

May 31, 1993, sec. 2, col.1.

21. See Mary Ann Glendon, *A Nation Under Lawyers*, 1994, at 22. In 1991, a survey of 105 of the largest law firms reported that 93.4 percent had dismissed lawyers in the preceding 18 months and 86 percent expected to do so in the following 18 months. In 1993, almost half of the top 250 firms had "downsized."

22. Image-building television campaigns are not limited to large or corporate-oriented law firms. For example, the Texas personal injury firm of Waltman & Associates has run a series of commercials promoting public service causes on themes such as homelessness, drug abuse and rights of the handicapped, under the slogan "Let's Get Involved."

23. *Supra* note 5.16.

24. *Id.* at 48.

25. *Id.* at 56.

26. *Id.* at 80.

27. Jim Rossi and Mollie Weighner, *An Empirical Examination of the Iowa Bar's Approach to Regulating Lawyer Advertising*, 77 Iowa L. Rev. 179, 248 (1991).

28. The Commission is conducting a mailed survey of lawyers to assess the frequency and effectiveness of a wide variety of client development techniques. The results of this survey are expected in Spring, 1995. These preliminary indications are not based on a statistical analysis, but an informal examination of the survey returns.

## Chapter VI.

### THE ROLE OF LAWYER ADVERTISING WITHIN THE GOALS OF THE ABA

The Mission of the American Bar Association is "to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." This statement was adopted by the Association in 1991, along with 11 goals designed to carry out the mission.<sup>1</sup>

The second of the 11 goals states, "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."<sup>2</sup> The tenth goal is, "To preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service."<sup>3</sup> Lawyer advertising, solicitation and marketing may lie at the intersection of conflict between these two goals.

On the one hand, if the communication of legal services promotes improved access to legal representation, especially among those who by virtue of economic or social condition have been denied or whose access has been limited, then the activity is consistent with the Association's goals and deserves support. On the other hand, if the communication of legal services interferes with the preservation and enhancement of the ideals of the profession as a common calling dedicated to public service, to that extent the activity is inconsistent with the Association's goals and should be opposed. Consequently, it is extremely important to consider the impact of advertising, solicitation and marketing on public image and access to legal services.

#### A. THE PUBLIC IMAGE OF LAWYERS

The legal community has a strong perception that the public's image of the profession has declined in recent years. Like measurements involving the usage of lawyer advertising, research addressing public perceptions of the legal profession, law firms and lawyers is difficult to compare because there is no standardization from one survey to the next in the questions asked. One questionnaire may, for

example, ask the level of confidence the individual has in law firms, while another may ask the extent to which people want their children to become members of certain occupations. The variations are nearly as numerous as the surveys.

Gallup conducted a poll asking a random selection of people to rate various professions and occupations according to this standard: "How would you rate honesty and ethical standards of people in these different fields, very high, high, average, low or very low?" The survey lists 25 professions. The poll was conducted in 1976, 1977, 1981, 1983, 1985, 1988, 1991, 1992 and 1993.<sup>4</sup> The results for lawyers are as follows:

TABLE III(A)

Percentage of Public Rating Honesty and Ethical Standards of Lawyers, by Year

	very high	high	average	low	very low	no opinion
1976	6	19	48	18	8	1
1977	5	21	44	18	8	4
1981	4	21	41	19	8	7
1983	5	19	43	18	9	6
1985	6	21	40	21	9	3
1988	3	15	45	23	10	4
1990	4	18	43	22	9	4
1991	4	18	43	20	10	5
1992	3	15	43	25	11	3
1993	3	13	41	28	13	2

The differences from year to year can be better visualized by a summated value for each year, excluding those with no opinion. Assigning values of "5" for each response of "very high" and "1" for each response of "very low," a single number can be calculated for each year. The higher the number, the more positive the attitude. The sums are as follows:

TABLE III(B)  
Summated Values by Year

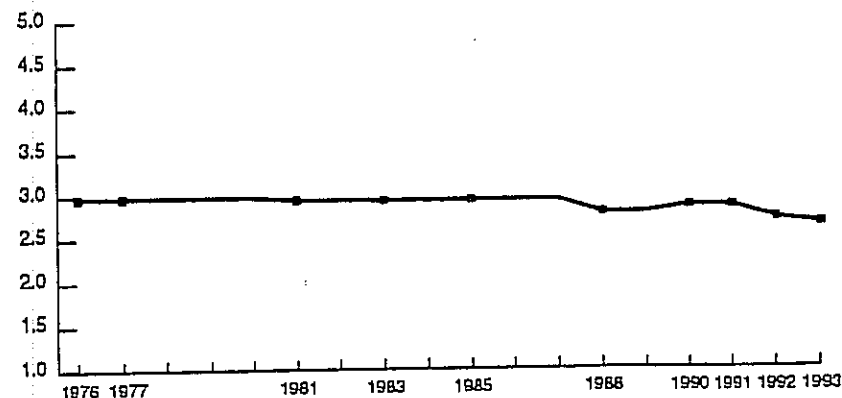
1976	2.97
1977	2.97
1981	2.94
1983	2.93
1985	2.93
1988	2.77
1990	2.85
1991	2.85
1992	2.7
1993	2.64

These values illustrate an overall decline for the past ten years, although not a steady one. The greatest change took place most recently, between 1991 and 1993, when the public opinion dropped almost twice as much as it did between 1976 and 1991.

Other research concurs with Gallup. The Yellow Pages Publishers Association commissioned Wiese Research Associates, Inc. to conduct a public perception study in April 1994. The survey of 400 people found that attitudes toward lawyers were fairly neutral, averaging 5.2 on a 10-point scale. The ratings were, however, far below those of physicians, dentists and CPAs, who rated 7.6, 7.5 and 7.0, respectively. Lawyers rated slightly

GRAPH 6

Summated Values of The Public's Image of Lawyers



lower than insurance agents, who rated 5.6. The respondents were then asked how their attitudes had changed over the past five years. Thirty-four percent reported their attitudes toward lawyers had declined, more than half of these indicating they had declined a lot. Only eight percent reported their attitudes toward lawyers had improved over the past five years. The decline of attitudes toward lawyers was far beyond those of the other professions measured.<sup>5</sup>

It is difficult, at best, to draw conclusions about the role of lawyer advertising as an influencing factor in the public's opinion about lawyers and the legal profession. The Gallup Polls on occupations demonstrate a decline in public opinion since the *Bates* decision. That decline was very subtle during the first decade of lawyer advertising, however. It then seemed jagged and, in the past two years, dramatic. While lawyer advertising has increased over the same time period, the public opinion polls do not provide data from which a correlation can be established.

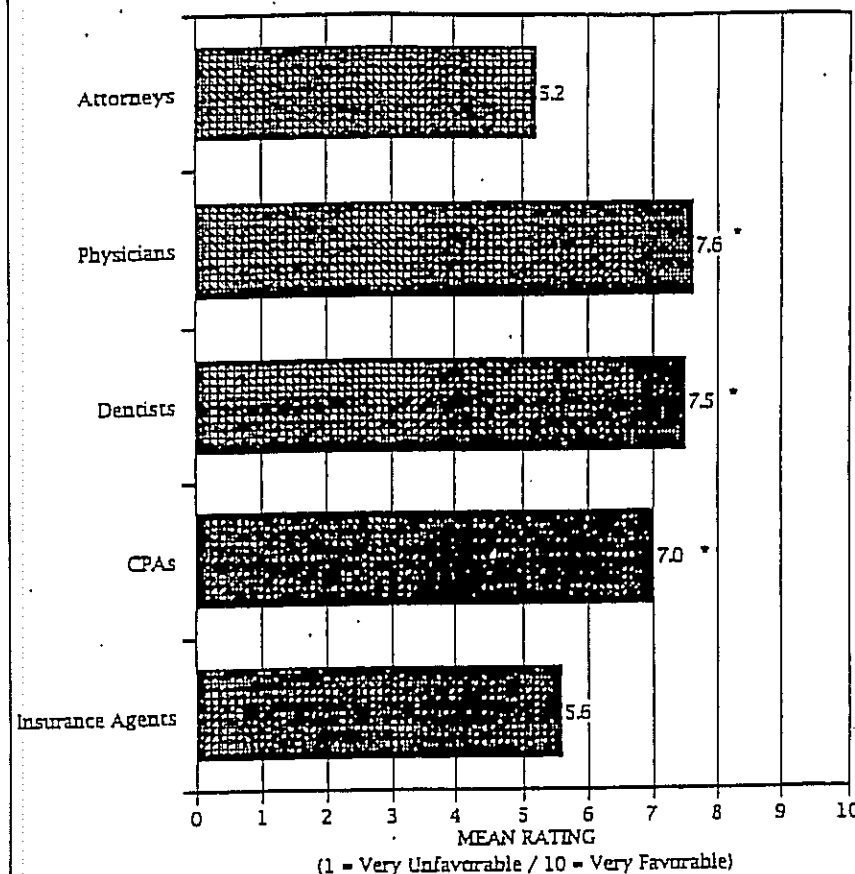
In fact, those who are most likely to have received information about lawyers through advertising have a relatively high impression of the legal profession. For example, the 1993 ABA-sponsored Peter Hart survey reportedly found that those who had the most favorable opinions of lawyers had the following characteristics: Black or Hispanic, women, annual family income of less than \$20,000, lower-class or lower-middle class, between 18 and 29 years old and using television as a primary source of information about lawyers. Alternatively, this study reportedly found that those most critical of lawyers had the following characteristics: white-collar workers, upper-middle class, college graduates, annual family income over \$50,000, men, between 45 and 59 years old who received most of their information about lawyers from newspapers.<sup>6</sup>

Some who presented material to the Commission during the hearing process expressed the point of view that lawyer advertising was a critical contributing cause in the decline of the profession's image in the public's eyes. Others indicated advertising was a scapegoat used by the bar to shift blame away from real problems and the shortcomings of lawyers and the legal system. Most who appeared before the Commission characterized lawyer advertising as a factor of minor influence, competing with an enormous range of fictional influences, actual developments and personal contacts that contribute far more to shaping public perceptions.

