

# Attorney Advertising in *The Litigators* and Modern-Day America: The Continued Importance of the Public's Need for Legal Information

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## I. INTRODUCTION

You cannot avoid them. They are everywhere: attorney advertisements. You see them on television, billboards, buses, benches, magazines, newspapers, and even urinals in bars.<sup>1</sup> If you go online, you arguably see them even more with a dizzying array of marketing, branding, and other promotions. Many also engage in crazy and zany videos.<sup>2</sup> They show wreck videos, play Christmas jingles, employ talking dolls, resemble soap operas, or depict lawyers as superheroes.<sup>3</sup> Some attorneys use sexually provocative ads.<sup>4</sup> Some certainly can push the boundaries of good taste.<sup>5</sup> The nicknames some of these lawyers inspire interest or at least laughter. To name a few,

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1. Stacy Barchenger, *Lawyer Banks on "DUI Dick" Name to Find Clients*, THE TENNESSEAN, <https://www.tennessean.com/story/news/2014/12/30/lawyer-banks-dui-dick-name-find-clients/21062843/> (last updated Jan. 1, 2015, 8:18 PM) (describing a now-deceased attorney, V. Michael Fox, who had his ads placed above urinals in various bars in Middle Tennessee). Several years earlier, a state lawmaker introduced a bill in the Tennessee legislature to limit DUI lawyer ads. See Erik Schelzig, *Senate Measure Would Ban Lawyers from DUI Advertising*, MEMPHIS DAILY NEWS (Apr. 24, 2008), <https://www.memphisdailynews.com/news/2008/apr/24/senate-measure-would-ban-lawyers-from-dui-advertising/>.

2. See, e.g., Kylie Madry, *Fort Worth's "Texas Law Hawk" Blows Up the Internet in Firework-Fueled Commercial*, DALLAS MORNING NEWS (July 6, 2017), <https://www.dallasnews.com/news/fort-worth/2017/07/06/fort-worths-texas-law-hawk-blows-internet-firework-fueled-commercial> (describing a lawyer commercial in which the lawyer set off fireworks that he had tied to himself).

3. *Supreme Court Won't Restrain Lawyer Ads*, MOBILE PRESS-REGISTER, Mar. 3, 2009, at B3; Joseph Goldstein, *Superhero Lawyer Ads Are Ruled Fit for TV*, N.Y. SUN (July 24, 2007), <https://www.nysun.com/new-york/superhero-lawyer-ads-are-ruled-fit-for-tv/58989/>.

4. See generally Steven A. Delchin & Sean P. Costello, *Show Me Your Wares: The Use of Sexually Provocative Ads to Attract Clients*, 30 SETON HALL L. REV. 64 (1999) (analyzing the ethics of lawyers' uses of sexually themed advertisements to attract clients).

5. Anna Massoglia, *Lawyer Videos That Push the Boundaries of Dignity and Good Taste*, LAWYERIST.COM (Nov. 25, 2016), <https://lawyerist.com/attorney-ads-that-pushed-the-bar/>.

there are “the Alabama Hammer,”<sup>6</sup> “the Texas Law Hawk,”<sup>7</sup> and “DUI Dick.”<sup>8</sup>

It is not about laughs but serious dollars. Some lawyers contribute literally millions of dollars to increase their brand through phone numbers, domain names, and other venues.<sup>9</sup> For example, an enterprising California-based attorney has spent millions marketing his brand “No Cuffs.”<sup>10</sup> A New Orleans-based attorney spends \$1 million per month in television advertising.<sup>11</sup> In 2015, personal injury attorneys spent more than \$892 million.<sup>12</sup> A year later, the total was close to \$1 billion.<sup>13</sup> Attorney advertising has become more than ubiquitous in modern America.

This Essay addresses the phenomenon of attorney advertising from several vantage points. Part II of the Essay addresses how best-selling author John Grisham depicts attorney advertising in his great book *The Litigators*. Part III discusses the legal framework of how the U.S. Supreme Court protected attorney advertising as a form of protected commercial speech. Part IV addresses how the states and bar regulators have treated attorney advertising. Finally, Part V addresses the recent Association of Professional Responsibility Lawyers Report and the American Bar Association’s proposed

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6. MIKE SLOCUMB LAW FIRM, <http://www.slocumblaw.com/alabama-hammer-741> (last visited Mar. 25, 2018).

7. LAW HAWK: BRYAN E. WILSON, ATTORNEY AT LAW, <http://texaslawhawk.com/> (last visited Mar. 25, 2018).

8. Barchenger, *supra* note 1.

9. Daniel Fisher, *Lawyers Bump Advertising Spending to \$890 Million in Quest for Clients*, FORBES (Oct. 27, 2015, 8:21 AM), <https://www.forbes.com/sites/danielfisher/2015/10/27/lawyers-bump-advertising-spending-to-890-million-in-quest-for-clients/>.

10. David L. Hudson, Jr., *NoCuffs, Big Bills: Firm Spends Millions on Marketing*, AM. B. ASS’N J., Jan. 2015, at 33, [http://www.abajournal.com/magazine/article/nocuffs\\_big\\_bills](http://www.abajournal.com/magazine/article/nocuffs_big_bills).

11. Victor Li, *Legal Advertising Blows Past \$1 Billion and Goes Viral*, AM. B. ASS’N J., Apr. 2017, at 35–36, [http://www.abajournal.com/magazine/article/legal\\_advertising\\_viral\\_video](http://www.abajournal.com/magazine/article/legal_advertising_viral_video).

12. Sick of Lawsuits, *Personal Injury Lawyers Spend More in Advertisements than Super Bowl Advertisers*, SOUTHEAST TEX. REC. (Feb. 11, 2016, 4:56 PM), <https://setexasrecord.com/stories/510663103-personal-injury-lawyers-spend-more-in-advertisements-than-super-bowl-advertisers>.

13. Li, *supra* note 11, at 36.

changes to the ABA Model Rules of Professional Conduct regarding attorney advertising. Part V briefly concludes.

## II. ATTORNEY ADVERTISING IN *THE LITIGATORS*

In *The Litigators*, the great John Grisham depicts a small law firm, Finley & Figg, that flouts the rules of professional conduct regarding attorney advertising to expand its business. Finley & Figg engaged in a variety of solicitous schemes, a few ethical and many others not so much.

