

2002

Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing

William E. Hornsby Jr.

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

William E. Hornsby Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. Rich. L. Rev. 49 (2002).

Available at: <http://scholarship.richmond.edu/lawreview/vol36/iss1/5>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

AD RULES INFINITUM: THE NEED FOR ALTERNATIVES TO STATE-BASED ETHICS GOVERNING LEGAL SERVICES MARKETING

*William E. Hornsby, Jr.**

I. INTRODUCTION

For most of the Twentieth Century, lawyer advertising was prohibited. Beginning with the Canons of Ethics (“Canons”),¹ adopted by the American Bar Association (the “ABA” or “Association”) in 1908, it was unethical for lawyers to advertise or engage in most forms of marketing.² The 1977 United States Supreme Court decision of *Bates v. State Bar of Arizona*³ held that, under the First Amendment doctrine of commercial speech, states did not have the right to ban lawyer advertising.⁴ The decision, however, gave states the responsibility to regulate this activity.⁵ This began an experiment to balance consumer protection with the flow of legal commerce that continues on a state-by-state basis today.

Despite the ABA’s adoption of provisions addressing lawyer advertising and solicitation in the Model Code of Professional Re-

* Staff counsel to the American Bar Association Commission on Responsibility in Client Development, a/k/a Commission on Advertising. The views expressed by the author are his own and should not be construed as the views or policies of the American Bar Association. In fact, for the purpose of intellectual dialogue, the author sets forth concepts that are inconsistent with some policies of the ABA. The author would like to thank Professor Rodney A. Smolla and all those involved in the 2001 Allen Chair Symposium for inviting him to participate.

1. ABA CANONS OF ETHICS (1908).
2. *See id.* at 26–28. The Canons were quickly and widely adopted by the states. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 42 (1976).
3. 433 U.S. 350 (1977).
4. *Id.* at 384.
5. *Id.* at 383–84.

sponsibility⁶ (the “Model Code”) and later the Model Rules of Professional Conduct⁷ (the “Model Rules”), the states have embarked on their own courses of rule-making, emphasizing and addressing different aspects of business development.⁸ While many states have adopted portions of the Model Rules governing the communications of legal services, no two states have identical ethics provisions in this area.⁹

Some states have adopted ethics rules that go to, or perhaps exceed, the constitutional limit of commercial speech. Many states have imposed requirements that are inconsistent with fundamentals of client development and therefore dissuade lawyers from advertising and marketing.¹⁰ Expansive definitions of misleading statements, required disclaimers, and bans on client testimonials found within the state rules create higher standards for business development in the legal community than perhaps in any other business or profession.¹¹

The inherent state-based regulation, the inconsistencies among states, and the high standards combine to make it difficult, if not impossible, for the Twenty-first Century multi-jurisdictional law firm to fully comply. The complexity of global law firms with hundreds of lawyers who are admitted to practice in a variety of jurisdictions, competing for business under the guidance of professional marketing staffs and using sophisticated business development strategies, creates a setting that precludes compliance with the nuances of state-based rules governing client development. Firms are then faced with a choice: to comply fully and limit their ability to compete in the global marketplace, or to disregard the rules and assume the risk that their lawyers may face disciplinary charges for the firm’s failure to comply with the ethics rules.

6. MODEL CODE OF PROF’L RESPONSIBILITY (1969).

7. MODEL RULES OF PROF’L CONDUCT (1983).

8. For online links to the specific state ethics provisions governing the communications of legal services, see Comm’n on Responsibility in Client Dev., *Links to State Ethics Rules Governing Lawyer Advertising, Solicitation and Marketing*, ABA Network, at <http://www.abanet.org/adrules/> (last modified Jan. 3, 2001) [hereinafter *Links to State Ethics Rules*].

9. *See id.*

10. *See* COMM’N ON ADVERTISING, ABA, *LAWYER ADVERTISING AT THE CROSSROADS: PROF’L POLICY CONSIDERATIONS* 110–19 (1995) [hereinafter *CROSSROADS*].

11. *See id.*

As a result, the legal profession needs to consider the extent to which its current state-based system of regulating business development successfully balances consumer protection and the flow of legal commerce. To the extent the status quo fails to meet the needs of the legal profession, policy-makers must explore various options to correct the balance. One such option is uniformity in both rules and their interpretations. Another option is to focus on hortatory measures that may better achieve the real goals of the legal profession and cede the governance of business development to the legislative branch.

This article begins with an examination of the history of regulating legal services marketing. Understanding this history is important to understand the current status of varied state regulations. Part III examines aspects of the current state ethics rules, illustrating the willingness of states to adopt and maintain rules that push the constitutional limitations regulating the communications of legal services. Part III concludes with a look at the scope of the state rules and their application to lawyers involved in client development in one state, but admitted to practice in another.

Part IV examines the nature of corporate, multi-jurisdictional law firms and the impact of the application of state rules governing the communications of legal services. Part V explores alternatives to the current status of state-based regulation, seeking ways in which the legal profession can successfully obtain the balance of consumer protection with the flow of legal commerce.

II. THE HISTORY OF REGULATING LEGAL SERVICES MARKETING

Today's patchwork of ethics rules governing lawyer advertising, solicitation, and marketing is partly the result of measured design at the state level and partly historical accident.

Throughout the Nineteenth Century, the marketing of legal services in America was a function of supply and demand, with limited regulatory intervention.¹² Many lawyers in the Colonial Period received their educations in England, where lawyers were

12. LOUISE L. HILL, *LAWYER ADVERTISING* 40-41 (1993).

trained and admitted to practice through the Inns of Court.¹³ The colonial lawyers were an exclusive group who valued etiquette, decorum, and collegiality.¹⁴ Common training and the fact that there were a limited number of lawyers to attend to the business of a new nation obviated the need for marketing.¹⁵

However, as the demand for legal services expanded beyond the American aristocracy and the nation extended into the frontier, more lawyers were needed. The standards necessary to practice law decreased, giving rise to the prairie lawyer.¹⁶ Since many of these lawyers were self-taught, the primary standard for admission to practice became good moral character.¹⁷ Relaxed admission standards and increased public demand led to a substantial growth of the legal profession in America.¹⁸ In 1850, there were approximately 22,000 lawyers in the United States.¹⁹ This number tripled in the next thirty years and stood at about 114,000 by the turn of the Twentieth Century.²⁰

This growth led to competition that, in turn, led to various forms of advertising and solicitation by lawyers. Legal services were advertised in the classified sections of newspapers, which, in that era, commonly appeared on the front pages.²¹ Lawyers advertised alongside businesses such as insurance companies, shippers, surveyors, and others involved in the development of the new nation.²² Although the art of advertising was not well-

13. *Id.*; see also HENRY SANDWITH DRINKER, LEGAL ETHICS 210-11 (1953).

14. See AUERBACH, *supra* note 2, at 48-50; HILL, *supra* note 12, at 40.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on "trade" as unseemly.

Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977) (citing DRINKER, *supra* note 13, at 210-11).

15. CROSSROADS, *supra* note 10, at 29; see DRINKER, *supra* note 13, at 210-12; HILL, *supra* note 12, at 40.

16. See CROSSROADS, *supra* note 10, at 29-30 ("Lawyers were viewed as guardians of the American aristocracy. The public saw this as an 'undemocratic' situation. Consequently, states began to redefine admission requirements and encourage entry into the profession with new standards . . .").

17. See DRINKER, *supra* note 13, at 19-21.

18. HILL, *supra* note 12, at 41.

19. *Id.*

20. *Id.*

21. CROSSROADS, *supra* note 10, at 31.

22. *Id.* at 30; see also William L. Wheeler, *Lawyer Advertising: The Way it Was in the Good Old Days*, 67 ILL. B.J. 90, 90-93, 137 (1978) (discussing techniques used for the

developed and many of today's media did not exist, lawyers took advantage of the methods that were available. Handbills, business cards and notices in city directories were used to provide information about the services lawyers provided.²³

Occasionally, law firms went beyond merely providing information and used persuasive techniques. In the late 1800s, a Washington, D.C., law firm distributed a forty-eight-page brochure entitled "Information and Advice Relating to Patents, Caveats, Trademarks and Copyrights."²⁴ The brochure included photographs of the firm's office and partners and quoted Abraham Lincoln on the cover.²⁵ Other brochures included client testimonials about the service they had received.²⁶

Perhaps the most notable lawyer to advertise in the Nineteenth Century was Abraham Lincoln. His various partnerships ran classified newspaper in the 1830s and the 1850s.²⁷ One biographer suggests that Lincoln was probably not directly involved in these ads and may not have known about them in advance.²⁸ However, Lincoln is reported to have sent letters to railroad companies, the wealthiest and most prestigious business in central Illinois at that time, soliciting their business during his years of practice.²⁹

In the latter part of the Nineteenth Century, the legal profession advanced a series of measures to limit its ranks and secure its position as a monopoly in America. It developed a system of formal education, eventually requiring that a lawyer graduate

marketing of legal services in the Nineteenth Century).

23. *Id.*

24. *Id.* at 90.

25. *Id.*

26. *Id.* at 92-93.

27. CROSSROADS, *supra* note 10, at 31-32; *see, e.g.*, LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 1 (rev. ed. 1981).

Lincoln's image is sometimes invoked as a model for lawyer advertising, with his advertising having been the feature of at least one recent television campaign for legal services. Other times, he, obviously, is advanced as the highest example of professionalism. He is probably an excellent illustration of the ability of a lawyer in that era to combine aspects of commercialism, competence and dignity in the practice of law.

CROSSROADS, *supra* note 10, at 31-32.

28. *See* DAVID HERBERT DONALD, LINCOLN 70-74, 145 (1995).

29. *Id.* at 155. Ironically, Lincoln lived and worked in New Salem, Illinois, which became a ghost town after the railroad failed to locate near there, deciding instead to run through Springfield, Illinois. *See id.* at 38-43, 154-57.

from law school before being admitted to the bar.³⁰ The profession created the bar examination to test competence.³¹ It developed a system of ethics and discipline, requiring lawyers to adhere to standards of conduct.³² Failure to do so led to disbarment.³³ Within this code, lawyers were prohibited from soliciting business, advertising, or going into business with those who were not lawyers.³⁴ The legal profession also advanced a series of state laws prohibiting non-lawyers from practicing law.³⁵

Ethics codes originated as individual hortatory measures designed to advance moral principles among lawyers.³⁶ The Alabama State Bar Association was the first state bar to establish an enforceable set of ethics in 1887.³⁷ The code banned targeted solicitations, but permitted common forms of advertising.³⁸ It stated that "newspaper advertisements, circulars and business cards, tending professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided."³⁹

30. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 547 (1994).

