiting language contained in Bates and R.M.J. than in opening opportunities for attorney advertising. As a general matter, states adopted one of two basic approaches to the Bates and R.M.J. cases, roughly corresponding to Proposals A and B put forward by the ABA after Bates.


33. The decision in Zauderer prompts another observation that, although related to the primary focus of this Article, is somewhat off the main point. In Zauderer, like its predecessor decisions in Bates and R.M.J., the Supreme Court recognized or at least paid lip-service to the state's continuing interest in monitoring advertising to prevent misleading statements. By refusing to permit blanket prohibitions of the type of advertising used in Zauderer, however, the Supreme Court has insured that the regulatory process will largely proceed on a case-by-case basis to enforce the primary concern of legitimate state regulation, namely a determination of whether the advertisement is misleading. This will entail significant administrative costs that many states may be unwilling to incur. As such, state supervision over advertising may become increasingly sporadic.

34. See, e.g., In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (prohibiting attorneys from using handbills, circulars, or billboards, and further prohibiting any claims of specialization). A good source for detail on various states' efforts to regulate advertising after Bates is H. Haynsworth, EXPANDING YOUR LAW PRACTICE: THE ETHICAL RISKS (1984).

35. Some of the restrictions almost defy understanding, although this perception is probably a function of having become acclimated to attorney advertising over the years. See, e.g., Foley v. Alabama State Bar, 481 F. Supp. 1308, 1310 (N.D. Ala. 1979), rev'd, 646 F.2d 355 (5th Cir. 1981) (claim by state that advertising the availability of free parking constitutes a violation of rules against giving valuable consideration in return for legal business); Eaton v. Supreme Court, 770 Ark. 573, 807 S.W.2d 55 (1990), cert. denied, 490 U.S. 966 (1981) (advertising circular disapproved in part because it was included in a packet of coupons for a variety of goods and services distributed to homeowners).

36. The general scheme set forth in Proposal A, which limited the content of advertising to 25 specific categories of information, was adopted in 30 states. Nineteen states and the District of Columbia enacted a version of Proposal B, which set forth a more generic limitation against false, fraudulent, misleading, or deceptive advertising. One state apparently
The ABA Model Rules, officially adopted in August 1983, completely restructured the ABA’s approach to regulating attorney advertising. Previously, Canon 2 of the Model Code of Professional Responsibility (Model Code) contained advertising and solicitation restrictions under its general axiom that an attorney had a duty to “Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available.” The fact that many of the advertising provisions limited attorney communication about services—and thereby restricted access—was an irony apparent to many.

Marketing restrictions are now contained in Part 7 of the Model Rules entitled “Information About Legal Services.” Since many states are likely to adopt large portions of the Model Rules, it is useful to analyze this approach to attorney marketing in detail.

As a general matter, the Model Rules quite properly reject any conceptual distinction between ‘advertising’ and ‘solicitation.’ Rather, they acknowledge that semantical labels are not useful in analyzing which marketing efforts should be permitted and which should not. On the whole, the Model Rules embrace both the letter and spirit of Bates and R.M.J., as opposed to the ABA’s earlier, more restrictive efforts to modify its prior prohibitions to conform to Bates.

As opposed to setting forth a laundry list of permitted information, Model Rule 7.1 establishes a general standard that an attorney “shall not make a false or misleading communication about the lawyer or the lawyer’s services.” It then defines three factors to be used to determine whether a communication is misleading. Specifically, the communication is misleading if it: (1) Contains a material misrepresentation of law or fact or omits a fact needed to make the statement not misleading; (2) is likely to create an unjustified expectation about the results the attorney can obtain; or (3) compares one attorney’s services with another absent factual substantiation.

39. As of Summer 1985, only two states, Arizona and New Jersey, had adopted the Model Rules. Other states are considering enacting the Model Rules, although many have proposed significant revisions in part 7 concerning attorney marketing. Even if not enacted in a particular state, however, the Model Rules’ approach will be important since, for example, some federal courts will require attorneys practicing before them to adhere to the Model Rules. See Kleiner v. First Nat’l Bank, 751 F.2d 1183 (11th Cir. 1985) (upholding fine against law firm based in part on violation of the Model Rules). For a useful summary of the history of ABA’s position on advertising and marketing, as well as an explanation of the Model Rules’ approach, see G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (1985).
41. Id.
Significantly, rule 7.1 does not include the Model Code’s prior language prohibiting an attorney from making “self-laudatory” or “undignified” statements.\(^{42}\) Rather, the Model Rules accept that the inherent purpose of marketing is to make ‘self-laudatory statements,’ and that the question whether an advertisement is dignified is hopelessly subjective.\(^{43}\)

Model Rule 7.2 sets forth a short series of specific rules relating to advertising. The rules are noncontroversial, and only require that: (1) An attorney keep a copy of any advertisement for two years together with a record of where the advertisement was published; (2) the ad identify one attorney responsible for its contents; and (3) an attorney not give anything of value to another person for recommending that attorney’s legal services other than to pay for the reasonable cost of the advertising.\(^{44}\) By imposing only minor procedural burdens, the Model Rules do not impose the significant bureaucratic strictures in effect in some states.

While the Model Rules as a whole greatly liberalize the previous regulatory regime, other portions include potentially significant restrictions. For example, Model Rule 7.3 substantially limits direct contact between attorneys and prospective clients.\(^{45}\) While it permits direct contact when the purpose is not for pecuniary gain, Model Rule 7.3 clearly limits such contact for purely commercial motives. Specifically, Model Rule 7.3 prohibits contact in person, by telephone, by letter, or by other forms of communication directed to specific recipients.\(^{46}\) It permits, however, “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.”\(^{47}\) Beyond the ‘general circular’ exception, the area

\(^{42}\) Id.

