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Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It

Linda H. Morton
California Western School of Law, lmorton@cwsl.edu

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ARTICLES

Finding a Suitable Lawyer: Why Consumers Can't Always Get What They Want and What the Legal Profession Should Do About It

Linda Morton*

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* Associate Professor, California Western School of Law. B.A., Princeton University, 1976; J.D., Northeastern University, 1981. I am grateful to Professors Thomas Barton, Michael Belknap, Barbara Cox, Jacquelyn Gentry, Paul Gudel, John Noyes, Glenn Smith, and Janet Weinstein for their comments on earlier drafts of this Article. I am also grateful to my research assistants, Terry Baty, Leonard Bole, Anthony Carolei, Michael Early, Cynthia Gentile, Linda Littlefield, Margaret Rodgers, Jerome Siegel, and Jeffrey Zella, for their diligent efforts and assistance.

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INTRODUCTION

Jessie is a young, middle class mother who wants a divorce from her husband, Ron. Ron will most likely request help from his friend Dave, a divorce attorney with a reputation as a real "fighter." Jessie, on the other hand, wants an attorney who is sensitive to her vulnerable state, who will return her phone calls promptly, and who has evening office hours, as she knows she will have to pick up a part-time job. She also wants someone who is competent, although she is not quite sure what that really means, having never had experience with divorce attorneys before. She has mentioned her plight to a few close friends who have told her they will "ask around," but Jessie feels she should start looking herself.

Where should she begin? She could look up "attorneys" in the Yellow Pages or study the ads in TV Guide, but are these attorneys competent? Calling the local bar association for a list of attorneys' names seems even more limiting, without further description of their practices other than "family law attorney." How will she know without visiting with each attorney which one will best satisfy her needs? What if any of them have committed malpractice or have had complaints filed against them? Is there any way of finding out? The hurdles to obtaining an attorney competent and compassionate enough to handle a divorce seem almost as daunting as the divorce itself.

Jessie's plight in not knowing where to turn for legal assistance compatible with her needs is common. In a national survey sponsored by the American Bar Association and American Bar Foundation in 1974, eighty-three percent of the public polled agreed with the statement, "A lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem."¹ The ABA initiated a follow-up survey in 1985 that produced nearly identical results to the same question posed a decade earlier.² The lay public is too often forced to rely upon the anachronistic "word-of-mouth" method in choos-

¹ BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 228-29 (1977); see Lori B. Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. B. FOUND. RES. J. 967, 1009 n.197 (citing additional surveys in support of Curran survey).

² ABA COMM'N ON ADVERTISING, *LEGAL ADVERTISING: THE ILLINOIS EXPERIMENT* 12 (1985). In this survey, 598 respondents were polled in shopping malls in 4 major cities across the United States.

ing an attorney.³ The problem is worse for those of lower income levels and socio-economic classes, who use attorneys less frequently and thus have less access to word-of-mouth sources.⁴ The rapid growth of the legal profession will only increase the public's need for truthful information concerning lawyers.⁵

This Article criticizes the inadequacy of information available to consumers⁶ seeking an attorney compatible with their needs, analyzes why such inadequacy exists, and proposes solutions. The central thesis is that the legal profession views the issue of dispensing information consumers need through the wrong lens—that of attorney, rather than consumer. As a result, the issue is framed narrowly in terms of regulating the rights of attorneys, rather than broadly in terms of disclosing to the public information it wishes to know. To ensure their self-regulation, lawyers have developed contorted and varying rules that attempt to define what information attorneys can release through the advertising media under the paternalistic⁷ guise of protecting the consumer from false and misleading information. With respect to

³ This method of transmitting information has been termed anachronistic by both the Supreme Court and the Bar, who state that the legal and lay communities are too isolated from each other for informal sources of information such as word-of-mouth to be effective. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 n.30 (1977); Andrews, *supra* note 1, at 992; see also Elliot E. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 UCLA L. REV. 438, 440 (1965), cited in MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1980).

⁴ Donna K. Darden et al., *The Marketing of Legal Services*, J. MARKETING, Spring 1981, at 123, 127-29 (setting forth findings indicating that the public's usage of lawyers increases with income, occupational prestige, and social class).

⁵ Sara Murray, Comment, *The Whole Truth or Nothing but the Truth? Should Attorneys Who Advertise be Required to Disclose Prior Disciplinary Actions Taken Against Them?*, 21 ST. MARY'S L.J. 953, 968-69 n.64 (1990).

⁶ In this Article, I limit the term "consumers" to middle and lower income persons who are in an economic bracket that enables them to choose their own attorney, but who, unlike the corporate client or upper-level income client, do not have the knowledge or sophistication to enable them to discern quality representation.

⁷ For criticism of the profession's paternalistic attitude, see, e.g., LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* 81-82 (1980) and JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 98 (1978), cited in William B. Fecher, Casenote, *Professional Responsibility: The United States Supreme Court Gives Attorney Advertising Increased Protection—Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985), 11 U. DAYTON L. REV. 455, 479 (1986).

attorney referral services and records of malpractice, the legal profession has been even more restrictive in releasing information to the public. Yet, in striving to maintain their autonomy, lawyers have only perpetuated the enormous gap between the information consumers would like to have concerning attorneys and that which they receive.⁸

Part I of this Article describes the types of attorney information consumers would find helpful and explains why they should have this information. Part II explores four sources of information they presently receive—(1) advertising, (2) attorney directories, (3) bar referral services, and (4) malpractice listings⁹—and explains why these sources are inadequate in supplying desired information to the public. Part III discusses why the legal profession withholds more information than it should from consumers. This part focuses on the regulatory nature of the Supreme Court's jurisprudence and the anachronistic attitudes of state bars. Finally, Part IV offers proposals for changing the way the legal profession looks at consumers' need for information and, ultimately, the way lawyers perceive themselves.

Essentially, to resolve the predicament in which legal institutions have placed consumers such as Jessie, the problem must be viewed as a consumer issue, not a legal issue. Unless the consumer is involved throughout the process of regulating information released, attorneys will be more inclined to protect their profession from interference by outsiders than to give the public access to information it needs. The public must be better educated regarding the practices of the legal profession, and lawyers must be better educated regarding the needs of the public. Negative and confusing legal standards currently imposed to restrict information should be replaced by guidelines developed and evaluated by consumers. Until lawyers relinquish their current lens and, with it, their need to maintain their autonomy by controlling

⁸ Robert F. Dyer & Terence A. Shimp, *The Discrepancy Between Consumers' Information Needs and Information Content in Lawyers' Newspapers Ads*, 1979 PROC. AM. ACAD. ADVERTISING 1 (survey of Maryland attorneys and consumers indicating that lawyers' advertisements fail to provide consumers with information they regard as important in selecting an attorney).

⁹ This Article focuses on the profession's regulation of the content of information on attorneys, rather than on the format or medium used to dispense it. Therefore, I do not address issues about the propriety of personal solicitation, direct-mail solicitation, or television advertisement.

the information dispensed, consumers of legal services will continue to be denied access to information they deserve.

I. WHAT CONSUMERS WANT AND WHY THEY SHOULD GET IT

Consumers have consistently expressed a need for more information with which to select an attorney.¹⁰ Unfortunately, a marked disparity exists between the type of information consumers want and the type the legal profession thinks they should have. The gap between the public's needs and the legal profession's compliance with those needs only frustrates the public and exacerbates its distrust of lawyers.¹¹ Closing that gap by providing more information would benefit both the public and the legal profession.

A. What Consumers Want

A survey of 233 consumers conducted in 1980 by Marketing Professor Robert Smith and Law Professor Tiffany Meyer confirms that, in choosing a lawyer, the public is primarily concerned with the integrity of the lawyer and the quality of the lawyer's services.¹² Yet, only twenty percent of the respondents actually used the factors of "integrity" and "quality of service" in choosing a lawyer. In contrast, 91.9% used the factors of "personal acquaintance" or "recommendation by a friend" to choose their

¹⁰ See *supra* text accompanying notes 1-2.

¹¹ The Curran survey indicates that 39% of the public polled believe that lawyers will take a case despite their not feeling sure they know enough about the relevant law to handle the case well. See CURRAN, *supra* note 1, at 229. The public's lack of trust in lawyers is also supported by the results of a 1983 Gallup poll in which only one out of three persons polled rated lawyers as "highly trustworthy." See ABA COMM'N ON ADVERTISING, *supra* note 2, at 1.

¹² Robert E. Smith & Tiffany S. Meyer, *Attorney Advertising: A Consumer Perspective*, J. MARKETING, Spring 1980, at 56, 60. In their survey, Smith and Meyer gave consumers a choice of 18 factors to rank in order of importance in choosing an attorney. The 18 factors, ranked in order of importance by consumers, were "Integrity of lawyer, Quality of service, Promptness of service, Area of lawyer specialty, Past experience of lawyer, Cost of legal service, Past representation by lawyer, Recommendation by other lawyer, Recommendation by friend, Convenience of office hours, Years in practice, Personal acquaintance, Referral by state/county bar, Law school attended, Referral by legal aid, Location of office, Listing in yellow pages, Other." *Id.*

attorney.¹³ Professors Smith and Meyer conclude that the disparity between criteria consumers say are important and those they actually use shows that consumers would use criteria pertaining to quality and integrity if such information were more available.¹⁴ Unfortunately, the legal profession refuses to release certain information the public needs to judge an attorney's integrity or quality of service.

What information might a consumer like to know to judge integrity or quality? To judge a lawyer's "integrity," defined by one dictionary as "the quality or state of being of sound moral principle; uprightness, honesty, and sincerity,"¹⁵ a consumer might like to know the lawyer's reputation in the community, including whether any other clients have complained about the lawyer, whether the lawyer has any malpractice claims pending or adjudicated, and whether the lawyer has any substance abuse problems.

The term "quality" is more elusive than "integrity" because it depends, in part, upon the needs of the individual consumer.¹⁶ While one consumer may think that a lawyer's "quality" depends upon where the lawyer graduated from law school and whether or not the lawyer made law review, another may view "quality" as the lawyer's ability to interact with others on a humane and compassionate level.¹⁷ One consumer may want a lawyer who has spent years practicing in a specific area of law, while another may prefer a lawyer who has a smaller client base and less experience, but who answers the telephone more readily and has flexible office hours.¹⁸ Other factors that may or may not impress mem-

¹³ *Id.* at 60. Ironically, consumers ranked these latter two factors 9th and 12th in terms of importance.

¹⁴ *Id.* at 61. The flaw in Smith and Meyer's criteria is that a recommendation could be based on "integrity" or "quality of service." Nonetheless, the basis for such recommendation is still personal experience with an attorney, rather than information released by the profession prior to representation.

¹⁵ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, COLLEGE EDITION 759 (1960).

¹⁶ Smith & Meyer, *supra* note 12, at 61-62.

¹⁷ Consumers polled in an Oklahoma survey ranked "Friendly and personable qualities" second in importance in their choice of attorney. See ANDREWS, *supra* note 7, at 45, 46 (Table 11).

¹⁸ See Dyer & Shimp, *supra* note 8, at 2. Consumers in the Dyer and Shimp survey ranked "Attorney Availability" first of eight criteria used to evaluate lawyers.

bers of the public seeking an attorney's services are the attorney's record of wins and losses, the ability to advocate and willingness to negotiate, price and flexibility of payment options, promptness in initiating action on a claim,¹⁹ availability for trial, or even free parking.²⁰

Sources such as advertising, attorney directories, referral services, and lists of attorneys sanctioned for misconduct could provide this information regarding integrity and quality of attorneys to the public. However, as Part II demonstrates, they fail to do so.

B. Why Consumers Should Get What They Want

The legal profession should provide consumers with information they want primarily because it is the duty of lawyers to serve the public in the administration of justice.²¹ As consumers of legal services, the public deserves to have its needs recognized and complied with. But, in addition to the public's deserving attorney information, other reasons support the disclosure of more information to consumers. First, lower income consumers

¹⁹ In fact, 59% of those polled in the Curran survey indicated that they believed lawyers were generally not prompt. CURRAN, *supra* note 1, at 229.

²⁰ In *Foley v. Alabama State Bar*, 481 F. Supp. 1308, 1310 (N.D. Ala. 1979), *rev'd in part*, 648 F.2d 355 (5th Cir. 1981), the Alabama State Bar had initiated a disciplinary action against two attorneys in part because the Bar claimed that the attorneys' advertisement of free parking to potential clients violated the rule against offering valuable consideration for legal business.