31. *Id.*

32. *See id.* at 544.

33. *Id.*

34. *Id.*

35. *See id.* The full range of the profession's methods of controlling the supply of legal services included:

- (1) direct regulation of access to the profession (admission requirements such as legal education, bar examination, and character-and-fitness scrutiny); (2) the prohibition on the practice of law by non-lawyers (unauthorized practice); (3) restraints on the flow of information about legal services (restrictions on lawyer advertising and solicitation of legal business); (4) restrictions on the form of delivery, such as limitations on group legal services, non-lawyer participation in or ownership of law firms, and dual practice restrictions; and, finally, (5) a variety of particularized regulations such as the local admission and local counsel requirements that restricted multistate practice by licensed attorneys and the prohibition of many forms of pro bono practice by lawyers who were federal employees.

Id.; *see also* AUERBACH, *supra* note 2, at 74-129.

36. CROSSROADS, *supra* note 10, at 33 (crediting the first ethics codes to DAVID HOFFMAN, RESOLUTION IN REGARD TO PROFESSIONAL DEPARTMENT (1846) and GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854)). The ABA Canons drew heavily on Sharswood's essay. AUERBACH, *supra* note 2, at 41. For representative examples of Sharswood's propositions, *see* SHARSWOOD, *supra*, at 55-61.

37. HILL, *supra* note 12, at 42.

38. *Id.*

39. *Id.*

The American Bar Association adopted its first set of ethics, entitled the Canons of Ethics, in 1908.⁴⁰ Although many of the provisions were adapted from the Alabama Code, the Canons banned solicitation and certain forms of lawyer advertising which had been permitted under the Alabama Code.⁴¹ In its condemnation, Canon 27 stated: "The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust."⁴² The Canons explicitly banned "circular advertisements, personal communications and indirect advertisement, whether by allied business or inspired newspaper comment."⁴³ Business cards were permitted, except for use in advertising or solicitation.⁴⁴

According to the 1995 ABA report, *Lawyer Advertising at the Crossroads*, these restrictions appear to have served only the interest of the profession to preserve its size and demographics, and advance the establishment of its monopoly.⁴⁵ The report states that "[h]istorical accounts fail to indicate that the restrictions were in any way the consequences of overreaching or that the public was harmed by lawyer advertising."⁴⁶

For nearly seventy years, these prohibitions on legal services marketing were stringently enforced. For example, in 1929, a lawyer placed a small classified ad in a San Francisco newspaper stating, "D. Barton, Advice free; all cases, all courts. Open eyes" followed by his address.⁴⁷ The State Bar of California recommended that the lawyer be suspended from practice for three months as a result of this advertisement offering free advice.⁴⁸ While the Supreme Court of California found the punishment too

40. ABA CANONS OF ETHICS (1908); see also CTR. FOR PROF'L RESPONSIBILITY, ABA, COMPENDIUM OF PROF'L RESPONSIBILITY RULES AND STANDARDS 313 (2001) [hereinafter COMPENDIUM].

41. HILL, *supra* note 12, at 41.

42. ABA CANONS OF ETHICS Canon 27 (1908).

43. CROSSROADS, *supra* note 10, at 33.

44. *Id.* Canon 27 was amended by the ABA in 1943 to authorize biographical information in approved law lists. COMPENDIUM, *supra* note 40, at 322. Canon 27 was amended in 1951 to permit lawyers to designate practice areas of admiralty, patent, and trademark on letterhead, office signage, and business cards. *Id.* at 322-23.

45. CROSSROADS, *supra* note 10, at 33.

46. *Id.*

47. Barton v. State Bar, 289 P. 818, 818 (Cal. 1930) (per curiam).

48. *Id.*

severe and reduced it to a public reprimand, it clearly condemned the action, stating that, "[i]t can readily be understood how unfavorably the public would react toward the profession as a whole if there were published large full-page extolling the learning, ability, and capacity of an attorney 'to get results.'"⁴⁹

The Canons' prohibitions went far beyond limited notions of lawyer advertising. Lawyers were sanctioned for various endeavors deemed to constitute unethical marketing. For example, lawyers were suspended for their involvement in articles that discussed their practices and successes.⁵⁰ In 1963, partners of a well-established New York City law firm were publicly censured for allowing *Life* magazine to publish an article on their practice, even though the original intent of the article was to profile a series of law firms.⁵¹ Hiring public relations firms, soliciting speaking engagements, and holding press conferences were deemed to be in violation of the ethics provisions.⁵²

Also in 1963, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 309, indicating that it was improper marketing for a lawyer to send Christmas cards to clients or other lawyers unless there was a personal relationship.⁵³ Cards could not identify law firms or be signed in a way that indicated the sender was a lawyer.⁵⁴ The opinion did, however, deem it appropriate for cards to include legal symbols in a holiday context.⁵⁵

In 1969, the ABA revamped its ethics rules and replaced the Canons with the Model Code, which was then adopted by the vast majority of states.⁵⁶ The Model Code incorporated the advertising and solicitation prohibitions of Canons 27 and 28 into new

49. *Id.* at 820.

50. See *Bushman v. State Bar*, 522 P.2d 312, 316-19 (Cal. 1974); *In re Tall*, 93 S.W.2d 922, 922-23 (Mo. 1936); *In re Axtell*, 242 N.Y.S. 18, 31-33 (N.Y. App. Div. 1930), *modified*, 257 N.Y.S. 470, 471-74 (N.Y. App. Div. 1932).

51. *In re Connelly*, 240 N.Y.S.2d 126, 132-40 (N.Y. App. Div. 1963) (*per curiam*).

52. See N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Op. 423 (1953).

53. ABA Comm'n on Prof'l Ethics and Grievances, Formal Op. 309 (1963).

54. *Id.*

55. *Id.*

56. COMPENDIUM, *supra* note 40, at 157.

Canon 2.⁵⁷ These provisions were amended in 1974 and 1975 to permit advertising in limited contexts.⁵⁸

By the 1970s, the need for affordable legal services to individuals had become apparent and well-documented. The American Bar Foundation and the ABA Special Committee to Survey Legal Needs issued a report, *The Legal Needs of the Public: The Final Report of a National Survey*, that identified the extent to which people faced legal problems without the use of lawyers.⁵⁹ The report indicated that those who were minorities, younger, less educated, or less affluent were least likely to find lawyers who were ready, willing, and able to handle their legal matters.⁶⁰

Relying in part on this report and advancing the newly-established doctrine of commercial free speech, a divided United States Supreme Court, in *Bates v. State Bar of Arizona*,⁶¹ held that the state lacked the constitutional right to ban lawyers from advertising.⁶² In *Bates*, the Court methodically negated the arguments set forth to retain the ban on lawyer advertising.⁶³ While the Court held a ban unconstitutional, it also indicated that the states had the obligation to govern lawyer advertising in order to protect the interests of the public.⁶⁴ In its conclusion, the Court stated that “[i]n sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.”⁶⁵

57. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-8 to 2-15, DR 2-101 to 2-103 (1969); see also CROSSROADS, *supra* note 10, at 35.

58. WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* 15 (3d ed. 2000).

59. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* (1977).

60. *Id.* at 214.

It is also clear from the data that the types of problems taken to lawyers by such subgroups of users as blacks/latinos, younger persons, the under-educated, or the less affluent are more likely to result in situations in which the lawyer consulted will not handle the Case, does not complete work on it, or is unable to achieve the desired results

Id.

61. 433 U.S. 350 (1977).

62. *Id.* at 379–81.

63. See *id.* at 359–82.

64. *Id.* at 383–84.

65. *Id.* at 384.

Although the ethics provisions of every state became unconstitutional overnight, the organized bar had anticipated the outcome of the *Bates* decision.⁶⁶ The ABA had conducted a conference in 1975 specifically aimed at addressing issues of lawyer advertising.⁶⁷ In addition, just prior to the *Bates* decision in 1977, the ABA had established a task force on lawyer advertising.⁶⁸ Within the six weeks between the Court's decision and the ABA's 1977 Annual Meeting, this task force drafted changes to the Model Code that were designed to comply with the Court's action.⁶⁹ The task force offered two alternative versions, one of which was adopted by the ABA House of Delegates that August.⁷⁰

Governing the parameters of lawyer advertising and legal services marketing was difficult, however, because of the limited direction found in the *Bates* decision. The Court made clear that false and misleading communications were not forms of protected speech.⁷¹ The Court, however, indicated that the issue decided in *Bates* was a narrow one when it stated that "[t]he heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed."⁷² The Court said that it would not decide the issues having to do with the quality of legal services or with the solicitation of legal services.⁷³ Furthermore, the case centered on a print advertisement that had been published in a newspaper.⁷⁴ Therefore, policy-makers had to grapple with a series of questions. To what extent could potential misrepresentations be limited? Could the states continue to ban solicitation? Was the decision limited to routine legal services? Was it limited to print media? Could

66. See *CROSSROADS*, *supra* note 10, at 37.

67. *Id.* The conference was designed to "inform the leaders of the bar and the profession about the issues that would be raised by advertising, and the effect that advertising would have on lawyers and the general public, and to motivate further consideration and discussion among state and local bar leaders." *Id.* (quoting Memorandum from Lawrence E. Walsh, ABA President, to the ABA Conference on Lawyer Advertising (Nov. 14, 1975)).

68. *Id.*

69. *Id.*

70. *Id.*

71. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

72. *Id.* at 367-68.

73. *Id.* at 366.

74. See *id.* at 384 ("The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services.").

states ban advertising through electronic media or direct mail ad campaigns?

In fact, the standard for assessing the constitutionality of commercial speech would not be set forth by the Court for three more years. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,⁷⁵ a case unrelated to lawyer advertising, the Court clearly and succinctly set out the governing test:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.⁷⁶

Even with the direction supplied by the Court in *Central Hudson*, the organized bar was left with a great deal of guesswork as it carried out its obligation to regulate the communications of commercial speech among lawyers.⁷⁷ Lawyers had been taught for nearly seventy years that lawyer advertising was wrong.⁷⁸ Advancing notions of professionalism and showing disdain for competition, they embraced a cultural bias against self-promotion.⁷⁹ This bias provided the support for restrictive provisions that repeatedly failed to pass constitutional scrutiny.⁸⁰ For example, in 1982, the United States Supreme Court held that states could not restrict the identification of practice areas and the circulation of announcements of office openings if the information was merely potentially misleading.⁸¹ In *Zauderer v. Office of Disciplinary*

75. 447 U.S. 557 (1980).