A variety of fictionalized media unquestionably contributes to the public's image. Television shows such as *Law and Order*, *Perry Mason*, *L.A. Law* and even *Night Court* and daytime dramas have left lasting

Graph 7

CONSUMERS' GENERAL ATTITUDES TOWARD  
ATTORNEYS VERSUS OTHER PROFESSIONS  
(Base: Those Able To Rate)

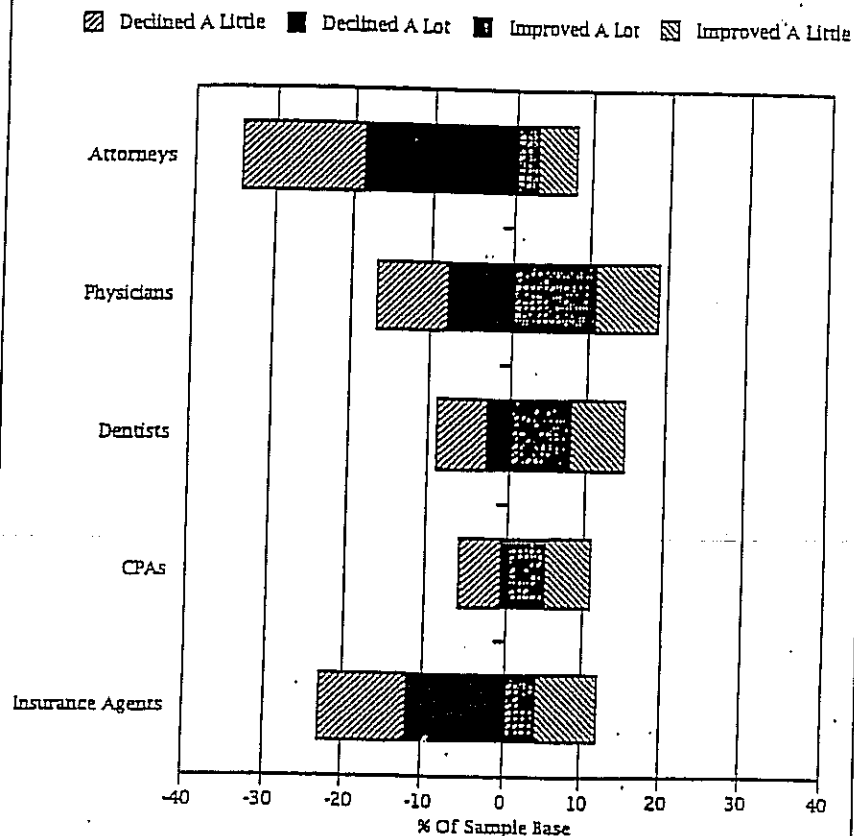


\*Significant difference versus attorneys ( $p < .01$ ).  
(Reference: Q1A-E)

WUEB RESEARCH ASSOCIATES, INC.  
Attorney Advertising/Perceptions Study - 4/94

Graph 8

CHANGE IN CONSUMER ATTITUDE TOWARD  
ATTORNEYS VERSUS OTHER PROFESSIONS  
OVER PAST 5 YEARS  
(Base: Total Sample / N=400)



(Reference: Q2A-E)

WEST RESEARCH ASSOCIATES, INC.  
Attorney Advertising/Perceptions Study • 4/94

impressions on millions of viewers, regardless of the reality of the representations. Movies, ranging from television productions to Academy Award-winning films, have focused on lawyers and the justice system for decades. To a lesser but not unsubstantial extent, novels by authors such as John Grisham and Scott Turow who center their stories around the legal system also exert an influence. The public clearly has an appetite for the drama that unfolds within the institutions of the law. Many suggest that these fictional influences overshadow any influence that may result from lawyer advertising.<sup>7</sup>

A 1993 *National Law Journal* poll illustrates the impact of fiction on public opinions of lawyers. People were asked who the lawyer was they admired the most. Over half could not think of anyone or reported they did not admire any lawyers. The next response was that of a family member, friend or personal lawyer. Of those who selected a famous person, F. Lee Bailey was cited most frequently, followed by Perry Mason. Ranked sixth, between the Attorney General of the United States and the First Lady was Matlock.<sup>8</sup>

In addition to fictionalized media, people are influenced by actual developments involving lawyers, judges and others within the legal system. When people in public opinion surveys are asked what lawyers can do about their negative image, the recurring themes involve honesty, care and value. Questions of dishonesty and greed have shaped opinions about lawyers for generations, but most sharply since the Watergate scandal between 1972 and 1974.<sup>9</sup>

Respondents in the 1993 ABA-sponsored Hart survey reportedly indicated the most negative impressions about lawyers were that they are too expensive, greedy or money-hungry and not honest: crooks.<sup>10</sup> Respondents to a 1993 public opinion survey sponsored by the *National Law Journal* replied to an open-ended question asking what lawyers can do to improve their image. The most frequent responses, with 26 percent each, advised lawyers to be more honest or more ethical and to charge less or be less greedy. The third most frequent suggestion was to provide better service.<sup>11</sup> The Wiese research had similar findings.<sup>12</sup> Those who indicated their opinions of lawyers had declined in the past five years were asked why. In an open-ended question, nearly a fifth of those responding said either that lawyers are just in it for the money or that they are too expensive. The next most frequent response was that they don't trust lawyers or that lawyers are dishonest.<sup>13</sup>

Fifteen years ago headlines included stories of a Michigan prosecutor who embezzled more than \$100,000 from an informant's fund, a personal injury lawyer who withheld \$1.5 million resulting from 85 civil cases, the disbarment of a former bar leader for conflict-of-interest

violations and perjury in Senate confirmation hearings by a presidential cabinet nominee.<sup>14</sup> Today, accounts of judicial and legal corruption are reported in metropolitan newspapers virtually daily. Stories include judicial fixes<sup>15</sup>, complicity in embezzlement and fraud,<sup>16</sup> favors of sex and drugs permitted by the U.S. Attorney's office for incarcerated witnesses to gang activities<sup>17</sup> and perjury in Senate hearings.<sup>18</sup>

Occasionally, lawyer advertising is mentioned by journalists as being among the things wrong with the legal profession. Less frequently, advertising and solicitation are the primary subject matter of such pieces, more often than not as satire.<sup>19</sup> Comparatively, however, both the activities of and coverage about lawyer advertising, solicitation and law firm marketing amount to little more than a footnote when analyzed next to the sensationalized coverage of corruption in the legal system, both in print and in the electronic media.

The cost of legal services and corollary public perception of greed of lawyers are no doubt matters of increased significance. During the time of the Commission's hearings, the media reported that the costs of legal fees for the representation of a member of the United States House of Representatives charged with criminal conduct would be over \$1.1 million.<sup>20</sup> The fees of criminal defense counsel in a sensational celebrity murder case were reported to be \$650 per hour for a single lawyer.<sup>21</sup> And, the President of the United States established a legal defense fund to defray the cost of his own representation, because, reportedly, he could not otherwise afford it.<sup>22</sup>

Research consistently shows that about two-thirds of adults in America have used the services of a lawyer at least once.<sup>23</sup> Many of the attitudes about lawyers, the legal profession and the justice system derive from these contacts. Some suggest this is the dominant influence of the public perception of lawyers. The research generally suggests people are satisfied with their own lawyer. However, in our system of advocacy some parties win and others lose and perhaps there are more of the latter. The elements inherent in an advocacy system unavoidably contribute to an unpleasant experience. Discovery is inherently invasive; litigation is inherently combative; and the judicial process frequently leaves participants with unrecovered expenses. Additionally, the legal system is one of blame-shifting, where a bad outcome may often be the result of the actions or decisions of someone within the system, frequently seen as another lawyer or a judge.

Perhaps to a lesser extent, but not insignificantly, the public's opinion of lawyers is shaped by some lawyers' roles in unpopular causes. In the defense of the Constitution and preservation of rights for all people, lawyers represent individuals with causes that do not enjoy

wide public support. Within that representation, they are trained to make day appear as night to the casually observing members of the public. This role of some lawyers will no doubt always serve to cap the level of respect the legal profession may enjoy. Like fictional depictions of lawyers, these perceptions may be one of the forces shaping public opinion.

## B. ATTITUDES TOWARD LAWYER ADVERTISING

A high percentage of lawyers attribute the declining image of the profession to lawyer advertising. A 1992 fax poll of readers of *California Lawyer* magazine responded to the question "How does attorney advertising contribute to the public's perception of lawyers?" Six percent replied favorably; eight percent indicated not at all and 86 percent said negatively.<sup>24</sup> Although the poll was one of self-selection and therefore not a scientific sample, others reported very similar results. A 1992 survey of Pennsylvania lawyers asked "What effect do you think lawyer advertising has had on the image of the legal profession?" Two percent replied positively; 76 percent negatively; six percent responded no effect and 15 percent were not sure.<sup>25</sup> The 1993 ABA Journal-sponsored Gallup Poll found that three percent of ABA members reported advertising has a positive impact on the legal profession, eight percent reported it has no effect and 87 percent indicated a negative effect.<sup>26</sup>

Ironically, in each of these surveys, a substantial portion of the respondents reported that they either advertised or had a marketing plan. Forty-five percent of the California lawyers had a marketing program, with an additional 23 percent working on one.<sup>27</sup> Forty-six percent of the Pennsylvania lawyers reported advertising,<sup>28</sup> and 61 percent of the ABA members in the Gallup Poll were doing at least one type of advertising.<sup>29</sup>

While evidence shows members of the legal community have a strong point of view on the public's opinion about lawyer advertising, it is not necessarily consistent with public views as assessed in various research.<sup>30</sup>

When the public has had the opportunity to complain about lawyer advertising in open-ended, quantified research, they have not done so. In the 1993 *National Law Journal* survey, of the 553 people who responded to the open-ended question of what lawyers can do to improve their image, four percent responded that the solution was to stop advertising.<sup>31</sup> In the 1994 Wiese research, of those who reported that their perception of lawyers had declined over the past five years, two percent attributed that decline to advertising.<sup>32</sup>

Research that probes public attitudes toward lawyer advertising is most critical when it is sponsored by states pursuant to a movement to adopt more stringent advertising ethical rules or states that sponsored the research preliminary to a court challenge. For example, a 1983 study sponsored by the Iowa State Bar Association measured public images of lawyers on a variety of characteristics before and after they were shown television commercials for legal services. The study was undertaken at the same time the Iowa Bar was litigating the constitutionality of its rules governing the communication of legal services.

