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## Attorney Advertising and Competition at the Bar

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# Attorney Advertising and Competition at the Bar\*

*Terry Calvani,\*\* James Langenfeld,\*\*\* and Gordon Shuford\*\*\*\**

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## I. INTRODUCTION

Generally, advertising tends to lower prices and stimulate competition.<sup>1</sup> This unexceptional statement becomes controversial, however, when applied to the legal profession. Indeed, only the newest members

\* The views expressed are those of the Authors, not necessarily the Federal Trade Commission, other Commissioners, or other Commission staff.

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1. See, e.g., Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961). This theoretical proposition has been confirmed by numerous empirical studies. See, e.g., J. CADY, *RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS* (1976); A. MAURIZI & T. KELLY, *PRICES AND CONSUMER INFORMATION: THE BENEFITS FROM POSTING RETAIL GASOLINE PRICES* (1978); Benham & Benham, *Regulating Through the Professions: A Perspective of Information Control*, 18 J.L. & ECON. 421 (1975); Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972); Cady, *An Estimate of the Price Effects of Restrictions on Drug Advertising*, 14 ECON. INQUIRY 493 (1976).

of the bar cannot recall the time when both professional and legal strictures precluded attorneys from advertising. Attorney advertising has been, and probably remains, a controversial subject. This Article analyzes attorney advertising and the regulations that police it.<sup>2</sup> The Article begins by discussing the legal history of restraints on advertising. The Article then presents an economic analysis of the effects of attorney advertising. Finally, the Article examines the empirical evidence measuring the impact of attorney advertising on both the price and quality of legal services. Based on this discussion, this Article recommends further liberalization of restrictions constraining professional advertising.

## II. HISTORY OF ETHICAL AND JUDICIAL RESTRAINTS ON ATTORNEY ADVERTISING

Over a century ago, the Alabama bar became the first state bar association to adopt a code of ethical standards for attorney behavior.<sup>3</sup> The Alabama Code is the foundation of the ethical precepts enforced by state bars today, which are designed to uphold the dignity of the bar and to protect consumers from questionable professional practices. The promulgation of ethical codes was a significant change in the way attorneys regulated themselves. In the early English tradition attorneys did not consider themselves as active participants in commerce but as public servants in a learned profession. The dignity of the bar and the quality of legal services were monitored by tradition and social etiquette. The adoption of the Alabama Code of Ethics in 1887 marked a watershed of change.<sup>4</sup> In essence, the Alabama Code permitted attorneys to provide useful information about legal services but did not allow attorneys to solicit particular clients. This distinction between information for the general public and solicitation to attract individual clients would

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2. This Article draws on the extensive work of the FTC, CLEVELAND REGIONAL OFFICE AND BUREAU OF ECONOMICS, REPORT OF THE STAFF TO THE FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (Nov. 1984) [hereinafter *Cleveland Report*].

3. ALABAMA STATE BAR ASSOCIATION CODE OF ETHICS (1887), cited in C. WOLFRAM, MODERN LEGAL ETHICS 53-54 nn.20 & 21 (1986).

4. Attorney advertising has been commonplace throughout much of American legal history. See generally *Cleveland Study*, supra note 2, at 20-26; see also Comment, *Of Shibboleths, Sense and Changing Tradition—Lawyer Advertising*, 61 MARQ. L. REV. 644 (1978). For a discussion of the advertising undertaken by a prominent member of the Tennessee Bar, who was later to serve on the United States Circuit Court, United States Court of Appeals, and the United States Supreme Court, see Calvani, *The Early Legal Career of Howell Jackson*, 30 VAND. L. REV. 39 (1977). See also Shaffer, supra 41 VAND. L. REV. 697, 703-09 (1988).

Canon 16 of the Alabama Code allowed attorney advertising in newspapers, but called for restraint in the form and manner of presentation.<sup>5</sup>

5. ALABAMA STATE BAR ASSOCIATION CODE OF ETHICS Canon 16 (1887).

end quickly. By the 1880s many state supreme courts were punishing attorneys for advertising regardless of the medium.<sup>6</sup>

In 1908 the American Bar Association (ABA) published its *Canons of Professional Ethics*. The thirty-two Canons adopted by the ABA were very similar to the Alabama Code and eventually were adopted by every state. Canon 27 contained one important modification of the Alabama Code by providing that "solicitation of business by circulars or advertisement, or by personal communications, or interviews, not warranted by personal relations, is unprofessional."<sup>7</sup> Starting in 1922 the ABA began to issue formal opinions interpreting the thirty-two Canons. The first of these formal opinions dealt with attorney advertising and stated in part: "Any conduct that tends to commercialize or bring 'bargain counter' methods into the practice of law, lowers the profession in public confidence and lessens its ability to render efficiently that high character of service to which the members of the profession are called."<sup>8</sup> The ABA eventually amended Canon 27 to allow attorney listings in telephone and legal directories. Many members of the legal community opposed even this small step towards the promotion of the legal practice, and successfully prohibited "distinctive" listings in telephone directories.<sup>9</sup>

### A. *Early Judicial Response to Attorney Advertising*

Until 1975, judicial decisions supported the states' right to prohibit advertising by attorneys and other professionals. First, it was generally assumed that bar associations were free to regulate attorney conduct without violating the federal antitrust laws. Most observers assumed that the profession of law, like that of medicine, was not subject to the federal antitrust laws under the so-called "learned professions exemption." In 1975, however, the Supreme Court rejected restraints on commercial practices by professionals in *Goldfarb v. Virginia State Bar*.<sup>10</sup> In *Goldfarb* the Court held that the Virginia State Bar Association, which had permitted the use of minimum fee schedules for its members, could be sued for violation of the Sherman Act's proscription

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6. See, e.g., *People ex rel. Maupin v. MacCabe*, 18 Colo. 186, 188, 32 P. 280, 280 (1893) (suggesting that "[t]he ethics of the legal profession forbid that an attorney should advertise his talents or his skill as a shopkeeper advertises his wares").

7. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908), quoted in AMERICAN BAR FOUNDATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 74-75 (1967) [hereinafter OPINIONS].

8. ABA Comm. on Professional Ethics and Grievances, Formal Op. 1 (1924), quoted in OPINIONS, *supra* note 7, at 230-31.

9. ABA Comm. on Professional Ethics and Grievances, Formal Op. 284 (1951), quoted in OPINIONS, *supra* note 7, at 628.

10. 421 U.S. 773 (1975).

against price fixing.<sup>11</sup> For the first time the organized bar was subjected to the strictures of the federal antitrust laws. If the bar could not combine to restrict price competition, it seemed open to question whether it could combine to restrict advertising.

Second, courts held that states could regulate attorney advertising, as they would any other business activity, without violating the first amendment.<sup>12</sup> The courts reasoned that since self-promotion was economically, rather than politically, motivated, the first amendment did not apply. This distinction between political and commercial speech was recognized by the Supreme Court in *Valentine v. Chrestensen*.<sup>13</sup> In *Chrestensen* local police restrained the petitioner from distributing handbills that advertised a for-profit exhibit of a submarine.<sup>14</sup> The Supreme Court, on review, maintained that purely commercial speech contained no informational value.<sup>15</sup> Thus, the Court expressly held that "purely commercial speech" was outside the scope of the first amendment.

In the mid-1970s the Court modified the commercial speech doctrine by distinguishing "purely commercial speech" from constitutionally protected communications that conveyed information or rendered an opinion. In 1975 the Court decided *Bigelow v. Virginia*,<sup>16</sup> in which the Court reversed the appellant's conviction for advertising out-of-state abortion services. *Bigelow* involved an advertisement by The Women's Pavilion, a New York organization, which announced counseling and information for women with unwanted pregnancies. The ad also stated that abortions were legal in New York. The appellant was convicted of violating a Virginia ordinance that prohibited any publicizing of encouragement to have an abortion. In upholding the conviction the Virginia courts relied on *Chrestensen* and held that the first amendment protection of free speech did not apply to commercial speech.<sup>17</sup> The Supreme Court reversed, determining that the protected informational portions of the ad outweighed the unprotected commercial aspects of the advertisement. Therefore, the advertisement received

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11. *Id.* at 791-92; see 15 U.S.C. § 1 (1974).