76. *Id.* at 566.

77. See CROSSROADS, *supra* note 10, at 16–26 (discussing the United States Supreme Court's analysis of lawyer advertising following the *Central Hudson* decision).

78. See *id.* at 1–2 (noting that the ABA's 1908 ban on lawyer advertising remained in place until 1977).

79. Cramton, *supra* note 30 at 607. For an analysis of the professional milieu exploring the relationship between public service and commercialism, see BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* 151–72 (1970).

80. CROSSROADS, *supra* note 10, at 15.

81. *In re R.J.M.*, 455 U.S. 191, 203 (1982).

Counsel,⁸² the Court found that states could not ban illustrations that provided accurate information, even if the state deemed them undignified.⁸³ In this 1985 decision, the Court stated that “the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.”⁸⁴

Each miscalculation led to the need for the states to change their ethics rules in order to bring them into conformity with the Court’s holdings.⁸⁵ Then, in 1983, a wildcard further disrupted any possibility of creating unity among the states in the regulation of legal services marketing.⁸⁶

Even though case law required the ABA to change its model provisions, the Association encouraged the states to adopt these changes and to bring their ethics rules in line with the Court’s ruling in *Bates* and its progeny.⁸⁷ While the states were in the process of considering the changes, however, the ABA advanced an initiative that led to a completely revamped set of ethics governing the legal profession.⁸⁸ In 1983, the Model Rules substantially changed the overall format and substance of many rules set forth in the Model Code, including those addressing lawyer advertising and marketing.⁸⁹

82. 471 U.S. 626 (1985).

83. *Id.* at 648.

84. *Id.*

85. See MODEL RULES OF PROF’L CONDUCT vii, viii (2000) (“Nineteen amendments have been made to the Rules and Comments since their initial promulgation in 1983. A synopsis of these amendments, most of which, with the notable exception of those dealing with lawyer advertising, have been minor, is included as an appendix to this volume.”).

86. See Robert W. Meserve, *Introduction to MODEL RULES OF PROF’L CONDUCT I*, 1–3 (2000) (noting that the Model Rules of Professional Conduct were adopted by the ABA’s House of Delegates on August 2, 1983).

87. See *id.*

88. *Id.*

89. *Id.* The Model Code included ethics considerations (“ECs”), which were guidelines providing unsanctioned directions to lawyers, and disciplinary rules (“DRs”), setting the floor of acceptable behavior. Failure to adhere to the provisions of the DRs could lead to disciplinary action and result in sanctions against the lawyer. The Model Rules eliminated the ECs and provided only sanctionable rules, along with explanatory comments. *Id.*

In the eighteen years since the ABA adopted the Model Rules, forty-three states have adopted versions of the Rules.⁹⁰ Other states have retained the Model Code⁹¹ and a few have incorporated the substance of the Model Rules into the format of the Model Code.⁹²

While states were in the process of considering their policies to govern legal services marketing shortly after the adoption of the Model Rules, the ABA Commission on Advertising held hearings in 1986 to determine whether the Model Rules sufficiently met the needs of the profession and the public.⁹³ The Commission concluded that advertising could assist lawyers in building a client base, especially to serve low- and moderate-level income people with their personal legal needs.⁹⁴ The Commission also reported, however, that many lawyers, and in particular, bar leaders, considered advertising to be inappropriate self-promotion “undermining the integrity of the profession and weakening the public’s image of lawyers in general and the legal system.”⁹⁵

Even though some lawyers held strong sentiments to advance ethics provisions more restrictive than those found in the Model Rules, the litany of United States Supreme Court cases striking down restrictions, combined with the prospects of antitrust violations against the ABA stemming from the Federal Trade Commission (the “FTC”),⁹⁶ led the ABA Commission on Advertising to conclude that restrictions would not be a viable long-term solution to the concerns expressed by the leadership of the organized bar.⁹⁷ As an alternative, the ABA Commission promulgated a set of aspirational goals exhorting lawyers who chose to advertise to

90. MODEL RULES OF PROF'L CONDUCT vii, viii (2000).

91. See, e.g., N.Y. CODE OF PROF'L RESPONSIBILITY (Consol. Cum. Supp. 2000); OHIO CODE OF PROF'L RESPONSIBILITY (2001).

92. See, e.g., NEB. CODE OF PROF'L RESPONSIBILITY (2001); OR. CODE OF PROF'L RESPONSIBILITY (2001).

93. CROSSROADS, *supra* note 10, at 38–39.

94. See *Practice Guide: ABA Aspirational Goals for Lawyer Advertising*, 2 *Laws. Man. on Prof'l Conduct* (ABA/BNA) 81:201, at 81:207–09 (July 18, 1990) [hereinafter *Practice Guide*].

95. CROSSROADS, *supra* note 10, at 38.

96. STAFF OF THE FEDERAL TRADE COMMISSION, SUBMISSION OF THE STAFF OF THE FEDERAL TRADE COMMISSION TO THE AMERICAN BAR ASSOCIATION COMMISSION ON ADVERTISING 2 (June 24, 1994) [hereinafter FTC SUBMISSION] (referencing correspondence from the FTC staff to ABA Commission on Advertising Chair, Thomas S. Johnson, on December 8, 1986).

97. CROSSROADS, *supra* note 10, at 37–38.

do so in ways that recognized the need to honor the legal profession.⁹⁸ The goals were adopted by the ABA in 1988.⁹⁹

At the same time, some states were dissatisfied with the scope of limitations set out in the Model Rules. Bar leaders in these states began the process of considering options. In 1990, the Florida Supreme Court adopted a set of rules set out by the Florida Bar which imposed a series of restrictions on lawyer advertising and marketing far greater than those found in the Model Rules.¹⁰⁰ Although set out in the format of the Model Rules, the specific provisions included a number of limitations not found in the ABA model. These included prohibitions of testimonials,¹⁰¹ dramatizations,¹⁰² and lyrics.¹⁰³ The Florida rules required a series of disclaimers and disclosures under various circumstances, including the statement: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."¹⁰⁴ The Florida rules also unilaterally prohibited lawyers from sending direct mail solicitations for personal injury or wrongful death matters within thirty days of the date giving rise to the need for legal services.¹⁰⁵ In addition, the Florida rules imposed a screening system that required lawyers to submit their ads to the state for review to determine whether they complied with the rules.¹⁰⁶

After Florida adopted its revised rules, several states initiated their own examinations of the provisions of their ethics rules governing legal services marketing. While no state adopted the Florida rules verbatim, several adopted various provisions that were not otherwise included in the Model Rules.¹⁰⁷ For example,

98. *Practice Guide*, *supra* note 94, at 81:207.

99. *Id.* at 81:207-09. The Aspirational Goals continue to be policy of the ABA and are posted at <http://abanet.org/legalservices/advabaaspirgoals.html> (last modified Jan. 31, 2001).

100. The rules adopted by the Florida Supreme Court in 1990 have since been modified. Those portions of the Florida Rules adopted in 1990 addressing the communications of legal services are included in CROSSROADS, *supra* note 10, at 182-91.

101. FLORIDA RULES OF PROF'L CONDUCT R. 4-7.1(d) (effective January 1, 1991).

102. *Id.* R. 4-7.2(e).

103. *Id.*

104. *Id.* R. 4-7.2(d).

105. *Id.* R. 4-7.4(b)(1)(A).

106. *See id.* R. 4-7.5.

107. *See* William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising:*

Texas¹⁰⁸ and New Mexico¹⁰⁹ adopted rules requiring the submission and screening of advertisements. Nevada adopted most of the Florida rules, but rejected the screening requirement, concluding that it would prove too burdensome and costly.¹¹⁰ The process of review and reconsideration led some states to adopt rules completely independent of those adopted in Florida.¹¹¹ For example, Arizona adopted a rule that requires lawyer advertising to be "predominantly informational."¹¹²

The transition from uniform state condemnation of lawyer advertising to the current situation, in which the state may regulate, but not prohibit, the communication of legal services, has not been an easy one. As a result of the limited direction provided by the United States Supreme Court,¹¹³ the cultural bias of the legal profession, the shift from the Model Code to the Model Rules,¹¹⁴ the reluctance of the ABA to strengthen its rules, and the dissatisfaction of the states with those Model Rules provisions, no state has adopted the provisions of the Model Rules governing the communications of legal services verbatim, and no two states have identical sets of rules governing the commercial speech of lawyers.¹¹⁵

Public Images and the Irresistible Aristotelian Impulse, 9 GEO. J. LEGAL ETHICS 325, 327-28 (1996).

The rules adopted in Florida in 1990 governing lawyer advertising, solicitation and marketing sparked a renaissance among the states, which imposed restrictions designed to limit lawyer advertising in general and sensationalism in particular. Nevada, New Mexico and Texas followed Florida in the adoption of restrictive rules. . . . Pennsylvania, Arizona, California, Ohio, South Dakota and Louisiana also adopted rules creating greater restrictions.

Id.

108. TEX. STATE BAR R. art. X, §9, R 7.05-07.

109. N.M. R. 16-702.

110. NEV. SUP. CT. R. 196.

111. Hornsby & Schimmel, *supra* note 107, at 327-28.

112. ARIZ. SUP. CT. R. ER 7.1.

113. See CTR. FOR PROF'L RESPONSIBILITY & HOUSE OF DELEGATES, ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT 498 [hereinafter ANNOTATED MODEL RULES] (summarizing United States Supreme Court cases concerning First Amendment considerations).