The research was conducted by an organization the Iowa State Bar had previously employed to demonstrate the need for merit selection of the judiciary.<sup>33</sup> The advertising study reported dramatic shifts in public

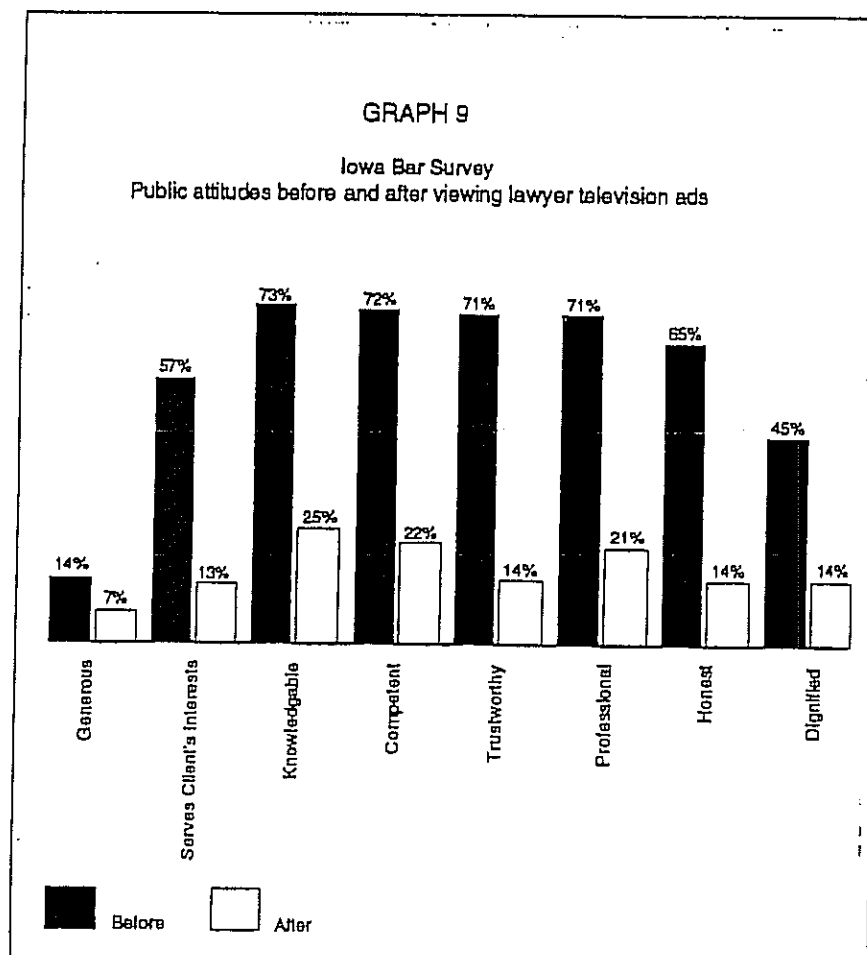
attitudes immediately after seeing a set of television commercials for legal services. For example, 71 percent of the respondents found lawyers to be trustworthy before the commercials; this dropped to 14 percent after they viewed the ads. Seventy-one percent thought of lawyers as professionals before seeing the commercials, and 21 percent after. Sixty-five percent found lawyers to be honest before and 14 percent after, and 45 percent found them to be dignified before and 14 percent after.<sup>34</sup>

As it is reported, the study is subject to criticism because 1) there is no indication of whether the data is statistically significant; 2) the report does not indicate the extent to which respondents had viewed ads or commercials for legal services before the research; and 3) the contents of the commercials viewed by the respondents for the study have not been made available.

Other research contradicting that sponsored by the Iowa State Bar Association was carried out in 1989 and reported in the *Iowa Law Review*.<sup>35</sup> Among the many aspects measured in this Contemporary Studies Project was electronic message testing (EMT). This provided pre-test and post-test assessments as people watched television commercials. Table IV suggests that the changes are far less dramatic than those reported by the Iowa Bar.<sup>36</sup>

Prior to promulgating a set of rules imposing wide-ranging restrictions on advertising and solicitation in Florida, that state's bar employed the same consultant used by the Iowa State Bar Association in its research to assess public attitudes toward direct mail solicitation in Florida. Although the data suggested a variety of interpretations, it was advanced as a demonstration of negative public attitudes toward direct mail from lawyers to individuals. For example, the "key findings" of the report begin "Overall, the results of both the general population and direct mail recipients surveys point in a clearly negative direction for direct mail advertising and solicitation by attorneys." Of those in the general population survey who responded for or against lawyer advertising by mail, however, 48 percent were for and 52 percent were against. Sixty three percent of young adults aged 18 to 24, presumably those most likely not to otherwise know how to find a lawyer, were in favor of direct mail.

The report's detailed findings indicated that "Florida adults in both surveys seem to be highly positive about the process used most frequently by the public to find and retain a lawyer." (That being some type of personal referral.) Yet more than one in every five of the respondents in the general survey who had never used a lawyer reported that it was hard to get enough information about choosing a



lawyer.<sup>37</sup>

The Nevada Bar took an approach similar to Florida. Prior to the promulgation of rules like those adopted earlier in Florida, the Bar sponsored a public attitudes survey and interpreted the results to support the rule changes.<sup>38</sup>

TABLE IV

QUESTION	Pre-test	Post-test
Is it proper for law firms and lawyers to advertise	76% (proper)	70%
Advertising would help consumers make more intelligent choices between law firms and attorneys	59% (agree)	54%
I would use the services, if needed, of a lawyer who advertises	67% (agree)	74%
Advertising of fees would lower the public's image of law firms and attorneys	28% (agree)	37%
Advertising by law firms and attorneys would tend to lower the dignity of the profession	33% (agree)	34%
Advertising of services would lower the public's image of law firms and attorneys	16% (agree)	20%
Advertising by law firms and attorneys would tend to lower the credibility of their profession	23% (agree)	35%
How appropriate is it for law firms and attorneys to advertise their services on television	49% (O.K.)	43%
How appropriate is it for law firms and attorneys to advertise their services on the radio	49% (O.K.)	64%
How appropriate is it for law firms and attorneys to advertise their services in the newspaper	76% (O.K.)	68%
How appropriate is it for law firms and attorneys to advertise their services by mailing brochures to your home or office	16% (O.K.)	10%

Measures of public attitude that do not tend to be affiliated with regulatory agendas seem to reach different conclusions. These studies suggest that the public is considerably more accepting of lawyer advertising in general than one might expect but that attitudes narrow as the media becomes more invasive. For example, Prof. Roy Sobleson sampled attitudes among consumers in Georgia in 1988, and the results are as summarized in Table V.<sup>39</sup>

TABLE V  
1988 Georgia consumer attitudes toward  
lawyer advertising, by medium

MEDIUM	Percentage Favorable	Percentage Unfavorable
Yellow Pages	79%	13%
Newspapers	57%	30%
Pamphlets	54%	33%
Television	44%	48%
Radio	41%	49%
Promotional Products	30%	62%
Billboards	25%	63%

Similarly, the Nevada Bar-sponsored study looked at consumer impressions as positive, negative and useful. As Table VI shows, the more invasive types of media tended to have higher negative ratings but also showed appreciable levels of usefulness. This was particularly so for television, where nearly a third of those surveyed found it to be "useful" (compared to just more than a third who indicated it was negative).

