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Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions

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INSIDE, OUTSIDE: CROSS-BORDER ENFORCEMENT OF ATTORNEY ADVERTISING RESTRICTIONS

*Margaret Raymond**

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I. INTRODUCTION

The cross-border regulation of lawyers poses many interesting problems. One persistently puzzling one is the cross-border enforcement of attorney advertising regulations.

My interest in this issue was piqued because I am a resident of the state of Iowa, which has among the most highly restrictive advertising rules in the country. The rules are particularly limiting with regard to television advertising. They provide that the information permitted by the rules may be “articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound.”¹ As for what appears on the screen, “no visual display shall be allowed except that allowed in print as articulated by the announcer.”² An ethics opinion

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1. IOWA RULES OF PROF'L CONDUCT R. 32:7.2(e) (2009). By contrast, some jurisdictions insist that the person appearing in the advertisement must in fact be the lawyer. *See, e.g.,* ARIZ. RULES OF PROF'L CONDUCT R. 7.2(e) (2009) (“If a law firm advertises on electronic media and a person appears purporting to be a lawyer, such person shall in fact be a lawyer employed full-time at the advertising law firm.”). Others require that, if the person in the ad is not really the lawyer who will do the work, that fact be clearly disclosed. *See, e.g.,* ARK. RULES OF PROF'L CONDUCT R. 7.2(e) (2009).

2. IOWA RULES OF PROF'L CONDUCT R. 32:7.2(e) (2009).

later indicated that this rule permitted the display of a still photo of a lawyer on the screen, as long as it was a photo “of the lawyer in a traditional still photograph, not of the lawyer in a dramatic pose.”³ There are also prohibitions on the use of statements that are “unverifiable”⁴ or that relate to the “quality of the lawyer’s legal services”⁵ and a more general prohibition on relying on “emotional appeal.”⁶

Iowa is not alone; numerous states have taken a more vigorous approach to the regulation of televised attorney advertising than that set forth in the American Bar Association’s (ABA) Model Rules of Professional Conduct.⁷ One might imagine that these stricter regulations are simply the nostalgic vestiges of a bygone era. On the contrary, however, attempts to regulate attorney advertising more aggressively reflect a growing trend. Both New York and Louisiana have imposed highly content-restrictive (and vigorously litigated) new rules on advertising in recent years.⁸

As one might imagine, good faith efforts to comply with these rules result in advertising that is, quite frankly, profoundly uninteresting, and—as most lawyers in Iowa appear to have concluded—a waste of money. We see very little local television advertising by Iowa attorneys, the rules having, in effect, taken all the fun out of lawyer ads.⁹

Yet if you watch a national cable channel in Iowa, you routinely see advertising that does not comply with the state’s rules regarding attorney advertising. It comes, for the most part, from lawyers outside the state.

3. See Iowa Supreme Court Bd. of Prof’l Ethics & Conduct, Ethics Op. 04-08 (2004) (“[I]t is the opinion of the Board that the rules for attorney advertising . . . do not prohibit the use of the attorney’s photograph in either print advertising or advertising by electronic media, including television.”).

4. IOWA RULES OF PROF’L CONDUCT R. 32:7.1(b) (2009).

5. *Id.*

6. *Id.*

7. See *infra* notes 21-33 and accompanying text.

8. Both states’ rules faced constitutional challenges. Louisiana’s rules were largely upheld by a federal district court. See *generally* Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 642 F. Supp. 2d 539 (E.D. La. 2009). Several aspects of New York’s recent attempt at such heightened regulatory standards were struck down by a federal district court; that ruling was largely upheld by the Second Circuit. See *generally* Alexander v. Cahill, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff’d in part and rev’d in part*, 598 F.3d. 79 (2d Cir. 2010).

9. The New Jersey Supreme Court asserted this view as well:

Attorney advertising restricted to a factual recitation (in print, by voice or image) of the need for legal services, the qualifications of the attorney, and the prices offered might fail to achieve these goals [of advising consumers and increasing the affordability of legal services]. The record suggests . . . that few would listen. Because of that, attorneys might not compete: they simply would not advertise.

In re Felmeister & Isaacs, 518 A.2d 188, 193 (N.J. 1986).

The question that motivated this paper was three-fold: whether states can regulate this type of cross-border advertising, whether they do, and whether they should.

This question has significant implications for states wishing to engage in more restrictive regulation of attorney advertising—what I call “high-regulatory” states. While those attempts at vigorous regulation face significant First Amendment challenges,¹⁰ states nonetheless engage in them. From that we assume, state rulemakers—or, at least, some vocal constituencies that have the ability to attract the attention of state rulemakers—see value in this more vigorous regulation of attorney advertising. That value may be derived from a variety of concerns, from the public interest to self-interest.¹¹

Whatever the motivating concerns, none of them should be more salient in the context of in-state lawyers than out-of-state lawyers. If a state wants to regulate advertising, it wants to regulate all advertising that the state’s consumers will see, regardless of where it originated or where the lawyers who engaged in it are admitted to practice. Enforcement accordingly advances the interests that are assertedly served by attorney advertising restrictions.

A failure to enforce restrictive rules against out-of-state lawyers, by contrast, has a somewhat counterintuitive result. Under such a regime, states that choose aggressive advertising regulations put their own lawyers at a competitive disadvantage,¹² both because those lawyers are limited in their advertising techniques, and because they may need to engage in behaviors—like filing or prescreening—that make the cost and burden of advertising greater for them than it is for out-of-state lawyers. If, as a policy matter, the result of restrictive advertising rules is to impose burdens on in-state lawyers that are not shared by their out-of-state competitors, and at the same time to expose consumers to disapproved advertising modes, perhaps the policy decision to regulate

10. See, e.g., *Alexander*, discussed *supra* note 8.

11. See, e.g., *In re Felmeister*, 518 A.2d at 211-12 (Handler, J., concurring in part and dissenting in part) (arguing that support of restrictive bans on attorney advertising can be “partisan” and that the court should accordingly be “very cautious in imposing restrictions on lawyer advertising.”).

