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> *America is a free market for people who have something to say, and need not fear to say it.*[1]

I. INTRODUCTION

In 1973, the American Bar Association (ABA) conducted a study examining the public's relationship with the legal system and lawyers. The study concluded that lawyers were used less than one-third of the time when a legal incident occurred.[2] Specifically, the study found that it had become increasingly difficult for the public, especially the middle and lower classes, to gain access to lawyers and legal services.[3] The advent of attorney advertising appeared to be the solution. While many leaders of the organized bar found advertising inappropriate and liable to undermine the integrity of the legal profession, it provided a means of building a client base among those of low and moderate incomes.[4]

Fast-forwarding to the present day, following a period of relative quiet, advocates against attorney advertising are speaking up again. Pointing to the public's less-than-stellar opinion of lawyers, proponents of increased regulation argue that such ads demean the legal profession and further negative perceptions of attorneys.[5]

This Essay argues that attorney advertising does not significantly contribute to the apparent negative image of the legal profession, and furthermore, that such advertisements in a free market system provide the public with numerous benefits with respect to cost, quality and availability of legal services. In addition, this Essay posits that the *Model Rules of Professional Conduct* (*Model Rules*), working within the parameters of the Supreme Court's 1977 decision in *Bates v. State Bar of Arizona*,[6] provide a proper regulatory framework for policing against advertisements

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1. Hubert H. Humphrey, *Address at the National Book Awards Ceremony*, N.Y. TIMES, Mar. 9, 1967, at 42.

2. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 136-62 (1977).

3. *Id.* at 214.

4. AMERICAN BAR ASSOCIATION, LAWYER ADVERTISING AT THE CROSSROADS 38 (1995).

5. *See* Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861, 868-69 (1997).

6. 433 U.S. 350 (1977).

that are most offensive and dangerous to the consumer—those that are false or misleading.

II. *BATES* AND THE *MODEL RULES*

A. Bates v. State Bar of Arizona

In *Bates v. State Bar of Arizona*, the United States Supreme Court extended First Amendment protection of truthful and non-deceptive commercial free speech to lawyers, holding that it was unconstitutional for states to ban such communications.[7] The Arizona State Bar (State Bar) presented three arguments in support of its assertion that attorney advertising was inherently misleading.[8] First, it explained that the individualized nature of legal services made it such that a consumer could not make an informed decision based on an advertisement.[9] Second, the State Bar argued that consumers were unaware, at least at the outset, of what legal services they would need.[10] Finally, the State Bar was worried that attorney advertising had the effect—intended or unintended—of highlighting factors irrelevant to the quality of services provided.[11] The Court rejected each of the State Bar's contentions.[12]

The Court then focused on the public's need for information, concluding that advertising was not inherently misleading.[13] In fact, advertising could play an important role in determining whether an individual was in need of legal services and, if so, how to find a lawyer to assist them.

In lifting the state bans on attorney advertising, the Court left the direction of advertising regulation in the hands of the individual state bar associations, stating, "we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly."[14]

B. *The* Model Rules *Pertaining to Advertising*

In response to the Supreme Court's decision in *Bates*, the ABA adopted a completely revised set of ethical provisions entitled the *Model Rules of Professional Conduct*. With three rules, the *Model Rules* define the boundaries of appropriate attorney advertising.

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7. *Id.* at 384.
8. *Id.* at 372.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 372-75.
13. *Id.* at 372-73.
14. *Id.* at 384.

Rule 7.1 prohibits "false or misleading communication about the lawyer or the lawyer's services."[15] Rule 7.2, which explicitly permits advertising, requires that lawyers retain copies of their ads for two years after they last appear and, furthermore, that the ad include the name of at least one lawyer responsible for the content of the ad.[16] This rule also prohibits lawyers from giving anything of value to a person for recommending the lawyer's services except the cost of advertising and the charges of non-profit lawyer referral services or other legal services organizations.[17] Finally, Rule 7.3 prohibits solicitation of a "prospective client with whom the lawyer has no family or prior professional relationship when a significant motive . . . is the lawyer's pecuniary gain."[18]

III. IS LAWYER ADVERTISING INHERENTLY BAD?

A. *Adverse Affects on Professionalism*

While attorney advertising may lower the cost and stimulate the use of legal services, proponents of increased regulation argue that such advertisements have an adverse effect on professionalism. However, as recent studies indicate, these criticisms of attorney advertising are not necessarily consistent with the public's views.[19] Echoing the Supreme Court in *Bates*, "the postulated connection between advertising and the erosion of true professionalism [is] severely strained."[20]

Two core economic values must be recognized when discussing attorney advertising and increased regulation. First, individual producers of services, such as attorneys, as well as consumers, should have the opportunity to maximize their own economic utility. Second, we must respect the economic efficiency of our free market system. Increasing regulations on attorney advertising would clearly impinge upon both of these economic values.