TABLE VI  
1990 Nevada consumer attitudes toward  
lawyer advertising, by media

MEDIUM	Positive Effect Percentage	Negative Effect Percentage	Useful Percentage
Telephone Directory	11.3	2.9	59.4
Television	16.5	36.7	31.8
Radio	6.5	14.8	23.6
Newspapers	7.2	5.4	19.3
Billboards	3.6	19.6	12.8
Magazines	5.3	7.9	20.9
Direct Mail	8.7	13	24.1

Research also illustrates there is a gulf between the opinions held by lawyers and those by the public on issues involving lawyer advertising. Research conducted by faculty at the Cleveland State University Marketing Department measured attitude differences between consumers and lawyers according to 1) specific types of media, such as television, Yellow Pages and sponsorship of community events; 2) functions of advertisements, ranging from educating consumers about rights to improving professional image and creating unnecessary law suits; 3) information desired for television advertisements, such as services provided, location, hours and price; and 4) perceptions of quality of the legal services in various media.<sup>40</sup>

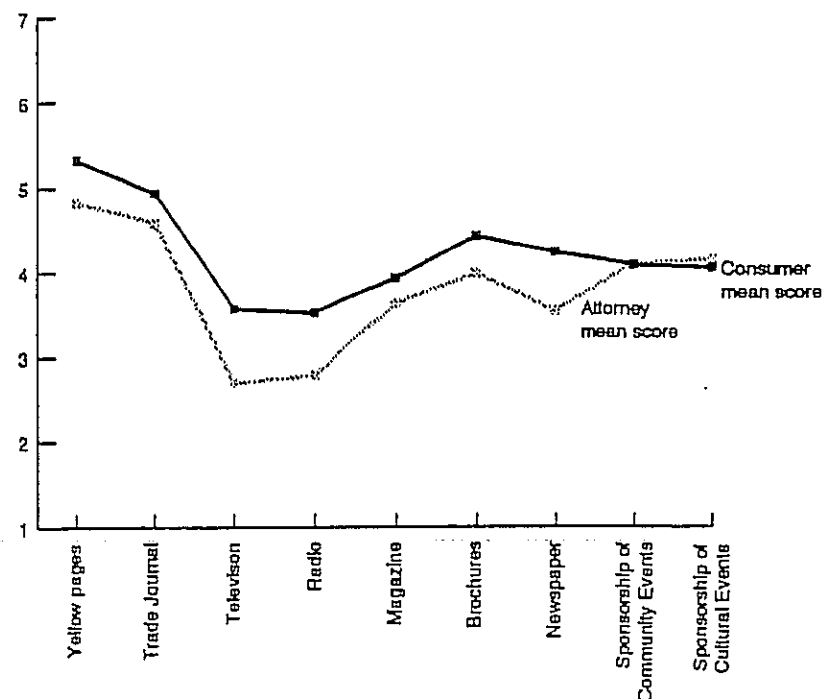
The following graphs illustrate the results of this research. In virtually every response, consumers are significantly more positive about lawyer advertising than lawyers.

The researchers report their findings are consistent with previous empirical studies, concluding that attorney attitudes toward lawyer advertising range from negative to neutral, while consumer attitudes are described as neutral to positive. The researchers indicate that the less favorable responses by lawyers are normative, passed down through firm cultures, and that they may stem from the long-time ethical ban on the activity, whereas consumers want information and consider advertising a method of becoming better educated. They suggest that even if

GRAPH 10

## Advertising Media

Respondents indicated their approval rating for specific media from 1=strongly disapprove to 7=strongly approve



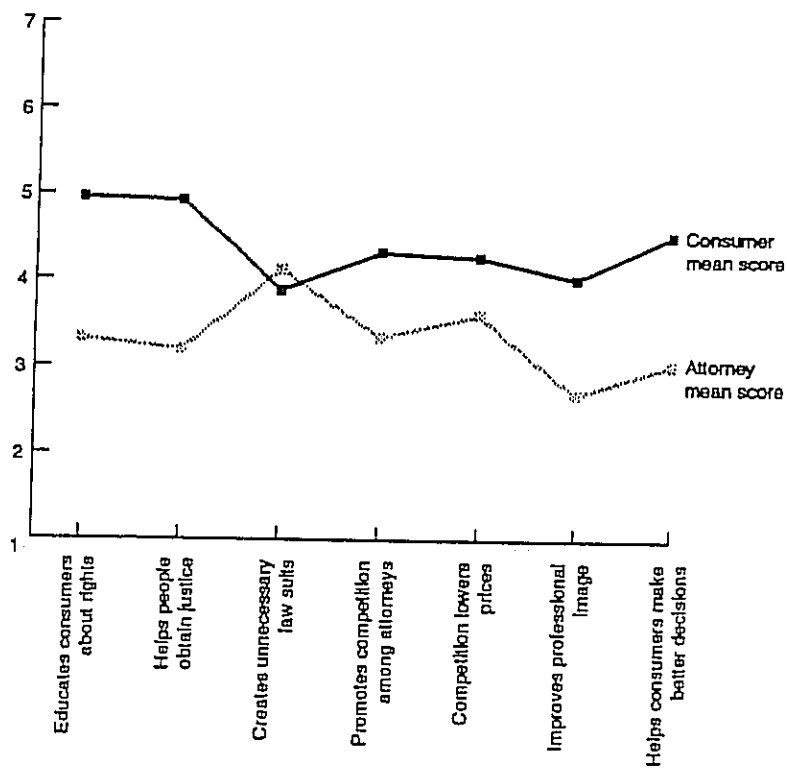
the perception of a specific lawyer based on his or her ad is negative, it is still helpful to consumers because they are better able to make decisions about who to select for legal services.<sup>41</sup>



GRAPH 11

## Functions of Legal Ads

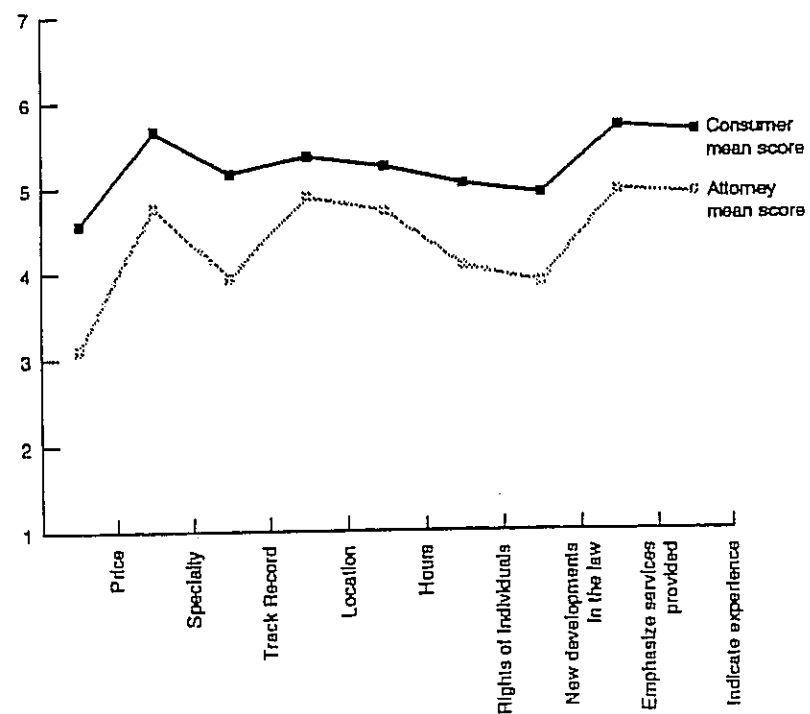
Respondents indicated their agreement with the stated functions of legal advertising from 1=strongly disagree to 7=strongly agree



GRAPH 12

## TV Ad Information

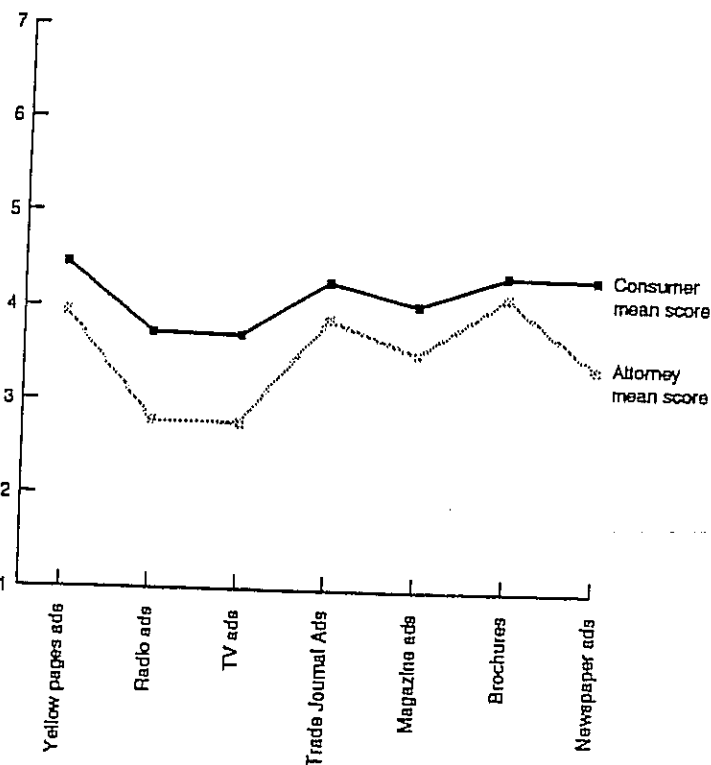
Respondents indicated their agreement that the stated information should be included in television ads from 1=strongly disagree to 7=strongly agree



GRAPH 13

## Perceptions of Quality of Legal Service Advertising

Respondents indicated the perceived quality of legal services advertising they have seen in the following media from 1=low quality to 7=high quality



The ABA Commission on Advertising itself sponsored and conducted empirical research measuring attitudes of the public and comparing them to those of lawyers. In 1990, the Commission issued its report on the *Survey on the Image of Lawyers in Advertising*. This study showed actual examples of print ads and television commercials for legal services to members of the public and to lawyers. It then measured their impressions on various concepts of dignity within the ads. The study reported these findings:

- Consumers are more accepting of lawyer advertising than are lawyers. In nine of ten actual ads and commercials, consumers gave higher dignity ratings than did lawyers.
- Consumers are less strict than lawyers in assessing dignity in lawyer advertising.
- Print advertising is not inherently more dignified than television advertising.<sup>42</sup>

In conjunction with the hearings, the Commission has conducted its own research to examine some of the issues brought up in this process. A fundamental concern has been the public images of lawyer advertising based on the content of the ads. As noted, the Iowa State Bar Association-sponsored research assessed public attitudes before and after they viewed television commercials. The University of Iowa Law School Contemporary Studies Project did similar pre-test, post-test assessments in 1991 with far different results. Neither study, however, attempted to measure the potential variations based on the different contents of the commercials. Therefore, the Commission conducted a mall intercept study to analyze 13 images of the public in response to three set of commercials for legal services.