12. See, e.g., *On Petition for Review of Opinion 475 of the Advisory Comm. on Prof’l Ethics*, 444 A.2d 1092, 1094 (N.J. 1982). New Jersey had a ban on television advertising. *Id.* Jacoby & Meyers sought to use its name in New Jersey and affiliate with a firm there. *Id.* One of the court’s concerns was that Jacoby & Meyers was at the time advertising on television in New York and that advertising reached New Jersey consumers of legal services. *Id.* “Allowing Jacoby & Meyers to affiliate with a New Jersey firm and advertise its name here while using television in New York would give its New Jersey affiliates an unfair advantage compared to other New Jersey firms.” *Id.* See *also id.* at 1099–1100.

aggressively ought to be revisited. Ultimately, the cross-border enforcement issue has the power to undermine the rationale for aggressive in-state regulation of attorney advertising.

II. DIFFERENTIAL REGULATION OF ATTORNEY ADVERTISING

Advertising is one arena in which the attempt at uniformity proffered by the Model Rules has been rejected; as of 2002, one commentator noted that “no two states have identical ethics provisions” in the area of advertising.¹³ In this Article, I focus specifically on the detailed rules that govern television advertising.¹⁴

With regard specifically to television advertising, a review of the various state approaches reveals a range of regulatory schemes, sortable into three distinct categories. One set of states largely follows the pattern of ABA Model Rules 7.1 and 7.2; the rules regulate “false or misleading” communication (and offer a range of definitions of conduct that could be considered “false or misleading”), but attempt little additional substantive regulation of the content of attorney television advertising. I call these “low-regulatory” states; their rules reflect a hands-off approach to advertising content, and often include a comment similar to Comment 3 to Model Rule 7.2, which strikes a disapproving tone with regard to content regulation.¹⁵

The second category—the “middle-regulatory” states—regulates a range of content or techniques in advertising (like endorsements, testimonials, dramatizations, or the use of actors), but imposes a regime

13. See William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 50 (2002).

14. Constraints on television advertising may, in some instances, spill over into regulation of “electronic media,” including internet advertising. Comment 3 to the ABA Model Rules of Professional Conduct refers specifically to “electronic media, such as the Internet.” MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 3 (2009). While some states have incorporated specific references to Internet use in their advertising rules, others have not yet done so.

15. Comment 3 states:

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Id.

of disclaimers in lieu of outright prohibition¹⁶ or applies aspirational direction, rather than disciplinary rules, to the content of attorney advertising.¹⁷

The third set of jurisdictions—the “high-regulatory” states—impose more stringent, content-based regulation on attorney advertising, which cannot be avoided through the use of disclaimers.¹⁸

There is some overlap between the categories; a state’s rules may permit some content when accompanied by an appropriate disclaimer and prohibit other categories of content outright. Inevitably, the categorization is somewhat subjective. The distinguishing characteristic of the high-regulatory states is that they regulate in a way that makes it possible to identify content that violates the jurisdiction’s rules from simply watching the advertisement.¹⁹ This is relevant because one reason that states might not enforce their own advertising rules strictly might be that they are unaware that the rules are being violated. For

16. A good example is MO. RULES OF PROF’L CONDUCT R. 4-7.1 (2009) (providing that proclaiming results, paid testimonials, endorsements, and simulated portrayals of lawyers, clients, victims, scenes or events are permissible as long as they are accompanied by appropriate disclaimers.). See also OR. RULES OF PROF’L CONDUCT R. 7.1(a)(6), (8), & (10) (2009).

17. See ME. RULES OF PROF’L CONDUCT R. 7.2-A (2009). Until Aug. 1, 2009, Maine’s Rules of Professional Conduct contained a provision prohibiting any “form of public communication that . . . [a]ppeals primarily to fear, greed, desire for revenge, or similar emotion.” *Id.* at R. 3.9(c)(2) (abrogated Aug. 1, 2009). Maine’s new rules largely track the ABA’s Model Rules, but Rule 7.2-A contains extensive suggestions about how advertising might “be more effective and reflect the professionalism of the legal community.” See *id.* at R. 7.2-A. These suggestions advise that “lawyers who advertise should . . . avoid crass representations or dramatizations, hawkish spokespersons, slapstick routines, outlandish settings, unduly dramatic music, sensational sound effects, and unseemly slogans that undermine the serious purpose of legal services and the judicial system,” *id.* at R. 7.2-A(a)(3); “avoid the use of simulated scenes, actors who portray lawyers, clients or participants in the judicial system, and dramatizations unless they are clearly identified as such,” *id.* at R. 7.2-A(a)(6); and “avoid representations designed to appeal to greed, exploit the fears of potential clients, or promote a suggestion of violence.” *Id.* at R. 7.2-A(a)(8). Part (b) of the Rule states explicitly that: “The responsibilities set forth in this Rule are aspirational and not to be enforced through disciplinary process.” *Id.* at R. 7.2-A(b). The Reporter’s Notes to the section indicate that its aspirational suggestions are designed to “encourage lawyers who advertise to do so in a dignified and professional manner without infringing on the First Amendment’s protection of commercial speech.” *Id.* at R. 7.2-A.

18. The characterizations are mine, but the nature of the variety of advertising regulation is also discussed in Hornsby, *supra* note 13, at 70-71.

19. Accordingly, I do not focus on the very common category of requirements regarding who may appear in the advertisement, or on the requirement of admission to practice or employment in the firm by the person appearing in the advertisement. While these requirements suggest a higher level of regulatory intensity, violations of these prohibitions would not necessarily be discernible to an observer without some further investigation. Professor Fred Zacharias described this characteristic as “transparency.” Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1002 (2002).

example, prohibitions on using an actor rather than a lawyer's voice-over in an ad may not be a violation that is apparent on the face of the ad without investigation. Similarly, one aspect of high regulation might be a submission and preclearance requirement, but the failure to comply with that requirement might not be apparent without further investigation.²⁰ Although these types of requirements reflect a more aggressive approach to regulating advertising, it is not one which would be immediately apparent upon watching the advertisement.