\(^{43}\) Despite the Model Rules’ sensible approach, the ‘dignity’ issue continues to divide the profession and the courts. Like many legal concepts, ‘dignity’ is hard to define on anything other than an ‘I know it when I see it’ basis. Some courts have, nonetheless, attempted to articulate a ‘dignity’ restriction. See, e.g., Bishop v. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass’n, 521 F. Supp. 1219, 1230 (S.D. Iowa 1981), vacated as moot, 686 F.2d 1278 (8th Cir. 1982); Committee on Professional Ethics & Conduct of the Iowa State Bar Ass’n v. Humphrey, 355 N.W.2d 565 (Iowa 1984), vacated & remanded, 105 S. Ct. 2693 (1985) (remanded for reconsideration in light of Zauderer), prior holding reinstated on remand, ___ N.W. 2d ___ (1985). But see In re Utah State Bar Petition, 647 P.2d 991, 997 (Utah 1982) (Durham, J., concurring & dissenting). On balance, the Model Rules’ approach is preferable since it will avoid extensive and nonproductive litigation.

\(^{44}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.2 (1983).

\(^{45}\) Id. Rule 7.3.

\(^{46}\) Id.

\(^{47}\) Id. In practice, however, the purported distinction between targeted mailings and general circulars will prove difficult to identify. Even the largest scale mailing can be personalized, thus, combining features of the ‘advertising circular’ with those of a specifically targeted mail campaign. Cf. Leoni v. State Bar, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr.
of prohibited contact is large.

While Ohralik clearly supports the restriction on personal contact for pecuniary gain, the Model Rules' limitation on direct mailing to targeted individuals raises serious constitutional questions if adopted and enforced by any state. As discussed in greater detail below, some state courts have held that direct mail campaigns to specific individuals known to need particular legal services are entitled to constitutional protection. It is likely that direct mail campaigns will continue to spur litigation, especially since these marketing efforts are among the most useful an attorney can conduct.

Model Rule 7.4 sets forth another potentially significant restriction. Basically adopting previous provisions, Model Rule 7.4 only permits attorneys to state either that they do or do not practice in particular fields of law.49 The rule further provides that attorneys may not state that they specialize except for attorneys practicing patent law, admiralty law, or other areas of designation or specialization established by the particular state.49

The theory behind Model Rule 7.4 is to permit an attorney to describe areas of practice so that potential clients can assess whether the attorney is able to handle a particular type of legal problem. By limiting identification of specialization to state-created areas of designation, the Model Rules may well be sanctioning a significant restriction if the state has not established a meaningful program. Even beyond this potential restriction, however, the Model Rules severely limit any statements an attorney may make concerning the quality of services or professed expertise the attorney may possess.

The limitation on advertising concerning specialization conflicts with a basic fact of modern legal practice. An increasing number of attorneys specialize to a significant degree. Whether this qualifies them as experts is, of course, open to question. To the extent that Model Rule 7.4 restricts the natural tendency of attorneys to address their qualifications within self-designated areas of specialization, it is likely to provide fertile ground for litigation.50

In summary, the Model Rules present a welcome simplification of the

423 (1985) (disciplining attorneys for conducting mail campaigns to over 250,000 recipients).
49. Id.
50. The final provision in part 7 of the Model Rules is noncontroversial and is appropriately treated in a footnote. Rule 7.5 concerns marketing practices relating to attorneys' use of firm names and letterheads, and sets forth only a limited set of restrictions that are fully justified to prevent deception. Significantly, rule 7.5(a) liberalizes previous regulations by permitting an attorney to use a tradename so long as the name does not suggest a relationship with a governmental agency, a charitable legal services organization, or is otherwise not deceptive. See generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.5 (1983).
earlier ABA Code of Professional Responsibility. By creating a separate part dealing with marketing issues, the Model Rules have improved substantially the conceptual approach to attorney marketing efforts. In most cases, the final version of the Model Rules stands on firm constitutional ground and provides a justified balance between regulation and free access to marketing methods. Two limitations, however, direct mail campaigns and advertising areas of specialization, create substantial restrictions in potentially justified areas of attorney marketing, thereby inviting further litigation.

II. THE FUTURE OF ATTORNEY ADVERTISING

One possible version of the evolution of the attorney’s right to advertise is that the Supreme Court established the right in 

Bates

and then has been called upon to rule that it meant what it said the first time. As noted from our analysis of 

Zauderer

, the Authors do not share that view. Rather, the 'degree of difficulty' factor in applying first amendment protection to the specific advertisement at issue in 

Bates

through 

R.M.J.

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increased significantly.

Zauderer

will not be the final word in the development, as the Supreme Court made clear by vacating a potentially significant decision from the Iowa Supreme Court for reconsideration in light of 

Zauderer

and denying review of another state court decision.51 Those decisions had reached quite inconsistent results. One upheld the potential constitutionality of direct mailings to mass tort victims52 that probably would have been rejected out-of-hand by many courts. The other decision approved a broad state ban on numerous useful techniques of creative advertising.53 Both cases raise difficult issues and portend some of the important questions that remain.

While there are certainly any number of specific matters left to be resolved,54 there are three crucial concerns remaining after 

Zauderer

and in

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51. See Committee on Professional Ethics & Conduct of the Iowa State Bar Ass’n v. Humphrey, 355 N.W.2d 565 (Iowa 1984), vacated & remanded, 105 S. Ct. 2693 (1985) (remanded for consideration in light of 

Zauderer

), prior holding reinstated on remand, ___ N.W.2d ___ (1985); 

In re Von Wiesen


52. 

In re Von Wiesen


54. While the three areas discussed in the text are in our opinion the most significant, other questions will certainly be litigated. One additional issue worthy of some comment relates to attorneys’ use of tradenames. Historically, the ABA’s Canon of Professional Ethics and Code of Professional Responsibility, as adopted by many states, prohibited the use of
light of the Model Rules that present perhaps the last significant issues in determining the parameters of an attorney's right to advertise. This Article, therefore, sets forth a brief description of those issues together with at least a hint of the Authors’ approach to their resolution.