The study surveyed 217 individuals divided into four groups. The first was a control group which saw three television commercials unrelated to legal services. The second group saw commercials for law firms that had high production values and were designed to stimulate positive images, even though they did not provide substantial information about the firms or their lawyers. The third group saw commercials of limited production value, but with high informational content. Each of the three commercials seen by this group featured a lawyer from the firm in an office setting. The fourth group saw commercials that had some element of sensationalism, dramatization or exaggeration.

The survey participants were asked to complete a questionnaire about their images of lawyers in general. They were then shown their respective set of three commercials. They were asked to complete a questionnaire on their personal demographics, followed by a questionnaire asking for responses to the same images as those on the first

questionnaire. For all but the control group, the participants were then given a questionnaire asking for their images of the lawyers in the law firms they had just seen advertised in the commercials.

When the survey respondents' images of lawyers were compared before and after they saw the commercials, the differences were rarely statistically significant. In other words, overall, consumers did not react differently to lawyers in general after they saw the commercials. Those who saw the "high-style" commercials found lawyers to be significantly more intelligent after they saw the commercials. Those who saw the "mid-style" commercials found lawyers in general to be significantly less honest after seeing those commercials. Those who saw the "low-style" commercials found lawyers to be significantly more intelligent and knowledgeable after watching those commercials.<sup>43</sup> Graphs 14 through 16 illustrate the limited changes in image before and after watching the commercials.

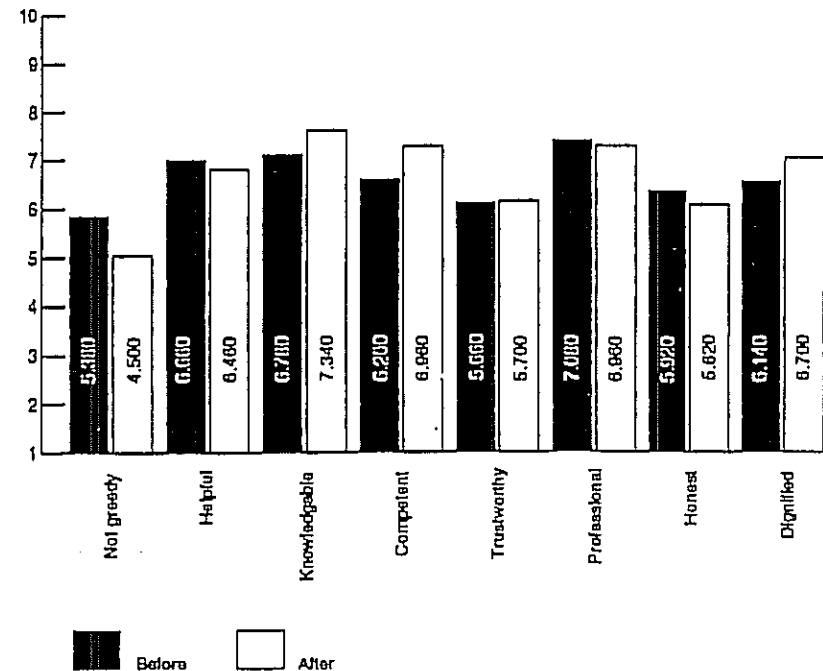
However, when the survey respondents who saw the high-style commercials were asked about the images of the lawyers who worked in those firms shown in the commercials, they reported significantly higher images than for lawyers overall. Graph 17 illustrates these changes. For some images, the respondents who saw the "low-style" commercials reported significantly lower results.<sup>44</sup> The responses were not significantly lower overall for this group. There were no significant changes in images of lawyers in general to the advertising lawyers for those who saw the "mid-style" commercials.

The main conclusions drawn from this research are:

- The content of television commercials for legal services positively affected consumers' images toward the lawyers of specific law firms that advertise, with significantly greater increases in images of firms that had higher quality commercials;
- The television commercials did not affect the consumers' images of lawyers in general, either positively or negatively; and
- Consumers were able to and did differentiate between lawyers in general and those lawyers whose advertisements they had just seen.<sup>45</sup>

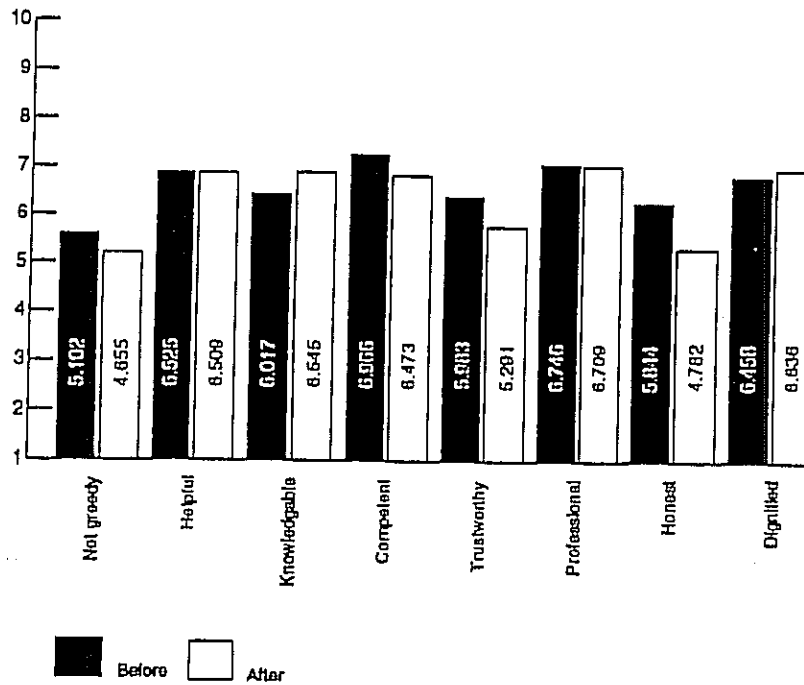
GRAPH 14

ABA Commission on Advertising Survey  
Mean scores of public images of lawyers  
before and after viewing High-Style television commercials



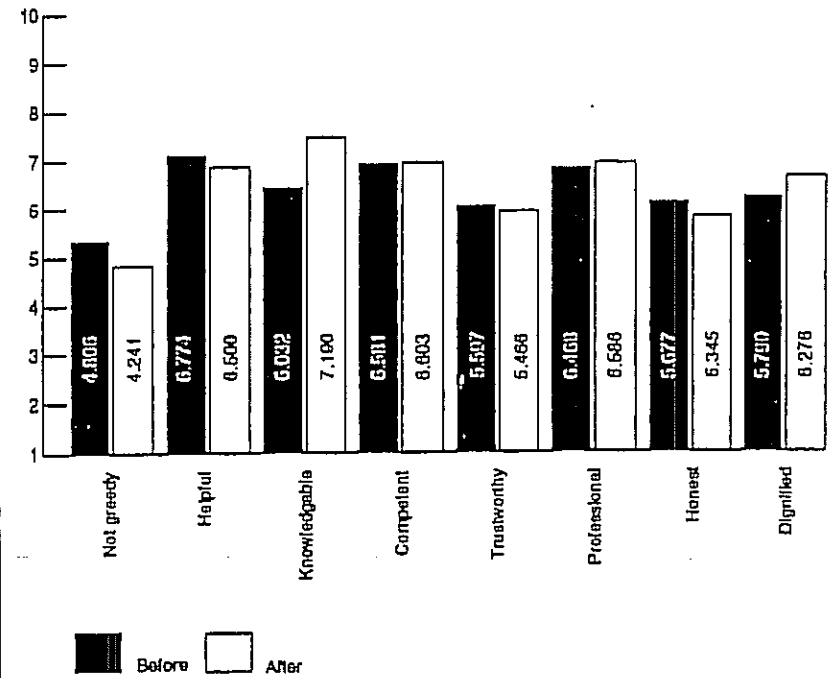
GRAPH 15

ABA Commission on Advertising Survey  
Mean scores of public images of lawyers  
before and after viewing Mid-Style television commercials



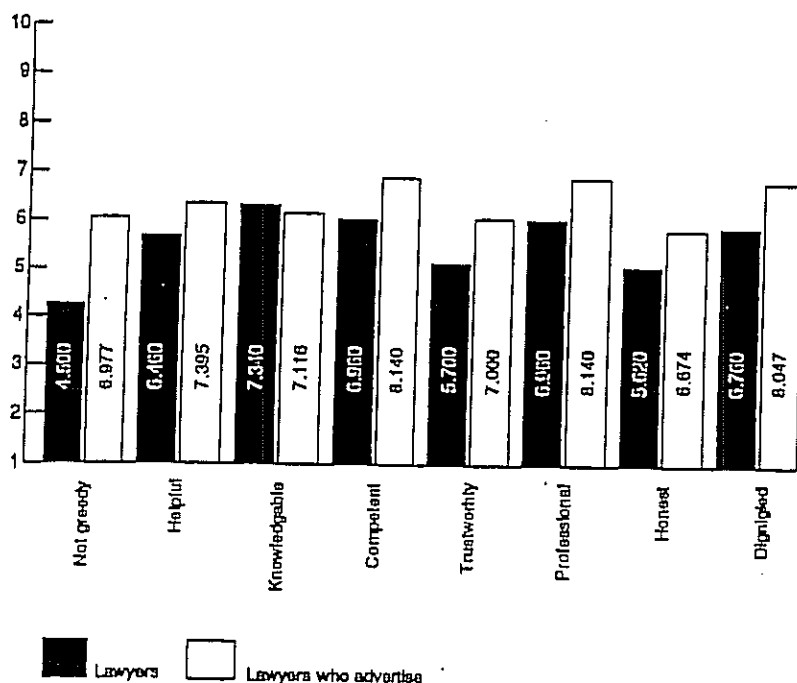
GRAPH 16

ABA Commission on Advertising Survey  
Mean scores of public images of lawyers  
before and after viewing Low-Style television commercials



GRAPH 17

ABA Commission on Advertising Survey  
Mean scores of public images of lawyers and lawyers who advertise  
after viewing High-Style television commercials



Some research has been done and much discussion has occurred about an issue that has been labeled "jury pollution." The concept is that public exposure to lawyer advertising influences decision-making when serving on a jury.