An informal survey of 46 California residents confirms many of the above assertions. In response to the question, "What information would you like to know about an attorney before you made your decision to retain one?" 28% responded that the attorney's reputation would be most significant. Of those polled, 22% cited cost as a critical factor in hiring an attorney. In addition, hidden fees, trial duration, and steep hourly rates were all areas of concern. Approximately 15% of the respondents felt communication regarding procedures, costs, and the status of their case would be highly significant. Respondents stated that the legal profession involved too much paperwork and that attorneys tended to procrastinate. Many of those polled felt intimidated and nervous about asking questions of their attorney. About 11% wanted to know an attorney's win/loss record regarding their type of case. One respondent suggested that a public facility profiling attorneys' education, years in practice, size of firm, and win/loss record be made available. Survey by Cynthia Gentile, Research Assistant, in San Diego (Oct. 1990).

²¹ See MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1990) ("A lawyer should strive to . . . exemplify the legal profession's ideals of public service.").

will have greater access to attorneys' services. Second, the quality of attorneys' services will improve while the costs will decrease. Third, the image of the legal profession will improve. Fourth, the profession's fears that the public will be misled by claims as to quality are groundless. Finally, the information that is currently dispensed is inadequate to meet the public's needs.

1. Lower Income Consumers Will Have Greater Access to Attorneys' Services

A study by Professors Donna Darden, William Darden, and G.E. Kizer indicates that poor people do not use lawyers as much as they should.²² The public's use of lawyers increases with income, occupational prestige, and social class.²³ One way to reach poorer people is through the advertising of legal services. According to the same study, nonusers of legal services find commercial and organized sources of information more important than users.²⁴ Thus, permitting attorneys who serve lower income levels to advertise information concerning the quality of their services, particularly such factors as cost, availability, and free parking, will improve access by those most in need of legal services.

Opponents to attorney advertising claim that it will encourage frivolous claims.²⁵ In *Bates v. State Bar of Arizona*, however, the United States Supreme Court dismissed this claim, noting the failure of the legal profession to adequately serve " 'the middle 70% of our population.' "²⁶ As the Court eloquently stated, "Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."²⁷

2. The Quality of Attorneys' Services Will Improve While the Costs Will Decrease

The quality of attorneys' services improves when consumers take a more active role in the selection of their legal service prov-

²² See Darden et al., *supra* note 4, at 127, 130.

²³ *Id.* at 127-28.

²⁴ *Id.* at 128-29.

²⁵ See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375-76 & n.31 (1977).

²⁶ *Id.* at 376 (quoting ABA, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 2 (1972)).

²⁷ *Id.*

iders.²⁸ A study by Douglas Rosenthal offers empirical data in support of this argument.²⁹ Professor Rosenthal concludes that the more actively involved clients are in the litigation process, the more likely they are to achieve good results in their cases.³⁰

Not only will the quality of services improve, but clients will be more satisfied. A 1986 study by Consumer Science Professor Howard Schutz and Debra Judge concludes that consumers who take a more active role in the selection of professional service providers, including lawyers, experience a higher degree of service satisfaction.³¹ Disclosing more information to consumers regarding the quality and integrity of attorneys will enable them to take a more active role in selecting an attorney suitable to their needs.

Disclosing more information to consumers will also decrease the cost of lawyers' services. With more information, consumers will have more choice of available attorneys, thus increasing competition among attorneys and lowering prices.³² Economic theorists Terry Calvani, James Langenfeld, and Gordon Shuford explain that lifting restraints on lawyer advertising will enable

²⁸ For a more in-depth, theoretical discussion of this concept, see Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 833-35 (1990).

²⁹ See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

³⁰ See *id.* at 30, 43-46. The results are the conclusions by 3 experienced negligence attorneys and 2 claims adjusters who evaluated 60 personal injury plaintiffs. Although Rosenthal speaks of client involvement in terms of clients who follow their cases' progress, aid their lawyer in obtaining evidence, and rely on their attorney for emotional support when necessary, certainly a client's ability to make an educated choice among attorneys comprises part of the "involvement" to which Rosenthal refers.

This conclusion is also supported by the Curran survey, in which 50% of clients interviewed felt that their attorneys did not keep them well enough apprised of their cases. Thirty-six percent of the respondents felt that lawyers are not concerned whether their clients understand what needs to be done in their case and why. CURRAN, *supra* note 1, at 230.

³¹ Howard G. Schutz et al., *Lawyers' Perceptions of Consumers' Attitudes: Satisfaction, Quality, and Selection Criteria*, 12 J. LEGAL PROF. 87, 89 (1987) (citing Howard G. Schutz & Debra S. Judge, *Consumer Satisfaction with Physicians*, 1986 PROC., ADVANCES HEALTH CARE RES. CONF., AM. ASS'N FOR ADVANCES HEALTH CARE RES., 49-51).

³² The United States Supreme Court acknowledged the value of a competitive environment in offering consumers more choice in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) and in *Virginia State Board*

new firms to compete more readily with established firms.³³ The increase in client volume will also enable lawyers to lower their fees.³⁴ In fact, a 1978 study by Professor Steven Cox has already shown that, on average, attorneys who advertise charge less than attorneys who do not.³⁵ Furthermore, a subsequent study designed by Cox for the Federal Trade Commission found that, on average, attorneys in more restrictive advertising states charge more than those in less restrictive states.³⁶

3. The Image of the Legal Profession Will Improve

Increasing the information made available to consumers on lawyers' integrity and quality of service will enhance the profession's image by improving professional ethics and public trust in attorneys. Disclosing to the public information on attorneys who have disciplinary actions pending against them may, in the short run, tarnish the profession's reputation. In the long run, however, the threat of disclosure will encourage attorneys to be more ethical. Supplying clients with more information to judge an attorney's qualifications may also help erode the reluctance of attorneys³⁷ and judges³⁸ to publicize misconduct and ensure

of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 769 (1975).

For an excellent economic analysis of the benefits of advertising, see generally Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1088-89 (1983).

³³ Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776-78 (1988).

³⁴ *Id.*

³⁵ *Id.* at 783 (citing Phoenix Pilot Study discussed in Steven R. Cox et al., *Consumer Information and the Pricing of Legal Services*, 30 J. INDUS. ECON. 305 (1982)).

³⁶ *Id.* at 783-84 (citing FTC study discussed in CLEVELAND REGIONAL OFFICE & BUREAU OF ECONOMICS, FTC, REPORT OF THE STAFF TO THE FEDERAL TRADE COMMISSION, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 79 (1984) [hereafter FEDERAL TRADE COMMISSION REPORT]).

³⁷ Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1223 & n.97 (1988) ("Experience has shown, however, that only a small percentage—ten to fifteen percent—of complaints to disciplinary authorities are filed by lawyers.") (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 683 n.18 (1986)).

³⁸ See Lois G. Forer, *When Should Judges Be Whistle Blowers? Ethical Obligations of the Judiciary to the Public*, JUDGES J., Summer 1988, at 5, 6.

prompt discipline.³⁹ If the profession is to remain self-policing, better that its own members note instances of legal malfeasance before the consumers do.

Releasing more information about the quality of legal services will help dispel the public's current distrust of the legal system⁴⁰ and encourage people to use it more often to resolve disputes. As the *Bates* Court recognized, "[T]he failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community . . ." ⁴¹ Thus, in dispensing more information, the profession will appear to care more about serving the community by ensuring that the public's needs are met.

4. Fears That the Public Will Be Misled by Statements as to Quality Are Groundless

Part II details the Supreme Court's and bar associations' current prohibitions on lawyers advertising the quality of their services.⁴² These prohibitions, allegedly based on fears that consumers will be misled by claims as to quality, are illogical.⁴³ There are no restrictions on a lawyer extolling the "quality" of

³⁹ See Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in The Wake of Himmel*, 1988 U. ILL. L. REV. 977, 992-96 (discussing abatement of disciplinary actions by Attorney Registration and Disciplinary Commission).

⁴⁰ See *supra* note 11. The United States Supreme Court in *Bates* used the Curran report findings substantiating the public's distrust of the legal system to support its conclusion that the public needed to be better informed. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370 n.23 (1977).

⁴¹ *Bates*, 433 U.S. at 370 n.21 (footnote omitted) (citing MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 115-16 (1975); John G. Branca & Marc I. Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 UCLA L. REV. 475, 516-17 (1977)).

⁴² See *infra* part II. Most states prohibit advertised statements concerning quality or "puffing." Andrews, *supra* note 1, at 1004-05; see *infra* notes 178-85 and accompanying text.

⁴³ Prior to the adoption of the ABA Model Rules of Professional Conduct, the FTC urged the ABA to clarify ambiguities in the proposed definition of "a false or misleading communication" contained in proposed Model Rule 7.1. See FEDERAL TRADE COMMISSION REPORT, *supra* note 36, at 152-54. The FTC's advice went unheeded. See *id.* at 154. The FTC has since urged the ABA to abandon any specific definition and adopt a simpler rule: "A lawyer shall not make a false or deceptive communication about the lawyer or the lawyer's services." See *id.* at 154-55.

her work to a client consulting face-to-face for the first time. Should the public not be protected in that situation as well? If we were to apply the same bright line to other services, should car garages be prevented from advertising the quality of their transmission service because consumers may lack knowledge about the technicalities of transmission repair? In fact, unverifiable opinions as to quality, frequently labeled "puffing," are a defense to claims of false advertising with respect to other products or services under the Federal Trade Commission Act.⁴⁴ Nonetheless, many states bar self-laudatory claims by lawyers, even if "verifiable."⁴⁵

The Supreme Court and the Bar are overreaching in their attempts to safeguard the public from advertisements they consider to be deceptive. The public, confronted every day by self-laudatory claims of suppliers of products and services, has already demonstrated its skepticism toward self-laudatory claims by lawyers. Of 361 consumers polled in a 1983 study, 43 percent did not necessarily believe that advertisements by lawyers would be truthful.⁴⁶ Those who complain that professional ads are misleading are attorneys, not consumers.⁴⁷

5. Current Information Supplied to Consumers Has Failed to Meet Their Needs

The profession should expand information dispensed to consumers because the current amount consumers receive is not

⁴⁴ Puffing is a defense to a claim of false advertising under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1988). See Cook, Perkiss & Liehe, Inc., v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 245 (9th Cir. 1990) (finding that a statement by a collection agency, "We're the low cost commercial collection expert," was not a factual misrepresentation, but a general assertion of superiority, and therefore not actionable under the Lanham Act); see also Frederick C. Moss, *The Ethics of Law Practice Marketing*, 61 NOTRE DAME L. REV. 601, 624 (1986) (citing other sources).

⁴⁵ Andrews, *supra* note 1, at 988.

⁴⁶ M. Jeffrey Kallis & Dinoo J. Vanier, *Consumer Perceptions of Attorney and Legal Service Advertising: A Managerial Approach to the Delivery of Legal Services*, AKRON BUS. & ECON. REV., Winter 1983, at 42, 45.

⁴⁷ See Calvani et al., *supra* note 33, at 781 (citing evidence from the health care profession); see also Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 667 n.11 (1985) (Brennan, J., joined by Marshall, J., concurring in part and dissenting in part) (asserting that it was not members of the public who complained that Zauderer's advertisement was misleading).

meeting their needs.⁴⁸ Where a service, such as law, is not always standardized, consumers need more information than they would for a standardized product.⁴⁹ Yet, as Part II demonstrates, the legal profession dispenses less information than that dispensed about routine services and products.

II. WHAT CONSUMERS GET AND WHY IT IS NOT ENOUGH

Four potential sources of information for consumers are (1) lawyer advertising, (2) attorney directories, (3) referral services, and (4) listings of lawyers sanctioned for malpractice. This part will describe each source and indicate its inadequacies in providing information to consumers. Despite the altruistic intentions of some of these services to reach out to consumers,⁵⁰ closer scrutiny of information they offer to the public indicates that these services do more to aid the legal profession than the public. The self-serving nature with which the information is dispensed can only exacerbate the distrust the public has for the legal profession.⁵¹

A. Attorney Advertising

Attorneys have been permitted to advertise since the Supreme Court's decision in *Bates v. State Bar of Arizona*⁵² in 1977. Following its decision in *Bates*, the Supreme Court has continued to establish vague guidelines for state bars to develop their own standards for regulating attorney advertising. Unfortunately, both the standards of the Supreme Court and those developed by state bars prohibit lawyers from advertising information that would be helpful to consumers seeking an attorney to suit their needs, including information about the quality of a lawyer's services.