For example, Wallis (“Wally”) Figg impersonated a doctor and engaged in the most direct form of face-to-face solicitation, “hovering over” a patient in her hospital bed.<sup>14</sup> For this form of “blatant solicitation,” he received a reprimand from the state bar association.<sup>15</sup> Undeterred, Wally would send flowers and letters to widows.<sup>16</sup> He drove by funeral homes looking for clients.<sup>17</sup> He and his senior partner, Oscar Finley (“Finley”), literally scrambled over other lawyers to sign up accident victims in the street.<sup>18</sup> Finley stopped by a police station where his cousin shuffled accident reports.<sup>19</sup>

Finley & Figg were “ambulance chasers” in the truest sense of the term.<sup>20</sup> They even named their dog “AC” after the term.<sup>21</sup> Wally particularly enjoyed the hustle and bustle of advertising, though perhaps because of age they eschewed online advertising. As the irascible office manager Rochelle said, “He advertised so much, in so many ways, and in so many odd places that it was impossible to keep up with him.”<sup>22</sup> He advertised on park benches, high school football

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14. JOHN GRISHAM, *THE LITIGATORS* 4 (2011).

15. *Id.* at 75.

16. *Id.* at 29.

17. *Id.* at 40–41.

18. *Id.* at 57.

19. *Id.* at 12.

20. Ambulance chasing is a long-used term in the legal profession that refers to attorneys who violate anti-solicitation rules to obtain clients. Usually, the term applies to aggressive personal injury plaintiffs’ attorneys who violate anti-solicitation rules. *See* Hildebrand v. State Bar of Cal., 225 P.2d 508, 519–20 (Cal. 1950) (Traynor, J., concurring) (describing problems of ambulance chasing).

21. GRISHAM, *supra* note 14, at 56.

22. *Id.* at 45.

programs, telephone poles, bingo cards, church bulletins, Rotary Club raffles, coupons, and elsewhere.<sup>23</sup> The firm even advertised on the side of buses.<sup>24</sup> Indeed, that was how the unsuspecting big-firm burnout David Zinc (“Zinc”) discovered his future colleagues.<sup>25</sup> As he branched into products liability law, Wally left “Beware of Krayoxx!” brochures in restaurant bathrooms.<sup>26</sup>

Wally could never convince Finley to go all-in on advertising. Wally wanted to advertise via television and billboards, even picking out the perfect location, but the less audacious Finley refused.<sup>27</sup>

Grisham writes that “a siren from an ambulance always quickened [Wally’s] pulse.”<sup>28</sup> He describes the “murky world of client solicitation.”<sup>29</sup> Wally even admitted that he often engaged in “false advertising.”<sup>30</sup> A key example was Wally introducing the new, young Zinc as a “mass tort specialist” when the young attorney had never handled a products liability case.<sup>31</sup>

Zinc had no illusions that his new bosses were the most ethical sort. He admitted to his wife that “I doubt if they spend much time discussing ethics.”<sup>32</sup> Zinc, however, realized that Finley & Figg served a higher purpose: they helped real people with real legal problems.<sup>33</sup> He told his frustrated father, a distinguished jurist: “That’s the beauty of street law—you meet the clients face-to-face, you get to know them, and, if things work out, you get to help them.”<sup>34</sup>

Once he successfully prevailed in a products liability case, Zinc had the leverage to force the firm to change names—Finley, Figgs & Zinc—and eliminate its advertisements on bus benches, bingo cards, and billboards.<sup>35</sup> A “Marketing Committee” consisting of only Zinc

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23. *Id.* at 2–3, 45.

24. *Id.* at 2.

25. *Id.* at 53.

26. *Id.* at 170.

27. *Id.* at 3.

28. *Id.* at 18.

29. *Id.* at 28.

30. *Id.* at 54.

31. *Id.* at 85.

32. *Id.* at 101.

33. *Id.* at 122.

34. *Id.*

35. *Id.* at 380–81.

wielded veto power over any proposed firm advertisements.<sup>36</sup> Wally and Finley, however, were burnt out on the practice of law; thus, Zinc left the firm after only a year to form his own firm.<sup>37</sup>

Many may think that Grisham exaggerated the conduct of the fictitious Finley & Figg. Sadly, lawyers have engaged in similar conduct. For example, an attorney in Ohio entered the hospital rooms of a young woman lain up in traction and tried to sign her up as a client.<sup>38</sup> Another attorney in Kansas obtained a list of people thinking of selling their home, mailed them all letters, and offered his services as an attorney.<sup>39</sup> A New Jersey attorney instructed his office manager and runner to contact accident victims on the day of their accident to try to procure their business.<sup>40</sup> Another New Jersey lawyer sent a solicitation letter to the father of an airplane crash victim.<sup>41</sup> One attorney earned the moniker “the Master of Disaster” because he frequented disaster sites around the world to sign up clients.<sup>42</sup>

Some of these egregious actions are quite recent. In late 2016, a Texas-based law firm allegedly solicited family members of children injured in a bus crash in Chattanooga, Tennessee.<sup>43</sup> One of the firm’s investigators went to a funeral home only four days after the crash.<sup>44</sup> In December 2017, the Tennessee Attorney General filed a lawsuit against the firm.<sup>45</sup> Similarly, a lawyer in Florida received 18 months’

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36. *Id.* at 381.

37. *Id.* at 384–85.

38. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 450 (1978).

39. *State v. Moses*, 642 P.2d 1004, 1005 (Kan. 1982).

40. *In Re Pajerrowski*, 721 A.2d 992, 992–94 (N.J. 1998).

41. *In Re Anis*, 599 A.2d 1265, 1267 (N.J. 1992).

42. Maura Dolan, *Fresh on the Heels of Trouble: Ambulance Chasing Lawyers Are Getting More Aggressive. Some Pay Tipsters or Use Telemarketing. One Attorney, the “Master of Disaster,” Flies Around the World to Catastrophes*, L.A. TIMES (Oct. 13, 1993), [http://articles.latimes.com/1993-10-13/news/mn-45319\\_1\\_ambulance-chasing-lawyers/2](http://articles.latimes.com/1993-10-13/news/mn-45319_1_ambulance-chasing-lawyers/2).

43. *Attorney General Files Lawsuit Against Predatory Law Firm Targeting Grieving Families*, CHATTANOOGAN (Apr. 26, 2017) [hereinafter *Attorney General Files Lawsuit*], <http://www.chattanooga.com/2017/4/26/346921/Attorney-General-Files-Lawsuit-Against.aspx>.

44. Zack Peterson, *Cashing in on Grief*, CHATTANOOGA TIMES FREE PRESS, (Dec. 18, 2016), <http://www.pressreader.com/usa/chattanooga-times-free-press/20161218/281479276061261>.