12. See *Head v. New Mex. Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935).

13. 316 U.S. 52 (1942).

14. *Id.* at 52-54. The New York City Sanitary Code prohibited the distribution of commercial advertising materials on the city streets, but allowed the distribution of handbills that concerned political issues. When the police stopped the distribution of the handbills, one side of which was pure commercial advertising and the other side of which was political, the lower court issued an injunction allowing distribution. *Id.* at 53-54.

15. *Id.* at 54.

16. 421 U.S. 809 (1975).

17. 213 Va. 191, 195, 191 S.E.2d 173, 176 (1972).

limited first amendment protection because it was not purely commercial speech, but "convey[ed] information of potential interest and value to a diverse audience."<sup>18</sup> With this decision the Court heralded a major change in the legality of professional and state restrictions on professional advertising.<sup>19</sup>

In 1976 the Court formulated the modern commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>20</sup> This case differed from *Bigelow* in that it involved strictly commercial speech.<sup>21</sup> At issue was a Virginia statute banning drug price advertisements.<sup>22</sup> In defense of the statute the Virginia State Board of Pharmacy (Board) offered two justifications for the ban on price advertisements. First, the Board argued that unrestricted price competition would lead to a reduction in the number of practicing pharmacists. The professional pharmacists would be driven out of business because discount pharmacists could offer lower prices.<sup>23</sup> Second, the Board argued that drug price information would reduce professional respect for pharmacists and eliminate personalized attention for customers. A third justification discussed by the Court, but not specifically mentioned by the Board, involved "maintaining a high degree of professionalism on the part of licensed pharmacists."<sup>24</sup>

The Court's decision balanced these justifications with the consumers' interest in the free-flow of commercial information.<sup>25</sup> Because the efficient allocation of resources, so important in our economy, is based on the economic decisions of the public, the Court concluded that it is necessary to insure that consumers receive the information they need to

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18. *Bigelow*, 421 U.S. at 822.

19. Perhaps in response to this and other developments, the organized bar relaxed its prohibition of attorney advertising. For example, the ABA House of Delegates amended its *Model Code of Professional Responsibility* in February 1976 to permit the use of limited information in the classified section of telephone directories. Newspaper and other media advertising were still prohibited. *Cleveland Report*, *supra* note 2, at 32.

20. 425 U.S. 748 (1976).

21. Justice Blackmun writing for the Court stated that the decision was not clouded by the pharmacist offering political or cultural views, but simply "I will sell you the X prescription drug at the Y price." *Id.* at 761.

22. The statute, Virginia Code Annotated § 54-524.35 (1974), stated in part: "Any pharmacist shall be considered guilty of unprofessional conduct who . . . (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription." *Virginia State Bd. of Pharmacy*, 425 U.S. at 750 n.2 (quoting VA. CODE ANN. § 54-524.35 (1974) (repealed by *Virginia State Bd. of Pharmacy*)).

23. *Virginia State Bd. of Pharmacy*, 425 U.S. at 768.

24. *Id.* at 766.

25. *Id.* at 763. The Court explained that "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Id.* at 765.

make informed economic decisions.<sup>26</sup> Private interests also were involved in this case. According to the Court, the groups most harmed by the lack of prescription drug price information were the poor, the sick, and the aged.<sup>27</sup> These groups tend to spend more on health care relative to the general public, and would benefit more from the price information. The Court dismissed the justifications for the ban on drug price advertisements as "highly paternalistic"<sup>28</sup> and stated that "the advertising ban does not directly affect professional standards one way or the other."<sup>29</sup> Moreover, the Board had made no claim that the advertising ban would inhibit pharmacists from "cutting corners" and providing an inferior service.<sup>30</sup> In fact, the Court noted that the result of the advertising ban could be "to insulate [the pharmacists] from price competition and to open the way for [the pharmacists] to make a substantial, and perhaps even excessive, profit. . . ."<sup>31</sup> Thus, the Court ruled that the benefits derived from the price information greatly outweighed the state's interest in regulating pharmacists' professionalism.

### B. *The New Beginnings of Attorney Advertising*

The Court in *Virginia State Board of Pharmacy* expressly limited the new freedom to advertise to pharmacists. Advertising by other professionals was reserved for a later decision.<sup>32</sup> One year later in *Bates v. State Bar of Arizona* the Court was faced with a direct challenge to state restrictions on attorney advertising.<sup>33</sup> In *Bates* two lawyers advertised their legal services in violation of the disciplinary rules of the Arizona Supreme Court.<sup>34</sup> The facts of the case demonstrate the presence of a new competitive force in the delivery of legal services. Bates and his partner opened a "legal clinic" that specialized in routine legal ser-

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26. *Id.* at 765.

27. *Id.* at 763.

28. *Id.* at 770.

29. *Id.* at 769.

30. *Id.*

31. *Id.*

32. The Court stressed:

[W]e have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.

*Id.* at 773 n.25 (emphasis in original).

33. 433 U.S. 350 (1977).

34. DR 2-101(B), incorporated in Ariz. Sup. Ct. R. 29(A) (1956) (repealed Feb. 1, 1985) (current version in ARIZONA RULES OF PROFESSIONAL CONDUCT Rule 42, ER 7.2 (codified as amended at ARIZ. REV. STAT. ANN. tit. 17A (Supp. 1987))).

vices such as uncontested divorces, simple bankruptcies, and uncontested adoptions. Bates and his partner refused to accept complicated cases in order to keep down costs while fully utilizing paralegals, automatic office equipment, and standardized legal forms. They set their prices low and relied on volume to make a profit. After two years, Bates and his partner determined that advertising was necessary to attract the required volume of business.<sup>35</sup> The State Bar initiated disciplinary proceedings, and the Arizona Supreme Court ultimately held that the lawyers had violated the state disciplinary rules prohibiting attorney advertising.<sup>36</sup> The Supreme Court noted probable jurisdiction.

In defense of the regulation prohibiting attorney advertising, the Arizona Bar urged six justifications for the ban, each of which was rejected by the Supreme Court. First, the Arizona bar argued that price advertising by lawyers would have an "adverse effect on professionalism."<sup>37</sup> The Supreme Court rejected this argument, finding the "postulated connection between advertising and the erosion of true professionalism to be severely strained."<sup>38</sup> The Court noted that clients expect attorneys to charge for their services and that price information might encourage some would-be clients to seek legal advice.<sup>39</sup> Indeed, the Court went so far as to suggest that, by not advertising, the bar may be doing the public a disservice, rather than preserving "professionalism."<sup>40</sup>

Second, the Arizona Bar argued that advertising for legal services is inherently misleading because legal services are individualized, because the client often does not know in advance what he needs, and because advertising alone cannot give a potential client all the information he needs to make an informed decision.<sup>41</sup> The Court rejected each of these arguments. The Court noted that routine services, such as those advertised by Bates, are billed at a standard rate. The Court also found that, while a client may not fully understand what is involved in a legal procedure, he can identify what he wants done.<sup>42</sup> The Court also concluded that consumers are aware of the limitations of advertising and that price information is relevant to a consumer's decision. The Court rea-

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35. *Bates*, 433 U.S. at 354.

36. *In re Bates*, 113 Ariz. 394, 555 P.2d 640 (1976) (en banc), *aff'd in part, rev'd in part sub nom. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). Justice Holohan, dissenting, would have found the state rule unconstitutional under the first amendment to the United States Constitution, 113 Ariz. at 402, 555 P.2d at 648 (Holohan, J., dissenting).

37. *Bates*, 433 U.S. at 368.

38. *Id.*

39. *Id.* at 370.

40. *Id.* at 370-71.

41. *Id.* at 372.