1. The Supreme Court's Standards

The Supreme Court first articulated standards for the states to follow in prohibiting attorneys' advertisements in *In re R.M.J.*,⁵³ a

⁴⁸ Dyer & Shimp, *supra* note 8.

⁴⁹ See generally Darden et al., *supra* note 4.

⁵⁰ For example, the State Bar of California publishes a leaflet for consumers entitled *What Can A Lawyer Referral Service Do For Me?*.

⁵¹ See *supra* note 11 and accompanying text.

⁵² 433 U.S. 350 (1977).

⁵³ 455 U.S. 191 (1981).

case following *Bates*. Using the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁵⁴ the Court indicated that a state may restrict ads that are "inherently likely to deceive" and ones that the record indicates did deceive.⁵⁵ On the other hand, the state may not absolutely prohibit potentially misleading information that may be offered in a nondeceptive manner, such as a listing of areas of practice.⁵⁶ Yet the state may still regulate ads that are not misleading, provided the state has a substantial state interest in the regulation and such regulation is restricted to serve that interest.⁵⁷ The Court in *R.M.J.* further acknowledged that the above standards are imprecise guidelines and that the parameters of permissible advertising can be uncovered only on a case-by-case basis.⁵⁸

The Court has articulated more specific standards since *R.M.J.*. A state may not impose "prophylactic rules," such as a ban on the use of illustrations or legal advice in advertisements, to facilitate discernment of advertisements that might be deceptive.⁵⁹ However, states may require disclosure of information, such as that regarding contingent fee agreements, where omission might mislead the public.⁶⁰ Moreover, states may forbid "unverifiable" claims as to the quality of lawyers' services, although lawyers may advertise verifiable facts, such as schools attended or certification,

⁵⁴ 447 U.S. 557, 562-66 (1980). The test stated in *Central Hudson*, a case involving a city regulation prohibiting electric utilities from advertising to promote the use of electricity, is as follows:

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

Id. at 566.

⁵⁵ *R.M.J.*, 455 U.S. at 202-03.

⁵⁶ *Id.* at 203.

⁵⁷ *Id.*

⁵⁸ *Id.* at 204 n.16.

⁵⁹ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643-49 (1985).

⁶⁰ *Id.* at 650-53.

from which a consumer might infer quality.⁶¹

A hazy bottom line as to the type of advertisement an attorney could currently publish without jeopardizing the attorney's right to practice law might be drawn as follows: An ad that is not inherently misleading, in that it is composed of accurate and verifiable facts from which one may infer, but which do not assert, the quality of services, provided that the ad does not actually mislead the public or have the potential to mislead the public such that the state's interest in protecting the public overrides the public's need for such information. A problem with the above standard is that, by its obvious contorted and confusing nature,⁶² it raises a host of questions and contradictions. As a result of the questions and contradictions raised, state bars, as well as attorneys, have erred on the side of caution in releasing information to the consumer.⁶³ Even worse, the standard fails to address the real issue—whether the consumer's need for further information has been met.

One question related to the consumer's needs that the standard raises is whether only factual claims are verifiable. An attorney's claim that she provides "knowledgeable service" in worker's compensation claims and is able to substantiate it with years of experience would be prohibited as not being factual, although it is verifiable. Similarly, an attorney may wish to advertise that he is responsive to clients, verifying the claim with client evaluations of his work. Yet, because such a claim is not a fact, despite its verifiability, the public would be precluded from receiving this information on the quality of the lawyer's services.

Another issue the standard raises is whether there is a distinguishable difference between opinions and inferences of quality, the former being prohibited while the latter are allowed. Applying the rule to the above illustrations, attorneys may publish years of experience, or in some states, even office hours, as the claims only imply quality. But attorneys may not state that they are experienced or responsive to clients because such statements are

⁶¹ *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2288 (1990).

⁶² For an excellent analysis of the confusion caused by varying and conflicting standards regarding advertisements prior to *Peel*, see Moss, *supra* note 44, at 602-45, and Timothy J. Williams, Comment, *Specialization: Recognizing De Facto Specialization and the Fundamental Right of the Attorney to Advertise*, 19 CAP. U. L. REV. 573 (1990).

⁶³ See *infra* text accompanying notes 64-80.

opinions about the quality of service provided. In essence, attorneys may claim only *how* they are experienced, not *that* they are experienced.

2. State Bars' Regulations

To encourage state bars to develop their own regulations on advertising, in 1977 the ABA Task Force on Lawyer Advertising proposed two models for attorney advertising regulations.⁶⁴ Proposal A, adopted by thirty-one states, as well as by the ABA in its Model Code of Professional Responsibility as Disciplinary Rule 2-101 (hereafter "DR 2-101"),⁶⁵ states twenty-five criteria attorneys may advertise, such as schools attended, foreign language ability, and office hours.⁶⁶ Proposal B, adopted by nineteen states, more generally prohibits ads that are false, fraudulent, misleading, or deceptive.⁶⁷ Some states also prohibit ads that are self-laudatory.⁶⁸

Both proposals prohibit claims as to quality—information the public has expressly requested.⁶⁹ DR 2-101 forbids those claims found to be "false, fraudulent, misleading, deceptive, self-laudatory or unfair,"⁷⁰ as well as those that are undignified.⁷¹ Based upon the public's lack of sophistication,⁷² DR 2-101 also forbids "representations concerning the quality of service, which cannot be measured or verified."⁷³ Proposal B prohibits public communications containing "statistical data or other information based on past performance or prediction of future success,"⁷⁴ "statements of opinion as to the quality of the services," and "a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public."⁷⁵

⁶⁴ ANDREWS, *supra* note 7, at 6.

⁶⁵ ANDREWS, *supra* note 1, at 986-88.

⁶⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980).

⁶⁷ ANDREWS, *supra* note 1, at 988; *see also* ANDREWS, *supra* note 7, at 6.

⁶⁸ ANDREWS, *supra* note 1, at 988.

⁶⁹ *See supra* text accompanying note 12.

⁷⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1980).

⁷¹ *Id.* DR 2-101(B).

⁷² *Id.* EC 2-9.

⁷³ *Id.*

⁷⁴ ABA Proposal B, DR 2-101(C)(2), *reprinted in* ANDREWS, *supra* note 7, app. at 125.

⁷⁵ ABA Proposal B, DR 2-101(C)(4), *reprinted in* ANDREWS, *supra* note 7, app. at 125. Even advertising the cost of legal services—information

In 1983, the ABA adopted the Model Rules of Professional Conduct.⁷⁶ Although the Rules recognize the particular need of persons of moderate means who have not used lawyers extensively to know more about legal services, claims as to quality are still forbidden. The Rules define misleading advertising, in part, as those ads that "create an unjustified expectation" about results or "compare the lawyer's services with other lawyers' services."⁷⁷ An example of information prohibited as misleading is the result an attorney has obtained for a client.⁷⁸

As Part III argues, by establishing a distinct set of regulations on deceptive advertising for their own profession, thus foregoing standards on consumer advertising already established by the Federal Trade Commission Act,⁷⁹ lawyers have ensured their self-regulation at the public's expense. State bars, allegedly confused by broad standards unique to attorneys enunciated by the Supreme Court, have been overly cautious in their release of information to the public.⁸⁰ As a result of the legal wrangle over whether an attorney's advertisement has breached a specific standard, the desire of consumers to know more about attorneys who might help them has been sadly forgotten.

B. Attorney Directories

National, state, county, and even city directories offer little help to a consumer seeking information on attorney services other than attorneys' names, biographical information, and, perhaps, fields of practice. The information offered is simply too sparse and inaccessible to consumers to be of any real value.

At a national level, Martindale-Hubbell⁸¹ offers attorneys' names, listed alphabetically by state, and a brief biographical sketch, including undergraduate and law schools, years of gradua-

expressly sought after by consumers—has been viewed as involving inherent questions of quality and may be prohibited in some states. Scott Makar, Note, *Advertising Legal Services: The Case for Quality and Self-Laudatory Claims*, 37 U. FLA. L. REV. 969, 1001 & n.203 (1985) (citing *Lyon v. Alabama State Bar*, 451 So. 2d 1367, 1373 (Ala. 1984)).

⁷⁶ MODEL RULES OF PROFESSIONAL CONDUCT (1990).

⁷⁷ *Id.* Rule 7.1. The FTC specifically opposed the adoption of this rule, stating that it is precisely this type of information that consumers would find helpful. See FEDERAL TRADE COMMISSION REPORT, *supra* note 44.

⁷⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 cmt. (1990).

⁷⁹ See 15 U.S.C. §§ 45, 52, 55(a) (1988).

⁸⁰ See Makar, *supra* note 75, at 985-87.

⁸¹ MARTINDALE-HUBBELL LAW DIRECTORY (1991).

tion, and address. It even provides a ranking of attorneys' reputation in the field; however, the rankings are by local attorneys, not clients. Furthermore, it does not restrict listings by attorneys who have been disciplined by state bars or courts. Another apparent drawback of the directory is that it is not "user-friendly," due to the vast quantities of information it holds. Listings may be difficult for the consumer to decode⁸² and are only alphabetized by name, not listed according to area of practice. The public would most likely be better off calling a local referral agency for information than using a national directory.

For consumers who want to know names of attorneys within a particular state, there are state-wide listings available. For example, Parker and Son Publishers, Inc., publishes a directory of California attorneys⁸³ that lists attorneys by geographical area of practice, such as Los Angeles or Sacramento. It lists the attorney's name, firm, address, telephone number, and field of certification, if available. Volume II of the directory lists information helpful to attorneys, such as lists of courts, court reporters, paralegals, and expert witnesses. Both volumes are available for \$27.00.

Directories are also published on a municipal level. For example, The Daily Transcript of San Diego publishes a directory of attorneys practicing in San Diego⁸⁴ that includes the attorney's name, firm name and address, telephone number, and optional name of law school and graduation date. The directory is available for \$10.00.

Again, the problems with such directories are that they offer sparse information, are not widely circulated to members of the public, and are expensive. A consumer could get almost the same amount of information from a referral agency without having to pay for a directory or hunt one down in a public library. The directories may be useful to members of the profession seeking information on opposition or co-counsel in a case, but they are not formatted or detailed for inquiring consumers to use to gain insight into the integrity or quality of attorneys' services.

⁸² A typical listing is as follows: Gordon, Debra K. . . . '59 '84 C.999 B.A. L. 1049 J.D.[Estep, W. & G.].

⁸³ PARKER DIRECTORY OF CALIFORNIA ATTORNEYS (Mary Redondo ed., 72d ed., 1991).

⁸⁴ ATTORNEY DIRECTORY (1991).

C. Referral Services

Persons of moderate income who can afford reasonable legal fees but cannot find a lawyer are turning more frequently to lawyer referral services. According to ABA statistics, there are 329 bar association-sponsored non-profit lawyer referral services in the country.⁸⁵ California now boasts 74 non-profit lawyer referral services, which projected contacts by 800,000 California residents in 1990.⁸⁶ The Chicago Bar Association's Lawyer Referral Service averages 2,500 calls per month, and the Houston Lawyer Referral accepts more than 500 calls per day.⁸⁷

The referral services have the potential to provide a wealth of attorney information to the inquiring public, yet the information the majority now dispense on attorney members of their referral panels is minimal. The real beneficiaries are not the consumers, but the services, which charge panel membership fees, and the attorneys, who are provided with clients.

Typically, a referral service will give a caller the name of a lawyer who claims to practice in the caller's problem area and will certify that the lawyer is a member of the bar in good standing and has malpractice insurance.⁸⁸ Some services will offer a caller only names of attorneys practicing locally,⁸⁹ while a few of the more sophisticated services provide computerized match-ups as to specialty and neighborhood locale.⁹⁰

Thus, at best, a consumer can get the name of a lawyer who specializes in a specific area, has a valid license to practice law, and has malpractice insurance. Consumers cannot get information they have expressly requested, such as office hours, years of practice in a certain field, and complaint records.⁹¹ Moreover, claims of lawyer expertise in certain areas are usually based on the lawyers' own claims that they are proficient in that area.⁹² Obvi-

⁸⁵ See Margaret Fisk, *A Good Lawyer Can Be Hard to Find*, NAT'L L. J., May 29, 1989, at 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 30.

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 30.