45. *Attorney General Files Lawsuit*, *supra* note 43.

probation and 150 hours of community service for improperly contacting an accident victim, which is a third-degree felony under a Florida statute.<sup>46</sup>

Many lawyers have moved to cyberspace with aggressive advertising. “Ambulance chasing is now taking place in cyberspace,” writes Bob Buckley.<sup>47</sup> “Hungry lawyers . . . are now using the Internet to hustle cases.”<sup>48</sup> Others have engaged in the seedy world of “competitive keyword advertising.”<sup>49</sup> Under this process, lawyers purchase keyword ads to ensure that their names or firm names pop up first when consumers type in certain words.<sup>50</sup> In competitive keyword advertising, lawyers will buy the name of another lawyer or law firm as a keyword, and online searches for the competitor’s name will direct Internet users to the purchaser’s domain instead.<sup>51</sup>

Many practitioners still view lawyer advertising as a cesspool of hyperbolic, self-laudatory, and potentially misleading puffery.<sup>52</sup> Others claim that some attorney ads, particularly those seeking prospective clients in suits against drug manufacturers, may even be harmful.<sup>53</sup> One commentator says that they “invoke fear and emotional paralysis in some patients.”<sup>54</sup> Grisham appears to support this point of

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46. Gary Blankenship, *Unlawful Solicitation Is Taken Very Seriously: Board Panel Is Considering Even Stronger Methods of Enforcement*, FLA. B. NEWS, May 1, 2016, at 1.

47. Bob Buckley, *Lawyers Hustling Work Online a New Low*, THE EXAMINER, Dec. 7, 2011, at B7.

48. *Id.*

49. See generally Eric Goldman & Angel Reyes III, *Regulation of Lawyers’ Use of Competitive Keyword Advertising*, 2016 U. ILL. L. REV. 103 (2016).

50. David L. Hudson, Jr., *Texas Lawyers May Use Competitors’ Names in Keyword Marketing*, AM. B. ASS’N J. (Nov. 2016), [http://www.abajournal.com/magazine/article/search\\_engine\\_marketing\\_legal\\_ethics](http://www.abajournal.com/magazine/article/search_engine_marketing_legal_ethics)

51. *Id.*

52. Ralph H. Brock, “*This Court Took a Wrong Turn with Bates*”: *Why the Supreme Court Should Revisit Lawyer Advertising*, 7 FIRST AMEND. L. REV. 145, 198 (2009); M.H. Gertler, *Lawyer Advertising Point: Enough Is Enough*, 64 LA. BAR J. 110, 110–13 (2016).

53. Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 325 (2013).

54. Melissa Landry, *Often Misleading and Sometimes Dangerous, Lawyer Ads Should be Regulated*, THE DONALDSONVILLE CHIEF, Mar. 2, 2017, at A4.

view in *The Litigators*, using Figg & Finley as a caricature of the lawyers who are ambulance chasers. This view has some merit. It is undeniable that some lawyers cross the line with their excessive solicitations and distasteful ads. Attorney advertisers, however, have a valuable ally on their side: the First Amendment of the United States Constitution. Attorney advertising also serves a purpose of the highest order: informing consumers of their legal rights.

### III. SUPREME COURT'S DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE AND PROTECTION FOR ATTORNEY ADVERTISING

The United States Supreme Court has recognized both the need to regulate attorney advertising and its role in helping consumers learn about legal assistance.<sup>55</sup> Originally, commercial speech received no free-speech protection at all. In 1942, for example, the U.S. Supreme Court rejected the free-speech claims of an industrious entrepreneur named F.J. Chrestensen who sought to advertise his World War I submarine through handbills he distributed on New York City streets. City officials informed Chrestensen that his activities violated the Sanitary Code, which prohibited commercial handbills.<sup>56</sup> The resourceful Chrestensen then printed double-sided handbills, detailing his dispute with city officials on one side and his commercial speech on the other side.<sup>57</sup>

The U.S. Supreme Court rejected Chrestensen's attempts at injecting political speech into his leaflets, declaring "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."<sup>58</sup> The Court "plucked the commercial speech doctrine out of thin air."<sup>59</sup> If the Supreme Court granted First Amendment protection to any form of advertisement, such as the famous editorial advertising "Heed Their Rising Voices"

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

56. *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942) (referencing N.Y.C. Sanitary Code § 318).

57. *Id.* at 52-53.

58. *Id.* at 54.

59. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 627 (1990).



in *New York Times Co. v. Sullivan*, the Court justified it by stating that the ad did more than propose a commercial transaction.<sup>60</sup>

In the mid-1970s, the U.S. Supreme Court ruled that commercial speech was entitled to First Amendment protection. The seminal case was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>61</sup> The case examined a Virginia law prohibiting pharmacists from advertising prescription drug prices; Virginia asserted that allowing such advertisements would demean the professionalism of the pharmacy profession.<sup>62</sup> In striking down the statute as a violation of the First Amendment, Justice Harry Blackmun, writing for the majority, stressed the importance of the information to consumers: “When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.”<sup>63</sup>

Justice Blackmun also emphasized society’s strong interest in the “free flow of commercial information”<sup>64</sup> and that such a free flow was “indispensable” in a market economy based on private choices.<sup>65</sup> The high professional standards and regulations of the pharmacist profession addressed the state’s concerns with professionalism.<sup>66</sup> Justice Blackmun then authored a time-honored passage in response to the idea that the Commonwealth of Virginia was simply acting in the best interests by protecting its citizens. He wrote:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well

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60. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (“The publication here was not a ‘commercial’ advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.”).

61. 425 U.S. 748 (1976).

62. *Id.* at 766.

63. *Id.* at 763–64.

64. *Id.* at 764.

65. *Id.* at 765.

66. *Id.* at 768.

enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the “professional” pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.<sup>67</sup>

According to Justice Blackmun, however, “some forms of commercial speech regulation are surely permissible.”<sup>68</sup> These included regulations governing “[u]ntruthful,” “misleading,” and “deceptive” commercial speech.<sup>69</sup>

A. *Extending Commercial Speech Protection to Attorney Advertising: Bates v. State Bar of Arizona*

*Virginia Pharmacy* paved the way for the seminal lawyer advertising decision, *Bates v. State Bar of Arizona*.<sup>70</sup> John R. Bates and Van O’Steen graduated from Arizona State University College of Law in 1972.<sup>71</sup> They started working at Maricopa County Legal Aid Society after graduation, providing various legal services to those who could not afford legal services.<sup>72</sup> After two years, they left legal aid and formed a small law firm, which they called a “legal clinic,” in downtown Phoenix in 1974.<sup>73</sup> They soon realized they did not have enough clients to keep the doors open.<sup>74</sup> They turned to advertising

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67. *Id.* at 770.

68. *Id.* at 770.

69. *Id.* at 771.

70. 433 U.S. 350, 363 (1977).

71. Van O’Steen, *Bates v. State Bar of Arizona: The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245, 246 (2005).