114. See Meserve, *supra* note 86, at 1-2.

115. See discussion *infra* Part III.

III. THE CURRENT STATUS OF STATE RULES GOVERNING LEGAL SERVICES MARKETING

The rules of most states have common elements and frequently include identical provisions.¹¹⁶ Differences among the states might not necessarily lead to overwhelming obstacles for multi-state law firm compliance. However, various state rules go to, or perhaps beyond, the constitutional edge of permissible restrictions on commercial free speech through, for example, the adoption of expansive definitions of false or misleading representations.¹¹⁷ States frequently embrace provisions that are inconsistent with marketing techniques that would advance the flow of legal commerce when, for example, they require cumbersome disclaimers.¹¹⁸ States tend to stress the regulation of different methods of marketing.¹¹⁹ For example, some jurisdictions impose restrictions specifically addressing the electronic media, which are designed to govern television advertising,¹²⁰ while others focus on the regulation of direct mail solicitations.¹²¹ The scope of the application of the rules, however, may be widening as states explore their rights to control lawyers admitted in other jurisdictions.¹²² When combined, these factors may tilt the balance between consumer protection and legal services marketing in ways that are detrimental to both the public and the law firm.

In both *Bates* and *Central Hudson*, the United States Supreme Court clearly established the right of the state to prohibit commercial speech that is false or misleading.¹²³ This limitation has been a cornerstone of the regulation of lawyer advertising since the *Bates* decision. The current ABA Model Rules set out four standards for determining whether a communication is false or misleading.¹²⁴ First, the communication cannot contain a material

116. See HORNSBY, *supra* note 58, at 17 ("Most states have adopted Model Rule 7.1 either verbatim or with additions or minor modifications.").

117. See *infra* notes 135–42 and accompanying text.

118. See *infra* notes 143–55 and accompanying text.

119. See *infra* notes 156–90 and accompanying text.

120. See *infra* notes 156–69 and accompanying text.

121. See *infra* notes 170–90 and accompanying text.

122. See *infra* notes 197–210 and accompanying text.

123. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

124. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2000).

misrepresentation of fact or law.¹²⁵ This is fundamentally the basis for consumer protection statutes. Second, the communication must not omit a fact necessary to make a statement nondeceptive.¹²⁶ Third, a communication is false or misleading if it is likely to create an unjustified expectation about the results the lawyer can achieve.¹²⁷ This standard assumes that each legal matter is unique and one should not rely on prior experiences of past clients to assess the outcome of his or her particular legal issue.¹²⁸ This rule is commonly interpreted to limit client testimonials that would lead prospective clients to believe that they would obtain a similar outcome.¹²⁹ Finally, the communication must not compare the lawyer's services to those of other lawyers, unless the comparison can be factually substantiated.¹³⁰ This provision prohibits the sort of puffery such as when a lawyer characterizes his or her services as being better than those of another.¹³¹

These provisions regulating the marketing of legal services are far more strict than limitations in other commercial settings where testimonials and puffery are not uncommon.¹³² These rules have never been constitutionally challenged in specific applications and, thus, the courts have never given direction on what is within the parameter of false or misleading. In *Bates*, the United States Supreme Court clearly indicated that the restrictions placed on lawyer advertising could be greater than that for businesses or products.¹³³ The Court stated: "In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."¹³⁴ Thus far, the states have been free to set boundaries of communications that they deem misleading and therefore impermissible.

125. *Id.* R. 7.1(a).

126. *Id.*

127. *Id.* R. 7.1(b).

128. *Id.* R. 7.1 cmt. 1.

129. *Id.*

130. *Id.* R. 7.1(c).

131. *Id.*

132. See FTC SUBMISSION, *supra* note 96, at 3-4.

133. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

134. *Id.*

While most states have adopted the four provisions of the ABA Model Rules governing false or misleading communications, several jurisdictions have adopted additional provisions.¹³⁵ In particular, a series of states have ethics rules that prohibit testimonials, deeming them inherently false or misleading.¹³⁶ While the commentary to the Model Rules provides justification that a testimonial is potentially misleading when it creates an unjustified expectation about the outcome of a matter, a rule that declares that a testimonial is false or misleading does not consider the possibility that the substance of the testimonial could address an attribute of the lawyer, the firm, or the services provided other than the outcome.¹³⁷ In other words, a testimonial could speak to the values of the firm or the responsiveness of the lawyer, neither of which give rise to an expectation of outcome.¹³⁸ These types of testimonials have been termed "soft endorsements."¹³⁹

The 1994 Submission of the Staff of the FTC to the ABA Commission on Advertising commented on this issue when it stated:

To be sure, testimonials and endorsements can be used in ways that mislead about likely outcomes, and it may be both appropriate and necessary to take action against those that do. But some aspects of professional services, unrelated to particular outcomes, might well be communicated truthfully and usefully by a report of a client's actual experience. Rather than a conclusive ban, an approach might be taken similar to that of the [FTC] Commission's guides on this subject, that seeks to ensure that client testimonials are truthful and not misleading.¹⁴⁰

While testimonials are the most common examples of the states' expansive definitions of false or misleading communications, the rules of South Dakota serve to illustrate the extent to which a state reaches to define what it deems false or misleading.¹⁴¹ Instead of the four types of communications considered false or misleading within the Model Rules, Rule 7.1(c) of the South Dakota Rules of Professional Responsibility lists seventeen

135. HORNSBY, *supra* note 58, at 24-25.

136. *Id.* States that deem testimonials false or misleading include Florida, Louisiana, Mississippi, Nevada, New Mexico, and Wyoming. *Id.*

137. See MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2000).

138. *Id.*

139. Philadelphia Bar Ass'n Prof'l and Guidance Comm., Op. 91-17 (1992).

140. FTC SUBMISSION, *supra* note 96, at 12.

141. See S.D. RULES OF PROF'L CONDUCT R. 7.1(c)(1)-(17).

communications that the state deems false or misleading.¹⁴² While these provisions will no doubt prevent that may be false or misleading, the extent of the list raises the question of the constitutional right of a state to define that which is false or misleading. Simply put, under the *Central Hudson* test, can a state, constitutionally, decree any aspect of commercial speech to be false or misleading and therefore prohibit it?

In *Bates*, the Court suggested that, as an alternative to bans, less restrictive methods of controlling lawyer advertising, such as disclaimers, might be appropriate.¹⁴³ States have accepted the invitation and employed this methodology widely.

State ethics rules may require disclaimers in virtually all advertising, in all advertising except under defined safe harbor provisions, or only under certain circumstances. For example, Iowa requires lawyers who advertise under its rules to include the statement: "The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa."¹⁴⁴

As discussed in Part II, Florida requires a similar disclaimer for print ads, which states: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."¹⁴⁵ However, the disclaimer is not required if the content of the ad is limited to certain information that is otherwise set forth in the Florida rules.¹⁴⁶ These safe harbor provisions include information such as date of admission, foreign language capabilities, and acceptance of credit cards.¹⁴⁷

In other instances, the requirement to include a disclaimer is predicated on the content of the ad. Most frequently, ads for con-

142. *Id.*

143. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) ("We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.")

144. IOWA CODE OF PROF'L RESPONSIBILITY FOR LAWYERS DR 2-101(A) (2001).

145. R. REGULATING FLA. BAR 4-7.3(b).

146. *Id.*

147. *Id.* R. 4-7.2(c)(10).

tingency fee cases stating that if there is no recovery, there is no fee, are required to also inform the potential client of his or her possible liability for costs.¹⁴⁸

Lawyers who advertise their fields of practice sometimes have obligations to include disclaimers involving certification of specialties. For example, Texas requires lawyers to disclose in their that they are not certified by the Texas Board of Legal Specialization if the lawyer advertises for services in fields of practice that are those in which the state certifies lawyers and the lawyer is not, in fact, certified as a specialist in Texas in that field.¹⁴⁹ Law firms must include this disclosure if any members of the firm are not certified.¹⁵⁰

On the other hand, Illinois, like most states, has no mechanism to certify lawyers as specialists.¹⁵¹ When a lawyer is certified by another state or an independent entity, such as the National Board of Trial Advocacy, and the lawyer communicates that certification in Illinois, the lawyer must include a disclaimer stating that "the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois."¹⁵²

In some media, the requirement to include multiple disclaimers may not be particularly intrusive in light of the nature of the media. For example, the Internet facilitates the conveyance of any reasonable amount of information with limited interference with the main message.¹⁵³ Other disclaimer requirements are more onerous in certain media. For example, an Illinois rule governing advertising of certification would be difficult to include on a business card, the medium through which a lawyer may typically

148. See, e.g., KY. SUP. CT. R. 3.130, R. 7.04; MD. RULES OF PROF'L CONDUCT R. 7.2(e) ("An advertisement or communication indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses.").

149. TEX. STATE BAR R. art. X, § 9, R. 7.04(b)(3).

150. *Id.*

151. ILL. SUP. CT. R. art. VIII, R. 7.4(b).

152. *Id.* R. 7.4(c)(2).

153. See, for example, the Internet Web site of the Clausen Miller law firm, at <http://www.clausen.com/disclaimer.asp> (last modified Sept. 26, 2001) [hereinafter Clausen Miller Web site], where the firm includes twenty-seven disclaimers in a scrolled window that is accessible from the firm's home page.

communicate his or her certification status.¹⁵⁴ On this point, the FTC's staff has stated:

Disclaimer and other disclosure obligations, which many jurisdictions require, tend to increase advertising costs, by requiring that messages be longer or by forcing advertisers to displace other information. Disclosure obligations may also discourage advertising if advertisers believe consumers will take the disclosure to reflect negatively on the advertiser, regardless of whether that imputation is justified. Because of these effects, disclosure requirements that are unnecessary can reduce the amount of useful information available to consumers. Disclosures and disclaimers can sometimes be necessary to prevent deception. It is important in evaluating disclosure requirements to weigh the costs against the expected benefits.¹⁵⁵

It would be unfortunate for lawyers who are certified as specialists by bona fide organizations to refrain from communicating that fact because of apprehension that consumers might take the disclaimer negatively.

While the great majority of states embrace aspects of the Model Rules governing the communications of legal services, they also typically add provisions that focus on areas of specific concern to their particular state. Frequently, limitations are imposed on types of media, in particular television and direct mail solicitations.¹⁵⁶

The *Bates* Court invited states to specifically address issues inherent in television advertising by stating that "the special problems of advertising on the electronic broadcast media will warrant special consideration."¹⁵⁷ Since the *Bates* decision addressed print advertising, some assumed that it would remain permissible to ban television advertising for legal services. The ABA's revision of the Model Code following *Bates* did not permit television advertising but was revised the following year to do so.¹⁵⁸ Model

154. See ILL. SUP. CT. R. art. VIII, R. 7.4(c)(2).

155. FTC SUBMISSION, *supra* note 96, at 12.

156. See HORNSBY, *supra* note 58, at 38-42, 61-68.

157. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

158. See TASK FORCE ON LAWYER ADVERTISING, ABA, REPORT TO THE BOARD OF GOVERNORS OF THE TASK FORCE ON LAWYER ADVERTISING 1, 3, reprinted in LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION 91, 93 (rev. ed. 1981) ("Neither proposal would allow one-to-one solicitation, nor would either now permit the use of television in the absence of a determination by the appropriate state authorities that is necessary to provide adequate information to consumers of legal services." (citation omitted)).