In the study sponsored by the Florida Bar measuring attitudes and opinions about direct mail, a sample of those who had received direct mail solicitations were asked if direct mail solicitation would have any affect if they served on a jury. Eleven percent of those who responded to the question indicated the direct mail would have an affect. There did not appear to be subsequent questions about the extent and nature of that affect. Hence, it is unknown whether the affect would have been a bias against or in favor of a lawyer, a party or the judicial system. It is also unknown whether the bias would affect the decision-making even if the court admonished the juror against it.<sup>45</sup>

The Nevada Bar-sponsored study went into the issue in slightly more detail. It first asked respondents if they had served on a jury. Of the 815 people questioned, 217 replied that they had. Of those 217, 18 reported that they were on a jury where they recognized or were familiar with one of the attorneys because the survey respondent had seen or heard the attorney in a television or radio advertisement. Knowing that a lawyer had advertised had no effect on 17 out of 18 respondents service as a juror, while one person reported that it had an adverse effect; that person also reported, however, that he or she did not know whether that adverse effect had anything to do with the lawyer's client. This suggests that one out of 815 people may or may not have been prejudiced against a client who was represented by a lawyer known by the juror to have advertised.

The survey then asked the entire sample, hypothetically, were they to become a juror in the future and recognized a lawyer in the case as one who advertised on television or radio, whether that knowledge would affect them. Seventeen percent indicated it would: 2.3 percent favorably and 15.1 percent unfavorably. When asked if it would affect their feelings about the client, however, the number who felt they would be affected unfavorably dropped to 8.5 percent. When asked if the information would affect their decision in the case, 6.0 percent reported it would do so unfavorably. When those who indicated it would have an effect were asked if it would have an effect even if the court instructed the jurors otherwise, half reported it would. This results in 31 out of 796 survey respondents (3.9%) reporting in the hypothetical that the fact that a lawyer advertises would affect their decision over the instructions of the court.<sup>47</sup>

In 1988, Stephanie Moore Myers submitted her thesis for an M.A.

in Communication Studies at the University of Nevada, Las Vegas, entitled *Attorney Advertising: The Effect on Juror Perceptions and Verdicts*. The research was based on a survey of jurors who had sat on trials in Las Vegas, questioning them about their opinions on their jury service and about lawyers in general, including those who advertise. Of the 221 survey respondents, only 30 served on juries where a lawyer in the case was one who advertised on television. The study reports that of those 30, five voted in favor of the plaintiff and 25 voted in favor of the defense. When this sample was compared to the 222 respondents commenting on plaintiff's lawyers who did not advertise, the jurors reported that the non-advertising lawyers were rated significantly higher in the manner in which evidence was presented. There was no significant difference between the advertising lawyers and the non-advertising lawyers in the credibility and sincerity of the lawyers or in the presentation, however. When the study compared the plaintiff's lawyers to the defense counsel, the defense counsel rated significantly higher than the plaintiff's advertising lawyers in credibility and sincerity and in representing their client. Although the research design is creative, the research itself is too limited to draw conclusions.<sup>48</sup> Nevertheless, those interested in conducting further research on the issue of "jury pollution" should review the thesis in detail.

The issue of "jury pollution" is complex, both theoretically and pragmatically. While it merits further extensive research, studies known to the Commission at this point would not justify a conclusion that advertising by lawyers creates an impact that legitimately interferes with the administration of justice.

### C. DISCIPLINE AS A MEASURE OF ATTITUDES

Another measure of public attitudes toward the communication of legal services is the level of disciplinary complaints. Many factors make it extremely difficult, if not impossible, to measure accurately the frequency, nature or origination of complaints based on lawyer advertising, solicitation or marketing. For example, records are not designed to permit these measures; terminology varies from venue to venue; and, in some jurisdictions, records of complaints are confidential.

Nevertheless, the Commission has explored the extent to which consumers bring disciplinary action both within the Commission's hearings and through an informal, confidential survey. This anecdotal information tends to suggest strongly that consumers do not complain with any frequency about lawyer advertising. Most complaints originate with competing lawyers who find themselves at a competitive disadvan-

tage with those lawyers who are allegedly making unethical misrepresentations. Even these complaints appear to be a very small percentage of disciplinary concerns.

Of the consumer complaints that are lodged, most seem to be the result of direct mail solicitation, which may have embarrassed or offended the recipient. The State Bar of Texas instituted a hotline to provide a readily-available method for consumer complaints about improper lawyer solicitations. Not only does the hotline provide a format to enable prosecutions, but it also measures the extent of this perceived problem. The hotline is designed to help enforce the state's barratry statutes, involving illegal in-person and telephone solicitations of clients. For the first eight months of its operation, the hotline averaged 20 calls per week. Seventy-five percent of those complaints were about direct mail solicitations from lawyers to potential clients, which, if truthful and non-deceptive, were legally and ethically appropriate communications. For the first ten months of 1994, the hotline averaged three to eight calls per month complaining of in-person or telephone solicitation. While a few complaints are in the grievance process, none of them have led to prosecution in the first year and a half of the hotline's operation.<sup>49</sup>

This information does not serve to measure collateral problems with lawyers who may advertise or solicit for business. Disciplinary records simply cannot determine whether a lawyer accused of case neglect obtained that case as a result of advertising.<sup>50</sup> Insofar as there is direct consumer concern about the communication of legal services, complaints are extremely limited.

### D. PROFESSIONALISM

Many of those who objected to advertising to the Commission, indicated that advertising was "unprofessional." Notions of professionalism and commercialism seem antithetical.

Professionalism arose as a concept in the law in pre-Colonial England. Lawyers sought to distinguish themselves from tradesmen. Since lawyers were among the social elite, from families of wealth and property, they were interested in preserving social order rather than delivering services in exchange for remuneration. As a result, the practice of law came to be viewed by lawyers as an activity dedicated toward the public good. The collegiality that resulted from the common training of socially homogeneous men at the Inns of Court further contributed to an environment void of competition for representation.

Although there has been an inherent sense of public responsibility

among the legal profession in America, lawyers have undertaken these responsibilities simultaneously with commercial practices. Therefore, professionalism in America most often has been viewed as a concept addressing taste, civility and public spirit, but not the absence of remuneration for legal services.

An historic view of professionalism shows that it is the subject of a quest with great durability. When the 19th Century antebellum industrialization unfolded and many of the best lawyers became the counselors to the robber barons, many in the bar nostalgically lamented the loss of a profession that was dedicated to serving the people.

Nearly 90 years ago, Justice Brandeis expressed the concern this way:

Lawyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. They are less than formerly the students of a particular kind of learning, the practitioners of a particular art. And they do not seem to be so much of a distinct professional class.<sup>51</sup>

The same sentiment continues to be advanced nearly a century later. Compare Brandeis' concerns to those of Sol Linowitz today:

In too many of our law firms, the computer has become the managing partner and we are ruled by hourly rates, time-sheets and electronic devices. We have seen an increase in technological expertise with a corresponding diminution of the human side of law practice. We are making more and achieving less, and in the process, I am afraid, we have lost a great deal of what we were meant to be.<sup>52</sup>

The point is not that these concerns were or are legitimate, but that they have endured throughout the 20th century. The Stanley Commission Report, *In the Spirit of Public Service*, addresses this phenomena when it states, "Perhaps the golden age of professionalism has always been a few years before the time that the living can remember. Legend tends to seem clearer than reality."<sup>53</sup>

As to the relationship between professionalism and commercialism, Justice Blackmun, for the Supreme Court in the *Bates* decision, may have summarized it best:

But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an

attorney with the expectation that his services will be rendered free of charge.<sup>54</sup>

According to the ABA Blueprint for Improving the Civil Justice System,

There is a widely shared belief that there has been a substantial decline in adherence to the traditions of the bar and of appropriate relationships and civility which should attend the practice of law among and between lawyers, the judiciary and clients. This decline is often characterized as a lack of professionalism. Professionalism lies not so much in following certain rules as in the development of personal attitudes and a manner of deportment that leads to appropriate professional relationships and courtesy in manner and deed.<sup>55</sup>

If professionalism is construed as a nostalgic notion of an era, perhaps a fictitious one devoid of commercialism within the practice of law, it falls short as a valid objection to lawyer advertising. If, on the other hand, it is advanced as a notion favoring civility, good taste and improved decorum within a long-commercialized profession, then, those issues must be considered by the bar. Doing so would suggest a focus on specific advertising rather than the issues of commercialism and competition as a whole.

#### E. THE ROLE OF ADVERTISING IN ACCESS TO LEGAL SERVICES

Many who provided information to the Commission expressed their concerns about the role of advertising in the declining image of the legal profession. Some cited, as anecdotal evidence, social encounters with friends and acquaintances who are critical of the most overt advertising endeavors, primarily television commercials. These opinions are substantiated by some empirical evidence demonstrating that many, if not a majority of consumers, when asked, express negative attitudes toward lawyer advertising. Despite the conflicting evidence and ambiguous research, these critical views of lawyer advertising might provide compelling guidance for policies on this subject if there were no competing interests.

The ABA, however, is also dedicated to improving access to legal services. The role of advertising to meet that goal must be given very serious consideration. Many of those who appeared at the hearings discussed a crisis in the delivery of legal services to the low and middle income populations. There is a lack of resources and mechanisms for people to first determine whether or not they have a problem that can be solved or helped if they are represented by a lawyer. Additionally,

they need to know how to find a lawyer who is capable and willing to represent them when they have identified their legal need.