72. *Id.*

73. *Id.*

74. *Id.*

even though the state bar rules prohibited such advertising.<sup>75</sup> The applicable rule provided:

A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.<sup>76</sup>

Bates and O'Steen submitted the ad to *The Arizona Republic*, advertising prices for routine legal services.<sup>77</sup> The State Bar of Arizona served them with a complaint for violating the advertising rule.<sup>78</sup> The Committee of the State Bar recommended a six-month suspension.<sup>79</sup> The Board of Governors of the State Bar reduced the suspension to one week.<sup>80</sup> Bates and O'Steen appealed to the Arizona Supreme Court, which affirmed the punishment but reduced it to censures.<sup>81</sup>

The U.S. Supreme Court narrowly reversed on the First Amendment issue by a 5-4 vote.<sup>82</sup> The Court addressed numerous arguments that the State advanced, including that advertising would have an adverse impact on professionalism,<sup>83</sup> that attorney advertising is inherently misleading,<sup>84</sup> that it will have an adverse impact on the administration of justice,<sup>85</sup> that it will have harmful economic

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75. *Id.* at 246–47.

76. *Id.* at 248 n.6.

77. *Id.* at 247.

78. *Id.* at 248.

79. *Id.* at 249.

80. *Id.*

81. *Id.*

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

83. *Id.* at 368–72.

84. *Id.* at 372–75.

85. *Id.* at 375–77.

impacts,<sup>86</sup> that it will have an adverse impact on the quality of legal services,<sup>87</sup> and that it will be too difficult to enforce.<sup>88</sup>

Regarding professionalism, Justice Blackmun questioned whether advertising would cause the legal profession to look undignified.<sup>89</sup> He noted that other professions, such as bankers and engineers, advertise without a loss of dignity.<sup>90</sup> He also pointed out that the ban against advertising arose as a “rule of etiquette,” not ethics.<sup>91</sup>

Justice Blackmun rejected the idea that attorney advertising is inherently misleading. O’Steen and Bates simply advertised their prices for such routine legal services as uncontested divorces, simple adoptions, uncontested personal bankruptcies, and name changes.<sup>92</sup> Regarding adverse impacts, Justice Blackmun refuted the idea that advertising would cause negative harms. “But advertising by attorneys is not an unmitigated source of harm to the administration of justice,” he wrote.<sup>93</sup> “It may offer great benefits.”<sup>94</sup> Advertising would inform the public about choices of counsel and the availability of legal services,<sup>95</sup> particularly to the populace priced out of the legal market.<sup>96</sup>

Justice Blackmun next addressed the argument that advertising would drive up legal costs. He questioned this argument, noting that the advertising ban “serves to perpetuate the market position of established attorneys.”<sup>97</sup> Advertising is helpful for new attorneys to penetrate the market.<sup>98</sup> With respect to quality of legal services, Justice Blackmun wrote that advertising might actually help legal clinics, such as that set up by Bates and O’Steen, to perform better legal work.<sup>99</sup>

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86. *Id.* at 377–78.

87. *Id.* at 378–79.

88. *Id.* at 379.

89. *Id.* at 368–69.

90. *Id.* at 369–70.

91. *Id.* at 371.

92. *Id.* at 372.

93. *Id.* at 376.

94. *Id.*

95. *Id.* at 376–77.

96. *Id.* at 377.

97. *Id.* at 378.

98. *Id.*

99. *Id.* at 378–79.

Finally, Justice Blackmun did not think much of the argument that it would be too difficult to enforce whether attorneys crossed the line and engaged in false and misleading advertising. “For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.”<sup>100</sup> Justice Blackmun concluded: “In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.”<sup>101</sup>

The *Bates* decision “altered, in a profound way, the legal profession and the legal services marketplace.”<sup>102</sup> The case “led to a virtual explosion” in attorney advertising.<sup>103</sup> Judge William Canby, who represented his former students successfully in *Bates*, told me years ago: “The case stands for the idea that commercial information is something that offers vitally important information to consumers just as other types of speech, and the speech is important because it leads to economic decisions that govern our lives. . . . Abraham Lincoln advertised his services when he practiced law.”<sup>104</sup>

While the Court protected *Bates*’ and *O’Steen*’s ad, the Court wrote that it might be a different story with regard to “in-person solicitation.”<sup>105</sup>

### B. Direct, Face-to-Face Solicitation Treated Differently

Recall that in *Bates*, the Supreme Court said that direct solicitation might be treated much differently than the truthful newspaper ad of John Bates and Van O’Steen.<sup>106</sup> The Court addressed that question the very next year in the case of *Ohralik v. Ohio State Bar Association*.<sup>107</sup> Cleveland-based attorney Albert Ohralik may

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100. *Id.* at 379.

101. *Id.*

102. *O’Steen*, *supra* note 71, at 245.

103. David L. Hudson, Jr., *Bates Participants Reflect on Landmark Case*, NEWSEUM INSTITUTE (Nov. 18, 2004), <http://www.newseuminstitute.org/2004/11/18/bates-participants-reflect-on-landmark-case/>.

104. *Id.*

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

106. *Id.* at 366.

107. 436 U.S. 447 (1978).

have been part of the inspiration for Grisham's memorable character, Wally Figg. Ohralik learned from the postmaster's brother that two young women were injured in an automobile accident.<sup>108</sup> He visited one of the young women's parents, who said that the decision of whether to hire him as the attorney would be up to their daughter.<sup>109</sup> Ohralik then proceeded to the hospital where he saw 18-year-old Carol McClintock lain up in traction in her hospital room.<sup>110</sup> She did not sign an attorney retainer agreement that day but did two days later while still in her hospital room.<sup>111</sup>

Ohralik also visited the home of the other young woman in the car, Wanda Holbert, and tried to sign her up as a client.<sup>112</sup> He secretly tape-recorded the conversation with Ms. Holbert.<sup>113</sup> Ms. Holbert orally agreed to let Ohralik represent her.<sup>114</sup> The next day, Ms. Holbert's mother called Ohralik, saying she did not want to sue and that her daughter was withdrawing the representation.<sup>115</sup> Ohralik said that there was a binding contract.<sup>116</sup>

Both young women discharged Ohralik as their attorney and filed bar complaints against him.<sup>117</sup> The state disciplinary board brought charges against Ohralik for improper solicitation and rejected Ohralik's First Amendment-based defense.<sup>118</sup> The Supreme Court of Ohio adopted the Board's findings but increased the punishment from the recommended public reprimand to an indefinite suspension.<sup>119</sup>

Ohralik appealed to the U.S. Supreme Court, which unanimously affirmed and ruled against the hospital-visiting attorney.<sup>120</sup> Ohralik argued that, just as Bates and O'Steen informed potential clients about their legal rights, he did so as well with his in-

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108. *Id.* at 449.