Rule 7.2 includes a comment that suggests the importance of conveying information through television advertising.¹⁵⁹ That comment states that “[t]elevision is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public.”¹⁶⁰

State rules which focus on television advertising are designed to permit this flow of information while avoiding inappropriate persuasion. For example, a New Jersey rule requiring television advertising for legal services to be primarily informational¹⁶¹ was upheld, with the Supreme Court of New Jersey stating: “As the record before us and the general literature abundantly prove, the emotional impact of television advertising, in its ability to persuade subliminally, through symbols, music, drama, authority figures—the entire host of emotive non-rational techniques—far exceeds that of the print media and radio.”¹⁶²

Article 9 of the California Business and Professions Code singles out electronic media, requiring that the message as a whole be factually substantiated.¹⁶³ Florida, Iowa, and Wyoming are among the other states that single out provisions governing television advertising for legal services. Iowa requires that the information be articulated “only by a single nondramatic voice . . . with . . . no visual display . . . except that allowed in print as articulated by the announcer.”¹⁶⁴ Among its restrictions on television advertising, Wyoming requires:

The information shall be articulated by a voice, with no background sound or other instrumental music. The voice shall not be that of a celebrity whose voice is recognizable by the public. If a person appears as a lawyer in an advertisement for legal services, or under such circumstance as may give the impression that the person is a lawyer, such person must be a member of the Wyoming State Bar,

159. See MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (2000).

160. *Id.*

161. N.J. RULES OF PROF'L CONDUCT R. 7.2(a) (“All shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising.”).

162. *In re* Petition of Felmeister & Issacs, 518 A.2d 188, 201 (N.J. 1986).

163. CAL. BUS. & PROFS. CODE § 6158.3 (West Supp. 2001).

164. IOWA CODE PROF'L RESPONSIBILITY FOR LAWYERS DR 2-101(B)(5) (2001).

admitted to practice and in good standing before the Wyoming Supreme Court and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm which is advertising.¹⁶⁵

Florida dedicates a separate rule to advertising in the electronic media.¹⁶⁶ For both radio and television, the information:

[S]hall be articulated by a single human voice, or on-screen text, with no background sound other than instrumental music. . . . Visual images appearing in a television advertisement shall be limited to the advertising lawyer in front of a background consisting of a single solid color, a set of law books in an unadorned bookcase, or the lawyer's own office (with no other office personnel shown).¹⁶⁷

In an interesting and unusual conflict between two states' rules of ethics, Iowa prohibits the voice in an electronic advertisement to be that of the lawyer,¹⁶⁸ while Florida prohibits the voice to be that of anyone other than that of a lawyer who is a member of the firm whose services are advertised.¹⁶⁹

Direct mail solicitations are also singled out for widely disparate and restrictive treatment among the states as they govern the communications of legal services. Direct mail is regulated in some combination of three ways. First, Model Rule 7.3(c) and the rules of virtually every jurisdiction require direct mail to be labeled as advertising material under certain circumstances.¹⁷⁰ Second, Model Rule 7.3(b) and the rules of most states require lawyers to refrain from sending direct mail solicitations to people under various circumstances.¹⁷¹ This Model Rule prohibits lawyers from sending written solicitations when "(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves coercion, duress or harassment."¹⁷² Third, some states have followed Florida by adopting a bright line rule that prohibits lawyers from sending solicitations to prospective clients for personal injury or wrongful

165. WYO. R. PROF'L CONDUCT FOR ATTORNEYS AT LAW R. 7.2(f).

166. R. REGULATING FLA. BAR 4-7.5.

167. *Id.*

168. IOWA CODE PROF'L RESPONSIBILITY FOR LAWYERS DR 2-101(B)(5) (2001).

169. R. REGULATING FLA. BAR 4-7.5.

170. MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (2000).

171. *Id.* R. 7.3(b); *see also* HORNSBY, *supra* note 58, at 61-68.

172. MODEL RULES OF PROF'L CONDUCT R. 7.3(b)(1)-(2) (2000).

death representation within thirty days of the day that gives rise to the event creating the cause of action.¹⁷³

The labeling requirement is the source of greatest disparity among the states.¹⁷⁴ The purpose of the rule is to notify the recipient that correspondence from a lawyer, which may otherwise be an extremely important matter, is nothing more than a commercial solicitation, which may be acted upon or discarded according to the needs of the prospective client.¹⁷⁵

A small, but very significant distinction is found between the states that have adopted the Model Rule and those that have adopted a more expansive interpretation. Model Rule 7.3(c) requires mail to be labeled “advertising material” only if it is going to “a prospective client known to be in need of legal services in a particular matter.”¹⁷⁶ Some states such as New Mexico¹⁷⁷ and Georgia,¹⁷⁸ however, require more explicit labeling. New Mexico, for instance, requires all advertising to be labeled as such unless it falls into a narrow set of safe harbor provisions.¹⁷⁹ The rule states: “Inin the form of correspondence, the top of the first page of the communication and the outside of the communication shall have printed on it in conspicuous writing the words: [‘LAWYER ADVERTISEMENT’].”¹⁸⁰ Georgia requires labeling for written communications to those other than close friends, relatives, and former clients.¹⁸¹

Some states require the labeling to be specific colors, specific sizes, or in specific locations. For example, Arizona Supreme Court Rule 7.3(b) requires written communications to be labeled: “ADVERTISING MATERIAL: THIS IS A COMMERCIAL SOLICITATION.”¹⁸² This notice has to be printed in red ink, in all capital letters and in a type size at least twice that of the largest

173. HORNSBY, *supra* note 58, at 64. States with bright line rules include Alabama, Colorado, Idaho, Louisiana, Missouri, Nevada, New Jersey, South Carolina, Tennessee, Texas, and Wyoming. *Id.*

174. *See id.* at 64–66.

175. *See id.* at 65–66.

176. MODEL RULES OF PROF'L CONDUCT R. 7.3(c) (2000).

177. N.M. R. 16-701(D).

178. R. & REGULATIONS ORG. & GOV'T STATE BAR GA. 7.3(b).

179. N.M.R. 16-701(D).

180. *Id.*

181. R. & REGULATIONS ORG. & GOV'T STATE BAR GA. 7.3(b).

182. ARIZ. SUP. CT. R. ER 7.3(b).

type size used in the communication.¹⁸³ Texas Rule 7.05(b)(2) requires, in some circumstances, that the word “ADVERTISE-
MENT” be in a color that contrasts sharply with the background color of the mailer and be at least 3/8” tall or three times the height of the letters used in the body of the communication, whichever is larger.¹⁸⁴

States frequently have inalterable words or phrases that must be included as part of these labeling requirements. Nevada requires the statement to read: “NOTICE: THIS IS AN ADVERTISEMENT!”¹⁸⁵ For recipients known to need legal services, Missouri requires the statement: “ADVERTISING MATERIAL: COMMERCIAL SOLICITATIONS ARE PERMITTED BY THE MISSOURI RULES OF PROFESSIONAL CONDUCT BUT ARE NEITHER SUBMITTED TO NOR APPROVED BY THE MISSOURI BAR OR THE SUPREME COURT OF MISSOURI.”¹⁸⁶

Beyond labeling requirements, direct mail is an advertising mechanism that sometimes obliges the lawyer or firm to add disclaimers. Florida requires the first sentence of any written communication sent concerning a specific legal matter to state: “If you have already retained a lawyer for this matter, please disregard this letter.”¹⁸⁷ Oklahoma requires the lawyer to provide specific information about how recipients can report abuses.¹⁸⁸ The communication must end with the statement: “If you find anything in this communication to be inaccurate or misleading, you may report the same by writing to the General Counsel of the Oklahoma Bar Association [followed by the address], or by calling [followed by the telephone number].”¹⁸⁹

South Carolina requires, in addition to simple labeling, the following information for communications sent to those known to be in need of legal services:

183. *Id.*

184. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 7.05(b)(2).

185. NEV. SUP. CT. R. 197(3) (requiring it to be in red ink and in legible type at least twice the size of the largest type in the body of the statement).

186. MO. SUP. CT. R. 4-7.3(a).

187. R. REGULATING FLA. BAR 4-7.4(b)(2)(H).

188. OKLA. R. PROF'L CONDUCT 7.2(c)(1).

189. *Id.*

(A) "You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at [telephone number] in Columbia or toll free [telephone number]. . . . If you have already engaged a lawyer in connection with the legal matter referred to in this letter, you should direct any questions you have to that lawyer;" and

(B) "The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this letter is general and that your own situation may vary."

. . . .