A. Advertising Expertise, Specialization, and Quality of Services

Given the advent of attorney specialization, attorneys naturally can be expected to desire to advertise their particular areas of specialization, and thereby either expressly or impliedly indicate expertise. As previously noted, the Model Rules only permit an attorney to identify areas of practice, thus, limiting claims of specialization to either patent law, admiralty law, or other specific areas designated by the state. While some states have enacted specialization programs, many have not done so, thereby significantly restricting efforts by attorneys to advertise areas of specialization.55


The purpose of prohibiting the use of tradenames is to prevent the public from being deceived as to the identity or status of the attorney using the name. In re Shannon, 292 Ore. 339, 638 P.2d 482 (1982). Certainly, the courts should be vigilant in protecting against unfair uses by attorneys of tradenames that seek either to expropriate another entity's goodwill or unfairly assert a nonexistent connection. Beyond those concerns, however, a state's interest in limiting the use of tradenames is minimal. By the same token, however, the amount of information conveyed to the public through a tradename is relatively insignificant. To the extent that the first amendment only protects an attorney's right to convey useful information to potential consumers, states are probably on firm ground in restricting the use of tradenames. See Friedman v. Rogers, 440 U.S. 1 (1979) (upholding the constitutionality of restrictions on the use of tradenames by optometrists). Nor can the use of a tradename necessarily be justified as a creative advertisement under Zauderer. In Zauderer, the illustration served a communicative function as an attention-getting device. A tradename usually does not serve this purpose.

Of course, states should not necessarily prohibit the use of tradenames just because they may do so constitutionally. In re Utah State Bar Petition, 647 P.2d 991 (Utah 1982). Non-misleading tradenames are probably no more likely to injure consumers than law firm names containing the name of a deceased partner, a common practice in metropolitan areas.

55. See, e.g., In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (prohibiting advertising concerning areas of practice until specialization program was approved); In re Mountain Bell Directory Advertising, 185 Mont. 68, 604 P.2d 108 (1979) (prohibiting advertising concerning areas of practice until prohibition was approved).
In a significant recent decision, the Supreme Court of Minnesota struck down rule 2-105(b) of the Minnesota Code of Professional Responsibility, which prohibited an attorney from holding himself or herself out to the public as a specialist until such time as the Minnesota Supreme Court adopted rules or regulations permitting such action.64 In re Johnson65 concerned an attorney who advertised that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA).66 The NBTA, a national organization, applied a rigorous set of standards before certifying an attorney as a trial specialist. As of 1983, the NBTA had certified only 541 lawyers in the entire nation.68

The Minnesota Board of Professional Responsibility issued a charge of unprofessional conduct against the attorney.69 On appeal following an administrative proceeding upholding the provision, the Supreme Court of Minnesota held that the rule was unconstitutional as applied to the ad in question.70 The court acknowledged, however, that there were significant problems with an attorney’s self-designated claim of specialization or expertise. “Members of the general public could be misled by a claim to specialization when no guidelines for specialization in the profession have been drawn.”72 Nonetheless, the court found that the attorney’s assertion in this case was not misleading.73

The analysis in Johnson is significant and will serve as a starting point for future cases concerning marketing programs seeking to capitalize on attorneys’ claims of specialization. At this point, many states have not instituted rules defining particular areas of specialization although virtually all states have discussed the issue. Although Minnesota was one of the states that had no specialization or designation program at all, Johnson can be cited as authority for the proposition that states having such a program may not have the constitutional power to restrict to a mere handful of generic descriptions the number of ‘specialties.’ After Johnson,

760 (1979).

Tennessee’s decision to preclude advertising identifying areas of practice was challenged in federal court and found to be unconstitutional. In Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), aff’d without opinion, 698 F.2d 1218 (6th Cir. 1982), the district court concluded that information relating to areas of practice would be of importance to potential consumers and, thus, was entitled to first amendment protection. But cf. Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 902, 910-12 (D.R.I. 1981) (attorney listing of ‘laundry list’ of areas without explanation is inherently misleading).

57. 341 N.W.2d 282 (Minn. 1983).
58. Id. at 282.
59. Id. at 283.
60. Id.
61. Id. at 285.
62. Id.
63. Id.
attorneys in states that only recognize a few specialties can make a strong argument that a self-defined specialty is valid, so long as the designation is not misleading. To the extent that the attorney can demonstrate objective evidence of specialization, such as the certification by the National Board of Trial Advocacy in Johnson, the attorney's argument obviously will be strengthened. If Johnson is correct—and its approach is certainly consistent with Bates, R.M.J., and Zauderer although perhaps not compelled by those cases—then the constitutionality of Model Rule 7.3 is open to serious doubt.

While the purpose of this Article is not necessarily to argue in favor of or against attorney advertising in a particular context, the problem of advertising areas of specialization is sufficiently important that a few observations are in order. First, the trend towards specialization is a fact that cannot be dismissed, ignored, or reversed. A rule of law that essentially rejects the trend is at least uninformed and, indeed, probably regressive. Second, consumers undeniably have a valid interest in obtaining information about an attorney's claimed area of specific expertise. Consumers with a specific legal problem are entitled to receive information permitting them to select an attorney as well versed in that subject matter as possible. This interest is the central principle in forming the Bates trilogy. Third, there are many potentially invalid reasons why some attorneys or bar associations might choose to limit this type of information. For example, permitting broad advertising of specialized areas arguably would have more serious repercussions on already established attorneys who are more likely to be general practitioners. Fourth, advertisements relating to areas of specialization are not any less able to be subjected to meaningful review to avoid misrepresentations or misstatements. Finally, malpractice liability rules may be especially well suited to compensating clients who fall victim to improper or unsupported claims of expertise by attorneys. Thus, on balance, although the issue is far from one-sided, the permissive approach enunciated in In re Johnson is preferable to the alternative of prohibiting such advertising.

A slightly different issue, which has not yet been the subject of extensive litigation, is the extent to which attorneys may make affirmative statements regarding the quality of their services or make direct claims concerning their expertise, as opposed to identifying areas of practice or specialization with its indirect assertion of expertise. Obviously, most advertisements for ordinary commercial products make numerous affirmative claims about the qualities of the product being offered for sale. To

64. For a conflicting approach, see In re Amendments to the Code of Professional Responsibility & Canons of Judicial Ethics, 276 Ark. 600, 637 S.W.2d 589 (1982) (rejecting request by attorneys to advertise designation by NBTA because state administrative agencies had to process all specialization or certification requests).
date, most states, like the Model Rules, have expressly prohibited specific
claims about the quality of services an attorney can provide.