The first element of this research project was to identify the "high-regulatory" states, whose attorney advertising rules fall within that third category. My research identified Arkansas,²¹ California,²² Florida,²³

20. See, e.g., MISS. RULES OF PROF'L CONDUCT R. 7.5 (2009).

21. See, e.g., ARK. RULES OF PROF'L CONDUCT R. 7.1(d) (2009) (providing that a communication is false or misleading if it "contains a testimonial or endorsement"); *id.* at R. 7.2(e) (prohibiting the use of "clients or former clients" in advertisements and stating that "[d]ramatization in any advertisement is prohibited").

22. CAL. BUS. & PROF. CODE § 6158.1 (prohibits "methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation").

23. FLA. RULES OF PROF'L CONDUCT R. 4-7.2(c)(1)(F) (2009) (prohibits as false and misleading any communication that "contains any reference to past successes or results obtained"); *id.* at R. 4-7.2(c)(1)(J) (prohibiting any communication that "contains a testimonial"); *id.* at R. 4-7.2(c)(3) (prohibiting "any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer."). The Comment accompanying this Section elaborates:

Subdivision (c)(3) prohibits visual or verbal descriptions, depictions, portrayals, or illustrations in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. . . . As an example, a drawing of a fist, to suggest the lawyer's ability to achieve results, would be barred.

Id. at cmt.

Rule 4-7.5 also imposes specific restrictions on television or radio advertising, prohibiting "any spokesperson's voice or image that is recognizable to the public" or "any background sound other than instrumental music." *Id.* at R. 4-7.5(b)(1). The Comment to this Section elaborates:

The prohibition against false, misleading, or manipulative advertising is intended to preclude, among other things, the use of scenes creating suspense, scenes containing exaggerations, or situations calling for legal services, scenes creating consumer problems through characterization and dialogue ending with the lawyer solving the problem, and the audio or video portrayal of an event or situation. Although dialogue is not necessarily prohibited under this rule, advertisements using dialogue are more likely to be misleading or manipulative than those advertisements using a single lawyer to articulate factual information about the lawyer or law firm's services. The prohibition against any background sound other than instrumental music precludes, for example, the sound of sirens or car crashes and the use of jingles.

Id. at cmt.

Indiana,²⁴ Iowa,²⁵ New Jersey,²⁶ New York,²⁷ Pennsylvania,²⁸ South Carolina,²⁹ South Dakota,³⁰ Texas,³¹ and Wyoming³² as high-regulatory

24. IND. RULES OF PROF'L CONDUCT R. 7.2 (2009) ("A lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim."). Rule 7.2(d) provides more detailed prohibitions on content: Communications may not contain "statistical data or other information based on past performance or prediction of future success," *id.* at R. 7.2(d)(2); "a testimonial about or endorsement of a lawyer," *id.* at R. 7.2(d)(3); or "a statement or opinion as to the quality of the services or . . . a representation or implication regarding the quality of legal services," *id.* at R. 7.2(d)(4); and may not "appeal[] primarily to a lay person's fear, greed, desire for revenge, or similar emotion." *Id.* at R. 7.2(d)(5).

25. *See supra* notes 1-6 and accompanying text.

26. New Jersey Rule of Professional Conduct 7.2 requires that advertisements "shall be predominantly informational," prohibits the use of "drawings, animations, dramatizations, music, or lyrics" in connection with televised advertising, and provides that "no advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence." N.J. RULES OF PROF'L CONDUCT R. 7.2 (2009). The requirement that advertisements be "predominantly informational" was substituted for an earlier rule requiring that all advertisements be presented "in a dignified manner," by the New Jersey Supreme Court, when its decision in *In re Felmeister and Isaacs*, 518 A.2d 188 (N.J. 1986), suggested constitutional difficulties with the earlier rule. *Id.* at 188-89. The *Felmeister* court also suggested limiting the prohibitions on the use of "drawings, animations, dramatization, music or lyrics" to television advertising, as the current rule does. *Id.*

27. New York's rules, which prohibited a broad range of techniques, were struck down in large part in *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff'd in part and rev'd in part*, 598 F.3d. 79 (2d Cir. 2010).

28. Pennsylvania Rule of Professional Conduct 7.2(d) provides that, "No advertisement or public communication shall contain an endorsement by a celebrity or public figure." PA. RULES OF PROF'L CONDUCT R. 7.2(d) (2009). Rule 7.2(f) prohibits non-lawyers from portraying lawyers in advertisements. *Id.* at R. 7.2(f). The other prohibitions in the rule are addressable through disclaimer or disclosure. *See, e.g., id.* at R. 7.2(e) (requiring disclosure that an endorser is paid); *id.* at R. 7.2(g) (advertisement may not contain "a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.")

29. The South Carolina Rules of Professional Conduct prohibit testimonials and communications containing "a nickname, moniker, or trade name that implies an ability to obtain results in a matter." S.C. RULES OF PROF'L CONDUCT R. 7.1 cmt. 4 (2009) elaborates:

Paragraph (e) precludes the use of nicknames, such as the "Heavy Hitter" or "The Strong Arm," that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers.

Id.

Rule 7.2(f) provides that, "A lawyer shall not make statements in advertisements or written communications which are merely self-laudatory or which describe or characterize the quality of the lawyer's services." *Id.* at 7.2.