3) "ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATION OF ANY LAWYER MAY BE DI-RECTED TO THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE. POST OFFICE BOX [number] COLUMBIA, SOUTH CAROLINA 29211 TELEPHONE NUMBER [number]."¹⁹⁰

A fundamental aspect of marketing inherent to the notion of competition is the ability of the service provider to distinguish his or her services from those of others providing the same or similar services. As discussed above, Model Rule 7.1 places limits on the ability of lawyers to make such distinctions, particularly through the restriction prohibiting lawyers from comparing their services to those of other lawyers, unless factually substantiated.¹⁹¹ However, some states have imposed restrictions that further limit the ability of lawyers to provide prospective clients with information that compares their services to other lawyers. Section 6158.3 of the California Business and Professions Code requires that an advertisement in an electronic media "disclose the factual and legal circumstances that justify the result portrayed in the message, . . . or the advertisement must state that the result portrayed in the advertisement was dependent on the facts of that case, and that the results will differ if based on different facts."¹⁹²

One of the simplest ethics requirements that undermines notions of marketing is a required disclaimer from Alabama that states: "No representation is made that the quality of the legal

190. S.C. APP. CT. R. 407, R. 7.3(C)(2)-(3).

191. MODEL RULES OF PROF'L CONDUCT R. 7.1(c) (2000).

192. CAL. BUS. & PROFS. CODE § 6158.3 (West Supp. 2001).

services to be preformed is greater than the quality of legal services performed by other lawyers.¹⁹³

Iowa DR 2-101 expands this concept considerably by stating that:

A lawyer shall not, on the lawyer's own behalf, or that of a partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, use, or participate in the use of, any form of public communication which contains any false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement, which contains any statement or claim relating to the quality of the lawyer's legal services, which appeals to the emotions, prejudices, likes, or dislikes of a person, or which contains any claim that is not verifiable.¹⁹⁴

In its report to the ABA Commission on Advertising, the staff of the FTC made this observation about these rules:

These restrictions effectively prohibit dramatizations. But dialogue and demonstration may be effective ways to explain the law, particularly to consumers who do not already know how legal terminology corresponds to their experiences and problems. Dramatizations or illustrations that some consumers—and professionals—view as tacky or offensive, but are not deceptive, may not offend other consumers at all, and those who do find them objectionable may register their distaste by refusing to patronize the offenders.¹⁹⁵

Even though the legal profession is regulated on a state-by-state basis, legal services marketing can clearly be a multi-state function.¹⁹⁶ In fact, in some media it is difficult, if not impossible, to limit the reach of marketing. Print in regional publications, television that are cablecast, and sites on the Internet are inherently multi-jurisdictional, or in the case of the Internet, a-jurisdictional.¹⁹⁷ The scope of the state's regulatory function, then, comes into question. Obviously, the state has the right, and indeed the responsibility, to regulate the lawyers admitted in that state. However, does the state have the right to regulate lawyers who are not admitted in that state, but who are seeking clients there?

193. ALA. R. PROFESSIONAL CONDUCT 7.2(e).

194. IOWA CODE OF PROF'L RESPONSIBILITY FOR LAWYERS DR 2-101(A) (2001).

195. FTC SUBMISSION, *supra* note 96, at 14.

196. *See* CROSSROADS, *supra* note 10, at 114.

197. *Id.* at 155-56.

This question forces one to examine the underlying legitimacy of the ethics rules governing legal services marketing. Their purpose is to provide consumers within the state protection against misrepresentations¹⁹⁸ and overreaching as lawyers seek business.¹⁹⁹ These purposes could not be met, and the legitimacy of the rules could not be served, if the consumer was only protected against the lawyers admitted in the consumer's state, but not against the lawyers who are admitted in another state and are seeking business in accordance with the rules where those lawyers are admitted. Therefore, the reach of the ethics rules may go beyond those lawyers who are admitted in any particular state and extend to any lawyer seeking clients in the jurisdiction, even if the lawyer is not admitted in that jurisdiction.

It is possible that the state's reach is determined by the rules themselves. In West Virginia, the preamble to the ethics rules limited the application of the rules to those who were regularly engaged in the practice of law in that jurisdiction. This limited application served as a successful defense in *Lawyer Disciplinary Board v. Allen, Coale & Van Susteren*.²⁰⁰ The defendants were out-of-state lawyers who solicited potential clients in-person, allegedly out of compliance with the West Virginia rules.²⁰¹ Since the lawyers were licensed in other states, they were not deemed to be regularly engaged in the practice of law in West Virginia.²⁰² The preamble to the West Virginia rules was subsequently modified to exclude the limitation of the application of the rules.²⁰³

On the other hand, South Carolina Appellate Court Rules 418 requires an "unlicensed lawyer" who advertises in that jurisdiction to comply with its rules governing the communications of legal services.²⁰⁴ An "unlicensed lawyer" is a person admitted to practice law in a jurisdiction other than South Carolina.²⁰⁵

198. See MODEL RULES OF PROF'L CONDUCT R. 7.1 cmt. 1 (2000) ("Whatever means are used to make known a lawyer's services, statements about them should be truthful.").

199. See *id.* R. 7.3 cmt. 1 ("There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services.").

200. 479 S.E.2d 317 (W. Va. 1996).

201. *Id.* at 333.

202. *Id.* at 319.

203. *Id.* at 336.

204. S.C. APP. CT. R. 418(b).

205. *Id.* R. 418(a).

Lawyers who violate state ethics rules in those states where they are admitted are subject to disciplinary procedures that may lead to the suspension or revocation of their right to practice.²⁰⁶ Lawyers admitted in other jurisdictions, however, are not subject to revocation of the right to practice law in jurisdictions where they do not have that right.²⁰⁷ Therefore, if a state extends the scope of its rules governing legal services marketing, it also needs to create the sanctions for the lawyers who do not comply with the rules of the state where the lawyer is marketing.²⁰⁸ The South Carolina rule provides for contempt of court, an injunction against any future violation, and a refund of all fees paid pursuant to any employment that may have resulted from the advertising or solicitation.²⁰⁹

Similarly, Indiana disciplinary authorities brought injunctions against lawyers licensed in California when those lawyers solicited potential clients in Indiana, in violation of the Indiana rules.²¹⁰ Since the lawyers were not successful in obtaining clients, there was no issue involving fees.²¹¹

Expansive interpretations of false and misleading communications, extensive disclaimer requirements, restrictions focused on specific types of media, rules that undermine marketing techniques commonly employed for all other services, and the expanded scope of the application of these rules combine to create difficulties for lawyers and firms, particularly those involved in client development in a variety of states. In some ways, these factors also fail to achieve the goals of consumer protection in the marketplace of legal services. These issues are examined in the next section.

IV. THE IMPACT OF STATE RULES GOVERNING THE COMMUNICATIONS OF LEGAL SERVICES

In order to understand the potential impact of individual state rules on the flow of legal commerce, it is important to look at the

206. See HILL, *supra* note 12, at 137–39.

207. *Id.*

208. *Id.*

209. S.C. APP. CT. R. 418(d).

210. *In re Murgatroyd*, 741 N.E.2d 719, 720 (Ind. 2001).

211. *Id.*

structures for the delivery of legal services and the function of marketing within those structures.

The practice of law has been conceptually divided into two hemispheres: those who provide personal legal services and those who provide corporate and institutional legal services.²¹² In its analysis of lawyer advertising in *Bates*, the United States Supreme Court made at least one fundamentally incorrect conclusion in presuming that lawyer advertising is the exclusive domain of those who provide personal legal services.²¹³ The Court stated that “[t]he only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants.”²¹⁴

Personal legal services certainly lend themselves to advertising. In the 1970s, lawyers began to provide personal legal services through legal clinics, using a variety of tools that were designed to lower costs for routine services.²¹⁵ Standardized forms were used. Paralegals were leveraged.²¹⁶ Offices were located in malls and neighborhood storefronts, with less overhead expense than downtown offices.²¹⁷ The need for volume that would provide an economy of scale to provide these services was dependent on advertising.²¹⁸ Although legal clinics did not prosper and have gone out of business, these economic measures were widely adopted by lawyers providing personal legal services.²¹⁹ While their marketing techniques have broadened in the past two decades, expanding into direct mail²²⁰ and Internet-based opportunities,²²¹ much

212. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

213. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372–73 (1977).

214. *Id.* at 372.

215. SPECIAL COMM. ON DELIVERY OF LEGAL SERVS., ABA, REPORT ON THE SURVEY OF LEGAL CLINICS & ADVERTISING LAW FIRMS 1 (1990) [hereinafter SURVEY REPORT] (analyzing the adaptation of clinical strategies into non-clinic structures).

216. SPECIAL COMM. ON DELIVERY OF LEGAL SERVS., ABA, LEGAL CLINICS: MERELY ADVERTISING LAW FIRMS? 43 (1982).

217. *Id.* at 42.

218. CROSSROADS, *supra* note 10, at 35.

219. SURVEY REPORT, *supra* note 215, at 29.

220. See James A. Sweet, University of Wisconsin Survey Center, Report on Survey of Accident Victims 17 (Feb. 8, 1997) (Report conducted for the Wisconsin Board of Attorneys Professional Responsibility) (on file with author). The report indicates that 5% of accident victims who were sent direct mail and went on to hire a lawyer, found their lawyer through solicitations, compared to 3.5% who found their lawyers from the Yellow Pages

of the client development effort for personal legal services has not seen dramatic change in that time.²²² The Yellow Pages remains a prominent method of advertising.²²³ Television advertising for legal services steadily increases²²⁴ and tends to focus on personal injury, bankruptcy, and drunk driving representation.²²⁵

Advertising for personal legal services is oriented toward those who have not used a lawyer and do not otherwise know how to find one.²²⁶ This justifies the need for consumer protection found within the state ethics rules. Lawyers providing personal legal services are most likely to operate as solo practitioners or within a small office.²²⁷ They are most likely to serve clients within a single state and therefore focus their marketing within that state. Compliance with the rules may be burdensome and may be inconsistent with good marketing principles.²²⁸ To that extent, the rules may limit access to legal services and reduce the flow of legal commerce.²²⁹

The ethics rules, however, are no doubt far less inhibiting to those providing personal legal services than they are to lawyers working in the other hemisphere. States do not generally limit their rules to those providing services to the uninitiated. The rules apply broadly to the communications of legal services, while the most pronounced change in marketing endeavors in the past twenty years is found among those lawyers providing services to

and another 3.5% who found their lawyers from television advertisements. *Id.*

221. CROSSROADS, *supra* note 10, at 156.

222. SURVEY REPORT, *supra* note 215, at 21.

223. The heading "attorney/lawyer" is the seventh most referenced topic, with 270,900,000 references in 2000. Yellow Pages Publishers Assoc., *Top 300 Headings 1* (2000), available at http://www.yppa.org/pdf/Top_300_Numeric_20010411.pdf (last modified Apr. 11, 2001).

224. According to the Television Bureau of Advertising, \$225,464,800 were spent on television advertising for legal services in 2000, ranking it twenty-second among twenty-five categories. Television Bureau of Advers., *TV Basics: Top 25 Spot Television Categories*, TVB Online, at <http://www.tvb.org/tvfacts/index.htm> (last visited Feb. 8, 2002).

225. See generally, Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785 (2000); Ronald D. Rontunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It*, 49 ARK. L. REV. 703 (1997); Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 364 (1994).

226. CROSSROADS, *supra* note 10, at 44 ("Promotional ads are frequently targeted toward lower income individuals, less able to find a lawyer through a personal referral.")