As presently formulated, the commercial free speech doctrine may not
be broad enough to include subjective claims regarding an attorney's
competence or the quality of his or her legal services. The doctrine ap-
plies most directly and is perhaps limited to objective information that in
the context of attorney advertising has traditionally been limited to veri-
ifiable information. Courts resolving these issues will be faced with diffi-
cult decisions. Certainly, some claims by attorneys regarding the quality
of services can be quantified, and courts should respect an attorney's
right to use objective and nonmisleading advertising even if it relates to
the quality of services.

The State of Ohio attempted to justify its restriction in Zauderer on
the need to protect potential clients from attorneys claiming expertise.
The Supreme Court, however, properly noted that the issue was not
squarely raised since the attorney had not made any direct claims of ex-
pertise, but only stated that he had handled similar cases, which was
true. In an important statement, however, the Supreme Court antici-
pated the issue by noting that a state cannot "prevent an attorney from
making accurate statements of fact regarding the nature of his practice
merely because it is possible that some readers will infer that he has some
expertise in those areas." Given this position, there seems little reason
to restrict an attorney's right to make more direct claims of expertise if
supported by objective information. This is especially true if the malprac-
tice liability rules recognize that any marketing claims can be used to
assist in determining the applicable standard of care.

A related question, which for certain purposes constitutes a separate
issue, is the extent to which states may constitutionally require an attor-
ney to include a disclaimer or disclose other information in the advertise-
ment that the attorney otherwise would not include. The Court in
Zauderer approved a forced disclosure relating to the client's ultimate
responsibility for costs of litigation in cases accepted on a contingency fee
basis. States will predictably seize upon this power to require disclo-
sures, perhaps with a vengeance. To be sure, a disclaimer or disclosure re-
quirement is less onerous than an outright prohibition on advertising. It
only requires attorneys to "provide somewhat more information than they
might otherwise be inclined to present." The attorneys' interest in not
providing the information will often be minimal, especially when com-
pared to the potential clients' interest in being fully informed. The Court

65. 105 S. Ct. at 2276.
66. Id. at 2278 n.9.
67. Id. at 2281-83.
68. Id. at 2282.
in Zauderer, however, noted that disclosure requirements that were "unduly burdensome" could offend the first amendment.⁶⁹

Most of the many potential areas in which the states are likely to require disclosures or disclaimers will be appropriate, as was the case in Zauderer. Perhaps one of the most likely types of required disclaimers will relate to claims of specialization, in order to attempt to deny any implied claims of expertise or promises concerning the quality of services to be rendered or the results to be obtained.⁷⁰ Since these disclaimers strike at the heart of the issue of advertising areas of practice or specialization, it is worth analyzing whether the states’ power in this regard should be recognized.

While the Court in Zauderer was correct that requiring the disclosure of useful information to potential clients is constitutional, courts should not immediately conclude that all such requirements are valid especially as they relate to specialization. It is at least arguable whether a general disclaimer concerning the quality of services or specialization to be used in all advertisements by attorneys is appropriate. Rather, an argument can be made that attorneys should be permitted to present factual information that demonstrates their particular competence to perform a certain task. Rather than providing meaningful information to a potential consumer, overly general disclaimers may incorrectly imply conditions that simply are not true.⁷¹ The advertisement then could become an internally inconsistent statement. What the attorney attempts to suggest by a claim of specialization is then dished by a disclaimer leaving potential

⁶⁹. Id.

⁷⁰. In Mazzaro v. Alabama State Bar, 434 So. 2d 732 (Ala. 1983), the Alabama Supreme Court upheld the constitutionality of Alabama DR 2-102(A)(7)(f), which required each advertisement for legal services to contain the following language: "No representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services." Id. at 734. See In re Goldin, 689 S.W.2d 869, 870 (Tenn. 1985) (adopting revised disclaimer requirement that the state "does not certify specialists in the law, and [the attorneys] do not claim certification in any listed area").

⁷¹. See Spencer v. Honorable Justices of Supreme Court, 579 F. Supp. 880, 891-92 (E.D. Pa. 1984), aff’d, 760 F.2d 261 (3d Cir. 1985) (regulation requiring attorneys to state affirmatively that they were not certified as specialists unfairly implied that other attorneys might in fact be specialists). With respect to prevention or defense of legal malpractice claims, it may be advisable for attorneys to include disclaimers or other forms of explanation in order to counter the potential client’s claim that advertising constituted a representation of success. It would be better for any disclaimer to be written specifically to correspond with the nature of the representation made in the legal advertisement, rather than relying upon some form of blanket disclaimer. A court would be far more willing to consider a specific disclaimer that was included for a particular reason than a general blanket disclaimer that, as recognized by some courts, may itself be misleading. Cf. Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 903, 907 (D.R.I. 1981) (law firm’s statement in advertisement that it made no claim of expertise was itself misleading because that was the purpose of the advertisement).
clients without any sense of what they are being told. Courts should not be willing to condone disclaimers that are themselves misleading, and should instead afford appropriate scrutiny to insure against that possibility. As with most issues in this area, the focus should be on the value to the consumer of the information in question. If the disclaimer or item to be disclosed is not true, confusing, or of little relevance, the courts should not indulge its coerced use by state regulation.

B. Direct Mail Campaigns and Marketing Efforts to Third Parties

A central principle of effective marketing is to target the advertising message to interested recipients. For example, if a firm specializes in house closings, marketing activities focused on actual or likely house purchasers and sellers would be most efficient. Direct mail campaigns conducted by attorneys, however, have proven to be troublesome. Some states view targeted mail campaigns as raising a heightened potential for deception, and have attempted to restrict such efforts. Indeed, the ABA Model Rules prohibit mailings to specific individuals as opposed to general mailings.72

The constitutionality of direct mail campaigns to potential clients has received considerable attention by state courts, although with contradictory results. Prior to R.M.J., a number of courts disapproved direct mail campaigns,73 while other courts have held that direct mail is a permissible form of advertising.74 Many of these decisions are unsatisfactory in their constitutional analysis. The results of the cases often can be better understood with reference to the message contained in the advertisement. Those mailings containing purely objective information have been ap-

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proved regardless of the form of the marketing scheme, while those seeming to suggest a particular course of conduct—which obviously promotes the attorney's best interests—are suspect.