30. S.D. RULES OF PROF'L CONDUCT R. 7.1(b) (2009) provides that, "All communications shall be predominantly informational," which means that, "in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer

states. Louisiana's new rules, which became effective on Oct. 1, 2009, put Louisiana in the high-regulatory category as well.³³

predominates and that the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication." *Id.* Rule 7.1(c) describes seventeen categories of false or misleading communication, including prohibitions on "opinion, representation, implication or self-laudatory statement regarding the quality of the lawyer's legal services which is not susceptible of reasonable verification by the public." *Id.* at R. 7.1(c)(3). The rule also prohibits any "impersonation, dramatization, or simulation which is not predominantly informational." *Id.* at R. 7.1(c)(15). Many other prohibitions are dealt with through disclosure or disclaimer. *See, e.g.*, R. 7.1(c)(12) (prohibiting testimonials or endorsements unless the claims can be substantiated and a disclaimer is included); R. 7.1(c)(13) (prohibiting paid testimonials, unless the fact of payment is disclosed); R. 7.1(c)(14) (prohibiting testimonial not by an actual client, unless that fact is conspicuously disclosed). R. 7.2(h) requires persons appearing in advertisements in electronic media purporting to be lawyers to be the advertising lawyer or a lawyer employed full-time by that lawyer. *Id.*

31. TEX. RULES OF PROF'L CONDUCT R. 7.02 (2009) defines as false or misleading seven categories of communications, including references to past successes unless a detailed set of rules is complied with, Rule 7.02(a)(2), and prohibits the use of an actor or model to portray a client of the lawyer. *Id.* at R. 7.02(a)(7). Comment 5 to Rule 7.02 provides:

Statements comparing a lawyer's services with those of another where the comparisons are not susceptible of precise measurement or verification, such as "we are the toughest lawyers in town," "we will get money for you when other lawyers can't," or "we are the best law firm in Texas if you want a large recovery," can deceive or mislead prospective clients.

Id. at cmt. 5. Rule 7.04(g) requires that any person portraying a lawyer or narrating an advertisement as if he or she were a lawyer must actually be one of the lawyers whose services are advertised. *Id.* at R. 7.04(g). Rule 7.04(m) prohibits any "motto, slogan, or jingle that is false or misleading" (though Comment 18 suggests that there are "informative" rather than "misleading" mottos, slogans and jingles and that these would be permitted). *Id.* at R. 7.04(m).

32. WYO. RULES OF PROF'L CONDUCT FOR ATTORNEYS AT LAW R. 7.1(d) (2009), together with Rule 7.2(h), precludes dramatizations, endorsements, and testimonials. *Id.* at 7.1(d), 7.2(h). Rule 7.2(f) requires that a person in an ad who appears to be a lawyer must be "a member of the Wyoming State Bar, admitted to practice and in good standing before the Wyoming Supreme Court and must be the lawyer who will actually perform the service advertised or a lawyer associated with the law firm which is advertising." *Id.* at 7.2(f) (2009).

33. Louisiana's recent rule changes had a somewhat dramatic history. In 2006, the Louisiana legislature passed a resolution stating that "the manner in which some members of the Louisiana State Bar Association are advertising their services in this state has become undignified and poses a threat to the way lawyers are perceived." *Pub. Citizen v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 544 (E.D. La. 2009). In response to the resolution, the Louisiana Supreme Court created a committee to study the matter and, in October 2006, the Bar Association's Rules of Professional Conduct Committee advanced a set of proposed amendments to the advertising rules. *Id.* The Louisiana Supreme Court adopted the Rules, which were originally to be effective on Dec. 1, 2008. *Id.* The rules were challenged in court and, in response, the state Supreme Court postponed the effective date of the rules, commissioned a survey, postponed the effective date of the rules yet again, and recommended review of the rules by the Committee. *Id.* The Committee reviewed the rules and recommended revisions to several. *Id.* The Supreme Court adopted the final recommendations of the Committee; the effective date of these new Rules is October 1, 2009. *Pub. Citizen*, 642 F. Supp. 2d at 544. In *Public Citizen, Inc. v. Louisiana Attorney Discipline Board*, the plaintiffs challenged the new rules on First Amendment grounds. *Id.* at 547. They objected to the provisions of the rules that prohibited communications that contained a "reference or testimonial to

The nature of high-regulatory content restriction varies considerably. Some prohibitions appear frequently: Prohibitions on testimonials or endorsements³⁴ and dramatizations³⁵ are common. Others are rarer: Some states include prohibitions on “self-laudatory” statements,³⁶ appeals to “fear, greed, desire for revenge or similar emotion,”³⁷ displays of counsel “exhibiting characteristics clearly unrelated to legal competence,”³⁸ or the use of a “nickname, moniker or trade name that implies an ability to obtain results in a matter.”³⁹

past successes or results obtained,” that “promise[d] results,” that “include[d] a portrayal of a client by a non-client without disclaimer of such,” or that depicted “any events or scenes or pictures that are not actual or authentic without disclaimer of such,” that “include[d] the portrayal of a judge or a jury,” or that “utilize[d] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter,” as well as some regulation of Internet advertising. *Id.* at 545. The Court held that some of the regulations were permissible because they prohibited inherently misleading techniques, and that others satisfied the *Central Hudson* test. *Id.* at 552-57. It rejected the requirement of spoken disclosure of the identity of a nonattorney spokesperson, finding that the rule was not shown to address a specific harm, and rejected some of the requirements relating to online advertising, noting that the state’s survey data did not apply to Internet advertising and that the rules adopted for online advertising “simply applied the same Rules as those developed for television, radio, and print ads to Internet advertising.” *Id.* at 558-59.

34. Arkansas, Indiana, and Wyoming prohibit both endorsements and testimonials; South Carolina prohibits testimonials only. While the text of Florida’s rule seems to prohibit testimonials only, *see* FLA RULES OF PROF’L CONDUCT R. 4-7.2(c)(1)(j) (2009), the Comment to the rule indicates that the rule “precludes endorsements or testimonials.” *Id.* at cmt.

35. Arkansas, New Jersey, and Wyoming prohibit dramatization expressly. Two additional states seem to have such a prohibition, even though their rules do not describe it that way. California’s prohibition on “displays of injuries, accident scenes, or portrayals of other injurious events which may or may not be accompanied by sound effects and which may give rise to a claim for compensation” appears to be a prohibition on particular varieties of dramatization. CAL. BUS. & PROF. CODE §6158.1(b) (2009). Florida’s Rule 4-7.2(c)(3) does not seem quite this broad at first glance; it prohibits “any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.” FLA. RULES OF PROF’L CONDUCT R. 4-7.2(c)(3) (2009). The Comment accompanying this Section suggests that its intended scope is broader, however: “Subdivision (c)(3) prohibits visual or verbal descriptions, depictions, portrayals, or illustrations in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem.” *Id.* at cmt. This seems to amount to a prohibition on dramatization, even though it is not denominated as such.