42. *Id.* at 374.

soned that advertising should not be prohibited simply because it is incomplete; if such advertising is indeed misleading, the bar can require that more information be disclosed.<sup>43</sup>

Third, the Arizona Bar argued that attorney advertising would lead to an increase in litigation, which would overburden already overcrowded courts.<sup>44</sup> The Supreme Court dismissed this argument by refusing to "accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."<sup>45</sup> The Court also indicated that attorney advertising is a natural, free-market response to the problem of underutilization, since "the middle 70% of our population" do not receive adequate legal services, one of the reasons for which is the fear of high legal fees.<sup>46</sup>

Fourth, the Arizona Bar argued that attorney advertising would increase the cost of legal services and would allow established attorneys to become so entrenched that younger attorneys would be unable to enter the market place.<sup>47</sup> The Court found this argument unsupported. Relying on evidence of the effects of advertising on other professions, the Court concluded that advertising increases competition and reduces prices.<sup>48</sup> Because attorneys rely on reputation and community contacts, the Court also reasoned that advertising can help establish an attorney in a community, which would reduce rather than create barriers to entry in the market place.<sup>49</sup>

Fifth, the Arizona Bar argued that attorney advertising would reduce the quality of legal services.<sup>50</sup> The Court found this argument unconvincing by reasoning that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising."<sup>51</sup> The Court suggested that the standardization of routine matters might even improve the quality of legal work.

Finally, the Arizona Bar argued that a total ban on attorney advertising was justified because the large number of lawyers and the lack of sophistication of the typical client made enforcement of advertising standards too difficult.<sup>52</sup> The Court concluded that the traditional integrity of the bar, and the desire of members of the bar to weed out those who have overstepped their trust, would provide adequate en-

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43. *Id.* at 375.

44. *Id.*

45. *Id.* at 376.

46. *Id.*

47. *Id.* at 377.

48. *Id.*

49. *Id.* at 377-78.

50. *Id.* at 378.

51. *Id.*

52. *Id.* at 379.

forcement of reasonable standards governing attorney advertising.<sup>53</sup>

Having found no economic or professional justification for the total ban on attorney advertising, the Court held that the Arizona State Bar's regulations prohibiting attorney advertising violated the first amendment. Just as the Court in *Virginia State Board of Pharmacy* had concluded that restrictions on pharmacist advertising were not justifiable because of the substantial public interest in "the free flow of commercial speech," the Court in *Bates* held that a total ban on attorney advertising was unjustifiable. While the Court acknowledged that a state could restrain false or misleading advertising, the Court concluded that Arizona's prohibition of all attorney advertising was "overbroad."<sup>54</sup> The *Bates* decision has prompted a virtual revolution in attorney advertising.

While the Court has resolved the question concerning the legality of attorney advertising, *Bates* left countless other issues unresolved.<sup>55</sup> The *Bates* Court did not rule out all limitations on attorney advertising.<sup>56</sup> False, deceptive, or misleading advertising is subject to regulation, and disclaimers may be necessary to prevent misleading the consumer.<sup>57</sup> These unresolved issues have caused subsequent litigation.

A year after *Bates*, the Court considered whether state disciplinary rules could prohibit solicitation of clients for political purposes. In *In re Primus*<sup>58</sup> an attorney advised a woman of her legal rights after she was

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53. *Id.*

54. *Id.* at 382-84.

55. Antitrust challenges to restrictions on attorney advertising have encountered difficulty when such restrictions are the creations of government rather than private action. Under the state action exemption doctrine, conduct of the state as a sovereign enjoys antitrust immunity. See generally *Antitrust Law Developments*, 2 A.B.A. SEC. ANTITRUST L. 605 (1984). These issues were presented in *Bates*. *Bates* argued that the Arizona Supreme Court's disciplinary rules violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, because of their "tendency to limit competition." *Bates*, 433 U.S. at 356. In affirming the Arizona court's rejection of this argument, the Court found that the regulation and the imposed discipline were, in reality, the actions of the state supreme court, which, as a co-equal branch of the state government, was the state itself. Accordingly, the action complained of was that of the sovereign and thus entitled to state action immunity. The Court distinguished the plaintiffs' reliance on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in which the Court concluded that the minimum price restrictions at issue were not protected by the state action exemption since "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent [County and State Bar associations]." 421 U.S. at 790. Thus, the conduct at issue was that of the professional associations and not the state itself. Cf. *Cantor v. Detroit Elec. Co.*, 428 U.S. 579 (1976). Further analysis of this subject is beyond the scope of this Article. For a discussion of the doctrinal differences between first amendment and antitrust analysis of this issue, see Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487 (1986).

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

57. *Id.* at 383-84.

58. 436 U.S. 412 (1978).

sterilized as a condition for receiving Medicaid, and informed her by letter that the American Civil Liberties Union would represent her at no cost.<sup>59</sup> The Supreme Court of South Carolina held that the attorney violated the state's disciplinary rules barring client solicitation and imposed sanctions. The United States Supreme Court reversed, holding that this conduct should receive first amendment protection since it was politically, rather than financially, motivated.<sup>60</sup>

In the same term the Court decided *Ohralik v. Ohio State Bar Association*.<sup>61</sup> In *Ohralik* the Court considered the question, expressly reserved in *Bates*, whether a state can forbid the in-person solicitation of clients for pecuniary gain. In a case that can only be described as classic "ambulance chasing," the Court affirmed the judgment of the Ohio Supreme Court imposing disciplinary sanctions on an attorney for the in-person solicitation of clients.<sup>62</sup> In reaching its decision, the Court reaffirmed the state's role in maintaining standards among members of the licensed professions, "[i]n addition to its general interest in protecting consumers and regulating commercial transactions."<sup>63</sup> The Court noted that the state's interest in regulating attorneys is particularly important because of the lawyer's role in the administration of justice and as an officer of the court.<sup>64</sup>

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59. *Id.* at 414-21.

60. *Id.* In reaching its decision the Court relied on *NAACP v. Button*, 371 U.S. 415 (1963), in which the Court stated:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

*Id.* at 429-30.

61. 436 U.S. 447 (1978).

62. *Id.* In *Ohralik* an attorney solicited two teenage females involved in an automobile collision, both of whom were still recovering from their injuries. *Id.* at 449-50. The injured passenger was a young woman under the age of eighteen and still in high school. *Id.* at 449. Ohralik secured a verbal agreement of representation with the passenger and a written representation agreement with the driver, while she was still in the hospital in traction. *Id.* at 450-51. It was later disclosed that Ohralik used a concealed tape machine to record his conversations with the driver's parents and the passenger. *Id.* Both the driver and the passenger attempted to discharge Ohralik. *Id.* at 451-52. The passenger's mother attempted to discharge Ohralik from the case the very next day. *Id.* In the attempt to revoke their agreements with Ohralik, both women filed complaints with the grievance committee of the county bar. *Id.* The state bar filed formal charges against Ohralik with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. *Id.* at 452-53. Ohralik was successful in his claim for one-third of the driver's recovery, but his suit against the injured passenger was dismissed with prejudice after the decision of the Ohio Supreme Court.

63. *Id.* at 460.

64. *Id.*

In *In re R.M.J.*<sup>65</sup> the Court considered a state's effort to regulate the language and content of attorney advertisements. Following the *Bates* decision, the Missouri Supreme Court had tried to strike a balance between the prohibition of attorney advertising and unlimited permissibility. Accordingly, Missouri permitted attorney advertising, but restricted it to certain types of information and, in certain cases, prescribed the language to be used.<sup>66</sup> *In re R.M.J.* involved the disbarment of an attorney who had advertised information that was not expressly permitted under the Missouri regulations: that he was admitted to practice before the United States Supreme Court and that he practiced in areas of law which were described by language not permitted under the regulations (such as "personal injury" rather than "tort law"). Moreover, in contravention of the state regulation, the attorney's advertisements did not include the required disclaimer of expertise after listing his areas of practice. The attorney also mailed cards announcing the opening of his law office to persons other than former clients.<sup>67</sup> In subsequent disbarment proceedings, the Missouri Supreme Court upheld the constitutionality of the regulations at issue.<sup>68</sup> On appeal, the United States Supreme Court reaffirmed that truthful advertising enjoys first amendment protection. According to the Court, states may prohibit misleading advertising, but state regulations may be no broader than is necessary to prevent deception.<sup>69</sup>

Applying these principles, the Court found that the State's prohibition on the use of certain terms to describe areas of legal practice—"tort law" but not "personal injury"—did not serve a substantial government purpose. Nor did the Court find that such language was misleading. Accordingly, the restrictions on the specific language of attorney advertisements were impermissible.<sup>70</sup> The Court then focused on the allegation that the attorney had impermissibly mailed cards announcing the opening of his office to persons other than former clients. The Court found nothing in the record that would support either a substantial government purpose to prohibit such mailings or a finding that they were inherently misleading.<sup>71</sup> Accordingly, the Court reversed the Missouri judgment to disbar the attorney.