The recent trend is in favor of permitting direct mail campaigns to clients. Indeed, a recent New York Court of Appeals opinion upheld a direct mail campaign targeted to victims of a mass tort, victims of the Kansas City Hyatt Regency disaster.\textsuperscript{76} In that case, the court rejected each of the state's concerns for overreaching, unprofessionalism, and stirring-up litigation, essentially concluding that since the recipients had the simple option of discarding the correspondence, the state's concerns were overblown.\textsuperscript{76} The decision is potentially of great importance if adopted as a general statement of law, and clearly threatens the constitutionality of the Model Rules' prohibition of certain types of direct mail advertising. In the past, courts had been far more willing to protect victims of mass torts from perceived harassment by attorneys.

Another efficient marketing technique is to conduct direct mail campaigns to third parties who are in a position to recommend attorneys to others. Real estate brokers, bankers, accountants, and stock brokers are frequently asked by clients or customers to recommend an attorney. Similarly, employers are key contacts for establishing group prepaid legal services for their employees.\textsuperscript{77} From a purely marketing perspective, attorneys would often be well advised to concentrate on these key third parties in conducting a marketing campaign.

When attorneys try to entice third parties, potential added concerns arise, such as the danger that the third party will in turn conduct an improper 'solicitation' of potential clients.\textsuperscript{78} As with the direct mail question, none of the leading Supreme Court cases directly control the constitutional issues, although the third party mailing issue has been considered by a few state courts with differing results.

The New York Court of Appeals recently considered a third party mail-

\textsuperscript{75} 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). See generally Adams v. Attorney Registration & Disciplinary Comm'n of the Supreme Court, 617 F. Supp. 449, 455 (N.D. Ill. 1985) (holding that there is no "principled reason for allowing direct mailing to the public at large, but not to target audiences").


\textsuperscript{77} See Allison v. Louisiana State Bar Ass'n, 362 So. 2d 489 (La. 1978) (holding that attorneys' mailing of letters to employers concerning prepaid legal services was not constitutionally protected).

ing issue in *In re Alessi.* In that case, a group of attorneys had sent a letter to 1,000 realtors in the Albany, New York area quoting fees for specific types of real estate transactions. Other than providing this information and a telephone number at which the realtors could contact the attorneys for more information, the letters contained little else.

The enforcement agency of the New York State Bar challenged the distribution of the letter claiming that it violated a section of New York's Judiciary Law, as well as DR 2-103(A) of the New York Code of Professional Responsibility that, as limited by earlier judicial decisions, prohibited direct mail advertising by attorneys to real estate brokers or other third parties with an independent client relationship. The New York Court of Appeals held that the prohibition of direct mail solicitation of real estate brokers was constitutional. The court, citing its own earlier decision in *In re Greene,* found that the state had a significant interest in preventing conflicts of interest and concluded that the state could prohibit mailings "to that limited number of third persons who themselves may have dealings with the potential clients of the attorney from which a conflict of interest may result." The regulations did not prohibit an attorney from making known directly to potential clients the availability of the attorney's services, or even letting certain third parties know of the existence of such services. Rather, the rules prohibit an attorney from contacting particular types of third parties, such as real estate brokers, whose interest could become more closely intertwined with those of the attorney than those of their mutual client. Under these limited circumstances, a prophylactic rule was permissible.

Another court, however, reached a different result on the third party issue. The Supreme Court of Connecticut in *Grievance Committee for Hartford-New Britain Judicial District v. Trantolo* recently struck down Connecticut's blanket prohibition against mailed solicitations to

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80. 60 N.Y.2d at 231, 457 N.E.2d at 683, 469 N.Y.S.2d at 578.
81. Id. at 232, 457 N.E.2d at 684, 469 N.Y.S.2d at 579.
82. Id. at 232, 457 N.E.2d at 683, 469 N.Y.S.2d at 579.
84. 60 N.Y.2d at 234, 457 N.E.2d at 685, 469 N.Y.S.2d at 580.
85. Id. at 235, 457 N.E.2d at 686, 469 N.Y.S.2d at 581.
86. Id. Judges Cooke and Kaye dissented, on the basis that *R.M.J.* required that direct mail advertising to individuals such as real estate brokers be afforded some constitutional protection. They essentially reasoned that the majority's analysis was based upon the possibility of a conflict of interest as opposed to the probability of a conflict. In their view, *R.M.J.* requires more than the existence of a possibility to justify state regulation. Id. at 238, 243, 457 N.E.2d at 687, 690, 469 N.Y.S.2d at 582, 585 (Cooke & Kaye, JJ., dissenting).
third parties. 88 In Trantolo, an attorney mailed announcements concerning an open house to twenty-five realtors in the Hartford area. 89 The State Grievance Committee alleged the announcement violated Connecticut’s DR 2-103(C), which provided that “[a] lawyer shall not request a person or organization to recommend or promote the use of his services.” 90 The Connecticut Supreme Court held the mailing was protected under the first amendment. 91

While agreeing that the State had a substantial, valid interest in banning some forms of solicitation, the court held that a total ban on third party communications was overly restrictive. 92 The court left open the possibility that less restrictive means of regulation would be constitutional. It even suggested a number of alternatives, such as requiring that a copy of any mailing and the list of recipients be filed with an appropriate state agency. 93

It is likely that this kind of controversy will continue given the Model Rules’ orientation. 94 Certain statements in Zauderer, however, suggest that the form of advertising per se should not be the critical issue, but rather the states’ legitimate area of regulation as it relates primarily to content. The Court in Zauderer gave a narrow reading to Ohralik, essentially confining it to the personal solicitation context. 95 Those state courts that have condemned direct mail schemes on the authority of Ohralik have given that case too broad an application. In deciding the direct mail cases, courts should carefully differentiate between the content of the mailings and the fact of mailing. 96 As made clear by the many courts that have approved advertising sent through mail, this marketing form is not inherently misleading or coercive, even if directed to a small number of potential consumers. Courts could perhaps reach a middle ground by accepting the constitutionality of direct mail marketing, with the caveat that the disciplinary agencies are entitled to perhaps greater deference in limiting the content of the mailing to insure that they are not misleading or coercive.