36. IND. RULES OF PROF’L CONDUCT R. 7.2 (2009); S.C. RULES OF PROF’L CONDUCT R. 7.1 (2009).

37. IND. RULES OF PROF’L CONDUCT R. 7.2 (2009).

38. N.J. RULES OF PROF’L CONDUCT R. 7.2 (2009). N.Y. RULES OF PROF’L CONDUCT R. 7.1 (2009), which included such a prohibition, was struck down in *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff’d in part and rev’d in part*, 598 F.3d. 79 (2d Cir. 2010). The law firm challenging the New York rules claimed that its previous advertising techniques would violate the new rules. *Id.* These included advertisements “portraying its attorneys as giants towering over downtown buildings, depicting its attorneys counseling space aliens concerning an insurance dispute, and representing its attorneys running as fast as blurs to reach a client in distress.” *Id.* at

Violation of these prohibitions would be plainly apparent to the casual observer. To the extent that out-of-state lawyers are violating the prohibitions, the next question is whether those lawyers are being subjected to discipline—or other consequences—for doing so.

III. REGULATING THE OUT-OF-STATE LAWYER

A. *The Power to Enforce*

The first question is whether it would be possible for high-regulatory states to discipline out-of-state lawyers for violations of the state's advertising rules.

States that have adopted the Model Rules approach to jurisdiction, set out in Model Rule 8.5, should not have much difficulty. That rule provides that “[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”⁴⁰ While there is little caselaw applying the state versions of this rule, it could certainly be interpreted to permit imposing discipline on a lawyer who has advertised in a jurisdiction on the ground that such advertising amounted to an “offer to provide” services in the jurisdiction.⁴¹ A number of high-regulatory states have adopted this version of Model Rule 8.5,⁴² though some have not.⁴³

243. Evidently, the firm was concerned that these vignettes featured characteristics unrelated to legal competence.

39. S.C. RULES OF PROF'L CONDUCT R. 7.1 (2009); N.Y. RULES OF PROF'L CONDUCT R. 7.1 (2009). This provision was struck down in New York; a law firm challenging the regulation routinely advertised themselves as “the heavy hitters.” *Alexander*, 634 F. Supp. 2d at 239.

40. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2009).

41. *Id.* There is, however, an ambiguity in the provision that might be problematic. Is it the offer that must occur in the jurisdiction, or is it the ultimate services that are being offered that must be provided in the jurisdiction? This could become an issue if the lawyer's work would not require the “practice of law” within the jurisdiction.

42. *See, e.g.*, ARK. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); IND. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); IOWA RULES OF PROF'L CONDUCT R. 32:8.5(a) (2009); LA. RULES OF PROF'L CONDUCT R. 8.5 (2009); N.J. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); PA. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); S.C. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); S.D. RULES OF PROF'L CONDUCT R. 8.5(a) (2009). *But see* N.J. RULES OF CT. R. 1:20-1(a) (2009) (“Every attorney and business entity authorized to practice law in the State of New Jersey, including those attorneys specially authorized for a limited purpose or in connection with a particular proceeding, shall be subject to the disciplinary jurisdiction of the Supreme Court. . .”).

43. Wyoming, for example, has omitted this sentence from its version of Rule 8.5. *See* WYO. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); *see also* FLA. RULES OF PROF'L CONDUCT R. 4-8.5(2009). California's rules provide that they “shall also govern the activities of lawyers while engaged in the performance of lawyer functions in this state,” CAL. RULES OF PROF'L CONDUCT R.

Presented with the problem of regulating out-of-state lawyer solicitation, the Indiana courts concluded that they did have the inherent authority to discipline out-of-state lawyers who violated the state's rules on written solicitation. After a plane crash in the state in 1992 attracted written solicitations from out-of-state lawyers to Indiana clients, the disciplinary authority undertook disciplinary actions against out-of-state attorneys for their failure to comply with the state's solicitation rules.⁴⁴ The court concluded that, even though its usual sanctions were not operative in the context of lawyers not licensed in the state, the out-of-state lawyers were nonetheless subject to the court's regulatory authority.⁴⁵ The court stated:

[A]ny acts which the respondents take in Indiana that constitute the practice of law are subject to our exclusive jurisdiction to regulate professional legal activity in this state. By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts As such, they held themselves out to the public as lawyers in this state.⁴⁶

The court noted that it could have proceeded against the lawyers for unauthorized practice, but that it was not restricted to that remedy where there had been misconduct as well.⁴⁷

1-100(D)(2) (2009), but make no reference to an offer to provide services. New York did not adopt this sentence in its version of Rule 8.5, but, oddly, it retained the comment relating to the omitted provision in its Comment to Rule 8.5. See N.Y. RULES OF PROF'L CONDUCT R. 8.5(a) & cmt. 1 (2009) ("Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state is for the protection of the citizens of this state. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule."). Texas's rule permits the application of the state's rules to lawyers not admitted in Texas only when they are "specially admitted" for a proceeding. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 8.05 (2009).

44. *In re Murgatroyd*, 741 N.E.2d 719, 720 (Ind. 2001).

45. *Id.* at 721.