The commitment by the bar to the delivery of legal services is well reflected by Judge Learned Hand, who said that for a democracy to be preserved, there must be one commandment: "Thou shalt not ration justice." In its *Blueprint for Improving the Civil Justice System*, the ABA's Working Group on Civil Justice Proposals stated, "Any proposal to improve the civil justice system should address first and foremost the need to provide access to the justice system for all Americans."<sup>55</sup>

As discussed above, the communication of the availability of legal services includes advertising by firms serving corporations, which aims to identify the firm's image and create better recognition. But the access issue is most applicable to the delivery of personal legal services to those of limited incomes.

The unmet legal needs of the poor and middle class have been the subject of discussion and concern for more than 60 years. In the depth of the Depression, Karl Llewellyn proposed a plan to bring legal services to an estimated 80 percent of the public who he believed could not otherwise obtain legal representation. His plan was the genesis of neighborhood legal clinics.<sup>57</sup> At the same time, the Association of American Law Schools initiated a formal study of the use of lawyers' services by the public. A variety of legal needs assessments since have uniformly illustrated unacceptable levels of unmet legal needs concentrated in lower and middle-income populations.<sup>58</sup>

When, in the *Bates* decision, Justice Blackmun cited a 1972 ABA report that concluded the middle 70 percent of the American population is not being adequately reached or served by the legal profession, he poignantly noted that even though litigation may increase as a result of advertising, "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."<sup>59</sup>

Clearly an increasing number of people are using impersonal methods of finding lawyers, including advertising, lawyer referral and prepaid legal services, rather than personal referrals from friends, acquaintances and work colleagues. There are indications that those finding lawyers in these impersonal ways now are mostly minority and low-income population who had difficulty finding a lawyer at all 20 years ago.

The 1977 American Bar Foundation-sponsored study *The Legal Needs of the Public: The Final Report of a National Survey*, provides a benchmark for identifying the ways in which people found lawyers to meet their legal needs. Table VII illustrates the methods of selection employed by people shortly before the *Bates* decision.<sup>60</sup>

TABLE VII  
Distribution of Lawyer Users by the Way Lawyer  
for Most Recent Case Was Selected

METHOD OF SELECTION	First lawyer selection	Later lawyer selection
Used lawyer previously	1%	2%
Knew lawyer personally in other context	33	31
Recommended by someone other than prior attorney	52	53
Heard of lawyer but not through recommendation or referral	6	3
Other way	9	1

Table VIII-A illustrates that far fewer ethnic minorities knew a lawyer than did whites at the time of that study. Minorities were substantially more likely to use the recommendation of someone else.<sup>61</sup>

TABLE VIII-A  
Method of Selecting Lawyer by Race

METHOD	Whites	Blacks/Latinos
Referred by prior lawyer	3%	2%
Used lawyer previously on business	2	1
Knew lawyer in other context	34	12
Recommended by someone other than prior lawyer	48	71
Heard of lawyer but not through recommendation or referral	5	4
Other way	9	10

Similarly, but to a less extent, lower income people were less likely to know of a lawyer and more likely to turn to someone else for a recommendation.<sup>62</sup> Those recommendations came from the following sources<sup>63</sup>:



TABLE VIII-B  
Sources of Recommendations

Friend, neighbor, fellow worker, business acquaintance, etc.	39 %
Relative	23
Adversary or other party in transaction	6
Another lawyer	4
Realtor	4
Employer	4
Bank or financial institution	3
Insurance company or agent	2
Union	2
Yellow Pages of telephone directory	2
Lawyer referral service	0.1
Miscellaneous	11

Since the *Bates* decision, impersonal methods of selecting a lawyer have played an increasing role. These methods include lawyer referral services, social service referrals, prepaid plans, and group legal services in addition to advertising. A variety of state and national studies identify both how people selected their lawyer (when they actually engaged one) and how they would select a lawyer (which includes those who had not previously used the services of a lawyer, providing a better minority and low income representation).

Sobleson reports in a 1988 survey of Georgia residents that 60 percent would ask a friend or relative for advice on which lawyer to choose, while 13 percent would include advertising of any kind in making that choice.<sup>64</sup>

Table IX shows the ways in which Nevada residents selected lawyers as reported in a 1990 study.<sup>65</sup>

TABLE IX  
How Nevada Residents Found Lawyers, by percentage

Recommendation	51.1
Personal Acquaintance with Attorney	21.7
Yellow Pages	11.8
Other Sources of Referral	9.1
Local Bar Association Recommendations	2.8
Television Advertisement	1.6
Other Forms of Advertising	1.2
Don't Know	0.6

Table X illustrates how people who had not retained a lawyer in the past would find one, if they needed to do so.<sup>66</sup>

TABLE X  
How Nevada Residents Would Select a Lawyer, by percentage

Recommendation from family/friend	54.4
Yellow Pages	12.9
Local Bar Association Recommendations	9.4
Personal Acquaintance with Attorney	8.8
Television Advertisement	2.5
Other Forms of Advertising	5
Don't Know	6.6

Recent national data demonstrate that those who have used legal services still heavily rely on personal recommendations, but less so than in the past, with advertising, in particular the Yellow Pages, serving as the most common method of impersonal referral.

The 1994 Yellow Pages Publishers Association-sponsored Wiese study identifies the sources for selecting a lawyer as depicted in Table XI. These open-ended responses show higher usage of advertising methods compared to other impersonal methods.<sup>67</sup>

TABLE XI  
Sources Used to Choose an Attorney

Friend/relative recommended	44 %
Knew attorney personally	11
Yellow Pages	10
Word-of-mouth	8
Personal referral (unspecified)	5
Local/close to home	3
Own lawyer recommended	2
Company attorney/through work	2
Used before/personal experience	2
Professional recommendation	2
Through legal agency/service	2
Real estate agent	2
TV ad	2
Reputation	2
All other sources	12
Don't know	5

Data from the ABA's 1994 Comprehensive Legal Needs Study examined how low- and moderate-income people obtained legal representation. Table XII demonstrates the dimension of the role played by advertising, especially the Yellow Pages, in the delivery of legal services to the poor.<sup>53</sup>

Table XII  
Referral Source by Income Category

SOURCE	Low-income households	Moderate-in households
Referred by friend	32 %	38 %
Already knew advocate	32	34
Found in Yellow Pages	18	11
Lawyer Referral Service	6	4
Ad in print/electronic media	3	less than 1
Other (hotline, direct solicitation, prepaid)	4	4

According to this research, more than one in every five low-income households use a form of lawyer advertising to find a lawyer, while nearly 12% of the moderate-income families do so.

Those who advertise personal legal services, especially personal injury or other contingency-fee services, target low and moderate-income populations. Those prospective clients in these demographic categories are the least likely to know of other resources for finding a lawyer. The results of the Comprehensive Legal Needs Study clearly indicate advertising is a viable vehicle to enable low income families to find legal representation. The importance of this finding cannot be ignored as the organized bar continues to pursue its goal of improved access to all persons regardless of their income. Policies must be sensitive to this finding.

## ENDNOTES

1. ABA Policy and Procedures Handbook, Chicago, 1993-1994, p.2.
2. *Id.*
3. *Id.*
4. See *The Gallup Report*, 1976, 1977, 1981, 1983, 1985, 1988; *The Gallup Poll Monthly*, Feb. 1990, May 1991, July 1992, July 1993.
5. Wiese Research Associates, Inc., *Attorney Advertising/ Perceptions Study*, Commissioned by the Yellow Pages Publishers Association for

the American Bar Association, (1994) Figures 1,2, p.10.

6. Gary A. Hengstler, *Vox Populi, The Public Perception on Lawyers: ABA Poll*, ABA Journal, September, 1993, p. 60-65. The demographics factor of those with the most favorable opinion of lawyers was the same as those found by the National Law Journal to be most likely to find a lawyer through advertising. See Samborn, *Supra* note 4.7.

7. Joel Whalen, DePaul University Associate Professor of Marketing, advised the Commission that there is not enough exposure to lawyer advertising to compete in creating an adverse image of the legal profession. He represented that negative images are more strongly formed from fictionalized television programs that have the capacity to have a far greater influence. Both Professor Whalen and Robert Zabel, Midwest Director of the Ad Council, testified that the service (or product) shapes the image. Professor Whalen indicated that someone unhappy with a service will tell 13 others, while someone pleased will tell three others. Mr. Zabel testified that advertising is limited by its consistence or inconsistency with the service. People will not respond over a period of time to advertising that is not consistent with that which it offers. Thus, if lawyers advertise that they want to help, but show no willingness to do so after they are hired, the client will not support the firm and the advertising will prove to be ineffective. If, on the other hand, the advertising projects a message that lawyers are greedy and the lawyers sustain that image with their conduct, the ad will continue to produce that impact.

8. *Who's Most Admired Lawyer?*, The National Law Journal, August 9, 1993, p. 24.

9. See for example Barbara A. Curran, *The Legal Needs of the Public: A Final Report of a National Survey*, The ABA Special Committee to Survey Legal Needs and the American Bar Foundation, 1977, at 232, where Watergate was prominently mentioned by those who reported they had become more negative about lawyers and their behavior.

10. *Supra* note 6.6.

11. Randall Samborn, *Anti-Lawyer Attitude Up*, The National Law Journal, August 9, 1993, p. 1, 20-24.

12. See Wiese *supra* note 6.5 at Table 2, p.14.

13. *Id.*

14. See for example, *Why Lawyers Are in the Doghouse*, U.S. News & World Report, May 11, 1981, p. 38-41, which cites numerous examples of misconduct.

15. Marianne Taylor, *Nine are Indicted in Cook County Court Probe*, Philadelphia Inquirer, December 15, 1983 at A1; William B. Crawford

Jr., *Greyford Indictments Hit Suburban Court*, Chicago Tribune, December 10, 1987, at 1.