Most recently in *Zauderer v. Office of Disciplinary Counsel*,<sup>72</sup>

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65. 455 U.S. 191 (1982).

66. *Id.* at 193.

67. *Id.* at 196-97.

68. *Id.* at 198.

69. *Id.* at 203.

70. *Id.* at 205.

71. *Id.* at 206.

72. 471 U.S. 626 (1985).

which involved the propriety of an attorney's advertisements, the Court restated that attorney advertising was commercial speech and entitled to the constitutional protection of the first amendment.<sup>73</sup> According to the Court, "Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest."<sup>74</sup>

In considering Zauderer's advertisements, the Court evaluated the State's interest in the regulations that the advertisements apparently had violated. First, the Court asked whether the advertisements "ran afoul of the rules against self-recommendation and accepting employment resulting from unsolicited legal advice."<sup>75</sup> Finding that the advertisements were not false or deceptive, the Court considered whether prohibition of such representations "advances a substantial governmental interest." The Court could find none.<sup>76</sup> Second, the Court considered the use of an illustration in one of Zauderer's advertisements. Although it found "no suggestion that the illustration actually used by [Zauderer] was undignified," the Court observed that "we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify abridgement of their First Amendment rights."<sup>77</sup>

Finally, the Court considered whether Zauderer's failure to inform

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73. Zauderer had sought to augment his legal practice by newspaper advertising. One advertisement represented that in drunken driving cases the "[f]ull legal fee [would be] refunded if [the client was] convicted of DRUNK DRIVING." *Id.* at 629-30. When challenged by the attorney for the appellee, Zauderer withdrew the advertisement, apologized, and volunteered to refuse to represent those who had answered the ad. In a second advertisement Zauderer publicized his willingness to represent women who had used the Dalkon Shield:

DID YOU USE THIS IUD? The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage. . . . It is also alleged to have caused unplanned pregnancies ending in abortions [and] miscarriages. . . . If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients.

*Id.* at 630-31. The advertisement concluded with the firm's telephone number and a note that the reader might call for "free information." *Id.* at 631. The Office of Disciplinary Counsel filed a complaint charging Zauderer with violation of the state disciplinary regulations. Before a panel of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court, Zauderer urged that the restrictions on the content of the advertising were unconstitutional. Both the panel and the Board itself rejected Zauderer's arguments. The Ohio Supreme Court found that Zauderer had violated the state regulations and that the regulations did not contravene the first amendment. *Id.* at 631-36.

74. *Id.* at 638.

75. *Id.* at 639.

76. *Id.* at 641.

77. *Id.* at 647-48.

clients that they "might be liable for significant litigation costs even if their lawsuits were unsuccessful" was unlawful.<sup>78</sup> The Court rejected Zauderer's argument that the State must either establish that the advertisement was deceptive absent additional disclosure, or that the State had a substantial governmental interest which would be furthered and that no less drastic means was available to it. Rather, the Court held that "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>79</sup> Accordingly, the Court found that Zauderer's representation that there would be no attorney's fees unless there was a recovery presented the possibility of deception. Therefore, the Court concluded that "[t]he State's position that it is deceptive to employ advertising that refers to contingent-fee arrangements without mentioning the client's liability for costs is reasonable enough to support a requirement that information regarding the client's liability for costs be disclosed."<sup>80</sup>

The reaction of the organized bar to these cases concerning attorney advertising also has been most noteworthy.<sup>81</sup> Virtually every jurisdiction has revised its regulation of attorney advertising. There has been a myriad of methods for addressing the specific questions involving attorney advertising.<sup>82</sup> While important, these questions about the application of general principles to specific cases are beyond the scope of this Article. Instead, this Article now analyzes the possible effects of attorney advertising and examines how attorney advertising has af-

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78. *Id.* at 650.

79. *Id.* at 651.

80. *Id.* at 653.

81. For a description of the initial response of the ABA, its revisions of regulations in the 1980 Discussion Draft of the Rules of Professional Conduct circulated by the Kutak Commission, and the reaction of state regulators, see *Cleveland Report, supra* note 2, at 34-54; Metzloff & Smith, *The Future of Attorney Advertising and the Interaction Between Marketing and Liability*, 37 *MERCER L. REV.* 599, 605-09 (1986).

82. The courts have decided other cases addressing specific questions on media choice and mail solicitation by attorneys. In *Committee on Professional Ethics & Conduct of the Iowa State Bar Association v. Humphrey*, 355 N.W.2d 565 (Iowa 1984), *vacated*, 472 U.S. 1004, *nonacq.* 377 N.W.2d 643 (Iowa 1985) (en banc), *appeal dismissed*, 475 U.S. 1114 (1986), the Supreme Court vacated the Iowa Supreme Court's rule that prohibited background sound, visual displays, and dramatized voices in electronic media presentations. However, the Iowa Court reaffirmed on remand. In *In re von Wiegen*, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), *cert. denied*, 472 U.S. 1007 (1985), the New York Court of Appeals found that mail solicitation enjoyed first amendment protection, but could be regulated to some degree.

The Supreme Court has heard arguments in *Shapiro v. Kentucky Bar Association*, 726 S.W.2d 299 (Ky. 1986), *cert. granted*, 108 S. Ct. 64 (1987), *motion granted*, 108 S. Ct. 690 (1988), which presents the question of whether a state can prohibit an attorney from engaging in direct mail solicitation. Relying on *Zauderer*, the Kentucky Supreme Court held that the state rule was unconstitutional, but adopted Model Rule 7.3, which still prohibits direct mail solicitation. *Shapiro* appealed, and the Supreme Court accepted certiorari.

fects the delivery of legal services.

### III. THE ECONOMIC THEORY OF PROFESSIONAL ADVERTISING

A consumer's decision to consume legal services, like his or her decision to make any other purchase, is based on the estimated trade-off between the costs and the potential benefits provided by the service. In general, economic theory predicts that the better informed a consumer, the better the consumer can weigh the costs and the benefits of buying any good or service. An informed consumer is in the best position to choose from existing products or services, because he or she will reap the rewards of a good choice or bear the costs of a bad one. In an unconstrained market, this freedom of choice forces firms to communicate the benefits of their service or product to consumers, and to compete to provide the service that consumers want at the lowest feasible price.<sup>83</sup> Under certain circumstances, however, markets may not function as smoothly as this simple economic model predicts.

Both opponents and supporters of attorney advertising agree that the dissemination of truthful, nondeceptive information to consumers will directly benefit consumers and enhance competition in the legal market.<sup>84</sup> The fundamental dispute is over how this information can be distributed most efficiently, without reducing the quality of legal services.

Opponents of attorney advertising believe that the legal profession necessarily operates in a market of imperfect information which adver-

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83. This economic efficiency analysis contrasts with the traditional approach to the law espoused by Professor Norman Bowie, *supra* 41 VAND. L. REV. 741, 741-55 (1988) which focuses on the altruistic motivations of the law. Economic efficiency analysis, on the other hand, argues that the law should provide the legal services that consumers demand. Empirical estimates reflect the increased costs derived from the traditional approach. For example, the restrictions on lawyer advertising and other professional activities have the altruistic goal of ensuring equal justice and fairness under the law. As the studies show, however, the economically efficient manner of providing goods and services enables more consumers to use the services regardless of the providers' motivation, and to do this at significantly lower costs.