On the third party issue, it is questionable whether the targeted broker,

88. Id. at 34-35, 470 A.2d at 239.
89. Id. at 29, 470 A.2d at 238.
90. Id. at 30 n.3, 470 A.2d at 236-37 n.3.
91. Id. at 32-35, 470 A.2d at 238-39.
92. Id. at 34-35, 470 A.2d at 239.
93. Cf. Kentucky Bar Ass’n v. Stuart, 568 S.W.2d 933 (Ky. 1978) (approving conduct of attorneys in mailing letters concerning fees and services to real estate agencies).
95. 105 S. Ct. at 2277.
96. Cf. Leoni v. State Bar, 39 Cal. 3d 609, 704 P.2d 183, 217 Cal. Rptr. 423 (1985) (concluding that a massive letter campaign to potential clients was misleading although mail advertising, in general, was constitutionally protected).
banker, or accountant will in fact attempt unfairly to solicit clients for the attorney or that the solicitation efforts that do occur on the attorney’s behalf will result in a conflict of interest. While the concerns raised by the court in Alessi are significant, it is clear that there are potential benefits to increasing the amount of information about attorney services available to those third parties who regularly recommend legal services to their own clients. Absent specific findings of the probability or existence of abuse, states should permit the flow of information to proceed, especially given that the third-party referral process admittedly occurs on a personal level between attorneys who already have an on-going relationship with the third party. Assuming that the third party cannot receive any compensation from the attorney, which is almost uniformly prohibited, it is doubtful whether that third-party will use high pressure tactics to obtain clients for someone else.

Indeed, third parties are likely to perform a useful and objective function in referring attorneys to their clients. Their relationship to their own clients, the crucial factor for denying direct marketing contact with third parties in Alessi, instead suggests that they would act in an informed manner to assure that their clients received the best assistance possible. Often, these third parties are in a better position to be aware of the available choices and to know something about the competing attorney’s qualifications. They predictably have an interest in recommending the ‘best’ attorney to their own clients. While it is difficult to measure, a substantial amount of informal contact already occurs on a personal basis between third parties and attorneys, which probably cannot be prohibited or monitored effectively. Permitting additional communication in written form that can be monitored should hardly swing the balance too far. Rather than seeking limits on this type of communication, states should perhaps be seeking ways to improve this form of communication.

C. Use of Nonobjective Characteristics

The final area of continued uncertainty is both the least substantive and the most difficult one in which to articulate the respective interests at stake. The question is simple enough: to what extent can attorneys use nonobjective information to increase the effectiveness of their advertisements? Advertising professionals stress the importance of nonobjective factors in effective marketing. Television commercials for consumer products are filled with snappy generalizations, music, or generally unsupportable claims.

There is substantial uncertainty over the attorney’s right to conduct this type of advertising. Indeed, some states initially attempted to limit attorney advertising to the print media on the theory that television, with its unique opportunities for multisensory stimulation, would be inher-
ently misleading.\textsuperscript{97} This position, however, has generally been rejected.

There is not much in the \textit{Bates} trilogy directly addressing the issue. \textit{Bates} and \textit{R.M.J.} concerned advertising information, not slogans. The holdings were limited to that context, and by implication perhaps would sanction, or even invite, limitations on nonobjective traits. \textit{Zauderer}, however, complicates the analysis. In that case, the Supreme Court expressly held that an attorney's use of a nondeceptive illustration in an advertisement could not be prohibited by a state.\textsuperscript{98}

At issue in \textit{Zauderer} was a diagram of a Dalkon Shield intra-uterine device. The Court noted that an illustration "serves important communicative functions; it attracts the attention of the audience to the advertiser's message, and it also may serve to impart information directly."\textsuperscript{99} Accordingly, the Court ruled that limitations on visual media of expression must also be scrutinized under the first amendment's safeguards relating to commercial speech.\textsuperscript{100}

Despite \textit{Zauderer}'s holding, states may well continue to restrict the type of 'gimmicks' used by attorneys in their advertisements, labelling them undignified, unprofessional, or somehow inherently misleading. Some state limitations, such as Rhode Island's attempt to limit advertisements in telephone directories to yellow pages in the 'Lawyers' section only, simply do not further any legitimate state interest.\textsuperscript{101}

Nonetheless, the use of teasers, dramatic voice-overs, or pure hucksterism offends many. In a recent decision, contrary to the recent trend towards allowing greater flexibility in attorney advertisements, the Iowa Supreme Court held that a state-imposed prohibition on music, 'dramatic' voices, or self-laudatory statements in attorney advertising was constitutional.\textsuperscript{102} That decision was vacated by the United States Supreme Court for consideration in light of \textit{Zauderer},\textsuperscript{103} but on remand the Iowa Supreme Court again held that the prohibition was constitutional.

The Iowa court held that a "line can and should be drawn between

\textsuperscript{97} \textit{See generally In re Felmeister}, 95 N.J. 431, 471 A.2d 775 (1984).
\textsuperscript{98} 105 S. Ct. at 2280-81.
\textsuperscript{99} \textit{Id.} at 2280.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{See Lovett & Linder, Ltd. v. Carter}, 523 F. Supp. 903, 909-10 (D.R.I. 1981) (permitting colorful ad by attorney on back cover of telephone directory). The district court in \textit{Lovett} found that there was "no constitutional infirmity in being the biggest, best or most colorful in almost any commercial activity—including advertising." \textit{Id.} at 910.
what informs the public and what promotes the lawyer." In light of Zauderer, it is questionable whether that line is sufficiently bright. Yet, despite the difficulty of drawing lines, many courts have approved regulation of or disciplinary actions based upon nontraditional advertising.