⁹¹ See *supra* text accompanying notes 17-20.

⁹² Fisk, *supra* note 85, at 30. Although a few services do require proof of expertise, an ABA survey of the 329 referral services indicates that only 15% had experience requirements for lawyers listed in areas of general practice and only 21% had experience requirements for lawyers listed on

ously it is in the lawyer's financial interest to profess as many areas of expertise as possible.⁹³

Although referral services claim to screen their attorneys for ethical violations, the violation must reach advanced stages in the complaint process, such as the lodging of formal charges, official reprimand by the state bar, or a complaint pending before the state supreme court, before the referral service will screen the attorney.⁹⁴ Until such point, the public has no access to complaint records.⁹⁵

With the increasing number of referral agencies serving as sources of business for lawyers, profit-making referral agencies, some with little concern for screening for expertise or ethical violations, have sprouted.⁹⁶ To better regulate these services, states are beginning to enact minimum standards,⁹⁷ including certification or experience requirements.⁹⁸ But once again, the legisla-

specialty panels. *Id.*; see also Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 718 (1977) ("Lawyer referral services have, for a number of years, been assigning clients to particular lawyers based *solely* on the lawyers' assertions as to which cases they believe themselves competent to handle.").

⁹³ One might argue that a lawyer's claim of expertise to a referral service is the same as a lawyer's advertised claim. However, because bar-sponsored agencies promote the claim, claims may very well have more credence to a consumer than claims by individual lawyers in local advertisements. Therefore, the referral service should have a higher standard of care in ensuring that any claims of expertise are valid or in disclosing attorneys' lack of experience to consumers.

⁹⁴ Fisk, *supra* note 85, at 30.

⁹⁵ See *infra* text accompanying notes 109-11.

⁹⁶ See Steven Pressman, *Refer Madness*, CAL. LAW., July 1990, at 17; see also Craig Weinerman, *Should You Buy A Case From This Referral Service?*, SAN DIEGO TRIAL LAW. ASS'N TRIAL B. NEWS, Oct. 1990, at 25.

⁹⁷ Pressman, *supra* note 96, at 17-18.

⁹⁸ Fisk, *supra* note 85, at 30. Such experience requirements are not to be confused with certification requirements for advertising of attorney services, see Paul Marcotte, *Certified Lawyers*, A.B.A. J., Sept. 1990, at 14; Thomas F. Gibbons, *The Right to Specialize*, A.B.A. J., May 1990, at 57-60, although there may be overlap between the two sets of standards. For example, a lawyer in California who complies with the state's certification standards for a specialty automatically meets a referral service's criteria for membership on an experience panel. MINIMUM STANDARDS FOR A LAWYER REFERRAL SERVICE IN CALIFORNIA para. 7.2 [hereafter MINIMUM STANDARDS ACT] (adopted Nov. 4, 1989, effective Oct. 26, 1989), reprinted in CAL. BUS. & PROF. CODE § 6155 app. (West 1990).

tion frequently serves the attorney better than it does the consumer.

California is one state that has already enacted minimum standards for lawyer referral services,⁹⁹ as required by California Business and Professions Code section 6155. Although the "Minimum Standards for A Lawyer Referral Service in California" (hereafter "the Minimum Standards Act") and Business and Professions Code section 6155 are helpful in promoting stricter regulation of referral services, the purpose of the regulation appears to be more to protect attorneys from "in-house" referral agencies, which charge outside attorneys excessive fees and refer cases primarily to their own board members,¹⁰⁰ than to educate and protect the consumer.

The Minimum Standards Act indicates that one of its general purposes is to "provide information about lawyers and the availability of legal services which will aid in the selection of a lawyer,"¹⁰¹ yet it offers no specific requirements as to the types or amount of information a referral service must provide. In a bold effort to solicit consumer input, the Minimum Standards Act also requires annual review of a random sampling of comments by ten percent of the clients who received referrals, yet the review is by a committee of in-house referral service members, who are to make "such alterations to the operation of the Service as it deems necessary."¹⁰² Such in-house review guarantees little in the way of promoting consumer concerns and satisfaction.

Although concern is generally expressed for regulating the quality of attorneys on referral panels,¹⁰³ the Minimum Standards Act requires each service to have only "uniform procedures" for

⁹⁹ MINIMUM STANDARDS ACT, *supra* note 98.

¹⁰⁰ In its provision requiring the state bar to establish minimum standards for lawyer referral services, Business and Professions Code section 6155 states as follows: "The minimum standards shall include provisions ensuring that panel membership shall be open to all attorneys practicing in the geographical area served who are qualified by virtue of suitable experience, and limiting attorney registration and membership fees to reasonable sums which do not discourage widespread attorney membership." CAL. BUS. & PROF. CODE § 6155(f)(1).

¹⁰¹ MINIMUM STANDARDS ACT, *supra* note 98, para. 3.1(b).

¹⁰² *Id.* para. 5.2.

¹⁰³ One of the purposes of the Minimum Standards Act is "to improve the quality of legal services available to the public . . ." *Id.* para. 3.1(e). The Minimum Standards Act requires services to establish their own quality requirements as to participation. *Id.* paras. 6.1, 7.2.

removal of attorneys from panels, offering no specifics as to the stage in the complaint process at which removal is required.¹⁰⁴ Review of the quality of services is conducted by the service itself, not by outside members of the legal community and lay public.¹⁰⁵ The Minimum Standards Act has more specifics protecting attorneys' due process rights regarding removal from referral panels¹⁰⁶ than specifics protecting consumers against unethical lawyers.

D. Malpractice Listings

To ascertain attorney integrity or quality, consumers want information about prior and pending complaints against the lawyer they are interested in.¹⁰⁷ That a lawyer has been suspended for failing to file an appeal on time, for sexually assaulting a client, or for converting at least \$30,000 in client funds are all relevant factors in a consumer's choice of attorney.¹⁰⁸ Unfortunately for the consumer, access to such information is limited. Only "public" information is published; moreover, sources of public information are not as accessible to consumers as they should be.

1. How a Consumer's Complaint Against an Attorney Becomes Public

In twenty-eight states, a complaint becomes public when, after a full investigation, the complaint is proven to be accurate and grounds for disciplinary action exist.¹⁰⁹ At that point, a formal notice to show cause issues, and the list of charges filed with the

¹⁰⁴ *Id.* para. 6.4 ("Each service shall establish a uniform procedure for review of refusals to admit to, and decisions to suspend or remove from, membership on any panel.").

¹⁰⁵ *Id.* para. 7.4 ("The governing committee or their designee of each Service is required to establish a method of review for continued panel membership. Such review shall evaluate the quality of services provided by member attorneys and be conducted at least once every two years.").

¹⁰⁶ *Id.* para. 6.4 ("In every case where a Service refuses to admit an attorney to a panel or suspends or expels an attorney from a panel, the Service must give the attorney a written statement of the reasons for its decision and offer the attorney a meaningful opportunity to be heard in his or her defense.").

¹⁰⁷ For a discussion of how prior disciplinary action might affect attorney services, see Murray, *supra* note 5, at 970-72.

¹⁰⁸ *Id.* at 968-70.

¹⁰⁹ Charles-Edward Anderson, *The Gag is Removed*, A.B.A. J., June 1990, at 22, 23.

state court becomes a matter of public record. Twenty states do not permit complaints to be released to the public until sanctions are actually imposed.¹¹⁰

Until a complaint becomes public, the complainant is not permitted to discuss the case.¹¹¹ The articulated rationale for this "gag rule" is to protect the public's interest in the integrity of the judicial system.¹¹² Only two states, Oregon and Florida, have agreed to lift their gag rules, thereby allowing a consumer to disclose the filing of a formal disciplinary complaint against a lawyer.¹¹³

The great majority of complaints never reach the stage where most jurisdictions would permit their public disclosure. A 1988 report issued by HALT, a legal reform group, states that less than 2 percent of more than 70,000 complaints filed with state attorney discipline agencies resulted in public discipline. Ninety percent were dismissed.¹¹⁴ In 1986, California received an estimated 8574 complaints about attorney conduct.¹¹⁵ As a result of those

¹¹⁰ *Id.* at 23. It is noteworthy that this policy directly contradicts ABA Model Rule for Lawyer Disciplinary Enforcement 16(B), which states, "Upon filing and service of formal charges . . . the proceeding should be public, except for: (1) deliberations of the hearing committee, board, or court; or (2) information with respect to which the hearing committee has issued a protective order." MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 16(B) (1989). As the Commentary to Rule 16 notes, "Once a finding of probable cause has been made, there is no longer a danger that the allegations against the respondent are frivolous. The need to assure the integrity of the disciplinary process in the eyes of the public requires that at this point further proceedings are open to the public." *Id.* Rule 16 cmt.

The constitutionality of the policy is also subject to question. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837-45 (1978) (holding that the First Amendment does not permit criminal sanctions against third parties who publish truthful information on confidential proceedings of a Judicial Inquiry and Review Commission, even though the state constitution and statutes proclaim such proceedings to be confidential).

¹¹¹ Anderson, *supra* note 109. This policy is also of questionable constitutionality. See *Landmark*, 435 U.S. at 837-45.

¹¹² See, e.g., *Daily Gazette Co. v. Committee on Legal Ethics of the State Bar*, 326 S.E.2d 705, 709 (W.Va. 1984).

¹¹³ Anderson, *supra* note 109.

¹¹⁴ Samuel Greengard, *Lawyer Discipline Today*, BARRISTER, Spring 1990, at 11.

¹¹⁵ ABA CTR. FOR PROFESSIONAL RESPONSIBILITY & THE STANDING COMM. ON PROFESSIONAL DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1

complaints, the California Bar formally charged only 192 lawyers with disciplinary violations and ultimately sanctioned only 185.¹¹⁶ The profession's reticence to publish attorneys' errors results in practitioners' impression that they can "get away with" certain unethical conduct.¹¹⁷ Private reprovals do not have the dire results of eliminating potential clients, who could otherwise learn of attorneys' misdeeds. The legal profession looks particularly defensive compared to other professions, such as business and medicine, because the members of these other professions appear to be disciplined more regularly.¹¹⁸

2. Sources That Provide Public Information on Attorney Misconduct

Three current sources of information on attorney malfeasance are (1) the National Discipline Data Bank, (2) journal publications, and (3) state bar hotlines.

The National Discipline Data Bank is a nationwide clearinghouse of information on attorneys publicly disciplined by federal and state courts and federal administrative agencies. The American Bar Association's Center for Professional Responsibility created the clearinghouse in 1968 to prevent lawyers disciplined in one jurisdiction from illicitly practicing in another.¹¹⁹ Thus, its purpose is to make attorney information more available to state bars, not to the public.

Public access to the Data Bank's records is limited. The public is not permitted access to cumulative lists of lawyers disciplined; a consumer can find out only if a certain lawyer has been disci-

(1987) [hereafter *LAWYER DISCIPLINE SURVEY*] (Chart I), cited in Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 748 n.352 (1990).

¹¹⁶ *LAWYER DISCIPLINE SURVEY*, *supra* note 115, at 1.

¹¹⁷ See generally Lerman, *supra* note 115.

¹¹⁸ Two percent of all attorneys against whom complaints were lodged in Illinois in 1987 were disciplined. Sixty-six percent of all other professionals against whom complaints were brought were disciplined. Greengard, *supra* note 114, at 14.

¹¹⁹ See publication by the ABA Center for Professional Responsibility, *National Discipline Data Bank Services*.

The Data Bank now has information voluntarily submitted by disciplinary agencies created by each jurisdiction's highest court. Just recently, however, the Bank has asked reporting agencies to expand the type of information they submit to include court orders, disciplinary board findings, and hearing committee reports. *New Procedures to Improve Discipline Data Bank Services*, *PROF. LAW.*, May 1991, at 5.

plined in the current year. Although there is a hotline number regarding individual names of lawyers disciplined, members of the public cannot call, but must submit their requests in writing, stating the purpose of their inquiry. Each inquiry costs \$5.00. The Data Bank contains only names of lawyers who have been publicly disciplined. In the majority of cases, where sanctions indicate private reproof, the attorney's name is not published.