84. See Kallis & Vanier, *Consumer Perceptions of Attorney and Legal Service Advertising: A Managerial Approach to the Delivery of Legal Services*, 14 AKRON BUS. & ECON. REV., Winter 1983, at 42, 46 (table 4) (indicating that consumers demand information on attorney expertise, availability, location, and fees). Another study also shows the usefulness of factual information in the attorney selection process. The top three selection criteria actually used by consumers who reported past use of an attorney were personal acquaintance, recommendation by friend, and past representation by the lawyer. When ranked by how important each should be when selecting an attorney, these same criteria were listed considerably lower. Criteria that consumers considered more important included integrity of the lawyer, quality of service, promptness of service, area of lawyer specialty, past experience as a lawyer, and the costs of legal services. Smith & Meyér, *Attorney Advertising: A Consumer Perspective*, 44 J. MARKETING, Spring 1980, at 56, 60 (table 1). Information on legal costs and areas of specialty, and to a lesser degree other considerations, can be advertised at least as reliably and truthfully as other methods of obtaining this information, and may provide this information at a lower cost. *Id.* at 61-63.

tising cannot correct. Consumers lack the information or expertise that would enable them to judge the quality of the offered services, sometimes even after they have employed an attorney and the matter has been resolved. In many cases it may be difficult to assess the quality of services. For example, if an attorney settles a divorce case, the attorney's client may not know if he or she received an equitable division of property at the time the divorce is made final. In a torts case that is not settled, the losing party may never know if he or she lost because of the weakness of the case or because of incompetent representation by counsel.

Opponents of attorney advertising also contend that attorneys may be in a position to convince clients to bring nonmeritorious cases to increase business, rather than to serve the interests of their clients. If clients cannot distinguish between good and bad service, then there is no reward for a firm to provide high quality service, and the quality of service could drop below the level the clients want.<sup>85</sup> Some opponents of attorney advertising claim that advertising will reduce the profession's ability to serve the public. The commercialization of legal services will reduce both the client's confidence in his attorney and the attorney's own sense of dignity and self-worth.<sup>86</sup> In this way, clients presumably would view all attorneys as providing low quality services, and good attorneys would not be rewarded for their superior service.

Finally, the opponents of attorney advertising predict that even truthful and informative advertising could raise the price of legal services.<sup>87</sup> The theory states that prices could rise because advertising creates market power for established firms.<sup>88</sup>

In response to the claim that the legal profession necessarily operates in a world of imperfect information, the legal profession created

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85. See S. YOUNG, *THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA*, (1987); *OCCUPATIONAL LICENSURE AND REGULATION* (S. Rottenberg ed. 1980).

86. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977) (summarizing the argument that "[o]nce the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized").

87. *Id.* at 377.

88. See W. COMANOR & T. WILSON, *ADVERTISING AND MARKET POWER* (1974). However, more recent analysis has questioned the usefulness of this theory. Comanor and Wilson, the same authors who argued that advertising could increase market power and lead to increased profits through higher prices, stated in a later article that

because the distribution of advertising intensities is highly skewed, there is no indication that these effects [that high advertising can have substantial anticompetitive consequences] are pervasive throughout the economy . . . . Rather, [higher profits] appear to be concentrated in a small number of industries with high advertising-sales ratios and/or high absolute levels of advertising per firm.

Comanor & Wilson, *The Effect of Advertising on Competition: A Survey*, 17 J. ECON. LITERATURE 453, 470 (1979).

occupational licensing and other restrictions on lawyers, and assigned the regulatory power to the state bars. State bars attempt to mold attorney behavior for the public good by scrutinizing and restricting professional conduct, including the use of attorney advertising. However, restricting attorney advertising is unlikely to correct the problems of practicing law in a world of imperfect information and may even exacerbate these problems. Prior to *Bates*, information on price, quality, and other factors necessary for a decision in the legal market were traditionally available only through the attorney's public reputation and personal knowledge of the consumer. By adding advertising to the decision making process, economic analysis indicates that the flow of information to consumers at a low cost will improve, and that this information will not reduce the quality of legal services.

First, attorneys' costs fall when advertising is substituted for the more expensive, traditional methods of attracting business. While advertising cannot replace a good reputation, advertising can provide useful information to many consumers at once, which reduces the total cost of providing legal services.<sup>89</sup> At least part of these cost reductions will be passed on to consumers, as long as the legal profession is competitive.

Second, absent advertising, some legal firms would find it difficult to obtain the volume of business necessary to reduce the cost of providing routine legal services. Suppliers of routine legal services are "particularly strong in industries where firms can realize substantial economies of scale by providing specific services at high volume."<sup>90</sup> Advertising may be necessary for such a firm to obtain sufficient volume in order to reduce its costs and thereby lower its prices.

Third, advertising reduces consumers' search costs. Advertising permits consumers to discover information about available services and prices in less time and at less expense than if they had no choice but to visit a number of attorneys to obtain the same information. Fourth, the reduction in consumers' search time facilitates "comparison shopping,"

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89. Specialization in the promotion and the production of legal services by use of marketing and public relation firms can leave attorneys free for more productive legal activities. Past attempts at specialization, the partnership form of organization, show the advantages of this technique. The partners concentrate on attracting new clients, while the associates produce the legal services. One commentator notes:

In law firms, it is only the partners who participate in profit sharing. Associates typically are paid a "straight salary" that is not a function of firm profits. Accession to partner status from the associate ranks is to a large extent a function of existing partners' perception of an associate's ability to bring in business. . . .

McChesney, *Team Production, Monitoring, and Profit Sharing in Law Firms: An Alternative Hypothesis*, 11 J. LEGAL STUD. 379, 391 (1982).

90. *Cleveland Report*, *supra* note 2, at 82.

which encourages competition in terms of the price and types of legal services. Economic theory predicts that advertising will lower prices in a market when "advertising is an efficient means of conveying information."<sup>91</sup> The lower price is a result of the reduction of market power that otherwise may be present when consumer search costs are high.<sup>92</sup> Fifth, advertising also tends to lower prices by making entry easier for new firms to gain recognition and challenge established firms. If new firms are able to advertise, they will not have to rely on word of mouth for consumers to learn about their presence in the market place. Thus, new firms that can advertise will not be at a competitive disadvantage during the period of market entry.<sup>93</sup>

Sixth, advertising may actually reduce consumer deception and improve the ability of consumers to evaluate the quality of legal services.<sup>94</sup> In particular, advertising can induce consumers to seek additional information about the lawyer through other sources, which reduces the likelihood of consumers being deceived by advertising. Additionally, advertising may reduce the incentive for firms to run deceptive advertisements. Because advertising encourages consumers to learn more about the firm, attorneys who advertise realize that they will develop a negative reputation by making false or misleading claims.<sup>95</sup> A negative repu-

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91. *Id.* at 81.

92. See Stigler, *supra* note 1. On this point the *Cleveland Report* notes:

In markets where consumers are poorly informed about the distribution of price offers and where search is costly, sellers tend to have some degree of monopolistic power. In such markets, lowering consumer search costs reduces the monopolistic power of individual firms and tends to lower prices. Advertising that announces the presence or the price offer of the advertising firm can serve as a means of lowering consumer search costs. Such advertising will, in turn, tend to lower equilibrium prices in the market. If advertising is allowed, the individual firm's incentive for using it is to increase the number of consumers who will be aware of the firm's price offer. Other things equal, the firm's demand is higher when more consumers are aware of its presence in the market and its price offer.

*Cleveland Report*, *supra* note 2, at 81 (footnotes omitted).

93. *Cleveland Report*, *supra* note 2, at 82.

94. See generally Grady, *Regulating Information: Advertising Overview*, in *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* 222 (K. Clarkson & T. Muris eds. 1981); Hazard, Pearce & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1099 (1983) (suggesting that "[a]dvertising tends to cause consumers to seek information about the producer's reputation and about other consumers' direct experience with him").

95. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 106 (1985) (suggesting that "sellers who disappoint or deceive will not be the ones to advertise most"); see also Klein & Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615 (1981). According to Klein and Leffler: "A sufficient investment in advertising implies that a firm will not engage in short-run quality deception since the advertising indicates a nonsalvageable cost gap between price and production costs, that is, the existence of a price premium." *Id.* at 630. The authors note that consumers "know from past experience that when a particular type of investment [the price premium] is present such as advertising they are much less likely to be deceived." *Id.* at 634.

tation will deter consumers and the consumers' friends and families from relying on future claims by the attorney. Thus, to the extent that an attorney's future sales depend on his ability to maintain a reputation for reliability, an attorney can be expected to exercise self-restraint in his advertising claims, which reduces the need for the bar or other government bodies to regulate attorney claims.<sup>96</sup>

Seventh, the demand for legal services might increase as a result of lower prices and services that are better tailored to the needs of consumers of different incomes. Economic theory would usually view this development as a sign of improved consumer welfare. Although there may be valid reasons to limit the amount of litigation,<sup>97</sup> reducing the availability of legal services through advertising restrictions would be an anticonsumer way to accomplish this objective.

Thus, these economic theories suggest that attorney advertising will not only lower the price of legal services to consumers, but that it may improve the quality of these services and better meet the needs of clients. As in many areas of antitrust law,<sup>98</sup> the Supreme Court has relied on these economic theories in evaluating the proposed costs and benefits of attorney advertising. Although the organized bar has argued that consumers will be harmed by advertising, the Court has focused its inquiries on claims of the decreased quality of legal services, the potentially deceptive nature of legal advertising, and the possibility of increased legal costs for the consumer if advertising were not restricted. The Court has rejected these and other arguments as a basis for prohibiting attorney advertising.<sup>99</sup> Overall, the Court has ruled that the benefits of attorney advertising outweigh any countervailing cost considerations.<sup>100</sup> Empirical evidence supports the Court's rulings on these issues.

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96. Reich, *Preventing Deception in Commercial Speech*, 54 N.Y.U. L. REV. 775, 794 (1979).

97. Since consumers may not bear the full cost of using the judicial system, there may be a tendency to over consume legal services.

98. See Langenfeld & Scheffman, *Evolution or Revolution—What is the Future of Antitrust?*, 31 ANTI-TRUST BULL. 287 (1986).

99. See *supra* text accompanying notes 37-53.

100. The Court has recognized the significance of advertising in creating a competitive environment to ensure the consumer of the greatest available choice. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977) (noting advertising's "indispensable role in the allocation of resources in a free enterprise system"). Without this allocative effect of advertising, legal professionals could amass market power and create opportunities for excessive profits. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976).

#### IV. EMPIRICAL EVIDENCE ON THE EFFECTS OF PROFESSIONAL ADVERTISING

To determine whether attorney advertising benefits consumers, it is desirable to examine whether lawyer advertising will lower the cost of legal services without degrading the quality of these services. This section begins by discussing evidence that assesses the impact of advertising on other professions. This section then discusses the more recent studies of attorney advertising, all of which demonstrate that attorney advertising benefits consumers.

##### A. *Empirical Evidence on the Effects of Nonlegal Professional Advertising*

Similar to the development of the law, the studies measuring the impact of advertising and the delivery of nonlegal professional services antedates the subject of attorney advertising. In his study of prescription drugs, John Cady found that the quality of service provided by pharmacists was relatively consistent among states that did not regulate pharmacist advertising as well as states that prohibited such advertising.<sup>101</sup> The study also concluded "that prescription drug prices are significantly higher in regulated than in unregulated states."<sup>102</sup>

Professor Lee Benham undertook two studies that measured the impact of advertising on the price for ophthalmic goods and services. In 1972 Benham found that "[p]rices were . . . substantially lower in states which allowed advertising."<sup>103</sup> Advertising restrictions apparently increased the price of eyeglasses by twenty-five percent to more than one hundred percent.<sup>104</sup> In 1975 Benham evaluated the impact of three levels of professional regulation on eyeglass prices.<sup>105</sup> Benham indexed the price of eyeglasses to the following factors: The proportion of optometrists in a state who were members of the American Optometric

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101. J. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS (1976). In a national survey of over 1900 pharmacies, Cady studied five measures of service including the availability of home delivery, credit arrangements, emergency service, individual prescription records, and waiting area. With the exception of prescription records, Cady found no evidence that the pharmacists in states with advertising restrictions provided superior quality service to the consumer.

102. *Id.* at 11. The results stem from a comparison of a sample of ten drugs across the states that allow advertising and the states that did not. The ten drugs were picked to represent a sample of all drugs dispensed in 1970. The difference in price was 5.2% or \$3.83 in regulated states compared to \$3.64 in unregulated states. This difference is statistically significant at the one percent level.

103. Benham, *supra* note 1, at 352. The price differentials were estimated from data collected in a 1963 nation-wide survey on medical expenditures.

104. *Id.* at 344.

105. Benham & Benham, *supra* note 1.

Association (AOA); states that were classified as "restrictive," "nonrestrictive," and "other" by a survey of national eyeglass chains; and the proportion of eyeglasses bought from commercial sources in a state. All three indexes showed a strong association with the estimated price paid for eyeglasses.<sup>106</sup> In general, the mean price paid for eyeglasses fell as the proportion of AOA membership fell.<sup>107</sup> Benham suggests that these results are strongly correlated to the AOA restrictions on advertising eyeglass prices.<sup>108</sup> Others have published similar findings that confirm the relationship between price and advertising restrictions.<sup>109</sup>

A 1980 Federal Trade Commission (FTC) report empirically tested the effects of advertising on the price and the quality of optometric service.<sup>110</sup> The report found that "[t]he existence of advertising and commercial practice by some optometrists in a market does not result in a lowering of the quality of examinations available to consumers."<sup>111</sup> Further evidence reported in the optometry study suggests that optometrists in cities where advertising was allowed were less likely to prescribe unnecessarily new eyeglasses than optometrists in cities that restricted advertising.<sup>112</sup> Moreover, the price for the combined optometric services of eye examination and glasses was almost twenty-one dollars less in the least restrictive cities than in the most restrictive,

106. *Id.* at 434 (table 2), 435.

107. According to Benham,

When states with a rate of AOA membership greater than .7 are compared with those with a rate of less than .5, the mean price differs by \$10.53; it is 40 per cent higher in the former. The price difference between states classified as restrictive and those classified as nonrestrictive is \$9.27, 33 per cent higher in the restrictive states. Similar results hold for the categories of states with proportion of eyeglasses obtained from commercial firms less than .25 or greater than .50. In this case, the price differs by \$7.16 and is 25 percent higher in the former. In all three cases individuals living in states with a high level of professional control pay substantially higher prices.

*Id.* at 438-40.

108. Although the AOA Rules of Practice adopted in 1950 contain 14 separate rules, all of the rules cover only two major themes: "(1) the professional man obtains his clients by means other than advertising, and (2) the professional man emphasizes service rather than merchandise." M. HIRSCH & R. WICK, *THE OPTOMETRIC PROFESSION* 172 (1968).

109. See A. MAURIZI & T. KELLY, *supra* note 1. Feldman & Begun, *Does Advertising of Prices Reduce the Mean and Variance of Prices?*, 18 *ECON. INQUIRY* 487 (1980).

110. R. BOND, J. KWOKA, J. PHELAN & I. WHITTEN, BUREAU OF ECONOMICS, REPORT OF THE STAFF TO THE FEDERAL TRADE COMMISSION, EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (Sept. 1980).

111. *Id.* at 26. The report based its findings on detailed measurements of optometric services including the thoroughness of the eye examination, the accuracy of the prescription, the accuracy and the workmanship of the resulting eyeglasses, and the extent of unnecessary prescribing. All measurements of service quality in restrictive and nonrestrictive cities suggest that "consumers who purchase an eye examination only to get the correct prescription and an accurate pair of eyeglasses may safely shop on the basis of price." *Id.* at 23.

112. *Id.* at 21-22 (tables 8 & 9).

nonadvertising cities.<sup>113</sup>

Evidence from the health professions also suggests that fears of deceptive advertising may be overblown. A survey of state regulatory agencies reported in a national symposium sponsored by the FTC found "little evidence of fraudulent or misleading advertising. In fact, one state attorney said 'the majority of complaints that we have about professional advertising are from other professionals. We have practically no consumer complaints about professional advertising.'"<sup>114</sup>

In summation, empirical evidence from studies of nonlegal professions shows that banning professional advertising of price and non-price information has not benefited consumers and may, in fact, have harmed consumers.