The difficulty in analysis is that neither the states' nor the attorneys' interests are terribly weighty. The lawyer's interest in having polished advertising is minimal. As long as the state permits the information to be advertised, regulations on the aesthetic quality seem incidental. The states' espoused concerns are those traditionally voiced: dignity, professionalism, and the fear of stirring up litigation. Certainly, these items have some, albeit limited, vitality after Zauderer. The inherently subjective nature of professionalism and dignity makes them slim reeds upon which to outlaw a wide range of admittedly common advertising techniques.

The holding in Bates is premised upon the potential client's interest in obtaining information about legal services. If nonobjective techniques are an issue, resolution may depend upon whether the consumers find that dramatic touches, illustrations, and other flourishes make advertisements either more palatable or noticeable.

Ultimately, the proper focus should be on whether the advertisements, taken as a whole, provide information to consumers that is constitutionally protected. If this condition exists, the presence of advertising techniques to improve the presentation of the information or to make it more likely to be effective is entitled to a measure of derivative protection. Providing information, after all, is the bulwark upon which the attorney's right to advertise is based. To the extent that an advertisement elevates form over function so that protected information about the attorney's qualifications or the need for or the availability of legal services becomes secondary, the advertisement is fairly prohibited on the ground that it is misleading.

III. MARKETING AND ATTORNEY LIABILITY

In the almost ten years since the Court began its reevaluation of attorney advertising rights in Bates, a tremendous amount of institutional re-

105. See, e.g., Eaton v. Supreme Court, 270 Ark. 573, 607 S.W.2d 55 (1980), cert. denied, 450 U.S. 966 (1981) (attorney's delivery of coupon for $10 initial consultation was improper since it could be perceived as a discount and was not informative). But see Oklahoma ex rel Oklahoma Bar Ass'n v. Schaffer, 648 P.2d 355 (Okla. 1982) (permitting ad guaranteeing service to be performed in five days or no charge since state has no interest in suppressing delivery of free services).
sistance has been overcome, although large numbers of the unconverted remain. While the process is not yet over, it is fair to say that the final major issues concerning the definition of the attorney’s right to advertise are now not only on the horizon, but are ready to be resolved.

With respect to the nature of legal practice, the decade-long transition has resulted in a significant increase in attorney communications of a self-serving variety with persons in the preclient formation stage, as well as a major change in the method whereby potential clients obtain attorneys in certain types of matters. To understand the long range effect from these structural changes, it is useful to speculate about other modifications in the universe of rules that may be appropriate or necessary to control an attorney’s behavior and relationship to clients, the courts, and others. The advertising rules, after all, do not operate in a vacuum. In thinking about the relationship with other professional norms, we are entering essentially uncharted waters; few courts or commentators have focused on the effect of advertising considerations on other areas.

To date, attorney advertising issues have usually arisen in the disciplinary context either in direct proceedings against the offending attorney or in suits brought by the attorney anticipating a disciplinary proceeding. The focus has necessarily been on the constitutional parameters of the attorney’s right to advertise. As noted above, this type of litigation will continue. As the contours of the advertising rights are clarified, however, other litigation scenarios are possible. For example, some courts have recognized that competing attorneys or consumers who have been directly injured by false or misleading advertising can bring suit against the allegedly offending attorney. See, Reed v. Allison & Perrone, 376 So. 2d 1067 (La. App. 1979) (approving possibility of potential claim by another attorney against attorneys who allegedly used false advertising under Louisiana’s consumer protection laws). Since most states restrict an attorney from using any comparisons with other attorneys in advertising, it is unlikely that there will be a significant amount of litigation between attorneys concerning advertising claims.

The authors do not mean to imply that attorney liability principles are the only set of rules in which changes in attorney advertising will be relevant. Another possible candidate for reexamination is the area of awarding appropriate sanctions against attorneys pursuant to such devices as the recently amended rule 11. Fed. R. Civ. P. 11. Under the new rule, federal courts have increasingly taken the lead in ferreting out and punishing attorneys or parties who conduct frivolous litigation. See, e.g., Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985); Kendricks v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1988). As part of the task of making the initial determination about the merits of the filing of a suit, as well as the subsequent allocation of responsibility between attorney and client, inquiry into the preclient formation process including a careful analysis of any advertising or marketing techniques used by the attorney may prove fruitful to the inquiring court.

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To be good marketers, attorneys must convince present and potential clients that they are or will be effective attorneys likely to obtain favorable results for them. In this respect, attorneys who successfully advertise or market their abilities will be no different than purveyors of any product. Attorney advertising usually will have one of three central attributes: (1) It will impliedly or expressly make statements concerning likely results; (2) it will tout the personal qualifications of the attorney; or (3) it will describe specific situations that can be addressed by the application of legal resources. Each of these central goals will be premised upon at least implied statements about the attorney's abilities.

Attorneys perform legal services that have real world consequences. What happens when an attorney obtains an unfavorable result? Obviously, this is not a novel question—attorneys have been losing cases for hundreds of years. One predictable result is that the client, acting like a rational consumer, may elect to retain a new attorney. Second, the client may decide to sue the attorney. Again, lawsuits by disgruntled clients are nothing new, although such lawsuits are becoming increasingly common. In marketing terms, a lawsuit against an attorney by a client can be analogized to a disappointed customer who purchased a product, the attorney's services, with the expectation of obtaining a good result. The malpractice suit becomes a type of breach of warranty case.

Court opinions in attorney malpractice cases are already beginning to reflect an increased awareness of the possible impact of attorney marketing on attorney liability. For example, in a recent opinion by the Eleventh Circuit, plaintiff decided to use the defendant-attorney's services because he was impressed with the law firm's "size and frequency of advertisements." At least from the client's perspective, attorneys who advertise areas of practice or expertise imply that they are competent or able to handle matters raising those types of problems.

Perhaps the most significant marketing change in the recent past has been the evolution of the attorney as a specialist. Equally significant is

108. Mayo v. Engel, 733 F.2d 807, 809 (11th Cir. 1984). The law firm advertised that it handled "business and contract law, stocks, divorces, and other types of legal problems." Id. at 809. The Eleventh Circuit affirmed a summary judgment in favor of the attorney who had allegedly been negligent in conducting a trademark search. The court noted that the lower court properly dismissed the misrepresentation count in part because there was no evidence that the law firm held itself out to the public as an expert in trademark law. Id. at 812. The result may well have been different if the firm had advertised itself as a specialist or expert in that area of practice.