227. See Cramton, *supra* note 30, at 540.

228. See RICHARD L. ABEL, *AMERICAN LAWYER* 120 (1989).

229. See *id.* at 120-22.

corporate and institutional interests.²³⁰ It is in this hemisphere that the *Bates* Court misjudged the application of advertising and, more broadly, legal services marketing, when it concluded that advertising was the exclusive domain of routine legal services.²³¹

Today's technologically-connected global law firm with scores of offices and hundreds of lawyers is a fairly recent development. In 1935, the average number of lawyers in the top ten law firms in Chicago was twenty-three.²³² In the next thirty years, that number had little more than doubled to fifty-five and one-half.²³³ Over the next fourteen years, however, the number of lawyers in the top ten Chicago firms nearly tripled, to 148 by 1979.²³⁴ In 2001, Chicago's largest office housed 489 lawyers.²³⁵ Today, a Chicago office of 148 lawyers would only rank twenty-fourth.²³⁶ Nationally, the twenty largest firms averaged over 230 lawyers at the end of the 1970s.²³⁷ Between 1979 and 1987, that number doubled as the top twenty firms averaged 527 lawyers.²³⁸ By 2001, the largest firm, Baker & McKenzie, had over 3,000 lawyers and sixty-two offices in thirty-five countries.²³⁹ The twentieth largest firm, according to the National Law Journal's list of the largest 250 law firms, is Winston & Strawn,²⁴⁰ which employs over 850 lawyers.²⁴¹

The developments in business acquisition have been as substantial as the growth of these firms. In the first decade after the *Bates* decision, some firms providing corporate legal services cre-

230. See *infra* notes 242–51 and accompanying text.

231. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977).

232. ABEL, *supra* note 228, at 182.

233. *Id.* at 311.

234. *Id.* at 182.

235. *Chicago Lawyer 2001 Survey*, CHI. LAW, Aug. 2001, at 10 [hereinafter *Lawyer Survey*].

236. See *id.* at 12.

237. ABEL, *supra* note 228, at 311.

238. *Id.*

239. Baker & McKenzie, *Firm Profile*, at <http://www.bakerinfo.com/BakerNet/Firm+Profile/default.htm> (last modified Nov. 2, 2001).

240. N.Y. Law Publ'g Co., *National Law Journal 250: The Largest 250 Law Firms in the U.S.*, Internet Legal Resource Guide, at <http://www.ilrg.com/nlj250/> (last visited Feb. 8, 2002).

241. James R. Thompson & James M. Neis, *Firm Overview: Message From the Chairman and Managing Partner*, Winston & Strawn, at <http://www.winston.com> (last modified Oct. 3, 2001).

ated the position of law firm marketer.²⁴² By 1985, law firm marketers had formed a professional association known as the National Law Firm Marketing Association.²⁴³ This association has changed its name to the Legal Marketing Association ("LMA") and currently has 1,250 members from forty-three states and nine countries.²⁴⁴ LMA members are employed by seventy-four percent of the largest 250 law firms.²⁴⁵

Law firm marketers carry various titles, such as client services director and director of client development.²⁴⁶ Marketing directors frequently have advanced degrees and several years of experience in professional services marketing or advertising.²⁴⁷ In major firms, they reportedly make between \$200,000 and \$400,000 per year.²⁴⁸ Most large firms not only have a law firm marketer, but also a staff of firm employees dedicated to business retention and development.²⁴⁹ Among the efforts to coordinate the business development endeavors of their firms, marketing staff produce client seminars on important and emerging legal issues, place articles authored by their firm's lawyers in industry publications, sometimes at a cost,²⁵⁰ and gather intelligence on perspective clients such as assessing their financial status and industry dynamics.²⁵¹

Large law firms also employ a wide range of more traditional marketing endeavors, including client entertainment, directory listings, holiday cards, identity campaigns, brochures, Web site development and maintenance, and advertising.²⁵² An LMA survey of law firms ranging from forty-five to 950 lawyers quantified the expenditures of various marketing costs.²⁵³ These firms spent

242. CROSSROADS, *supra* note 10, at 55.

243. *Id.*

244. Legal Marketing Association, *About LMA: LMA Fast Facts*, at <http://www.legalmarketing.org/about/fastfacts.cfm> (last visited Feb. 8, 2002).

245. *Id.*

246. *See Lawyer Survey*, *supra* note 235, at 10–12.

247. Martha Neil, *Learning How to Ad*, A.B.A. J., Oct. 2001, at 42, 45.

248. *Id.*

249. *Id.*

250. CROSSROADS, *supra* note 10, at 55.

251. Neil, *supra* note 247, at 46.

252. *LMA Data Reveal Where to Focus Your Marketing Budget*, PARTNER'S REPORT (Institute of Management & Administration, New York, N.Y.), June, 2001, at 13.

253. *Id.*

an average of \$67,400 on advertising, \$45,000 on collateral marketing material, and \$41,900 on directory listings.²⁵⁴

How do these major multi-jurisdictional law firms that have lawyers admitted in many jurisdictions, serve clients across the country and around the world, spend hundreds of thousands of dollars a year on marketing activities, and seek clients in virtually all venues, comply with the state ethics rules governing the communications of legal services? It appears many do not.²⁵⁵

The largest, most prestigious law firms sometimes make good faith efforts to comply with the various state rules, as evidenced by the extensive disclaimer of Clausen Miller,²⁵⁶ but some appear to disregard these ethics provisions altogether. This is not to say that law firms serving corporate interests are making fraudulent representations or launching campaigns of deception. As stated in the report of the ABA Commission on Advertising, *Lawyer Advertising at the Crossroads*: "Corporate firms tend to market their services with a belief that the sophistication of their clients controls the propriety of the advertising."²⁵⁷ Firms simply advance their marketing and spend their client development money in ways that are consistent with sound marketing principles, without regard to the nuances of state rules that undercut those principles.²⁵⁸ Questionable compliance centers on issues of meeting the parameters of false or misleading communications, including the absence of required disclaimers, use of client testimonials, and reference to the specialization of lawyers inconsistent with state rules governing such usage.

The failure of large firms to comply with the ethics governing legal services marketing is a combination of several factors. The rules are too varied and complex as a whole, and occasionally even contradictory.²⁵⁹ Compliance with the rules would prevent the ability of a law firm to maximize its investment in client de-

254. *Id.*

255. It would be inappropriate for the author to conclude that any particular lawyer or law firm stands in violation of the ethics of any particular jurisdiction. This is left for the reader to conclude. For this purpose, the author encourages readers to review the Web sites of the largest law firms. See <http://www.ilrg.com/nlj250/>, *supra* note 240. Compare their content to the state rules. See <http://www.abanet.org/adrules>, *supra* note 8.

256. See Clausen Miller Web site, *supra* note 153.

257. CROSSROADS, *supra* note 10, at 58.

258. See HORNSBY, *supra* note 58, at 4.

259. See *id.*

velopment. The rules are designed to protect the personal consumer who has had limited, if any, experience in the selection of a lawyer.²⁶⁰ And, perhaps because of this latter point, rule violations against large law firms serving corporate clients are not enforced.²⁶¹ Therefore, firms are in the position to assume the risk of enforcement and discipline as they advance their marketing endeavors.

For some, this system of having rules, violating rules, and not enforcing the rules when violations occur, may seem like the best alternative. It may appear that no one is harmed when a firm violates ethics rules that were never intended to apply to its circumstances. However, this situation has serious detriments within the entire scheme of ethical regulation. First, it calls into question the morality of advertising legal services. While the Model Rules focus on the inappropriateness of making false and misleading communications and overreaching through solicitation, state rules previously discussed tend to demean the function of client development and suggest that it is morally wrong when it serves as the lawyer's basis for making a living.²⁶²

Also, the complexity and variations of state rules place a burden on lawyers to decide which ethics rules ought to apply to them and therefore must be complied with. Lawyers ought not have this discretion. The ability to justify the breach of an ethics rule for conduct in one area, such as marketing, can easily lead to the justification of a breach in far more serious areas. To the extent that the legal profession finds it essential to regulate legal services marketing, the rules ought to be crafted in ways that are consistent with the nature of practice and should promote, rather

260. See CROSSROADS, *supra* note 10, at 109–10.

261. The National Organization of Bar Counsel maintains a Web site at <http://www.nobc.org> (last modified Jan. 29, 2002), where it posts disciplinary violations by topic on a semiannual basis. "Advertising and Solicitation" is one of the topics. See *id.* Never has this posting reported a case involving a lawyer from a major law firm under "Advertising and Solicitation." See *id.* See generally ANNOTATED MODEL RULES, *supra* note 113 for a report on numerous cases illustrating impermissible conduct in violation of each model rule.

262. See Mark H. Aultmann, *Moral Character and Professional Responsibility*, 8 GEO. J. LEGAL ETHICS 103, 112 (1994) ("One may with some seriousness speak of moral duty not to steal money. A duty not to advertise in the Yellow Pages, on the other hand, if it is serious, is serious only because a disciplinary apparatus chooses to treat it seriously."); see also CHRISTENSEN, *supra* note 79, at 154 (discussing the professional milieu that justifies for the regulation of lawyer advertising within the culture of the legal profession).

than frustrate, their compliance. It is important to examine alternatives to the current maze of state regulations.

V. ALTERNATIVES TO THE CURRENT STATUS OF STATE RULES GOVERNING THE COMMUNICATIONS OF LEGAL SERVICES

There are two alternatives to the current morass of state-based rules governing the communications of legal services: adoption of uniform rules throughout the states or deregulation of marketing by the legal profession.

States may soon have an opportunity to amend their rules to achieve uniformity and strike a balance to enable the flow of legal commerce while still providing consumer protection. In 1997, the ABA created the Commission on the Evaluation of the Rules of Professional Conduct, known as Ethics 2000.²⁶³ Ethics 2000's mission has been to study and evaluate the ethical and professionalism precepts of the legal profession, examine and evaluate the Model Rules and rules of the state jurisdictions, and formulate recommendations.²⁶⁴ Ethics 2000 has gathered data and held a broad series of hearings to gain input from all relevant sources.²⁶⁵

The ABA Commission on Advertising, now known as the Commission on Responsibility in Client Development, was among those to submit comments.²⁶⁶ It encouraged Ethics 2000 to modify the rules governing the communications of legal services in ways that incorporated new technology-based issues.²⁶⁷

263. See Ctr. for Prof'l Responsibility, *Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct: Mission Statement*, ABA Network, at http://www.abanet.org/cpr/e2k-mission_statement.html (last modified Mar. 9, 2001).