As the Court pointed out in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*,[21] a case which dealt with Virginia's ban against drug price advertising, a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent

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15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1998). Rule 7.1 goes on to define a false or misleading communication as one that: (1) "[C]ontains a material misrepresenting of fact or law, or omits a fact necessary to make [a] statement considered as a whole not materially misleading," (2) "is likely to create an unjustified expectation about results the lawyer can achieve," and (3) compares services with those of other lawyers, "unless the comparison can be factually substantiated." *Id.*

16. *Id.* Rule 7.2.

17. *Id.*

18. *Id.* Rule 7.3. Rule 7.3's prohibition on certain forms of solicitation is outside the scope of this paper and will not be discussed.

19. *See infra* notes 25-30 and accompanying text.

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

21. 425 U.S. 748 (1976).

political debate."[22] In voiding the state ban on drug price advertising, the Court sought to provide individual consumers with the opportunity to spend their "scarce dollars" more effectively.[23] As is the case with any form of commercial advertising, a seller will advertise only if she believes it is economically efficient to do so. Attorneys, as providers of services for a fee, are no different. Increasing regulation or imposing bans on certain truthful advertisements increases the public's cost of obtaining information regarding price and availability of legal services. The individual consumer should be allowed to maximize his own utility by making well-informed choices, especially in the context of legal services.

In 1992, the ABA conducted a survey to gauge the public's perception of the legal profession.[24] The results of the survey showed that the public's complaints about lawyers were divided among four categories, one being the public's disdain for attorney advertising.[25] According to the survey, the public's distaste for attorney advertising was "because [the public] perceive[d] legal advertising to be undignified and damaging to the legal profession."[26]

In 1993, the *National Law Journal* conducted a survey regarding the public's perception of lawyers; one question simply asked what lawyers could do to improve their image.[27] Only 4% of those responding to the survey said the solution was to stop attorney advertising.[28] In spite of declining opinions about the legal profession, the number of people using legal services has increased.[29]

The results of the ABA and *National Law Journal* polls suggest that attorney advertising is hardly to blame for the public's negative perception of the legal profession. In the ABA study, attorney advertising made up only one of four categories of complaints with the legal profession. The *National Law Journal* study provides even more recent and compelling proof that attorney advertising is a rather insignificant factor in determining the public's perception of the legal profession. Together, these studies suggest that increasing regulations on attorney advertising would account for nothing more than a marginal improvement in public perception of the profession.

It may be that lawyers who engage in criticism of attorney advertising are the ones most responsible for the negative image allegedly spawned from these ads.

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22. *Id.* at 763.

23. *Id.*

24. *See generally* Gary A. Hengstler, *Vox Populi—The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60 (1993).

25. *See id.* at 62. The four categories of complaints were: (1) lawyers lack compassion; (2) the legal profession has low ethical standards; (3) lawyers are greedy; and (4) dislike of attorney advertising. *See id.*

26. Richard P. Martel, Jr., *Regulation of Advertising in the Legal Profession—Still Hazy After All These Years*, 1997 DET. C.L. MICH. ST. U. L. REV. 123, 155-56.

27. *See* Randall Samborn, *Anti-Lawyer Attitude Up but NLJ/West Poll Also Shows More People Are Using Attorneys*, NAT'L L.J., Aug. 9, 1993, at 1.

28. *See id.* Concerns raised by poll respondents also included: (1) ethics (26%); (2) high prices (26%); (3) quality of service (18%); (4) too many lawsuits (7%); and (5) too much help to criminals (5%). *Id.*

29. *See id.*

Specifically, these critics perpetuate a stigma about the quality of legal services provided by attorneys who advertise. As a result, lawyers are discouraged from advertising at all, which, in turn, limits the use of marketing techniques and indirectly limits the regulatory function of the marketplace.

If the public does not find attorney advertising to be a major factor in forming the image of the legal profession, why, then, should we give such credence to those members of the practicing bar who find it so offensive?

B. Benefits to the Public Regarding Cost and Quality of Legal Services

As consumers of legal services, the public receives a direct economic benefit from attorney advertising. While the *Bates* Court observed that "the effect of advertising on the price of [legal] services has not [yet] been demonstrated," and therefore relied on "revealing evidence with regard to products,"[30] a 1984 study by the Federal Trade Commission (FTC) found that competition resulting from attorney advertising had in fact facilitated a reduction in the price of legal services to the public.[31] Specifically, the FTC study found that fees for basic legal services were higher in jurisdictions where advertising was restricted, and that attorneys who advertised generally charged lower fees.[32]

In addition to increasing the availability of legal services and lowering their cost, increased competition among attorneys through attorney advertising stimulates the use of legal services. For example, people who assume that legal representation is too expensive may decide to secure an attorney once they find out—through an attorney advertisement—that representation is within their budget.[33] The argument that attorney advertisements are inherently deceptive and likely coercive fails to appreciate the regulatory effect of the free market system in which these ads are run. As the Court stated in *Bates*, "the argument [that attorney advertisements are inherently misleading] assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information."[34]

Putting aside the fact that false or misleading advertisements would violate Model Rule 7.1, attorneys who advertise in a deceptive manner in a free market

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30. *Bates*, 433 U.S. at 377.