### *B. Empirical Evidence on the Effects of Attorney Advertising*

Many empirical studies have tested the impact of advertising for routine professional services on consumers. These studies attempted to measure the benefits and the costs associated with the liberalization of restrictions on attorney advertising. The studies hypothesized the effects of attorney advertising on quality, deception, and price. The evidence from these studies demonstrates that the Supreme Court's decision to allow attorney advertising does in fact increase consumer welfare.

One such study by Timothy Muris and Fred McChesney provides both subjective and objective evidence that refutes "the proposition that firms relying on advertising to charge lower prices will necessarily produce lower-quality services."<sup>115</sup> Based on their study, Muris and McChesney argue that advertising permits lower production costs for legal clinics, which reduces prices without a corresponding reduction in quality. The authors believe that advertising allows attorneys to lower production costs by specializing in legal, rather than promotional, work. In addition, the authors believe that advertising enables clinics to increase sales volume, relative to traditional firms, by informing consumers of lower prices and the services that are available.

Their study was composed of two parts. First, a survey compared the quality of services rendered by legal clinics to those rendered by traditional firms. This survey, conducted in the Los Angeles area, asked consumers to rank subjectively seven aspects of the legal services they

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113. *Id.* at 25.

114. Braun & Braun, *Advertising Health Care Professionals: Problems, Solutions and Benefits*, in *ADVERTISING BY HEALTH CARE PROFESSIONALS IN THE 80'S: PROCEEDINGS OF A NATIONAL SYMPOSIUM SPONSORED BY THE FEDERAL TRADE COMMISSION 87* (Dec. 1985).

115. McChesney & Muris, *The Effect of Advertising on the Quality of Legal Services*, 65 *A.B.A. J.* 1503, 1506 (1979).

received.<sup>116</sup> In all seven categories the legal clinics, which use advertising to attract many consumers with similar legal needs, recorded quality ratings superior to those of the traditional firms for services provided.

Second, Muris and McChesney compared the representation skills of attorneys in legal clinics and traditional firms for cases involving divorce and child support payments. Divorce cases were used for this study because the outcome—the size of the support payment—is based on a standard formula using financial data supplied by the parties. Holding the financial data constant, the authors measured the skill of the attorney in representing his client.<sup>117</sup> The results suggest that the quality of representation by legal clinics is superior to that of traditional firms in obtaining favorable child support payments. When the mother, who had custody of the child, was represented by the clinic, the child support award was forty dollars higher, holding all other variables constant. Inversely, when the father, who had to make child support payments, was represented by the legal clinic, the child support award was fifteen dollars lower. The authors concluded that “when advertising leads to lower prices, it need not result in a loss of quality. Indeed, . . . quality may even increase.”<sup>118</sup>

A survey taken in Florida three years after the *Bates* decision provides indirect evidence that attorney advertising generally is not deceptive. The survey found no evidence which linked legal firms that advertised with malpractice claims.<sup>119</sup> From February of 1979 to January of 1981, when the results of the survey were published, no malpractice claims filed in the state involved advertising lawyers. Florida had approximately 25,000 attorneys and about 300 malpractice claims filed annually. The survey results stated that “[e]arly indications are that whether a lawyer advertises isn’t a factor in predicting the likelihood of

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116. The respondents were all past consumers of legal services. The categories of services provided by traditional firms and legal clinics that were compared included: promptness in taking care of matters, interest and concern about the client’s problem, honesty in dealing with the client, explaining matters fully to the client, keeping the client informed of progress, paying attention to what the client had to say, and being fair and reasonable in charging for his service. *Id.* at 1505 (table 1).

117. A regression model was developed to estimate the amount of child support awards. The independent variables used included the incomes and expenses of both parties, the number of children involved, and the type of legal representation. The model reported that as a father’s income rises relative to the wife’s, the award will increase. Expenses of the mother show a positive relationship with the size of the award. Expenses of the father reduce the size of the award. The number of children increases the award, but not at a constant amount. For example, the second child does not double the award. *Id.* at 1505-06.

118. *Id.* at 1506.

119. Slonim, *Survey: Ads Not Drawing Malpractice Claims*, 67 A.B.A. J. 25 (1981). The survey was conducted by the Florida State Bar’s professional liability insurance carrier.

a malpractice claim."<sup>120</sup>

The most comprehensive study on attorney advertising is the Federal Trade Commission's report on lawyer advertising, which was conceived by Professor Steven Cox in a 1978 pilot study. Cox sought to investigate price differences between those attorneys who advertised and those who did not. Cox concluded that on average those attorneys who advertised charged lower prices than those who did not.<sup>121</sup> Subsequently, the FTC, with the assistance and cooperation of Professor Cox, conducted a more comprehensive study.<sup>122</sup>

The studies sought to measure the relationship between the price of legal services and the regulation of the legal profession. The Commission staff concluded on the basis of their investigation that restrictions on attorney advertising raised the price of routine legal services. According to the FTC study:

Attorneys in the more restrictive states, on the average, charged higher prices for most simple legal services than those in the less restrictive states. The fact that stronger restrictions on advertising are associated with higher prices suggests that,

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120. *Id.* at 25.

121. See Cox, DeSerpa & Canby, *Consumer Information and the Pricing of Legal Services*, 30 J. INDUS. ECON. 305 (1982) (published discussion of the major findings of the Phoenix Pilot Study).

122. The Commission staff and Professor Cox each undertook separate surveys, although both were designed by Cox. The first survey was conducted for Cox, with a grant from the National Science Foundation, by the Survey Research Laboratory at Arizona State University and included the cities of Birmingham, Alabama; Phoenix, Arizona; Fresno, California; Indianapolis, Indiana; Jackson, Mississippi; and Milwaukee, Wisconsin. The second survey was conducted for the FTC by Louis Harris & Associates and examined 11 cities: Hartford, Connecticut; Wichita, Kansas; Baltimore, Maryland; Boston, Massachusetts; Detroit, Michigan; Springfield, Missouri; Albuquerque, New Mexico; Columbus, Ohio; Oklahoma City, Oklahoma; Nashville, Tennessee; and Seattle, Washington.

Two hundred and fifty attorneys were interviewed in each city with reference to fees charged for the following services: a simple reciprocal will for a married couple with two children; a reciprocal will with a trust provision to take effect if both parents died within a short time of one another; an uncontested nonbusiness bankruptcy for a husband and wife; an uncontested dissolution of marriage when there are no children and the property settlement has been agreed upon; and an automobile accident when the driver of the other car has admitted responsibility and there is no permanent pain, disability, or lost earnings capacity. For each of these services, the attorneys were asked their flat fee (if one was applicable), their hourly rate, and the approximate number of hours it would take to complete the service. They were also asked how many clients had been billed for the same service during the past 90 days. In the context of the personal injury action, attorneys were asked the contingency fee charged if settled before trial and the fee charged following trial. See *Cleveland Report*, *supra* note 2, at 84-85. Attorneys were also questioned about their own advertising practices.

Estimating the restrictiveness of state regulations on the advertising issue obviously required greater discretion. Using the state regulation in effect at the time of the survey, states were classified as liberal, moderate, or restrictive on the advertising issue. For a more detailed explanation, see *id.* at 88. The researchers then included in their analysis numerous factors (*e.g.* number of divorces, age of population) designed to insure that they were measuring similar populations in terms of their demand for legal services, etc. Data were adjusted to reflect the cost of living.

in this type of market, the dominant effect of advertising is to enhance price competition by lowering consumer search costs.<sup>123</sup>

The study also indicated that greater flexibility to advertise would result in lower prices for legal services. The study noted that "as restrictions are removed, more attorneys use advertising. . . . [A]s advertising increases in the legal services market, prices will decline. . . . The data show that attorneys who advertise a specific service tend to provide that service at a lower price than attorneys who do not advertise that service."<sup>124</sup> Table One summarizes the findings of the FTC study. It shows that prices for basic legal services are more expensive in cities with moderate and restrictive state rules on attorney advertising as compared to cities with liberal rules on attorney advertising.