For those consumers frustrated by the limited access to attorney information through the Data Bank, a second potential source of information on attorneys disciplined is journal listings. Attorney sanctions are listed daily in California in the *L.A. Daily Journal* and the *San Francisco Daily Journal*. The public has access to both. Reproofs are also published in *The California Lawyer*, a monthly publication mailed to all lawyers practicing in the state. But combing through back issues to see if a particular attorney's name is listed is too inefficient to be a realistic option for consumers. Such lists are generally of greater interest to other practicing attorneys, who may recognize the names published or who want to become more familiar with the type of conduct that incurs formal discipline.

A third method for the public to find out whether certain attorneys have been publicly sanctioned is through state bar hotline services.¹²⁰ In California, information on attorneys is available, although not as well publicized nor as accessible as it could be. A hotline number for the State Bar of California is listed in the *Pacific Bell Yellow Pages*.¹²¹ Consumers must call the number to obtain an attorney's state bar number. The Bar will also state whether the attorney has been publicly sanctioned for a disciplinary violation.¹²² To obtain information about what the disciplinary violation was, a consumer must call the State Bar Court in Los Angeles. The State Bar Court will release copies of public records on a case at a cost of fifty cents per page. However, decisions still under investigation, decisions that pertain to attorneys

¹²⁰ Unfortunately, local bars, usually more accessible to consumers, do not have such services. The San Diego County Bar Association has only the following information on attorneys: name, address, telephone, law school, graduation date, bar passage date, and date of membership in county bar. Telephone Interview with Representative, San Diego County Bar Association (Oct. 10, 1990).

¹²¹ See PACIFIC BELL SMART YELLOW PAGES, Local Access Pages (1991).

¹²² Telephone Interview with Representative, State Bar of California (May 28, 1991).

who are not members of the state bar, and decisions in which the mental stability of the attorney is questioned are not available to the public.¹²³

The description of potential sources of information for consumers set forth above shows that all are inadequate in disclosing information the public wants to know. The legal profession's answer, in part, to the absence of available information on disciplined attorneys is to police the profession from within by encouraging such practices as "peer review" systems¹²⁴ and "blowing the whistle" on other attorneys.¹²⁵ Although a positive step within the profession, these methods foster the "closed" nature of the practice of law. Rather than emphasizing self-policing practices, the profession should emphasize practices that enable consumers to make their own decisions on an attorney's quality or integrity by giving them the information they need.

III. WHY CONSUMERS CAN'T ALWAYS GET WHAT THEY WANT

Parts I and II demonstrated the gap between what consumers want and what they get concerning attorney information. Essentially, the public wants information concerning the quality and integrity of lawyers, but standards designed by the Supreme Court and regulations imposed by bar associations hinder, rather than promote, consumers' access to this information. Part III describes how the framework of the Supreme Court's decisions and the reluctance of state bar associations perpetuate this gap between what the public wants and what it gets.

A. *The Framework for the Supreme Court's Decisions*

One reason for the gap is that the framework for the Supreme Court's decisions on attorney advertising has focused too much on regulating attorneys' rights instead of on dispensing needed information to the public. This framework is, in part, a result of the parties to the lawsuits being attorneys, rather than consumers. The decision-makers are also attorneys, who desire to maintain

¹²³ *Id.*

¹²⁴ For discussions of voluntary peer review systems, see Spaeth, *supra* note 37, at 1228-32 and Susan R. Martyn, *Peer Review and Quality Assurance for Lawyers*, 20 U. TOL. L. REV. 295, 314-18 (1989).

¹²⁵ See generally Rotunda, *supra* note 39. For a discussion of ethical obligations of the judiciary to report incompetent attorneys, see Forer, *supra* note 38.

the unique status of the profession. Thus, the issue is viewed through the lens of lawyers attempting to safeguard their own professional interests, rather than that of consumers seeking information about the legal profession.

1. Attorneys as Petitioners

In the cases where the Supreme Court has addressed the issue of attorney advertising, attorneys, not consumers, have petitioned the Court. As a result, the Court's task has been to balance the First Amendment right of attorneys to advertise against the interests of state bar associations in using prophylactic rules to restrict attorney advertisements. Although the Court has used the public's need for information to support the expansion of the right of attorneys to advertise, emphasis on the right of consumers to receive information has steadily decreased.

The Supreme Court's earliest treatment of commercial advertising was in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹²⁶ In that case, consumers (an individual user of prescription drugs and two non-profit organizations) brought an action to void a statute prohibiting pharmacists from advertising the price of prescription drugs.¹²⁷ The consumers argued that the statute violated their First Amendment right to receive information.¹²⁸ Upholding the lower court's decision voiding the state ban, the Supreme Court expressed strong rhetorical concern for safeguarding the public's First Amendment right to commercial information. The Court stated that the issue was not the pharmacists' First Amendment right to advertise, but the public's First Amendment right to receive information.¹²⁹ The Court recognized society's strong interest in the free flow of information¹³⁰ and asserted that people will perceive their own best interests, if only they are well enough informed.¹³¹ The Court also acknowledged that the lack of information on pharmaceuticals hits hard-

¹²⁶ 425 U.S. 748 (1976).

¹²⁷ *Id.* at 748. Interestingly, the lower court had upheld the statutory prohibition in a prior case where pharmacists, not consumers, were the plaintiffs. *Id.* (citing *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969)).

¹²⁸ *Id.* at 753-54.

¹²⁹ *Id.* at 756-57.

¹³⁰ *Id.* at 764.

¹³¹ *Id.* at 770.

est the poor, the sick, and the aged.¹³²

In 1977 the Supreme Court opened the door to attorney advertising with its decision in *Bates v. State Bar of Arizona*,¹³³ in which the Court held that the blanket suppression of attorney advertising by a state bar was unconstitutional.¹³⁴ However, in *Bates*, the petitioners were attorneys who wished to advertise their fees, not consumers who wished to be informed of lawyers' prices.¹³⁵ As a result, the decision is not framed in accordance with the First Amendment's protection of consumers' right to receive information. Instead, the emphasis is on attorneys' right to advertise and how the states ought to regulate such advertisement.

The Court stated the issue as "whether lawyers . . . may constitutionally advertise the prices" of routine legal services, not whether the public has a right to such knowledge.¹³⁶ In fact, the Court in *Bates* only briefly acknowledged consumers' First Amendment right to receive such information by its comment that a justice of the Arizona State Court viewed the issue as the right of consumers to know about the legal profession, rather than regulation of the profession.¹³⁷ Although the Court in *Bates* recognized the public's need for information to select an attorney, particularly the needs of the "not-quite-poor and the unknowledgeable" for greater access to attorneys,¹³⁸ the Court's language is used to rebut the state's arguments against attorney

¹³² *Id.* at 763.

¹³³ 433 U.S. 350 (1977). For almost 60 years preceding *Bates*, attorneys had not been permitted to advertise. Andrews, *supra* note 1, at 968.

¹³⁴ *Bates*, 433 U.S. at 382-83. In *Bates*, two attorneys questioned the validity of an Arizona State Bar rule that prohibited advertising by attorneys. The attorneys had advertised in a local newspaper that they offered "legal services at very reasonable fees," listing their fees for some of the services offered.

¹³⁵ *Id.* at 382-83.

¹³⁶ *Id.* at 367 (emphasis deleted). In this particular case, the Court found that the advertisement's references to a "legal clinic," its offer of attorney services at "very reasonable prices," and its failure to inform consumers that they do not necessarily require attorney services for a name change were not misleading. *Id.* at 381-82. In so holding, the Court rejected the state bar's arguments that attorney advertising would tarnish the profession's reputation, mislead the public, stir up unnecessary litigation, prohibit new attorneys from entering the field, decrease the quality of service, or be too difficult to regulate. *Id.* at 368-72.

¹³⁷ *Id.* at 358.

¹³⁸ *Id.* at 376-77.

advertising, not to confirm consumers' First Amendment right to attorney information.

Since *Bates*, the Supreme Court cases concerning attorney advertising—*In re R.M.J.*,¹³⁹ *Zauderer v. Office of Disciplinary Counsel*,¹⁴⁰ and *Peel v. Attorney Registration and Disciplinary Commission of Illinois*¹⁴¹—have all been brought by attorneys wishing to publish certain information. As a result, the issues have been framed as whether specific state regulations unconstitutionally prohibit specific information attorneys wish to publish. Repeatedly, the Court has been compelled to look at the dispensing of attorney information in terms of attorneys' needs, rather than consumers'.

The specific issue in *R.M.J.* was whether the Missouri State Bar Rules requiring attorneys to list areas of practice in express legal terms and forbidding attorneys from listing areas they are licensed to practice violated the attorney-appellant's First Amendment rights.¹⁴² In holding Missouri's regulations to be unconstitutional,¹⁴³ the Court only briefly acknowledged that the information advertised could be helpful to the public.¹⁴⁴ The Court made no mention in its decision of the public's right to such information under the First Amendment. Instead, the major

¹³⁹ 455 U.S. 191 (1981).

¹⁴⁰ 471 U.S. 626 (1985).

¹⁴¹ 110 S. Ct. 2281 (1990).

¹⁴² *R.M.J.*, 455 U.S. at 193. The Missouri State Bar Rules required attorneys to limit advertised information to 10 categories, which did not include areas licensed to practice. The Rules also required attorneys to describe their practice according to language specified in the Rules and to include a disclaimer. The Rules prohibited general mailings of announcement cards. *Id.* at 194-96.

The attorney-appellant was sanctioned by the Missouri Supreme Court for listing the courts where he was licensed to practice, for listing areas of practice in language other than that required (e.g., "personal injury" instead of "tort law"), for refusing to include a disclaimer, and for mailing announcement cards to persons other than those listed by the rule. The Missouri Supreme Court upheld the constitutionality of the first three rules without explaining the rationale for its decision. The court did not comment on the constitutionality of the rule on the mailing of announcements. The attorney-appellant admitted his failure to include a disclaimer. Thus, the issues on appeal were restricted to his description of practice and states licensed. *Id.* at 197-98.

¹⁴³ *Id.* at 205.

¹⁴⁴ The Supreme Court acknowledged that the attorney's use of words a layperson might understand was "more informative" than the legal terms required by the state bar and that the attorney's listing the fact that he was licensed to practice in two states could be "highly relevant." *Id.* at 205-06.

portion of the decision focused upon regulation of attorneys' right to advertise. The Court set forth standards¹⁴⁵ to guide state bars in analyzing the constitutionality of their restrictions and then interpreted the facts of the case under the established guidelines.

Zauderer is a further example of a decision that is framed in terms of the state's right to regulate attorneys' First Amendment rights, not the First Amendment right of the consumer to receive information. Because it was an attorney who initiated the lawsuit, claiming that Ohio's Disciplinary Rules prohibiting his advertisement were unconstitutional,¹⁴⁶ the Court presented the issue as "regarding the regulation of commercial speech by attorneys,"¹⁴⁷ not regarding the rights of consumers to receive certain information an attorney wished to convey. Once again, the Court acknowledged the benefits to the public in releasing additional information,¹⁴⁸ but only to justify First Amendment protection of attorneys' right to commercial speech, not as grounds for consumers' right to information: "[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides"¹⁴⁹ Reversing the lower court's findings, the Supreme Court in *Zauderer* ruled that the state may not discipline an attorney for a newspaper advertisement containing a nondeceptive illustration and legal advice.¹⁵⁰ However, a state may require attorneys to disclose information regarding fee arrangements in their advertisements.¹⁵¹

¹⁴⁵ See *supra* text accompanying notes 53-58.

¹⁴⁶ *Zauderer* had placed an ad in Ohio newspapers. The ad contained an illustration of a Dalkon Shield Intrauterine Device and certain legal advice concerning litigation over the Dalkon Shield. The ad also stated that clients would not owe any legal fees if there were no recovery. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 631 (1985). The State Supreme Court of Ohio upheld the findings of the Office of Disciplinary Counsel that *Zauderer's* ad violated Ohio's Disciplinary Rules. *Id.* at 635. In confirming the constitutionality of the Ohio Rules, the state court held that disclosure requirements regarding contingency fees prevented the public from being misled, that it was "allowable" to prevent attorneys' claims of expertise absent specified standards for assessment, and that it was "reasonable" to forbid illustrations and statements of legal advice. *Id.* at 636.

¹⁴⁷ *Id.* at 629.

¹⁴⁸ *Id.* at 646-47.

¹⁴⁹ *Id.* at 651.

¹⁵⁰ *Id.* at 655-56.