109. *Id.*

110. *Id.* at 450.

111. *Id.*

112. *Id.* at 451.

113. *Id.*

114. *Id.* at 451.

115. *Id.* at 451–52.

116. *Id.* at 452.

117. *Id.*

118. *Id.* at 452–53.

119. *Id.* at 453–54.

120. *Id.* at 454.

home and hospital visits.<sup>121</sup> The Court rejected the analogy, reasoning that in-person solicitation was not entitled to the same degree of respect and protection as truthful advertising of routine legal services.<sup>122</sup> The Court explained that “in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.”<sup>123</sup>

The Court also emphasized the roles of attorneys as “officers of the courts”<sup>124</sup>—an appellation that Zinc accepted more readily than Wally or Finley.<sup>125</sup> The Court stressed that protecting the public from improper solicitation was a “legitimate and important state interest.”<sup>126</sup> Ohralik’s conduct was “inherently conducive to overreaching.”<sup>127</sup> The Court concluded, “[t]he facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer’s in-person solicitation of professional employment.”<sup>128</sup>

### C. High Court Pattern of Protecting Attorney Advertising

After *Ohralik*, the Court began consistently protecting attorney advertisers in a series of cases.<sup>129</sup> On the same day the Court decided *Ohralik*, the Court protected an ACLU attorney in South Carolina who sought to obtain litigants to challenge an Aiken, South Carolina, policy of conditioning the receipt of Medicaid benefits upon sterilization.<sup>130</sup> The Court distinguished the conduct of Edna Smith Primus, the ACLU attorney, from Albert Ohralik because Primus was not engaged in “in-person solicitation for pecuniary gain.”<sup>131</sup>

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121. *Id.* at 455.

122. *Id.*

123. *Id.* at 457.

124. *Id.* at 460 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)).

125. *See* GRISHAM, *supra* note 14, at 380–81 (setting the ground rules for the proposed Finley, Figg & Zinc firm).

126. *Ohralik*, 463 U.S. at 462.

127. *Id.* at 464.

128. *Id.* at 468.

129. *See generally* DAVID L. HUDSON, JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 6:4 (2013).

130. *See generally In re Primus*, 436 U.S. 412 (1978).

131. *Id.* at 422.

The Court later struck down several Missouri restrictions on attorney advertising in *In Re R.M.J.*,<sup>132</sup> including a prohibition on advertising oneself as a “real estate” lawyer,<sup>133</sup> a restriction prohibiting an attorney from advertising that he was licensed in different states,<sup>134</sup> and a prohibition on sending general announcement cards about an attorney’s new solo practice.<sup>135</sup>

In the next case, the Court ruled that the Ohio Bar Association could not discipline an attorney for advertising that he was willing to represent women injured by a contraceptive device.<sup>136</sup> In that decision, the Court struck down a prohibition on illustrations in attorney ads.<sup>137</sup> The Court explained that the illustration of the contraceptive device was not misleading.<sup>138</sup> The Court explained that a state could require attorneys to include disclaimers in some ads to reduce the possibility of potentially misleading speech.<sup>139</sup> The Court explained, “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>140</sup>

Then, in *Shapiro v. Kentucky Bar Association*,<sup>141</sup> the Court struck down a general ban on attorney solicitation letters. The Court explained “the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.”<sup>142</sup> A few years later, the Court once again protected an

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132. 455 U.S. 191 (1982).

133. *Id.* at 205.

134. *Id.* at 205–06.

135. *Id.* at 206.

136. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 655–66 (1985).

137. *Id.* at 647–49.

138. *Id.* at 639–41.

139. *Id.* at 651 (quoting *In Re R.M.J.*, 455 U.S. at 201).

140. *Id.*

141. 486 U.S. 466 (1988).

142. *Id.* at 473–74.



attorney advertiser who advertised that he was a specialist certified by the National Board of Trial Advocacy.<sup>143</sup>

#### D. The Retrenchment

From *In Primus* through *Peel*, the Court consistently protected attorney advertising from regulation. In 1995, however, the Court sharply broke from this practice in *Florida Bar v. Went For It, Inc.*,<sup>144</sup> narrowly upholding a Florida Bar rule prohibiting solicitation letters until 30 days after an accident. Florida attorney G. Stewart McHenry and his lawyer referral service, Went For It, Inc., challenged the 30-day ban on solicitation letters as a direct infringement of First Amendment free-speech rights.<sup>145</sup> McHenry lost his law license for acts of sexual misconduct.<sup>146</sup> Went For It, Inc., however, continued as a named plaintiff.<sup>147</sup> The Florida Bar countered that the rule was necessary to protect the privacy rights of accident families and their families and the reputation of the Bar.<sup>148</sup> The Bar relied on a two-year, 106-page study that contained both anecdotal and statistical evidence that many members of the public viewed attorney solicitations as intrusive.<sup>149</sup> The Court applied the test for evaluating restrictions on commercial speech that it developed in the non-attorney advertising decision *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*.<sup>150</sup> Under the *Central Hudson* test, government officials can freely regulate speech that is false or misleading.<sup>151</sup> If the speech is truthful and non-misleading, however, the government must show that it has a substantial interest in its regulation, that its regulation

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143. *Peel v. Att'y Registration & Disciplinary Comm. of Ill.*, 496 U.S. 91, 93, 110–11 (1990).

144. 515 U.S. 618 (1995).

145. *Id.* at 621.

146. Fla. Bar v. McHenry, 605 So.2d 459 (Fla. 1992). McHenry allegedly touched a personal-injury client all over her body during a client consultation. *Id.* at 460. He claimed it was to determine the extent of her injuries. *Id.* Allegedly, he then went and masturbated at his desk. *Id.* Additionally, a second client complained that McHenry masturbated while she was in his office. *Id.* at 460–61.

147. *Went For It*, 515 U.S. at 621.

148. *Id.* at 625.

149. *Id.* at 626.

150. *Id.* at 623–28 (citing 447 U.S. 557 (1980)).