31. WILLIAM W. JACOBS ET AL., CLEVELAND REGIONAL OFFICE AND THE BUREAU OF ECONOMICS OF THE FTC, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING, 172 (1984).

32. *Id.*

33. *See Bates*, 433 U.S. at 370. Responding to the State Bar's assertion that advertising would diminish the attorney's reputation in the community, the Court stated:

> The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain council even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.

Id. (citations omitted).

34. *Id.* at 374-75.

system will soon find themselves out of business, or at best, with few clients. This is because advertising stimulates competition among attorneys, providing consumers with choices they wouldn't otherwise have. While it may take some time, consumers will eventually identify and retain the attorneys who are providing the most effective and cost-efficient legal services rather than those who are not.

Once the consumer has made this distinction, the business for legal services will flow steadily to the competent, cost-effective attorneys and force attorneys with less competence and lower standards out of business. Increased regulations on attorney advertising would serve little use, since the current *Model Rules*—in conjunction with a free marketplace—will result in a Darwinian system where only the most efficient and effective producers of legal services remain in business.

C. *The Future of the* Model Rules *on Advertising*

The *Model Rules* should not go beyond regulating the communication of legal services that are false or misleading since doing so would impede the realization of important societal goals.[35] As the Supreme Court clearly held in *Bates*, false or misleading communications do not receive protection under the First Amendment and can be banned without impinging upon free speech rights.[36] Consequently, the *Model Rules* protect the consumer in the most effective way possible—by prohibiting false or misleading communications.

All communications regarding legal services should be encouraged insofar as the communications inform the public and assist people in determining whether or not they are in need of legal services. As previously mentioned, communications which inform the public of the availability and cost of legal services have been shown to be in the public's interest.[37] Even communications that are objectively repugnant and distasteful provide useful information to the consumer. Specifically, such advertisements may dissuade the consumer from obtaining legal services from the advertiser and may motivate the consumer to search elsewhere for legal aid. If representations made in advertisements are false or misleading, then Rule 7.1's prohibition against false or misleading communications would protect the consumer by imposing disciplinary action for violations. Rule 7.2's requirements that lawyers retain copies of their ads for two years and include within the ad the name of at least one lawyer responsible for its content ensure that the public is aware of who is providing the legal services advertised, and furthermore, who is responsible for the tasteful/informative or distasteful/uninformative communication.

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35. For example, regulations limiting who may appear in television commercials for legal services may prevent an organization from sponsoring an effective public service-oriented campaign that, arguably, would benefit lower socio-economic classes.

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

37. *See supra* Part III.B.

One place where the *Model Rules* should be amended, however, is Rule 7.1's prohibition against "false or misleading communications." Specifically, within the definition of "misleading," the *Model Rules* should include specific examples of what constitutes a false or misleading act.[38] The practice of using client testimonials in advertisements should be one such example of a misleading communication since, oftentimes, these testimonials do not represent a typical outcome for clients of the advertising attorney. Specific examples of misleading communications would not only lessen the need for case-by-case analyses of what constitutes such communications, but would also clarify the regulatory guidelines for attorneys who decide to advertise their services.

The ABA should also sponsor programs aimed at creating awareness within the legal community of the virtues of attorney advertising. Members of the practicing bar should understand that today's competitive legal market requires some lawyers to market their services through advertising. Rather than be ipso facto critical of attorney advertising, the legal profession should encourage practitioners who engage in advertising to do so in a tasteful and informative manner.

IV. CONCLUSION

Advertising by attorneys should not be made the scapegoat for the legal profession's apparent negative public image.[39] Such advertisements, whether in good or bad taste, provide the public with useful information while contributing insignificantly to the profession's image. Attorneys, like other providers of commercial services, have the right to engage in truthful advertising. Furthermore, the public, as consumers, has the right to receive truthful communications regarding cost, availability and types of legal services offered. Most importantly, the *Model Rules*, operating within the parameters of the Supreme Court's decision in *Bates*, effectively protect the public by prohibiting those communications most offensive to the consumer—those which are false or misleading.

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38. *See, e.g.*, NEVADA SUP. CT. R. 195 ("A communication is false or misleading if it: . . . 4. Contains a testimonial or endorsement."); *see also* SOUTH DAKOTA R. PROF. CONDUCT Rules 7.1, 7.2 (containing several examples of false or misleading communications).

39. *See generally* Selinger, *supra* note 5.

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