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123. *Id.* at 79.

124. *Id.* at 126-27.

Table 1

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A Comparison of Service Prices Between Cities with Liberal,  
Moderate, and Restrictive Attorney Advertising Regulations

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<u>Increased Prices for:</u>	Comparing Liberal <sup>a</sup> Cities With:	
	<u>Moderate</u> <sup>b</sup>	<u>Restrictive</u> <sup>c</sup>
Personal Injury Contingent Fee	1.5%	4.5% <sup>d</sup>
Bankruptcy	\$32	\$44
Uncontested Divorce	—	\$33
Simple Reciprocal Will	—	\$7
Simple Reciprocal Will With Trust	—	\$26

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Source: *Cleveland Report*, *supra* note 2, at 113-117 (tables G-K).

<sup>a</sup> The states' code followed the former ABA Model Code of Professional Responsibility — Proposal B, which basically established a “false and misleading” standard for lawyer advertising. Broadcast media advertising was allowed. The use of either direct-mail advertising or trade names, or both was allowed.

<sup>b</sup> The states' code generally followed the content restrictions of ABA Proposal “A”. Both radio and television advertising were permitted. Trade names were prohibited, although the use of the term “legal clinic” in conjunction with the firm name was specifically allowed in some cases. Use of direct-mail advertising was prohibited.

<sup>c</sup> The states' code restricted advertising content to specified information. All broadcast media were prohibited. Direct-mail and trade names were prohibited.

<sup>d</sup> Percentage point increases.

Additional effects on price caused by attorney advertising are seen by comparing the fees advertising attorneys charge for specific services and the average price of those services in all cities.<sup>125</sup> The results are shown in Table 2.

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125. The average price is a weighted average of the price charged by attorneys in all cities for services billed in a 90 day period for a particular service. According to the study, “This analysis may more closely approximate the real average price paid by consumers, since it gives more weight to the prices quoted by those attorneys who provide more of the specific services.” *Id.* at 123.

Table 2

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Comparison of Attorneys that Advertise  
to Those that Do Not Advertise  
for Specific Services

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(Number of Cities<sup>a</sup>)

Services Provided by Advertising Attorney Is:	<u>Will</u>	<u>Bankruptcy</u>	<u>Divorce</u>	<u>Personal Injury</u>
Less expensive	2	2	5	0
More expensive	0	1	0	3

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Source: *Cleveland Report*, *supra* note 2, at 124 (table P).

<sup>a</sup> The number of cities are less than the 17 studied since some comparisons were not statistically significant.

In all cases, except personal injury, attorneys who advertised a specific service tended to charge less than either attorneys who did not advertise at all or attorneys who did not advertise the specific service.<sup>126</sup>

The results for personal injury cases show the reverse effect, but this result may be explained by careful examination of the data. On average, personal injury cases are *less* expensive in cities where advertising is allowed than in cities that restrict advertising, despite the fact that attorneys who advertise in those cities charge higher prices than those who do not. It would seem that the existence of advertising may lower prices, even if particular firms that advertise can charge relatively higher prices. The study concludes: "The empirical data, therefore, support the information theory of advertising and establish strong evidence for relaxing unnecessary restrictions on truthful, non-deceptive advertising practices."<sup>127</sup>

In sum, empirical studies assessing the impact of attorney advertising on the legal profession find that advertising lowers the price of legal services to consumers, without lowering the quality of those services. This evidence supports the view that attorney advertising enhances competition and reduces consumer search costs, without necessarily leading to consumer deception or increasing the cost of providing legal services.

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126. *Id.* at 125. The price differences suggested by the results are not insignificant. An attorney that advertised fees for a simple will charged about \$25 less on average than an attorney who did not advertise the specific service. For divorces the difference was approximately \$185.

127. *Id.* at 127.

## V. THE FUTURE OF ATTORNEY ADVERTISING AND THE ROLE OF THE FEDERAL TRADE COMMISSION

Given the powerful arguments in favor of attorney advertising, the existing evidence on the effects of attorney advertising, and the development of favorable case law, we believe the move to permit more attorney advertising is desirable and inevitable. Although many of the rules may be state sanctioned, the Federal Trade Commission has played, and will continue to play, a major role in advocating fewer restrictions on attorney advertising.

Professionally and governmentally imposed restrictions on the ability of lawyers to engage in "commercial practices" is a subject of concern to both the antitrust<sup>128</sup> and consumer protection<sup>129</sup> mandates of the FTC. Such restrictions affect the former because they impede competition, and the latter because the main danger of attorney advertising is the potential for deceptive advertising—a focal point of the FTC's consumer protection mission. Accordingly, the Commission has taken a keen interest in professional and government imposed restrictions on the ability of professionals, including lawyers, to practice their professions.

The Commission staff has submitted many comments supporting changes in professional conduct rules and state laws that would allow more nondeceptive attorney advertising.<sup>130</sup> The Commission has urged

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128. The FTC shares jurisdiction with the Antitrust Division of the Department of Justice in the enforcement of the antitrust laws. With the exception of criminal enforcement, which is the sole prerogative of the Justice Department, the FTC has concurrent jurisdiction in the discharge of this responsibility. Both agencies have jurisdiction to enforce the Clayton Act, 15 U.S.C. § 12 (1982). While technically only the Justice Department has jurisdiction to enforce the Sherman Act, 15 U.S.C. § 1 (1982); § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982), has been interpreted to include all of the proscriptions of the other antitrust laws. See *FTC v. Cement Inst.*, 333 U.S. 683 (1948). Thus, the Commission has jurisdiction to enforce both the provisions of the Clayton and Sherman Acts. Indeed, the courts have construed the Federal Trade Commission Act to reach conduct that is not proscribed by its sister antitrust laws, reasoning that the Commission's expertise enables it to reach conduct, which while harmful, is not contemplated by the other statutes. See generally Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227 (1980). But cf. *In re General Motors Corp.*, 103 F.T.C. 641 (1984).

129. The FTC is empowered under section 5 of the FTC Act and numerous other statutes to "eliminate unfair or deceptive acts or practices in or affecting commerce, with emphasis on those practices that may unreasonably restrict or inhibit the free exercise of consumer choice." *Federal Trade Commission 1985 Annual Report*, transmitted to Congress on May 8, 1987. Similar to the antitrust statutes the wording of the FTC Act allows great latitude in bringing actions in situations in which competition is restrained.

130. In its continuing program of advocating the consumers' interest in promoting a competitive marketplace, the Commission has submitted comments and information to many regulatory agencies on the local, state, and national levels. The FTC has become a reliable representative of consumer interests in regulatory matters, and many state bars have requested comments on the consumer welfare implications of proposed revisions of their Rules of Professional Conduct. A par-

that these prohibitions be reduced or eliminated. In particular, the stated goal of the Commission is to identify and encourage removal of restrictions that impede competition, increase costs, and harm consumers without providing any countervailing benefits. We believe that the FTC has played an important role in raising public awareness of the benefits of attorney advertising, which has significantly benefitted the consumers of legal services. In the future, we hope that state bars and the FTC can work together to reduce unnecessary restrictions on promotional activities of attorneys.

One particularly important opportunity for cooperation involves the recent convocation of a Board of Advisors to draft the *Restatement of the Law, The Law Governing Lawyers*, by the American Law Institute.<sup>131</sup> This *Restatement of the Law* presents an important opportunity to influence the development of the professional discipline of attorney-client relationships. Both proposed Chapters II and IV deal with the legal regulation of the legal profession and client-lawyer contracts for legal services, respectively, and will presumably address the important issue of attorney advertising. Given the influence of extant *Restatements* on the development of law, it is important that the organized bar, consumer interest groups, and agencies like the Federal Trade Commission ensure consumer interests are given paramount importance in any such document.

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tial list of states that requested comments from the FTC includes: Alabama, California, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Massachusetts, New Jersey, North Dakota, Oklahoma, Seattle, West Virginia, and Wisconsin.

131. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Prelim. Draft No. 1, Sept. 18, 1986).