264. *Id.*

265. Margaret Colgate Love, *ABA Ethics 2000 Commission Final Report and Summary of Recommendations*, ABA Network, at http://www.abanet.org/cpr/e2k-mlove_article.html (June 26, 2001).

266. *A Re-Examination of the ABA Model Rules of Professional Conduct Pertaining to Client Development in Light of Emerging Technologies: A White Paper Presented for the Purpose of Discussion by the American Bar Association Commission on Advertising*, ABA Network, at <http://www.abanet.org/legalservices/whitepaper.html> (July 1998) [hereinafter *White Paper*]; William P. Smith, III & David D. Beckman, *Comments on Model Rules Concerning Client Development*, ABA Network, at <http://www.abanet.org/legalservices/e2001.html> (Aug. 25, 2000).

267. See *White Paper*, *supra* note 266.

In August 2001, Ethics 2000 issued a report recommending a series of modifications to the Model Rules.²⁶⁸ Among the recommendations were important changes to the provisions of Rules 7.1 through 7.4.²⁶⁹ The recommended changes are designed to improve the balance between the flow of legal commerce and necessary consumer protection.²⁷⁰

New Model Rule 7.1 would create one overarching prohibition against false and misleading communications.²⁷¹ The proposed revision simply deems it false or misleading if a communication “contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”²⁷² Ethics 2000 recommends that prohibitions against the creation of unjustified expectations and unsubstantiated comparisons of services be deleted from the rule.²⁷³ The proposed comment, however, explains that would be misleading under this standard if they lead a reasonable person to form unjustified expectations or believe an unsubstantiated comparison was substantiated.²⁷⁴ In other words, under the Ethics 2000 standard, those marketing business-oriented legal services to more sophisticated clients would have greater latitude in the presentation of their marketing materials. Those marketing personal legal services to people who may not have experience in the selection of a lawyer would have to exercise greater caution to avoid the potential for misleading interpretations.

Model Rule 7.3, which governs solicitation, would change under the Ethics 2000 proposal to allow lawyers to solicit other lawyers in-person, including in-house counsel.²⁷⁵ The proposal would also

268. ABA Comm’n on Evaluation of Rules of Prof’l Conduct, *Report with Recommendation to the House of Delegates*, ABA Network, at http://www.abanet.org/cpr/e2k-report_home.html (Aug. 2001).

269. *Id.*

270. See ABA Comm’n on Evaluation of Rules of Prof’l Conduct, *Model Rule 7.1: Reporter’s Explanation of Changes*, ABA Network, at <http://www.abanet.org/cpr/e2k-rule71rem.html> (Aug. 2001) [hereinafter *Rule 7.1 Explanation*].

271. See ABA Comm’n on Evaluation of Rules of Prof’l Conduct, *Report with Recommendation to the House of Delegates: Rule 7.1*, ABA Network, at <http://www.abanet.org/cpr/e2k-rule71.html> (Aug. 2001) [hereinafter *Rule 7.1 Mark-Up*] (providing a marked-up copy of changes to Rule 7.1); see also *Rule 7.1 Explanation*, *supra* note 270.

272. *Rule 7.1 Mark-Up*, *supra* note 271.

273. *Id.*

274. *Id.*

275. ABA Comm’n on Evaluation of Rules of Prof’l Conduct, *Report with Recommendation to the House of Delegates: Rule 7.3*, ABA Network, at <http://www.abanet.org/cpr/e2k->

excuse lawyers from labeling written solicitations as "Advertising Material" when such material is sent to other lawyers.²⁷⁶ Stylish firm brochures directed to lawyers at major corporations would not have to include this label.²⁷⁷

The ABA began the process of considering, adopting, or rejecting the recommendations of Ethics 2000 at its Annual Meeting in August 2001.²⁷⁸ It will consider the recommendations for modifications to Model Rules 7.1 through 7.5 at its mid-year meeting in February 2002 or at its Annual Meeting in August 2002.²⁷⁹

After the ABA has completed its revision of the Model Rules, states will be asked to consider their adoption.²⁸⁰ This will provide an opportunity for the states to revisit their current rules governing the communications of legal services and assess their suitability to govern this subject by the standards of Twenty-first Century law firms and practices. The opportunity to adopt the ABA revisions will create the opportunity for the necessary state-by-state uniformity that strikes a balance between the flow of legal commerce and protection of consumers of legal services.

The other option to overcome the difficulties created by state-based ethics rules is for the legal profession to cede the obligation of governing legal services marketing to state legislatures rather than the states' highest courts. Although the legal profession is substantially self-regulated, it has embraced legislative controls in the past. For example, some law firms choose to be governed by statutes that regulate limited liability partnerships and limited liability companies. Some firms have readily embraced these structures and submitted themselves to the terms and obligations of the laws that permit them.

rule73.html (Aug. 2001) [hereinafter *Rule 7.3 Mark-Up*] (providing a marked up copy of changes to Rule 7.3); see also ABA Comm'n on Evaluation of Rules of Prof'l Conduct, *Model Rule 7.3: Reporter's Explanation of Changes*, ABA Network, at <http://www.abanet.org/cpr/e2k-rule73rem.html> (Aug. 2001) (providing rationale for changes to Rule 7.3).

276. See *Rule 7.3 Mark-Up*, *supra* note 275.

277. See *id.*

278. Ctr. for Prof'l Responsibility, *Ethics 2000 Commission: Summary of House of Delegates Action at the August 2001 Annual Meeting*, ABA Network, at http://www.abanet.org/cpr/e2k-summary_2001.html (Aug. 2001).

279. Press Release, Nancy Cowger Slonim, Media Contact, ABA Begins Action on Updating Ethics Rules, Adopts Election Administration Guidelines, at <http://www.abanet.org/media/aug01/houseaction.html> (Aug. 15, 2001).

280. See *id.*

In California, the legal profession is governed by the State Bar Act (the "Act"), under Chapter 4 of the Business and Professions Code.²⁸¹ Article 9 of the Act, entitled "Unlawful Solicitation," specifically governs legal services marketing.²⁸² The anomalous aspects of the Act may suggest that state legislation would not lead to uniformity any more than it now does under the legal profession's self-regulation. However, if the regulation of legal services marketing were a legislative function, it is likely uniform acts would evolve to stimulate the adoption of uniform statutes.

It could be argued that uniform acts are no more likely to result in uniformity than the Model Rules. Even if legislative provisions did not become uniform, however, those laws would probably favor the flow of commerce as a reflection of public attitudes and, of course, be subject to constitutional protections. In other words, the public is more inclined to favor competition among legal service providers and is more receptive to lawyer advertising when compared to the legal profession's sentiments regarding lawyer advertising.²⁸³ To the extent that statutes reflect public opinion, it is reasonable to expect that laws governing legal services marketing would be less restrictive on the flow of information than existing state-based ethics rules.²⁸⁴

Research from a variety of sources demonstrates the disparity between the attitudes of the legal profession and the public toward legal services marketing. In research examining fifteen academic marketing studies, Cleveland State University's marketing faculty concluded "that, in general, attorney attitudes toward advertising are negative while consumer attitudes are positive. . . . For a profession that maintains direct contact with their consumers, we were surprised to find both the disparity in attitudes, and the slow rate of change."²⁸⁵

281. CAL. BUS. & PROFS. CODE § 6000 (West Supp. 2001).

282. *Id.* §§ 6150–56.

283. See Hornsby & Schimmel, *supra* note 107, at 340 ("With virtually no exception, the research has found lawyers critical of advertising and consumers receptive to it."); see also FTC SUBMISSION, *supra* note 96, at 7 ("Consumers appear to be less hostile to professional advertising than lawyers are.").

284. The political system would also create a check and balance against abuses, since the statutes would be enforced by public officials, such as local prosecutors or state attorneys general, who are accountable to voters.

285. Bob Cutler, et al., *Alternative Perspectives to Legal Services Advertising: Attorneys Versus Consumers*, LAW ADVERTISING NEWS, Feb. 1993, at 3.

Similarly, a report commissioned by the South Carolina Bar Association stated, “[i]t is clear in the research that consumers have views on advertising that are significantly different from the views of professionals. Consumers generally support advertising and say that informational advertising provides a neutral to positive image of the profession.”²⁸⁶ A similar conclusion was drawn from research carried out in Georgia, Oklahoma, and by the ABA.²⁸⁷

This research does not demonstrate overwhelming public support for lawyer advertising, just a higher level of acceptability than that of the legal profession. For example, in the Oklahoma research, over fifty percent of the public respondents agreed that lawyers who advertise on television do a good job of informing people, while only twelve percent of the lawyers responding agreed with that position.²⁸⁸ This finding suggests that the public will call for restraint on legal services marketing that is sufficient to provide consumers with reasonable protection, but will be less restrictive than that which has been set out by the legal profession. The legal profession can then focus its attention on hortatory endeavors designed to encourage lawyers to honor the integrity of the legal profession as they market their services.

VI. CONCLUSION

For nearly 100 years, the legal profession has experimented with the regulation of legal services marketing. As the result of state-based responsibilities, historical accidents, and some degree of design, these efforts to regulate have created a system that is out of sync with Twenty-first Century practice settings. State rules may tend to strike the necessary balance between the flow of legal commerce and consumer protection, but when combined into multi-jurisdictional obligations, they become too limiting for those law firms competing on a global basis. The limitations and complexity, combined with infrequent enforcement, result in an

286. A. EMERSON SMITH, JR. ET AL., ADVERTISING & REGULATED PROFESSIONS: REPORT TO THE HOUSE OF DELEGATES OF THE SOUTH CAROLINA BAR 6 (Jan. 3, 1995) (unpublished report to the House of Delegates of the South Carolina Bar, on file with author).

287. See Hornsby & Schimmel, *supra* note 107, at 341.

288. *Id.*

assumption of risk and widespread noncompliance by those lawyers and firms that are otherwise held in the highest esteem.

The legal profession can either continue to embrace largely ignored ethics rules, or pursue alternative measures designed to meet the twin goals of advancing legal commerce and protecting consumers. These alternatives include the state-by-state adoption of uniform ethics rules, such as those advanced by the ABA Ethics 2000 Commission, or the ceding of the obligation to govern legal services marketing to the public through legislative regulation. Either alternative is likely to result in a system that serves the interest of the legal profession, practicing lawyers, and the public better than the morass of existing state-based rules.