¹⁵¹ *Id.* at 655. In reversing the state court's findings as to the illustrations

In *Peel*, the issue was, again, a narrow one, focusing on the right of attorneys to advertise. The question presented by Peel, the attorney-petitioner, was whether Peel's assertion on his letterhead that he was certified as a civil trial specialist by the National Board of Trial Advocacy was protected by the First Amendment.¹⁵² The Supreme Court held that Peel's letterhead was neither actually nor inherently misleading and that the state's interest in preventing consumers from being misled was insufficient to justify a prophylactic ban on statements of certification.¹⁵³ However, the major portion of the decision constitutes a debate between the justices about whether Peel's statements were misleading, inherently misleading, or potentially misleading. Four justices believed Peel's statement to be protected by the First Amendment, three justices believed the statement to be inherently misleading, and two justices believed the statement to be potentially misleading.¹⁵⁴ Although the Court recognized that the disclosure of truthful information benefits the public,¹⁵⁵ the public's constitutional right to such information seems to be a concern of the past.

and legal advice, the United States Supreme Court asserted that the ad's illustration and advice were not misleading, but accurate. *Id.* at 639. Zauderer did not make any claims of expertise or statements relating to the quality of his services, but only stated factually that he had represented other women in Dalkon Shield litigation, was willing to continue to do so, and that such litigation was not time-barred. *Id.* at 640. Furthermore, there was no substantial government interest in precluding the advertisement. *Id.* at 641-47.

¹⁵² *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2284, 2287. Peel's letterhead stated:

Gary E. Peel
Certified Civil Trial Specialist
By the National Board of Trial Advocacy
Licensed: Illinois, Missouri, Arizona

Id. at 2285. The Illinois Supreme Court held that Peel's letterhead was not protected by the First Amendment because the juxtaposition of certification and state licensure could mislead the public into thinking that his licensure stemmed from his certification, because his claim of certification attests to the quality of his services, and because the juxtaposition of the term "specialist" with the states of licensure could mislead the public into believing states confirmed the title of "specialist." *Id.* at 2286-87.

¹⁵³ *Id.* at 2293.

¹⁵⁴ *Id.* at 2297 (White, J., dissenting).

¹⁵⁵ *Id.* at 2292-93.

2. Attorneys' Unique Status

The framework of regulating of attorneys' rights is also a result of the Court's flawed assumption that lawyers constitute a unique profession.¹⁵⁶ This belief supports the Court's and the bar associations' development of regulations on attorney advertising that are different from those on other professions.¹⁵⁷ One way in which the Court has asserted the unique status of lawyers is by prohibiting advertisements that reflect upon the quality of lawyers' services—information consumers have specifically requested and ought to have. The Court's belief in the uniqueness of lawyers also confines the legal profession to developing, interpreting, and criticizing regulations on attorney advertising, rather than expanding its lens to view what the consumer wants to know. The Court has become overly involved in the "micromanagement"¹⁵⁸ of state regulations, thereby directing attention away from consumers' constitutional right to information.

Virginia Pharmacy concerned pharmacists, not lawyers,¹⁵⁹ yet the Court's dicta foreshadowed its view that advertisements by attorneys would be treated differently from those by other professionals. The Court cautioned that because the professions of law and medicine dispense "services," rather than "standardized prod-

¹⁵⁶ The Supreme Court's assumption that lawyers' singularity mandates separate regulations is flawed for at least two reasons. First, it is arguable whether lawyers' services are any more unique than those of social workers, environmental engineers, or mortgage brokers. The requirements of professional uniqueness have yet to be defined. Second, if lawyers' services are unique, the requirement of separate regulations on attorney advertising is not necessarily a logical, much less a practical, consequence. Certainly, every avocation would like to create, interpret, and adjudicate its own standards on advertising. That lawyers' standards are different from those of most avocations appears to stem from the fact that lawyers themselves are deciding that their own profession is unique and that such singularity requires unique regulations.

¹⁵⁷ See *supra* note 79 and accompanying text.

¹⁵⁸ The Court's shift in focus is acknowledged by Justice O'Connor in her dissent in *Peel*: "The plurality has thereby deserted the sole policy reason that justifies its headlong plunge into micromanagement of state bar rules—facilitation of a 'consumer's access to legal services.'" *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2299 (1990) (O'Connor, J., joined by Rehnquist, C.J. and Scalia, J., dissenting) (quoting majority opinion, 110 S. Ct. at 2293).

¹⁵⁹ See *supra* text accompanying note 127.

ucts," possibilities for deception in advertising are enhanced.¹⁶⁰ Former Chief Justice Burger's concurrence in *Virginia Pharmacy* stressed the differences between legal and medical services and standardized products.¹⁶¹ He argued that the need for regulation of lawyers is "especially great," since they administer justice and are officers of the courts.¹⁶² His concurrence also foreshadowed the Court's prohibition on lawyers' claims of quality. He suggested that law's status as a "learned profession"¹⁶³ and the professional judgment required of attorneys¹⁶⁴ might make it too difficult to judge the quality of services and thus evaluate which claims are misleading.¹⁶⁵

Although the *Bates* Court described as anachronistic the argument that lawyers are "above" trade,¹⁶⁶ it still distinguished the services of attorneys from other professionals¹⁶⁷ to justify its prohibition on lawyers' claims of quality. The Court rationalized its prohibition on quality claims by inferring that the profession was uniquely complex, as well as potentially unscrupulous. The Court argued that the public lacked understanding of lawyers' practices: "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."¹⁶⁸ Lawyers' claims as to the quality of their services, which the Court claimed could not be measured or verified, may be "so likely to be misleading as to warrant restriction."¹⁶⁹ Based on the ability of lawyers to take advantage of unsophisticated consumers, Former Chief Justice Burger

¹⁶⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 n.25 (1975).

¹⁶¹ *Id.* at 773-75 (Burger, C.J., concurring). However, as Justice Rehnquist pointed out in his dissent, the Court failed to explain why certain legal and medical "services," such as title searches and routine check ups, are not also "standardized." *Id.* at 785 (Rehnquist, J., dissenting).

¹⁶² *Id.* at 774 (Burger, C.J., concurring) (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 775.

¹⁶⁶ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1977).

¹⁶⁷ *Id.* at 383.

¹⁶⁸ *Id.* (citations omitted). Paradoxically, the Court's assertion here contradicts its earlier criticism of the state bar's argument that the public is not sophisticated enough to realize the limitations of advertising. *Id.* at 374-75.

¹⁶⁹ *Id.* at 383.

expressed his concerns for protecting the public: "To be sure, the public needs information concerning attorneys, their work, and their fees. At the same time, the public needs protection from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed."¹⁷⁰

In *R.M.J.* the Supreme Court reinforced the state's role in developing specific regulations pertaining to lawyer advertising to ensure the public's protection. Following its earlier logic in *Bates*, the Court in *R.M.J.* stated, "The public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling."¹⁷¹ In abolishing the states' prophylactic ban on certain types of attorney advertising, the *Zauderer* Court urged the states to analyze complaints about legal advertising in greater depth, on a case-by-case basis. However, instead of reiterating its earlier claims about the unique qualities of the legal profession, the plurality used a contradictory rationale to rebut the State's argument that attorneys' advertisements require prophylactic rules. The State argued that such rules are necessary because "it is intrinsically difficult to distinguish advertisements containing legal advice that is false or deceptive from those that are truthful and helpful."¹⁷² To refute the State's argument, the Court asserted that discerning deceptive statements in legal advertising is no more difficult than in other fields of commerce. Stating that "[t]he qualitative distinction the State has attempted to draw eludes us,"¹⁷³ the Court explained that the task of discerning truth from falsity in advertising "in virtually any field of commerce may require resolution of exceedingly complex and technical factual issues and the consideration of nice questions of semantics."¹⁷⁴

¹⁷⁰ *Id.* at 388 (Burger, C.J., concurring in part and dissenting in part).

¹⁷¹ *In re R.M.J.*, 455 U.S. 191, 202 (1981). Interestingly, the Court replaced the conscious deception by attorneys in *Bates* with the "limited ability of the professions to police themselves." See also *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2298 (1990) (O'Connor, J., dissenting).

¹⁷² *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644-45 (1985).

¹⁷³ *Id.* at 646.

¹⁷⁴ *Id.* at 645. In support of its assertion, the Court cited ABA Model Rule of Professional Conduct 7.2, stating that such discernment "is neither

However, the Court still imposed stricter standards on legal advertising than on advertisements of other professions to protect consumers from potentially deceptive practices of the legal profession. The plurality never asserted that lawyers are similar enough to other service professionals that state bars should relinquish their role of regulating legal advertising to the FTC. In fact, the Court maintained its belief in the unique status of lawyers when it upheld Ohio's claim that rules requiring attorneys to disclose that clients may have to pay certain expenses in contingent fee arrangements were reasonably related to the State's interest in preventing deception of consumers.¹⁷⁵

The unique status of lawyers as a profession was adamantly confirmed by the dissenting opinion of Justice O'Connor, who was joined by Chief Justice Burger and Justice Rehnquist. Justice O'Connor emphasized lawyers' unique status as "professionals,"¹⁷⁶ not to justify prohibitions on claims as to quality, but to accord states greater leeway in their use of prophylactic rules to

impractical nor unduly burdensome." *Id.* at 646 n.13. The Court also cited an FTC report which concluded that regulation of deceptive attorney advertising poses no distinct problems. *Id.* (citing FEDERAL TRADE COMMISSION REPORT, *supra* note 36, at 149-55). While the Court could have been encouraging FTC regulation of lawyer advertising, the Court may only have been suggesting that the FTC serve as a guide for the state bars in their regulation of lawyer advertising. See Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 508 (1986).

¹⁷⁵ *Zauderer*, 471 U.S. at 651. *Zauderer* had advertised that "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 631. The State claimed that the ad violated Ohio's rule that any advertisement mentioning contingent-fee rates must "disclos[e] whether percentages are computed before or after deduction of court costs and expenses." *Id.* at 633. The State also claimed that the ad was deceptive because it failed to mention that consumers would be liable for costs, even if their claims failed. *Id.* Noting the "unfortunate" vagueness as to precisely what Ohio attorneys must disclose, *id.* at 653 n.15, the Supreme Court nonetheless held that Ohio's rules did not violate *Zauderer's* First Amendment rights. *Id.* at 651.

¹⁷⁶ *Id.* at 677 (O'Connor, J., joined by Burger, C.J. and Rehnquist, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Other portions of the opinion indicate the Justices' concern that the professional status of lawyers has been wrongly diminished: "Lawyers are *professionals*, and as such they have greater obligations. . . . While some assert that we have left the era of professionalism in the practice of law" *Id.* at 676-77.

prohibit legal advertisements. Justice O'Connor argued that as a result of the complexity of legal services, there is an "enhanced possibility for confusion and deception."¹⁷⁷ State regulation is "qualitatively different" from regulation of commercial goods.¹⁷⁸ Consequently, states must be allocated more deference in their decisions to prohibit certain advertisements.¹⁷⁹

In *Peel*, the plurality made an even stronger statement than it had in *Zauderer* that lawyers are unique, both to support its holding permitting disclosure of lawyers' certification and to justify its continuing prohibition on claims as to the quality of lawyers' services. To support its holding, the Court veered from its prior claims in *Bates* and *R.M.J.* that legal professionals are more deceptive than other professionals. Instead, the Court asserted that lawyers are *less* likely to deceive because they are respected professionals: "The presumption favoring disclosure over concealment is fortified in this case by the separate presumption that members of a respected profession are unlikely to engage in practices that deceive their clients and potential clients."¹⁸⁰ To further support its holding that certification claims are protected by the First Amendment, the Court relied on information from the FTC affirming consumers' ability to distinguish claims of specialty in fields such as foreign car repair.¹⁸¹ The Court rejected the "paternalistic assumption" that consumers reading *Peel*'s letterhead are just as vulnerable as the audience for children's television¹⁸² and criticized Justice O'Connor's dissenting concerns about the public's lack of sophistication.¹⁸³

Yet, in seeming contradiction to its assertions that attorneys will not deceive the public and that the public will not be misled by lawyers' claims of specialty, the Court reinforced its prohibition on attorneys advertising the quality of their services.¹⁸⁴ The

¹⁷⁷ *Id.* at 674.

¹⁷⁸ *Id.* at 676.

¹⁷⁹ *Id.*

¹⁸⁰ *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2292 (1990).

¹⁸¹ *Id.* at 2290.