46. *Id.*

47. *Id.* at 722. The lawyers there sought federal court intervention to prevent the disciplinary proceeding; the federal district court declined to interfere on the ground of *Younger* abstention. See *Sterns v. Lundberg*, 922 F. Supp. 164, 171 (S.D. Ind. 1996). The date of the case suggests that this was a protracted matter. For a contrary result under a different set of state rules, see *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 335-36 (W. Va. App. 1996) (holding that under West Virginia law, as of the time of the alleged misconduct, the Lawyer Disciplinary Board had jurisdiction over individuals not admitted in West Virginia only if they "regularly engage[] in the practice of law in West Virginia" and that merely soliciting clients in the state, while it constituted "the practice of law," did not suffice for regular engagement). The West Virginia court noted that the rules had changed since the events at issue there and that, under the current rules, engaging in practice in the state would subject a lawyer to discipline for violating the West Virginia Rules of Professional Conduct, regardless of the lawyer's jurisdiction of admission. *Id.* at 336.

What the sanction would be is a different matter. The Indiana court imposed injunctive relief to assure that any future solicitations in the state of Indiana would comply with the rules of professional conduct there; in another case, the court excluded the lawyers from practice in the state of Indiana.⁴⁸

One might argue that solicitation, which targets specific, identifiable targets within the state, constitutes more concrete in-state conduct than television advertising does. The Florida Supreme Court did not take this view, and it chose a somewhat different path. The Florida Bar proposed to the state Supreme Court that it adopt a rule explicitly providing for disciplinary jurisdiction over out-of-state lawyers who violated the state's advertising rules.⁴⁹ The court explicitly rejected that approach, finding the rules "unnecessary" because of the ability to proceed against such lawyers for unauthorized practice. "Out-of-state lawyers are not lawyers who are subject to the Rules Regulating the Florida Bar; rather, they are 'nonlawyers' subject to . . . unlicensed practice of law charges if they . . . engage in improper solicitation or advertising in Florida."⁵⁰ In lieu of approving the rule applying the advertising rules to nonlawyers, the Court suggested "amplifying . . . the rules concerning the unlicensed practice of law in regard to solicitation and advertising by lawyers admitted in other jurisdictions."⁵¹ The decision suggests that the state would pursue out-of-state advertisers through the unauthorized practice vehicle; there is one reported decision in which Florida has pursued this route.⁵²

48. See *In re Coale*, 775 N.E.2d 1079 (Ind. 2002). The court noted:

[S]ince the respondents are not licensed in Indiana, our choices of sanction do not include direct impingement of their law licenses. . . . The respondents' gross violation of this state's rules governing solicitation warrants their exclusion of practice from this state for a period of time in order to ensure that, should they ever again solicit clients in this state, they will abide by Indiana's *Rules of Professional Conduct*.

Id. at 1084–85. Presumably, this meant no pro hac vice admission.

49. The proposed rule provided: "[L]awyers, whether or not admitted to practice law in Florida, who solicit or advertise for legal employment in Florida or who target solicitations or advertisements for legal employment at Florida residents . . . must do so only in accordance with the applicable provisions of the [] Rules Regulating the Florida Bar." Amendments to Rules Regulating the Fla. Bar—Adver. Rules, 762 So. 2d 392, 393 (Fla. 1999). Another proposed rule subjected lawyers to the Court's rules if they "disseminate advertisements within Florida or target advertisements at Florida residents." *Id.* As in Indiana, see *supra* note 44 and accompanying text, a plane crash prompted the increased attention to the behavior of out-of-state lawyers; as the court noted, these rules were proposed because of the "offensive and improper practices of some non-Florida attorneys who converged on the survivors of those killed in the ValuJet airplane crash in the Everglades in May of 1996." *Id.*

50. *Id.*

51. *Id.* at 394.

52. See *infra* note 62 and accompanying text.

B. *Choice of Law*

Whether the high-regulatory jurisdiction has the authority to sanction out-of-state lawyers for advertising in the state answers only half the question. The next issue is the choice of law: What jurisdiction's rules of professional conduct would govern the propriety of the advertisements?⁵³ If, under the choice-of-law rules, the governing law would not be the rules of professional conduct of the high-regulatory state, there would be little reason to pursue discipline.

Examining the choice of law provision in the ABA Model Rules demonstrates quickly that it is not well-suited to the problem at hand. That provision, Model Rule 8.5(b), provides:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct shall be as follows:

1. For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits . . . ; and
2. For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.⁵⁴

The provision suggests that discipline is imposed for "conduct" which either "occurs" or has its "predominant effect" in one particular jurisdiction. One could interpret the rule to suggest that the "conduct" of the lawyer is placing the advertisement, but the "predominant effect" of the advertisement is located in the jurisdiction where the advertisement

53. This problem was considered, from the perspective of the lawyer deciding whether to advertise, in Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 347-48 (1994). Professor Zacharias wrote, "In deciding how to advertise services, it does not suffice for a firm to follow the local code. Newspaper, television, and radio messages often cross state lines Thus, a national firm with members admitted throughout the country risks being subject to the rules governing all fifty states." *Id.* The article viewed this as one of the justifications for a federalized code of legal ethics.

The problem has become more complex since Professor Zacharias wrote his article; at the time, only those states in which a lawyer was admitted to practice could impose discipline on that lawyer. *Id.* at 348. Under current law, by contrast, jurisdictions adopting Model Rule 8.5(a) may discipline lawyers not admitted to practice in the jurisdiction under certain circumstances. See Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002) (challenging the prior paradigm and arguing for expanded disciplinary jurisdiction over lawyers not admitted in the jurisdiction).

54. MODEL RULES OF PROF'L CONDUCT 8.5(b) (2009).

is aired. A nationwide advertisement is likely to affect every jurisdiction in which it is broadcast—does the airing of that advertisement have one “predominant effect” or fifty? There is a similar problem with attempts to regulate Internet advertising and solicitation, where the locus of the virtual conduct, and its effects, are difficult to situate in the corporeal world.⁵⁵

The choice-of-law provisions in the high-regulatory states identified in this Article track, for the most part, Model Rule 8.5(b).⁵⁶ Under those rules, the possibility of applying the rules of the high-regulatory state to out-of-state lawyers’ conduct certainly exists. Some jurisdictions fail to create a choice of law rule at all, relying instead on traditional conflicts provisions.⁵⁷

While reciprocal discipline might serve as a deterrent for out-of-state lawyers, at least some jurisdictions decline to apply reciprocal discipline when the violation with which the lawyer is charged would not constitute a violation in the lawyer’s own jurisdiction of admission.⁵⁸

55. See, e.g., Daniel Backer, *Choice of Law in Online Legal Ethics: Changing A Vague Standard for Attorney Advertising on the Internet*, 70 *FORDHAM L. REV.* 2409, 2411, 2424-26 (2002) (arguing that in the context of Internet activity, “the ‘predominant effect’ test is problematic, because it is difficult to discern where the predominant effect of Internet activity is felt”).