109. See Zimmerman v. Office of Grievance Comm., 79 A.D.2d 263, 438 N.Y.S.2d 400 (1981), cert. denied, 104 S. Ct. 2681 (1984) (listing of areas of practice, despite disclaimer of expertise, was misleading when attorney lacked substantial experience in the area); In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (attorneys can only list areas of practice in which they are presently competent).
the fact that an increasing percentage of recent attorney malpractice suits concern claims alleging that the attorney was a 'specialist.' The 'expert' malpractice case can take a number of forms. The classic example is a claim by a client that an attorney made a mistake that a knowledgeable specialist would not have made. Almost as common are claims that an attorney held himself or herself out to the public as a specialist without having the requisite abilities.

The impact of 'specialization' on malpractice claims will be substantial. An attorney who becomes involved in a legal matter encompassing doctrines in which he or she does not have experience will be at risk that the client will sue if the results are 'bad.' Courts have increasingly suggested that attorneys may be liable for not referring a case involving difficult areas of law. For example, in Horne v. Peckham,109 the California Court of Appeals suggested that an attorney who is a general practitioner has a duty to refer his client to a specialist, or at least recommend the assistance of a specialist, if under the circumstances a "reasonably careful and skillful practitioner" would have done so.110 Apart from whether failure to recommend a specialist may constitute a cause of action under Horne, it is clear that the standard of care formulation in the jury instruction will be based on what a specialist would have done. General acceptance of this doctrine would have a profound impact on the practice of law in an environment increasingly characterized by specialization.111

Advertising is a positive statement concerning the qualifications of the person doing the advertising. Any claims, therefore, will create heightened expectations from the client. This claim will most often be manifested as one of competence or implied expertise. Accordingly, the trend towards advertising will predictably accelerate the courts' consideration of malpractice cases based upon specialization claims.

The Montana Supreme Court addressed the possible relationship be-

111. Id. at 415, 158 Cal. Rptr. at 720.
112. See R. Malen & V. Levit, Legal Malpractice 324-31 (2d Ed. 1981). The advent of specialization necessarily gives rise to heightened potential liability. The most obvious effect of holding one's self out as a specialist is with respect to the attorney's standard of care. Traditionally, the formulation of the attorney's standard of care is that an attorney is required to use such skill and prudence as attorneys of ordinary ability and care would exercise. Courts have recently held that, if an attorney holds himself or herself out as a specialist, that attorney "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." Wright v. Williams, 47 Cal. App. 3d 802, 811, 121 Cal. Rptr. 194, 199 (1975). See Neel v. Magana, Olney, Levy, Catherc & Gelland, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). The real significance for the reformulation of the standard of care as set forth in Wright may well be on its likely psychological impact on a jury. As a practical matter, the reformulated standard of care set forth in Wright will make it far more difficult for an attorney to prove nonliability for the alleged malpractice.
tween advertising and malpractice liability in *In re Mountain Bell Directory Advertising.* In that case, the court considered a proposal by the 'yellow pages' publishers to permit attorneys to list themselves under one or more of thirty-three different subcategories under the attorney listing. The Montana Supreme Court did not approve the program in part because such a listing would necessarily imply a claim of specialization. The directory service argued against this result by claiming that the client could be adequately protected by malpractice law, a point that was reinforced by the Montana State Bar's position that an attorney listing an area of specialization "should accept the professional responsibility for claiming specialized expertise." Rather than permit attorney liability principles to adjust any imbalance between the attorney's claims and talents, the court rejected the entire plan noting the adage that an ounce of protection is worth a pound of cure.

There is nothing inherently wrong with holding attorneys to the implied promises they make in advertising. Indeed, it would be logical to adjust the standard of care and other liability rules for legal malpractice cases to compensate for the new freedoms and potential opportunities created by the first amendment protections of attorney marketing efforts. Indeed, some sort of adjustment is almost inevitable. It may well be impossible in light of *Zauderer* to create meaningful limits to restrict the implications of special competence created by clearly protected advertising by attorneys. Thus, instead of trying to draw lines too faint to perceive, the effort to promote professional responsibility may be better spent elsewhere. Courts should willingly address the importance of the attorney's marketing efforts when relevant to the malpractice claim of an injured client.

113. 185 Mont. 68, 604 P.2d 760 (1979).
114. Id. at 68-70, 604 P.2d at 760-61.
115. Id. at 74, 604 P.2d at 764.
116. Id. at 73, 604 P.2d at 764.
117. Id. at 76, 604 P.2d at 765.
118. See Devine, *Letting the Market Control Advertising by Lawyers: A Suggested Remedy for the Misled Client,* 31 BUFFALO L. REV. 351 (1982) (suggesting application of deceptive trade practice sanctions against attorneys). Professor Devine opines that malpractice suits may not be an effective deterrent since too many cases concern relatively small sums of money and require expert evidence. This assumption is questionable since numerous claims will be substantial. Nonetheless, the suggested application of deceptive trade practice acts to attorneys is not an exclusive one, and can be accomplished in conjunction with other modifications.
IV. Conclusion

One orientation with respect to the definition of the attorney's right to advertise is that more communication is better. To be sure, this will involve some additional sacrifice of the dignity and professionalism concerns that have already been ravaged by the Bates trilogy. Instead of attempting to salvage some modicum of respect by artificial limitations on attorney advertising, courts should actively recognize and enforce reciprocal obligations on the part of advertising attorneys. It is certainly fair for courts to hold attorneys to what they say or impliedly promise in advertising. The ultimate beneficiary of advertising is the client, who supposedly obtains increased information to assist in locating an attorney who supposedly can handle the legal problem presented. By acknowledging the significance of this development in malpractice law by adjusting the attorney liability rules to take cognizance of the effect of advertising, the courts perhaps can reintroduce some of the professionalism concerns on a different, but nonetheless meaningful, basis.