151. *See Central Hudson*, 447 U.S. at 563.

directly and materially advances its substantial interest and is narrowly tailored.<sup>152</sup>

In *Went For It*, the Court assumed that the letters were neither false nor misleading.<sup>153</sup> The Court then accepted the Bar's stated interests in privacy and the reputation of the Bar as substantial.<sup>154</sup> More controversially, the Court also found that the 30-day ban on solicitation letters directly and materially advanced these interests in a narrowly tailored way.<sup>155</sup> The Court relied on the 106-page anecdotal and statistical study, noting that it was "noteworthy for its breadth and detail."<sup>156</sup> The study included letters from individuals, irate and upset at receiving lawyer communications after the death of a loved one.<sup>157</sup>

The idea that the 30-day rule directly and materially advanced privacy and reputational interests in a narrowly tailored way was problematic. In dissent, Justice Anthony Kennedy criticized the majority for reducing First Amendment protections for those most in need of information about legal services.<sup>158</sup> Besides pointing out that individuals in accidents often are in urgent need for legal assistance, he reasoned that no such time limitation operated to restrict the activities of insurance adjusters.<sup>159</sup> Justice Kennedy explained, "direct solicitation may serve vital purposes and promote the administration of justice."<sup>160</sup> He wrote that the Florida Bar was "manipulating the public's opinion by suppressing speech that informs us how the legal system works."<sup>161</sup>

The great irony of the Court's *Went For It* decision is that, at about the same time that the Court decreased First Amendment

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152. *Id.* at 565–66.

153. 515 U.S. at 624 (noting that government officials can regulate false or misleading speech but proceeding to examine the remaining prongs of the *Central Hudson* test, thus seemingly assuming the letters were neither false or misleading).

154. *Id.* at 625.

155. *Id.* at 626–28.

156. *Id.* at 627.

157. *Id.*

158. *Id.* at 635 (Kennedy, J., dissenting) ("The Court today undercuts this guarantee in an important class of cases and unsettles leading First Amendment precedents, at the expense of those victims most in need of legal assistance.").

159. *Id.* at 636.

160. *Id.* at 639.

161. *Id.* at 639–40.

protection for attorney advertisers, the Court was strengthening protection for other commercial advertisers.<sup>162</sup> Indeed, from the mid-1990s, the Court has increased protection for other advertisers, including liquor advertisers,<sup>163</sup> gambling advertisers,<sup>164</sup> and tobacco advertisers.<sup>165</sup> Attorney advertisers, however, remained strangely left behind—at least in some jurisdictions. First Amendment expert Rod Smolla explained this phenomenon in poignant language: “If commercial advertisers are First Amendment step-children, lawyers come closer to abandoned orphans.”<sup>166</sup>

#### IV. RESTRICTIONS ON ATTORNEY ADVERTISERS IN THE STATES

At least some states certainly appear to treat attorney advertisers like “abandoned orphans.”<sup>167</sup> These states impose a variety of restrictions on attorney advertisers. Some of the restrictions involve state rules of professional conduct that provide an exhaustive list of what constitutes “false and misleading” communications to clients.

For example, South Dakota lists 17 examples of “false and misleading” communications.<sup>168</sup> These include limitations on comparisons with other lawyers, testimonials, dramatizations, and the catch-all category of “any other material statement or claim that cannot

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162. As one astute legal commentator points out, three of the dissenters in *Florida Bar v. Went For It, Inc.* were Justices Kennedy, Ginsburg, and Stevens. See Melissa K. Feliciano, *THE MARYLAND SURVEY: 1996-1997: Recent Decisions: The Maryland Court of Appeals*, 57 MD. L. REV. 659, 671 (1997). They joined the plurality opinion in a case the next year, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), that provided greater protection for commercial speech. See Feliciano, *supra*, at 669; see also David L. Hudson, Jr., *Attorney Ads*, NEWSEUM INSTITUTE (Dec. 2008), <http://www.newseuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/advertising-first-amendment-overview/attorney-ads/> (“Ironically, the *Went For It* decision and other regulations on attorney speech have occurred during a time when the U.S. Supreme Court has more searchingly scrutinized restrictions on commercial speech in general.”).

163. See, e.g., *44 Liquormart, Inc.*, 517 U.S. 484.

164. See, e.g., *Greater New Orleans Ass’n v. United States*, 527 U.S. 173 (1999).

165. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

166. Rodney M. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 4 (2002).

167. *Id.*

168. S.D. RULES OF PROF’L CONDUCT r. 7.1(c).

be factually substantiated.”<sup>169</sup> Florida prohibits attorney ads that are “unduly manipulative or intrusive.”<sup>170</sup> Arkansas flatly prohibits lawyers from using testimonials or endorsements as ads.<sup>171</sup> Ohio prohibits lawyers from advertising legal fees with the terms “cut-rate,” “lowest,” “give-away,” “low-cost,” or “special.”<sup>172</sup> North Carolina has extensive disclaimer requirements for dramatizations.<sup>173</sup> Colorado requires lawyers to use only regular U.S. mail when sending unsolicited communications to persons.<sup>174</sup> Alabama has a special rule on the professional cards of non-lawyers.<sup>175</sup>

Some state court decisions regarding attorney advertising are hard to justify. For example, in *N.C. State Bar v. Culbertson*, the Court of Appeals of North Carolina admonished a lawyer for including on his letterhead and on his website that he was “Published in Federal Reports, 3d Series.”<sup>176</sup> The attorney indeed was an attorney of record in a federal case that was printed in the Federal Reporter.<sup>177</sup> This was truthful information. However, the Court of Appeals of North Carolina reasoned that “[a] member of the general public could easily be led to believe from defendant’s assertions on his firm letterhead and website that he authored the opinion contained in the Federal Reporter.”<sup>178</sup> The decision relies on a very paternalistic assumption about the lack of knowledge of the general public. The result in *Culbertson* borders on the absurd. The Florida Supreme Court approved of the imposition of public discipline upon attorneys who advertised themselves with a “pitbull” logo and used as their phone number “1-800-PITBULL.”<sup>179</sup> The Court wrote that the attorneys had used a “sensationalistic image and a slogan.”<sup>180</sup> The Court explained:

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169. S.D. RULES OF PROF’L CONDUCT r. 7.1(c)(5), (14)–(15), (17).

170. FLA. RULES OF PROF’L CONDUCT r. 7.

171. ARK. RULES OF PROF’L CONDUCT r. 7.1(d).

172. OHIO RULES OF PROF’L CONDUCT r. 7.1, cmt. 4.

173. N.C. RULES OF PROF’L CONDUCT r. 7.1(b).

174. COLO. RULES OF PROF’L CONDUCT r. 7.1(c).

175. ALA. RULES OF PROF’L CONDUCT r. 7.6.

176. 627 S.E.2d 644, 646 (N.C. Ct. App. 2006).

177. *Id.* at 649.

178. *Id.*

179. Fla. Bar v. Pape, 918 So. 2d 240, 241–42 (Fla. 2005).

180. *Id.* at 243.