56. See, e.g., ARK. RULES OF PROF’L CONDUCT R. 8.5(b) (2009); IND. RULES OF PROF’L CONDUCT R. 8.5(b) (2009); IOWA RULES OF PROF’L CONDUCT R. 8.5(b) (2009); N.J. RULES OF PROF’L CONDUCT R. 8.5(b) (2009); PENN. RULES OF PROF’L CONDUCT R. 8.5(b) (2009); S.C. RULES OF PROF’L CONDUCT R. 8.5(b) (2009); S.D. RULES OF PROF’L CONDUCT R. 8.5(b) (2009). Wyoming’s Rule varies somewhat; its Rule 8.5(a) appears to envision discipline only by a jurisdiction in which the lawyer is admitted, and Rule 8.5(b) provides that Wyoming’s rules will apply to any Wyoming lawyer for any conduct other than conduct in a court. WYO. RULES OF PROF’L CONDUCT FOR ATTORNEYS AT LAW R. 8.5(a), (b) (2009). If the lawyer is licensed to practice in multiple jurisdictions, the rules of the jurisdiction of the lawyer’s principal practice shall apply, unless the conduct has “its predominant effect in another jurisdiction in which the lawyer is licensed to practice,” in which case “the rules of that jurisdiction shall be applied to that conduct.” *Id.* at R. 8.5(b) (2009). New York’s rule is similar. See N.Y. RULES OF PROF’L CONDUCT R. 8.5(b) (2009).

57. Florida Rule of Professional Conduct 4-8.5 is a jurisdictional rule with no choice-of-law provision. FLA. RULES OF PROF’L CONDUCT R. 4-8.5 (2009). The accompanying Comment simply states that if a lawyer is practicing in a jurisdiction other than the jurisdiction of admission, and “the Rules of Professional Conduct in the 2 jurisdictions differ, principles of conflict of laws may apply”; if a lawyer is admitted in two jurisdictions “which impose conflicting obligations, applicable rules of choice of law may govern the situation.” *Id.* at cmt. See also TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 8.05 (2005) (similar). California has its own rule, applying its rules to the activities of its members, wherever they take place, and to nonmembers engaged in the performance of lawyer functions in the state. CAL. RULES OF PROF’L CONDUCT R. 1-100(D) (2009).

58. See, e.g., D.C. BAR R. XI, §11(c)(5) (2009) (providing that a lawyer may avoid reciprocal discipline by demonstrating by clear and convincing evidence that “[t]he misconduct elsewhere does not constitute misconduct in the District of Columbia”).

A lawyer from a low-regulatory state with such a provision might avoid reciprocal discipline in his jurisdiction of licensure on those grounds.

C. *The Practice of Nonenforcement*

What is really happening in the world of disciplinary enforcement? My approach to this question was simply to look at recent reported disciplinary decisions in each high-regulatory jurisdiction to determine whether these rules are in fact being enforced against out-of-state attorneys.⁵⁹ As it turns out, the answer appears for the most part to be “no.”

Arkansas, Pennsylvania, South Dakota and Wyoming appear to have no reported cases involving attorney discipline for violations of the advertising rules, even by in-state lawyers. California appears to do little advertising enforcement,⁶⁰ and none involving out-of-state lawyers. Florida engages in frequent enforcement of its advertising rules against in-state lawyers, but not against out-of-state lawyers.⁶¹ On at least one occasion, Florida has pursued advertising by an out-of-state lawyer as part of a pattern of unauthorized practice.⁶² Iowa has some reported cases involving discipline of in-state lawyers for advertising and

59. As a matter of methodology, I reviewed reported disciplinary decisions involving advertising that arose in the past ten years. If there was a significant modification of the rules regarding advertising during that time, I considered whether the issue involved in the disciplinary case was one that could arise under the current rule. Methodologically, this approach is far from perfect. First, it addresses only reported disciplinary decisions; it is possible that there is a repository of unreported decisions that tell a very different story, though that seems unlikely. Second, the disciplinary cases do not always recite the bar admission of the subject lawyer, so it is possible that some jurisdictions are doing more disciplining of out-of-state lawyers than is visible. Third, it is possible that cross-border advertising simply is not occurring in these jurisdictions. In light of the nature of national cable advertising, this seems implausible.

60. This observation is confirmed and discussed at length in Zacharias, *supra* note 19.

61. For enforcement against in-state lawyers, *see, e.g.*, Fla. Bar v. Pape, 918 So. 2d 240, 242 (Fla. 2005) (imposing discipline for a television advertisement that used a logo of a pit bull and the firm’s phone number, 1-800-PIT-BULL); Fla. Bar v. Ellis, 2003 WL 23112717 at *1-2 (Fla. Comm. on Prof’l Ethics 2003) (referee report imposing discipline for distribution of a flyer with “prohibited visual cartoon depiction of two dented automobiles involved in a collision” and a too-small disclaimer); Fla. Bar v. Simonson, 2003 WL 23996011 (Fla. Comm. on Prof’l Ethics 2003) (referee report imposing discipline for direct-mail advertisement that “created unjustified expectations” and “used language that was prohibited because it was not factually substantiated”); Fla. Bar v. Wolfe, 759 So. 2d 639 (Fla. 2000) (imposing discipline for, *inter alia*, distribution of a self-laudatory brochure including testimonials).