¹⁸² *Id.*

¹⁸³ *Id.* at 2290 n.13. Just as in *Zauderer*, Justice O'Connor argued strongly that states' decisions to withhold information should be accorded more deference because consumers lack sophistication concerning legal matters. *Id.* at 2297-301 (O'Connor, J., joined by Rehnquist, C.J. and Scalia, J., dissenting).

¹⁸⁴ *Id.* at 2288.

Court even went so far as to attempt to distinguish "statements of opinion or quality and statements of objective facts that may support an inference of quality."¹⁸⁵ In focusing on semantic differences in legal standards to analyze states' regulation of lawyers' advertisements, the Court seems to have forgotten what the consumer deserves to know.

B. State Bars' Reluctance to Disclose Information

A second reason why consumers cannot get what they want is that state bar associations have been reluctant to disclose information about the profession. Although they proffer the excuse that attorneys' unique status should exclude them from having to disclose information, a more likely motive is their desire to maintain autonomy from state and federal regulations governing commerce.

1. States' Reluctance to Allow Attorney Advertising

Despite *Bates*' encouragement of states to formulate their own rules to regulate attorney advertising, bar associations have been slow to respond¹⁸⁶ and have been reluctant to incorporate public needs into their policies. Prior to the Supreme Court's decision in *Bates*, the Department of Justice found it necessary to file a lawsuit against the ABA for antitrust violations¹⁸⁷ in prohibiting lawyer advertising.¹⁸⁸ The Department dropped its suit only after the ABA drafted Proposals A and B as models for states to follow.¹⁸⁹ The members of the ABA Task Force on Lawyer Advertising who drafted the proposals were lawyers, not consumers.¹⁹⁰

¹⁸⁵ *Id.* Even the Court could not agree about the status of Peel's statement. Although the plurality deemed it a factual statement leading to an inference of quality, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, argued that it was a statement of quality and thus should be prohibited. *Id.* at 2301 (O'Connor, J., joined by Rehnquist, C.J. and Scalia, J., dissenting).

¹⁸⁶ Makar, *supra* note 75, at 987.

¹⁸⁷ The Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), subjected lawyers, as well as other professionals, to federal antitrust laws. Until that point, lawyers' monopoly on price competition was immune to federal regulation under a learned profession's exemption. *Id.* at 791-92.

¹⁸⁸ ANDREWS, *supra* note 7, at 3.

¹⁸⁹ ANDREWS, *supra* note 7, at 6. For a discussion of the two models, see *supra* text accompanying notes 64-78.

¹⁹⁰ In its 1977 report to the Board of Governors, the Task Force asserted

Once states adopted either Proposal A or B, they interpreted the regulations narrowly, as demonstrated by the Supreme Court consistently finding that states' regulations violated attorneys' First Amendment rights.¹⁹¹ As of 1980, regulations in twenty-six states could have restricted the ad in *Bates*,¹⁹² as might the current ABA Model Rules of Professional Responsibility. For example, the Model Rules prohibit advertising that "compares the lawyer's services with other lawyers' services."¹⁹³ Bates's statement that his services were "very reasonable"¹⁹⁴ could subject him to sanctions under the Model Rules by comparing the reasonableness of his rates with those of other lawyers.¹⁹⁵

States have used consistent excuses to restrict the flow of attorney information to consumers, as evidenced by their defenses to relaxing restrictions on attorney advertising in Supreme Court cases. Many of their excuses are based on the assumption that the unique qualities of the profession elevate lawyers above other commercial practices. State bars have claimed that advertising tarnishes the image of lawyers and has an adverse effect on professionalism.¹⁹⁶ As a result, several states rule that lawyers' advertisements must be "dignified."¹⁹⁷ State bars have argued that attorney advertising is inherently misleading; attorney serv-

that it solicited the comments of consumers. See TASK FORCE ON LAWYER ADVERTISING, REPORT TO THE BOARD OF GOVERNORS (1977) in ANDREWS, *supra* note 7, at 91. However, apparently no consumers actually served on the Task Force. See *id.*

¹⁹¹ See *supra* text accompanying notes 139-55 (discussion of *R.M.J.*, *Zauderer*, and *Peel*).

¹⁹² ANDREWS, *supra* note 7, at 43. Although Andrews does not explain precisely how the ad would be prohibited, one apparent reason would be that many states continue to prohibit the use of illustrations in advertising. See, e.g., *infra* note 203 and accompanying text (indicating that Florida bans the use of illustrations in attorney advertising).

¹⁹³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1990).

¹⁹⁴ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1977).

¹⁹⁵ Although it would obviously be unwise for a state to prohibit precisely the same ad as the Court allowed in *Bates*, the fact that existing regulations could prohibit the very same ad indicates the reluctance of states to expand information available.

¹⁹⁶ See *Bates*, 433 U.S. at 368-72; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647-48 (1985); Andrews, *supra* note 1, at 1012; Hazard et al., *supra* note 32, at 1088.

¹⁹⁷ For examples of states requiring dignified ads, see Moss, *supra* note 44, at 642 n.233. See also Andrews, *supra* note 1, at 1010 n.199.

ices are too individualized to permit advertising.¹⁹⁸ They have asserted that advertising will stir up litigation, raise consumer costs, and lower the quality of lawyers' services.¹⁹⁹ They have complained that legal advertising regulations are too difficult to enforce.²⁰⁰ At times, they have not even provided specific reasons for their decisions to prohibit attorneys' advertisements.²⁰¹

Despite the Court's encouragement of state bars to disclose information, as well as the benefits to the profession disclosure provides,²⁰² states remain reluctant. Most recently, the Florida Supreme Court approved the state bar's proposal to ban illustrations, self-laudatory statements, and testimonials, and to require disclaimers in lawyers' advertisements.²⁰³ The next section suggests that states' motivation to prevent public access to attorney information runs deeper than the excuses they have provided.

2. Reasons for States' Reluctance

Although state bars may actually fear that advertising might tarnish the image of lawyers, more realistic reasons for withholding information are tied to the profession's need to maintain its autonomy through self-regulation. Only by maintaining autonomy can the controlling leaders of the bar stave off price competition and further federal regulation. Public ignorance of the practices of lawyers helps maintain that autonomy.

Authors Geoffrey Hazard, Russell Pearce, and Jeffrey Stempel

¹⁹⁸ See *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 110 S. Ct. 2281, 2286 (1990); *Zauderer*, 471 U.S. at 644; *Bates*, 433 U.S. at 372; *Andrews*, *supra* note 1, at 1012 n.207; *Hazard et al.*, *supra* note 32, at 1088.

¹⁹⁹ See *Zauderer*, 471 U.S. at 642-43; *Bates*, 433 U.S. at 375-78; *Hazard et al.*, *supra* note 32, at 1088, 1091 n.25; *Calvani et al.*, *supra* note 33, at 775 n.85.

²⁰⁰ See *Zauderer*, 471 U.S. at 644; *Bates*, 433 U.S. at 379.

²⁰¹ The Supreme Court criticized the lower court in *R.M.J.* for its silent record: "But the court did not explain the reasons for its decision, nor did it state whether it found appellant to have violated each of the charges lodged against him or only some of them." *In re R.M.J.*, 455 U.S. 191, 198 (1981).

²⁰² See *supra* text accompanying notes 22-41 (discussing benefits of disclosure).

²⁰³ See *Clay Hathorn, Florida Restricts Lawyer Ads*, A.B.A. J., March 1991, at 22. The Arizona Supreme Court is currently reviewing a petition by the Arizona State Bar calling for more severe restrictions on attorney's advertisements. Included in the petition are restraints on publication of fee information, comparisons of services, and publication of attorneys' specializations. See *Terrance C. Mead, Writing the Law of Lawyer Advertising*, 23 ARIZ. ST. L.J. 191, 192 (1991).

assert that the profession's resistance to advertising stems from its fear of price competition from other attorneys.²⁰⁴ Using a market analysis, the authors argue that the restrictions are a result of competition among groups of attorney practitioners. The bar has been dominated by attorneys who provide more individualized, rather than standardized, services.²⁰⁵ It is these individualized-service attorneys who benefit least from advertising, while the standardized-service attorneys, including public interest groups, benefit most.²⁰⁶ Thus, it is, in part, the political and economic domination of the bar by individualized-service attorneys²⁰⁷ that encourages restrictions on attorney information.²⁰⁸

The authors' theory is supported by the fact that it is lawyers, not consumers, who complain of advertising violations by other lawyers.²⁰⁹ It is also supported by the concerns of the Supreme Court in *Virginia Pharmacy* that states' restraints on price competition would support pharmacists' monopoly. Responding to the Board of Pharmacy's fear that advertising would allow consumers to choose the "low-cost, low-quality service and drive the 'professional' pharmacist out of business,"²¹⁰ the Court stated, "The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service."²¹¹ No doubt certain attorneys with individualized services would also enjoy insulation from price competition.

A common thread to the excuses of bar associations and the market analysis of Hazard, Pearce, and Stempel is the bar associations' concern that disclosure of certain information might undermine the economic and professional singular status of lawyers, resulting in the profession's loss of autonomy to public control.²¹² State bars may likely fear that disclosure might reveal certain flaws within the profession, as well as the fact that lawyers

²⁰⁴ See Hazard et al., *supra* note 32.

²⁰⁵ *Id.* at 1110-12.

²⁰⁶ *Id.*

²⁰⁷ *Id.*; see also Andrews, *supra* note 1, at 1003 ("It would seem that prohibiting lawyers from advertising hourly rates is designed less to protect the public than to protect nonadvertising lawyers from competition.").

²⁰⁸ Hazard et al., *supra* note 32, at 1112.

²⁰⁹ See *supra* note 47 and accompanying text.

²¹⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1975).

²¹¹ *Id.*

²¹² Indicative of the profession's desire to remain self-regulating is the

may not be unique. Once lawyers are no longer viewed as unique, the need for self-regulation evaporates, particularly where self-regulation has failed to address the flaws within the profession.²¹³

It is the appearance of self-regulation that allows attorneys to maintain their autonomy from external control.²¹⁴ Self-regulation is imperative for lawyers to continue their more covert practices, such as prohibiting smaller firms and legal clinics from competing,²¹⁵ lying to clients,²¹⁶ keeping malpractice sanctions from the public,²¹⁷ or refusing to blow the whistle on other lawyers.²¹⁸ Allowing the public greater access to information about what prices lawyers charge, how quickly they respond to phone calls,

ABA Commission on Professionalism's self-serving definition of "profession":

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgments.
2. That since clients cannot adequately evaluate the quality of the service, they must trust those they consult.
3. That the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good, and
4. That *the occupation is self-regulating*—that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust and transcend their own self-interest.

“. . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243, 261-62 (1986) (emphasis added), *quoted in Spaeth, supra* note 37, at 1212.

²¹³ A recent survey by the ABA indicates that 62.9% of lawyers polled believe that lawyers are not doing an adequate job of policing lawyer misconduct. A.B.A. J., May 1991, at 40.

²¹⁴ Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31, 33. In support of his statement, Powell quotes W.J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1951): “[T]he social control of the professional community over its members may be seen as a response to the threat of the larger lay society to control it.” *Id.* at 198.

²¹⁵ See *supra* notes 204-11 and accompanying text.

²¹⁶ For an excellent exposé of the various ways lawyers lie to clients, see Lerman, *supra* note 115.

²¹⁷ See *supra* text accompanying notes 107-15.

²¹⁸ See generally sources cited *supra* note 125 (discussing “whistle blowing” by the judiciary and the bar).

how often they settle cases, and how competent they are might expose flaws in the profession that lawyers would prefer the public not to see.²¹⁹ As the Supreme Court stated in *Virginia Pharmacy*, the free flow of commercial information is "indispensable to the formation of intelligent opinions as to how [a free enterprise] system ought to be regulated or altered."²²⁰

Unfortunately, the desire of state bars to maintain their autonomy overshadows the need of consumers, such as Jessie, to find a suitable attorney. Although the Supreme Court has expressed sympathy for consumers like Jessie, it, too, has been overly concerned with ensuring that attorneys maintain their unique status among professionals through regulatory control. Moreover, the tension created by the competing concerns of the state bars for autonomy and the Court for regulation can only exacerbate the legal profession's failure to address consumers' concerns.

The only way for the public to gain access to the type of information it needs to make informed decisions in choosing a lawyer is to restructure the way the legal profession views the problem. Unless lawyers abandon their need to control information about themselves—a need the Court expresses by promoting regulation and the state bars express by promoting autonomy—they will be unable to see the problem as consumers see it. Only if lawyers begin to approach the issue as addressing the needs of consumers instead of their own needs will the problem of finding a suitable attorney be alleviated.