16. Randall Samborn, *Complaint Puts Fraud at \$500K*, The National Law Journal, September 19, 1994, at A4.

17. Matt O'Connor, *Cellmate of Witness Tells of Rukn's Boasts*, Chicago Tribune, December 9, 1992, at 1.

18. Clay Chandler, *Republicans Urge Bentsen to Fire 3: Senators Say Treasury Aides Were Not Fully Truthful on Whitewater*, The Washington Post, August 11, 1994, at D8.

19. The television program *Saturday Night Live* has parodied television commercials for legal services. Chicago Tribune columnist Bob Greenie wrote a column critical of direct mail solicitations to people charged with drunk driving violations. He expressed the embarrassment suffered by the recipients of these letters. See Chicago Tribune, Section 5, page 1, April 18, 1994. Advertising was the subject matter of a column in the *Staten Island Sunday Advance* by Daniel D. Leddy, Jr., titled *How once-proud legal profession triggered its decline*, September 25, 1994. In-person solicitation of mass disaster was the topic of a segment on the television program *60 Minutes*, which focused on Washington, D.C. lawyer John Coale. Somewhat more frequently, lawyer advertising is among the problems of the legal profession listed by commentators. For example, *60 Minutes* commentator Andy Rooney used the proliferation of lawyer advertising as an example of the need for tort reform.

20. Susan Schmidt, *Vote '94: The Nation - For Indicted Member of Congress, Clout Keeps the Cash Coming*, The Washington Post, November 6, 1994, at A33; Ray Gibson, *Rostenkowski Campaign Funds are Being Used to Pay Legal Fees*, Chicago Tribune, December 9, 1992, at 10.

21. Debbie Howlett, *The Million-Dollar Question: O.J.'s Defense Tab Facing State's Resources is a Costly Affair*, USA Today, August 5, 1994, at 10A. See also John L. Mitchell, *Rodney King's Lawyers Bill City: \$4 Million*, The Los Angeles Times, September 24, 1994, at A1.

22. Ruth Marcus, *Clinton Legal Defense Fund Won't Bar Lobbyists' Gifts*, The Washington Post, June 30, 1994, at Section A.

23. See Curran, *supra* note 6.8, at 185, where it reports that 66 percent of respondents had at least one professional contact with a lawyer; *Vox Populi*, *supra* note 6.6 reports at 61 that "Nearly two-thirds of Americans surveyed have retained a lawyer in a legal matter during the past 10 years;" Samborn correspondence, dated June 30, 1994, reports that 70 percent of National Law Journal poll respondents had contacted an attorney for either personal or business reasons in the past five years; and Wiese research indicating that 79 percent of respondents lived in a household where a member had obtained legal services from an attorney.

ney, *supra* note 6.5 at 22.

24. *Fax Poll, California Lawyer*, June, 1993, p. 108.

25. *PBA Survey on Lawyer Advertising*, Pennsylvania Bar Association Task Force on Lawyer Advertising, 1992.

26. *Supra* note 5.14.

27. *Fax Poll, California Lawyer*, April 1992, p. 112.

28. *Supra* note 6.24.

29. *Supra* note 5.14.

30. There are also indications that lawyers are apathetic toward lawyer advertising. For example, the State Bar of Texas had difficulty in getting more than half of the state's lawyers to vote on regulations governing lawyer advertising. An ABA Journal article that appeared in February 1994, entitled *Image Problem*, resulted in three letters to the editor (all of which were from lawyers and disputed assertions that advertising contributes to lowered public image). The efforts to obtain input for this report, undertaken by the Commission on Advertising and detailed in Chapter I, did not result in comments from a large number of lawyers.

31. *Supra* note 6.11.

32. *Supra* note 6.5.

33. Carl Nielson, executive direction of the Iowa State Bar Association, testified that the research organization of Frank N. Magid Associates had been employed to undertake the bar's research on lawyer advertising and that they were selected because they had been used by the bar to carry out research that demonstrated the need for merit selection for the judiciary.

34. *Attitudes and Opinions Toward Advertising for Law Firms*, Frank N. Magid Associates, March 1983.

35. *Supra* note 5.26.

36. *Id.* at 240-241. The study contrasts the opinions of the public with those of law students on this issue, showing that those of law students, like lawyers generally, are more parochial on these issues.

37. *Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys*, Frank N. Magid Associates, Dec. 1987.

38. Testimony provided by David Allen, a lawyer who advertises on television, indicated that data reported in the *Report of Findings, Nevada Lawyers' Advertising Survey*, undertaken by Litigation Technologies, February 1990, was inconsistent with the representation made about that data.

39. Roy Sobelson, *The Ethics of Advertising by Georgia Lawyers: Survey and Analysis*, 6 *Georgia St. Univ. L. Rev.* 23, Fall 1989.

40. *Legal Services Advertising: A Comparison of Attorney and Consumer*

*Attitudes*, by Dr. Bob Cutler, Dr. Raj Javalgi and Kurt Schimmel.

41. *Id.*

42. *Report on the Survey on the Image of Lawyers in Advertising*, Commission on Advertising, American Bar Association, January 1990, at 53-54.

43. All levels of significance are at .05.

44. The images where respondents who saw low-style commercials and found lawyers from the firms that advertised to be rated significantly lower than lawyers in general are professional, knowledgeable, intelligent, effective and helpful.

45. The research identified here has not otherwise been published. The Commission is preparing a report on its findings and encourages others to replicate its methodology to assess public images in other jurisdictions. It should be noted the findings are somewhat similar to those reported in the *Contemporary Studies* project, *supra* note 5.26, where the research establishes no nexus between public attitudes toward lawyers and those toward the court. If the public makes a differentiation between their opinions of lawyers (or their opinions of lawyers who advertise) and their opinions of the courts, then they may have a lowered opinion of lawyers yet maintain a high opinion of the justice system. This blunts the ability of a state to advance a state interest justifying regulation of truthful, non-deceptive information because of the possibility the communication will reduce respect for the courts and the system of justice.

46. *Supra* note 6.37 at 31.

47. *Supra* note 6.38.

48. S. Moore Myers, *Attorney Advertising: The Effect on Juror Perceptions and Verdicts*, Department of Communication Studies, University of Nevada, Las Vegas, May 1988. See also S. Myers, A. Padderud and A. Ferri, *A Survey of Jurors' Attitudes Toward Attorney Advertising*, *Inter Alia*, July 1991, p. 11-19.

49. Sandra Goldsmith, *Hotline Halts Ambulance-Chasers in Texas*, ABA Student Lawyer, February 1994, Vol. 22, No. 6, p.8. Update information gathered in phone interview with Mr. Saadi Ferris, Texas State Bar on November 14, 1994.

50. The Commission heard testimony from the chair of the Utah State Bar Association's Committee on Lawyer Advertising, Steven Kaufman. Mr. Kaufman presented extensive concerns about the ability of at least one lawyer who advertises on television to properly handle his caseload. Extensive efforts were being made by the bar to curb alleged abuses caused by the lawyer.

51. ABA Commission on Professionalism, " . . . In the Spirit of

Public Service." A Blueprint for the Rekindling of Lawyer Professionalism. American Bar Association, 1986, p. 55.

52. Sol Linowitz, *Legal Profession Has Lost Its Human Touch*, The National Law Journal, May 9, 1994.

53. *Supra* note 6.51 at p. 55. See also Cramton, *supra* note 3.17 at 605, "Laments by bar leaders and prominent lawyers over the 'commercialism' of the bar and 'declining professionalism' have been staples of professional discourse throughout the 20th century."

54. *Bates*, 433 U.S. 350 at 368.

55. ABA Working Group on Civil Justice, *Blueprint for Improving the Civil Justice System*, American Bar Association, 1992, p. 12.

56. *Id.* at Executive Summary p. iv.

57. See Auerbach, *supra* note 3.17, at 205-209.

58. Curran, *supra* note 6.9, at 2.

59. *Bates*, 433 U.S. 350 at 376.

60. *Supra* note 6.9, at 201.

61. *Id.* at 220.

62. *Id.* at 221. Twenty-three percent of those in the lowest income quintile knew a lawyer personally in another context, compared to 41 percent of those in the highest quintile.

63. *Id.* at 203.

64. *Supra* note 6.39 at 71.

65. *Supra* note 6.38.

66. *Id.*

67. See Wiese *supra* note 6.5 at Figure 6, p.27.

68. ABA Consortium on Legal Services and the Public, *Findings of the Comprehensive Legal Needs Study*, American Bar Association, 1994, p.28.

## Chapter VII.

### THE ROLE OF REGULATION IN A FREE MARKET PLACE

#### A. THE STRUCTURE AND ROLE OF THE MODEL RULES

The legal profession has the responsibility to self-regulate. This is done at the state level, primarily through rules of the state supreme courts. The communication of legal services is part of the conduct addressed in state codes or rules governing legal ethics. When, in 1908, the American Bar Association promulgated its original **Canons of Professional Ethics**, it included the first prohibition of lawyer advertising. The Association encouraged the states to adopt its Canons. Most states did so quickly. Consequently, lawyer advertising, except for very narrow provisions, was soon banned on a state-by-state basis. The bans lasted, with a few exceptions, until 1977, when the U.S. Supreme Court decision in *Bates v. Arizona*, found the regulatory bans unconstitutional under the First Amendment doctrine of commercial free speech.

Perhaps because of its historic role over the past 85 years, regulation has been viewed as the principal, if not the only, mechanism to address concerns about lawyer advertising.

Under the ABA Model Code of Professional Responsibility in effect at the time of the *Bates* decision, the right of a lawyer to communicate services was limited to the use of "professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings or similar professional notices or devices."<sup>1</sup> The use of these devices was further prescribed, including the requirement that they be in a dignified form.

DR 2-101 expressly prohibited other communications activities:

(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communications" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine or book.

(B) A lawyer shall not publicize himself, his partner, or associate as