The logo of the pit bull wearing a spiked collar and the prominent display of the phone number 1-800-PIT-BULL are more manipulative and misleading than a drawing of a fist. These advertising devices would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information.<sup>181</sup>

The Court went so far as to write that “permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice.”<sup>182</sup>

The attorneys filed a petition for Supreme Court review, arguing that the ban on the pitbull advertising violated the First Amendment because it was demeaning and created an “amorphous and standardless judgment.”<sup>183</sup> The petition stated that, “under our First Amendment principles, even when discounted by the reduced standards applicable to commercial speech, we assign the management of good taste to the forces of the marketplace, not the forces of government.”<sup>184</sup> The High Court, however, denied review.<sup>185</sup>

In a disturbing trend, more and more states have engaged in “greater micromanagement of on-line advertising.”<sup>186</sup> For example, the New York County Lawyers Association Professional Ethics Committee issued an opinion that warned lawyers about making false

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181. *Id.* at 244.

182. *Id.* at 246.

183. Petition for Writ of Certiorari at 2, *Pape v. Fla. Bar*, 918 So. 2d 240 (Fla. 2005) (No. 05-1046).

184. *Id.* at 5.

185. *Pape*, 918 So. 2d at 240, *cert. denied*, 126 S. Ct. 1632 (2006).

186. ASS’N OF PROF’L RESPONSIBILITY LAWYERS, 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE 22 (2015) [hereinafter APRL REPORT],

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aprl\\_june\\_22\\_2015%20report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf).

or misleading statements on their LinkedIn profiles, even those submitted by other endorsers or reviewers.<sup>187</sup>

The Virginia Supreme Court ruled that a lawyer's blog about his cases could be subject to the state's advertising rules. The criminal defense attorney blogged about many of his cases, including the results he achieved.<sup>188</sup> Even though his blogs contained political commentary, the Virginia high court determined that the lawyer's blog was a form of commercial speech subject to the advertising rules.<sup>189</sup> "Hunter has admitted that his motivation for the blog is at least in part economic," the court found.<sup>190</sup> "The posts are an advertisement in that they predominately describe cases where he has received a favorable result for his client."<sup>191</sup>

In dissent, Judge Donald Lemon recognized that speech about the criminal justice system is political speech: "Speech concerning the criminal justice system has always been viewed as political speech."<sup>192</sup> He also pointed out that "[m]arketing is not Hunter's sole motivation for maintaining this blog. As discussed above, one of Hunter's motivations in maintaining the blog is to disseminate information about 'the criminal justice system, the criminal trials and the manner in which the government prosecutes its citizens.'"<sup>193</sup>

First Amendment expert Clay Calvert said, "[t]he decision could have a chilling effect on the speech of some of the most informed people in the United States when it comes to problems with the criminal justice system—namely, the attorneys who deal with it on a daily basis."<sup>194</sup> The attorney petitioned the U.S. Supreme Court, contending that "[s]peech concerning the judicial system is

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187. See generally N.Y.C. Lawyers Ass'n Prof'l Ethics Comm., Formal Op. 748 (2015), <http://pdfserver.amlaw.com/nlj/connected%20lawyer%20opinion.pdf>.

188. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 613 (Va. 2013).

189. *Id.* at 617.

190. *Id.*

191. *Id.*

192. *Id.* at 622 (Lemons, J., dissenting).

193. *Id.* at 623.

194. David L. Hudson, Jr., *Virginia Supreme Court Holds That Advertising Rules May Be Applied to a Lawyer's Blog*, AM. B. ASS'N J. (Nov. 2013), [http://www.abajournal.com/magazine/article/virginia\\_supreme\\_court\\_holds\\_that\\_advertising\\_rules\\_may\\_be\\_applied\\_to\\_a\\_law](http://www.abajournal.com/magazine/article/virginia_supreme_court_holds_that_advertising_rules_may_be_applied_to_a_law).

quintessentially ‘political speech’ falling squarely within the ambit of the marketplace of ideas.”<sup>195</sup> The U.S. Supreme Court denied review, failing to provide needed guidance on when an attorney’s blog may be considered commercial speech by bar regulators.<sup>196</sup>

#### A. A New Age for Attorney Advertisers?

There is a greater recognition in the last couple of years, at least in certain quarters, that lawyers need more freedom in advertising and that the current advertising restrictions are outdated. In 2015, the Association of Professional Responsibility Lawyers’ Regulation of Lawyer Advertising Committee issued a report that called for a comprehensive overhaul of the current rules.<sup>197</sup>

The APRL Report stated that the rules in most jurisdictions are “outdated and unworkable in the current legal environment and fail to achieve their stated objectives.”<sup>198</sup> Many of the current rules are based on lawyer ads in print and other traditional forms of advertising, such as business cards or mailers.<sup>199</sup> These rules are becoming increasingly outdated, as more and more lawyers are advertising on social media.<sup>200</sup> The APRL Report gave the informative example of a lawyer not being able to use Twitter in Florida because the lawyer would not have sufficient space to include a required disclaimer.<sup>201</sup> The trend of over-regulating attorney speech on the Internet is disturbing, because Internet-based advertising is “accepted practice” and the most common

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195. *Hunter*, 744 S.E.2d at 695.

196. *Hunter*, 744 S.E.2d at 611, *cert. denied*, 570 U.S. 919 (2013).

197. *See generally* APRL REPORT, *supra* note 186.

198. *Id.* at 3.

199. *Id.* at 20 (“State rules on lawyer advertising are largely based on print and other forms of traditional advertising such as announcements, business cards, mailers, newsletters, yellow pages, billboards, television and radio ads, newspaper advertisements, and listings in Martindale Hubbell or other print directories.”).

200. *See generally* ATTORNEY AT WORK, 2017 SOCIAL MEDIA MARKETING SURVEY REPORT (2017), <https://www.attorneyatwork.com/wp-content/uploads/2017/03/2017-Social-Media-Marketing-Survey-Report-@-AttorneyatWork.pdf>.

201. *See* APRL REPORT, *supra* note 186, at 21 (quoting David L. Hudson, Jr., *Firm Challenges Florida Bar Over Website Ad Limits*, ABA JOURNAL (Mar. 2015), [http://www.abajournal.com/magazine/article/firm\\_challenges\\_florida\\_bar\\_over\\_website\\_ad\\_limits/](http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits/)).

way that the public receives and tries to discover legal information and legal services.<sup>202</sup>

“The APRL report acknowledges what all of us know—that, with the growth of technology, American consumers now have access to a vast potpourri of information about lawyers,” committee member Bruce E.H. Johnson told the *ABA Journal*.<sup>203</sup> “As a consequence, many old-fashioned restrictions governing the dissemination of information about legal services have become outmoded and, to the extent that they inhibit information that is neither false nor misleading, potentially dangerous to free speech rights.”<sup>204</sup> The Committee did not call for an abdication of regulators’ authority over legal advertising.<sup>205</sup> Instead, the Committee explained that it advocated that the states create a “single rule” against lawyers engaging in “false or misleading advertising.”<sup>206</sup>