IV. WHAT THE LEGAL PROFESSION SHOULD DO ABOUT IT

It has been over a decade since *Bates* was decided. During that time, the legal profession has resisted, rather than promoted, the

²¹⁹ Finding inoperative disciplinary committees in several jurisdictions, the ABA Special Committee on Evaluation of Disciplinary Enforcement warned the legal profession to rectify the situation, or "the public soon will insist on taking matters into its own hands." ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 2 (1970), *quoted in* Powell, *supra* note 214, at 40.

²²⁰ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1975); *see also In re Bates*, 555 P.2d 640, 648 (Ariz. 1976) (Holohan, J., dissenting) ("[T]he information of what lawyers charge . . . is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered."), *quoted in* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 358 (1977).

Supreme Court's philosophy that "'people will perceive their own best interests if only they are well enough informed.'"²²¹ As a result, consumers such as Jessie still lack the information they need to choose an attorney.

Although suggestions for providing consumers with more information have been proposed, they do not address the consumer's need from a consumer's view. Instead, the proposals focus on appropriate regulation to safeguard attorneys' rights and only exacerbate the problem of the foxes guarding the hen house. Suggestions have been made that advertisements be analyzed more broadly in terms of constitutional safeguards of attorneys' First Amendment rights, rather than the more narrow terms of detailed state regulation.²²² Requiring disclaimers in all attorney advertising has also been proposed and adopted in some states.²²³ Other commentators have suggested stricter regulations²²⁴ and more explicit guidelines²²⁵ for attorney advertisements, with state bars taking a more active role in ensuring compliance with established regulations.²²⁶ Increased discipline for attorneys who violate advertising regulations has also been advocated.²²⁷

Other commentators have lent more support to the consumers' point of view. A generalized market regulation of lawyer advertis-

²²¹ *Bates*, 433 U.S. at 365 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

²²² See Moss, *supra* note 44, at 625-26; Andrews, *supra* note 1, at 1011-13 (suggesting that we apply the constitutional test of time, place, and manner to methods of advertising, disregarding the actual content of the ad).

²²³ Andrews, *supra* note 1, at 997-1000; see also *Bates*, 433 U.S. at 383-84. But see James R. Devine, *Letting the Market Control Advertising by Lawyers: A Suggested Remedy for the Misled Client*, 31 BUFFALO L. REV. 351, 375 (1982) (arguing that disclaimers may add to deceptive nature of the ad).

²²⁴ E.g., John T. Ballantine, Jr., *After Shapero v. Kentucky Bar Association: Much Remains Unresolved About the Allowable Limits of Restrictions on Attorney Advertising*, 61 U. COLO. L. REV. 115, 143-47 (1990) (favoring increased regulation to prevent deception of consumers, based on illiteracy of consumers and "special characteristics" of the legal profession).

²²⁵ E.g., Dorothy V. Kibler, Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision*, 65 N.C. L. REV. 170, 171, 194 (criticizing the Supreme Court for its ad hoc decisions and suggesting establishment of general guidelines to promote wider array of attorney advertising).

²²⁶ E.g., Linda S. Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 GEO. J. LEGAL ETHICS 429, 500 (1990); Mead, *supra* note 203, at 230.

²²⁷ Devine, *supra* note 223, at 351-58.

ing pursuant to the FTC Act and consumer laws has been proposed.²²⁸ This regulation would remove regulation of attorney advertisements from the hands of state bar associations. Certain authors advocate putting a public representative on lawyer discipline committees,²²⁹ educating consumers on the practice of law,²³⁰ redrafting the Model Rules so that they are less self-serving and illustrate the client's concerns,²³¹ and making more information available to consumers regarding their rights.²³²

These various proposals are a helpful beginning, but they do not go far enough. Consumer education is certainly important, but it must be offered in terms of what consumers want to know,

²²⁸ Lerman, *supra* note 115, at 699 (arguing that consumer protection laws are more effective than disciplinary proceedings, simpler than malpractice actions, and will keep lawyers more honest); Makar, *supra* note 75, at 1009, 1011 (false, misleading, and deceptive standard under FTC and constitutional safeguards of time, place and manner restrictions provide adequate protection); Andrews, *supra* note 1, at 1006; Kibler, *supra* note 225, at 193 (if all else fails, consider abandoning self-regulation). *But see* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1197 (1972) (arguing that FTC standards must be raised in establishing guidelines for legal advertisements, due to public's lack of sophistication concerning legal services).

²²⁹ Powell, *supra* note 214, at 40 (explaining proposal by Chicago Council of Lawyers to remove control of discipline from bar groups and ensure public representation on disciplinary committees).

²³⁰ Darden et al, *supra* note 4, at 131 (citing BARLOW F. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES* 36 (1970)).

²³¹ Although the Model Rules of Professional Conduct and the Model Code of Professional Responsibility require lawyers to represent their clients competently, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1980), nowhere in the Rules or the Code is the profession required to inform clients of lawyers' level of competency. In fact, the Model Rules appear to undercut any such requirement to inform by allowing lawyers to represent clients "in emergencies," where outside consultation would be "impractical," despite the fact that the lawyer "does not have the skill ordinarily required." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. (1990). The rule also permits lawyers to represent clients in matters in which "the requisite level of competence can be achieved by reasonable preparation," *id.*, as does the Code, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-3 (1980), yet neither mention the profession's duty to inform clients as to any evidence of *lack* of competency in a particular field.

²³² William H. Cunningham & Isabella C.M. Cunningham, *Consumer Protection: More Information or More Regulation?*, J. MARKETING, Spring 1976, at 67.

not in terms of what the legal profession thinks they ought to know. Requiring attorney advertisements and conduct to be regulated by consumer protection laws rather than state bar regulations would alleviate some of the problems caused by a self-policing profession, but it is still too narrow in scope. The consumer protection laws are designed, used, and interpreted by attorneys, rather than consumers. Attorneys, not consumers, will continue to promote litigation over disclosure of information, only under a different set of regulations. Instead, the public should design the process of releasing information about attorneys, determining how legal advertising should be regulated, what information regarding the profession should be released, and how attorneys should be disciplined.

One suggestion for a publicly-designed plan would be to establish state or community consumer commissions made up of nonlawyers to review proposed advertisements by attorneys.²³³ Rather than employing the negative legal prohibition of "false and misleading," the commission could impose a more positive inquiry at this initial stage as to whether or not the ad was "helpful to consumers." Decisions could be based upon immediate cir-

²³³ Although this procedure could be open to a constitutional challenge under the theory that it is a prior restraint on attorney advertising, commercial advertising has been held to be exempt from the prohibition on prior restraint. See, e.g., *Donaldson v. Read Magazine*, 333 U.S. 178, 189-91 (1948); *FTC v. Standard Educ. Soc'y*, 302 U.S. 112 (1937); *E.F. Drew & Co. v. FTC*, 235 F.2d 735, 739-40 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957), *cited in* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 n.24. In granting authority to states to discern which advertisements are false, misleading, or deceptive, the Court has stated, "Attributes such as these, the greater objectivity and hardness of commercial speech, may make . . . inapplicable the prohibition against prior restraints." *Id.* at 772 n.24. In *Central Hudson*, the Court even suggested the previewing of advertising campaigns to ensure adherence to the state's conservation policy. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 571 n.13 (1980). It is arguable that if the Court is willing to forego the prohibition against prior restraints to facilitate states' burden to discern truthful from deceptive advertising or to ensure adherence to a conservation policy, it should also be willing to forego the prohibition so that consumers may discern which advertisements might be helpful to them. Moreover, the actual screening process proposed would have little effect in actually prohibiting advertisements, as most advertising would most likely be found to be helpful in some way. Where the process would be effective is in encouraging the legal profession to consider foremost consumers' needs, as well as to encourage the public's involvement in determining the information it receives.

cumstance, rather than legal precedent. The commission could set general guidelines, if it wished, about types of information helpful to consumers, including information regarding the quality of attorneys' services. This approach of initial screening by consumer commissions involves trusting consumers reading the ad to discern for themselves what type of information would be helpful in seeking an attorney and trusting attorneys not to deliberately deceive the public.²³⁴

Once an advertisement is published, it might still be subjected to a "false and misleading" standard, but such a standard should be set and adjudicated by consumers, not attorneys, and perhaps weighed against the helpfulness of the ad in dispensing information to consumers. The result would be to lower the standard from what a "reasonable attorney" might advertise to a more consumer-oriented standard of whether the public would think the ad is false or misleading.²³⁵ Such a standard would also subject lawyers to the financial sanctions of punitive damages, attorney fees, and court costs, which are not covered under many malpractice insurance policies.²³⁶ With more risk of financial liability, lawyers are less likely to promote themselves in a false or deceptive manner.²³⁷ Even more significantly, the use of a consumer standard by consumer commissions would shift the focus of courts and bars from how to regulate attorney conduct to whether or not consumers' needs have been met.

To reinforce such focus, perhaps only consumers, not attorneys, should be permitted standing to bring actions complaining of attorney information published. Once a consumer brings a complaint, the attorney's conduct should be judged by public juries, not by a judge or the practicing bar. All malpractice ver-

²³⁴ As the Court stated in *Bates*, "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977).

²³⁵ See Devine, *supra* note 223, at 370-71 (advocating use of consumer protection acts to regulate attorneys' conduct, rather than bar association disciplinary codes). Although I agree with Devine's overall proposal to shift to a more subjective standard of review, I disagree with his rationale, which is based on public naivete. *Id.* at 371. Instead, I believe the standard should change because it is more appropriate to public needs.

²³⁶ *Id.* at 377.

²³⁷ *Id.* at 377-78.

dicts and settlements should be published and records kept for easy access by consumers.

In conjunction with abandoning lawyer regulation of the content of information dispersed and lawyer-administered sanctions for misconduct, the legal profession must do its utmost to educate consumers on what they should expect from an attorney.²³⁸ The more we demystify the practice of law by informing consumers, the more able consumers will be to evaluate attorney services. Corporate clients have learned that they can "shop" for attorneys.²³⁹ It is time the general public became aware of this as well. But consumer education must be developed in terms of what the public wants to know.

To promote public knowledge of attorney practices, existing mechanisms could be enhanced. The legal profession, working with the public, should continue to promulgate literature and conduct seminars on the practice of law. Bar associations could distribute free directories of attorneys and their areas of practice. Lawyer certification programs could be improved, so that directories and referral services could be made more explicit as to attorneys' fields of expertise.²⁴⁰ The directories and referral lists could be updated more regularly, supplementing their current contents with lists of attorneys having disciplinary actions pending. Other states besides Florida and Oregon should abolish their "gag" rules. Referral services ought to work toward supplying all consumers with computerized match-ups of attorneys to fit their needs. The referral services should mandate consumer evaluations of attorneys referred and make them available to members of the public seeking attorney services. A hotline number with information available about attorneys' areas of practice and

²³⁸ See *Bates*, 433 U.S. at 375 ("If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.").

Some states have begun this process. For instance, the Beverly Hills Bar Association has initiated a Citizens Law School, which educates the public on the practice of law. See B.J. Palermo, *L.A.'s Lay Law School*, CAL. LAW., April 1991, at 24. The State Bar of California also publishes a series of Consumer Rights pamphlets, one of which is entitled *How Can I Find and Hire the Right Lawyer?*.

²³⁹ Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 54 (1988).

²⁴⁰ Thomas F. Gibbons, *The Right to Specialize*, A.B.A. J., May 1990, at 57, 59.

malpractice or disciplinary actions pending should be made available to all consumers looking for lawyers. Finally, consumers themselves should decide what other types of information, such as years of practice in a specific field, they would like to have printed in directories or made available by telephone.

CONCLUSION

A critical factor in all the suggestions above is precisely that they are only suggestions, by someone who readily admits to holding a narrow legal perspective. Better yet, the suggestions and ultimate decisions should come from consumers dictating what they want and how the legal profession could reasonably meet their needs. For this to happen, attorneys must begin to look upon the practice of law as serving the client, not the legal profession. This entails reconsidering from a client's perspective the rules lawyers have established to govern their own procedures. The legal profession must encourage, rather than quell, consumer confrontation with its practices. Only if lawyers relinquish to the public the task of creating and interpreting standards by which to judge their own conduct can they re-establish their dignity as a profession.