The basis behind the APRL Report is the idea that rules governing attorney ads should not hamper attorneys’ ability to communicate truthful information to would-be legal consumers. The APRL Report explains that “[r]estrictions on accurate information about legal service, imposed by competing law firms that function as part of the regulatory governing body, restrain trade and hinders the public’s access to useful information.”<sup>207</sup> The effect of some of these overly broad advertising restrictions is that it chills attorneys from communicating to members of the public in the way that most members of the public generally communicate.<sup>208</sup>

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202. Mark L. Tuft, *Rethinking Lawyer Advertising Rules*, 23 THE PROFESSIONAL LAWYER 1, 1 (2016), [https://www.americanbar.org/content/dam/aba/publications/professional\\_lawyer/volume\\_23\\_number\\_3/ABA\\_PLN\\_v023n03\\_01\\_rethinking\\_lawyer\\_advertising\\_rules.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/volume_23_number_3/ABA_PLN_v023n03_01_rethinking_lawyer_advertising_rules.authcheckdam.pdf).

203. David L. Hudson, Jr., *Drastic Change Needed in “Outdated and Unworkable” Lawyer Advertising Rules, Says Report*, AM. B. ASS’N J. (Oct. 2015) [hereinafter Hudson, *Drastic Change*], [http://www.abajournal.com/magazine/article/all\\_aboard\\_for\\_streamlining](http://www.abajournal.com/magazine/article/all_aboard_for_streamlining).

204. *Id.*

205. APRL REPORT, *supra* note 186, at 4.

206. *Id.* at 3.

207. *Id.* at 26.

208. *Id.* at 27; see also Ronald G. Rotunda, *Regulating Attorney Advertising When It Is Not Misleading*, VERDICT JUSTIA (Oct. 12, 2015),



The APRL Report also revealed some other illuminating findings, including that complaints about advertising are rare, that those who complain about lawyer advertisements are usually other lawyers, few states actively monitor lawyer ads, and much disciplined conduct could have been disciplinable under the catch-all rule 8.4(c).<sup>209</sup> The APRL Report concludes that “[a] simple ‘false or misleading’ standard for lawyer communications about legal services best balances the important interests of access to justice, protection of the public and clients, integrity of the legal profession, and the uniform regulation of lawyer conduct.”<sup>210</sup> This proposal, according to the APRL Report, is “the best way to ensure honest communication by lawyers while at the same time promoting the widest possible access by the public to legal services.”<sup>211</sup>

“Our empirical study showed that the problem is not how the lawyer designates himself or herself as an admiralty lawyer, or whether the lawyer uses email or text messages,” ethics and constitutional law expert Ronald Rotunda, who served on the committee that drafted the APRL Report, told the *ABA Journal*.<sup>212</sup> “To the extent there is any problem, it has to do with misleading speech. If the disciplinary authorities focused their limited resources in that area, clients would be better off.”<sup>213</sup>

The APRL Report calls for a “common sense response” to regulating lawyer ads.<sup>214</sup> It says that lawyer ad rules should be uniform rather than a hodge-podge of different state rules.<sup>215</sup> Further, it states that “[l]awyers should not be subject to discipline for ‘potentially misleading’ advertisements or advertisements that a regulator thinks are distasteful or unprofessional.”<sup>216</sup>

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<https://verdict.justia.com/2015/10/12/regulating-lawyer-advertising-when-it-is-not-misleading>.

209. APRL REPORT, *supra* note 186, at 28.

210. *Id.* at 30.

211. *Id.* at 32.

212. Hudson, *Drastic Change*, *supra* note 203.

213. *Id.*

214. APRL REPORT, *supra* note 186, at 4.

215. *Id.* at 29.

216. *Id.*

*B. Latest ABA Draft Proposal of Rule 7*

The ABA responded to the APRL Report by proposing changes to Model Rule 7 that incorporate at least one major theme of the report—focusing, as the primary area of emphasis, on the “false and misleading” prohibition of Rule 7.1.<sup>217</sup> Under the new draft version of Rule 7, the currently published Rule 7.5, Firm Names and Letterheads, is deleted.<sup>218</sup> Much of what was Model Rule 7.5 becomes Comments 4 through 8 of Model Rule 7.1, the main rule against “false or misleading” communications.<sup>219</sup>

Model Rule 7.3, Solicitation of Clients, is modified to allow lawyers to solicit not only other lawyers, family members, or close friends, but also “a person who is known by the lawyer to be an experienced user of the type of legal services involved for business matters.”<sup>220</sup> Proposed Comment 2 to Rule 7.3 reflects a recognition of new technologies in lawyer advertising by defining “live person to person contact” to mean “in person, face to face, telephone, and real-time person to person communications such as Skype or Facetime, and other visual/auditory communications where the prospective client may feel obligated to speak with the lawyer.”<sup>221</sup>

The net effect is that the APRL Report and, at least to some degree, the proposed changes to ABA Model Rule 7 reflect a need to update the rules from a technological standpoint. Hopefully, when state regulators of attorney advertisers police the bar for allegedly false and misleading communications, they remember the value of attorney advertising to the public.

## V. CONCLUSION

There is no doubt that many attorney ads exhibit questionable taste. Some are downright offensive, silly, or strange. The image of

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217. *Id.* at 4.

218. *See* MODEL RULES OF PROF'L CONDUCT r. 7 (AM. BAR ASS'N, Working Draft December 21, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/scepr\\_advertising\\_rules\\_draft\\_12\\_21\\_17.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_advertising_rules_draft_12_21_17.authcheckdam.pdf).

219. *See id.*

220. *See id.*

221. *See id.*

the ambulance-chasing lawyer that John Grisham depicted so humorously in *The Litigators* is not likely to go away anytime soon. The Wally Figgs of the world will continue to cross ethical boundaries in pursuit of clients, though they probably will do so in more technologically advanced ways. While Wally did not advertise online, he certainly tried just about everything else. Grisham captured the essence of the overzealous lawyer acting more as a huckster than as a learned professional.<sup>222</sup>

What should never be forgotten, however, is that lawyer advertising serves a high purpose: to inform consumers or prospective clients of their legal rights. Furthermore, the First Amendment of the United States Constitution protects most lawyer advertising. In a free-market economy in a society devoted to the marketplace of ideas, it makes little sense to stem the free flow of commercial information—even if it involves tasteless or offensive speech. The APRL Report recognizes the benefits of attorney advertising and hopefully will lead to a better system—one in which the morality police do not sanction lawyers for offensive or tasteless speech but focus on ads that are truly false or misleading.

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222. See generally GRISHAM, *supra* note 14.