62. *See* Fla. Bar v. Rapoport, 845 So. 2d 874, 878 (Fla. 2003). Rapoport, a lawyer admitted to practice law in Washington, D.C., engaged in representation of parties in securities arbitrations in Florida and advertised his services in a Florida newspaper. *Id.* The court enjoined Rapoport from engaging in the practice of law in Florida. *Id.*

solicitation violations, but no out-of-state lawyer discipline cases.⁶³ Louisiana has reported cases involving enforcement of its rules against in-state lawyers, but no out-of-state lawyer cases.⁶⁴ New Jersey imposed discipline on a series of in-state attorneys for violations of the advertising rules.⁶⁵ Because the enforcement of many of the advertising regulations in New York has been enjoined,⁶⁶ it is not surprising that there has been no disciplinary enforcement of the challenged rules. Prior to those rules, research located no disciplinary cases involving advertising in New York by lawyers not admitted there.⁶⁷ South Carolina had only one reported discipline case involving advertising, which did not involve an out-of-state lawyer.⁶⁸

In one Texas case, a Texas lawyer was charged with dishonesty, fraud, deceit, or misrepresentation for advertising in another jurisdiction in which he was not admitted to practice.⁶⁹ Texas has not imposed discipline on out-of-state lawyers, however.

63. See Iowa Supreme Court Attorney Disciplinary Bd. v. Bjorklund, 725 N.W.2d 1 (Iowa 2006) (disciplining a lawyer for a range of ethical violations, including “unverifiable and self-laudatory” publicity on the attorney’s website); Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Bjorklund, 617 N.W.2d 4 (Iowa 2000) (imposing discipline for an advertisement in a movie flyer that stated, “Have You Been Caught Drinking and Driving? I CAN HELP!” on the ground that it was “self-laudatory, relates to the quality of the lawyer’s legal services, and is not verifiable”).

64. Most of the Louisiana cases involve improper solicitation employing runners. See *In re Doscou*, 948 So. 2d 1074 (La. 2008) (granting resignation in lieu of discipline for a lawyer who “paid sums of money to a third person for recommending his services as a lawyer”); *In re Broome*, 815 So. 2d 1 (La. 2002) (imposing year-and-a-day suspension for improper in-person solicitation of clients and misrepresenting to potential clients that the lawyer worked for the Department of Justice); *In re Cuccia*, 752 So. 2d 796 (La. 1999) (imposing sanction of disbarment for, *inter alia*, using an extensive system of runners to solicit clients); *In re Castro*, 737 So. 2d 701 (La. 1999) (extended minimum period for readmission of a disbarred attorney who engaged in unauthorized practice and used runners to solicit business); *In re Bernstein*, 725 So. 2d 483 (La. 1999) (consent discipline; three-year suspension for use of runners).

65. See *In re McArdle*, 795 A.2d 851 (N.J. 2002); *In re Power*, 795 A.2d 849 (N.J. 2002); *In re Augulis*, 766 A.2d 749 (N.J. 2001). New Jersey’s discipline cases recite the residence of the disciplined lawyer and the date of that lawyer’s admission to the New Jersey bar, making it very clear whether the disciplined lawyer is admitted in New Jersey.

66. See generally *Alexander v. Cahill*, 634 F. Supp. 2d 239 (N.D.N.Y. 2007), *aff’d in part and rev’d in part*, 598 F.3d 79 (2d Cir. 2010).

67. One disciplinary case involved a claim that advertising by a New York lawyer in New York was false and misleading because it suggested that the lawyer was “an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients,” even though the lawyer had “not been actively engaged in the practice of law in this State since 1995,” had “never tried a case to its conclusion and has conducted approximately 10 depositions.” See *In re Shapiro*, 780 N.Y.S.2d 680, 684 (App. Div. 4th Dep’t 2004). This case involved Jim “the Hammer” Shapiro, whose ads are available on YouTube. See *id.*

68. *In re Schmidt*, 648 S.E.2d 584 (S.C. 2007).

69. See *Steinberg v. Comm’n for Lawyer Discipline*, 180 S.W.3d 352 (Tex. App. 2005). The evidence suggested that Steinberg was both holding himself out as an Arizona lawyer and engaging

Indiana, by contrast, does engage in enforcement of its advertising rules against out-of-state lawyers.⁷⁰ Indiana has disciplined lawyers for violating its rules on written solicitation, most visibly in a reaction to a 1992 plane crash, after which two justices of the state Supreme Court criticized the conduct of lawyers soliciting victims and their families, and directed the disciplinary commission to adopt an “aggressive posture” with regard to the court’s rules on advertising and solicitation.⁷¹

IV. THE MEANING OF NONENFORCEMENT

Most high-regulatory states do not appear to be enforcing their advertising rules aggressively against out-of-state lawyers. To determine whether this is consistent with their goals in imposing these rules, we need to consider what those goals are.

What are the justifications that high-regulatory states assert for their restrictive advertising rules, and are they advanced by a policy of

in the unauthorized practice of law in Arizona. *Id.* at 357–58. There are some Texas cases involving discipline of Texas attorneys for advertising violations, e.g., *Swisher v. Comm’n for Lawyer Discipline*, 1999 WL 989581 (Tex. App. Oct. 27, 1999) (television advertising), *Neely v. Comm’n for Lawyer Discipline*, 196 S.W.3d 174 (Tex. App. 2006) (misleading print ad); *Rodgers v. Comm’n for Lawyer Discipline*, 151 S.W.3d 602 (Tex. App. 2004) (misleading Yellow Pages listing).

70. *See In re Murgatroyd*, 741 N.E.2d 719, 723 (Ind. 2001) (imposing an injunction on California lawyers who sent written solicitations to clients in Indiana that did not comply with Indiana’s Rules of Professional Conduct; the remedy “ensure[d] that, should the respondents ever again send written solicitations to prospective clients in this state, their solicitations will comply with Indiana’s *Rules of Professional Conduct*”). The parties there agreed upon the remedy. The case was charged, in the alternative, as a violation of the Rules of Professional Conduct or as the unauthorized practice of law. *Id.* at 720. The attorneys litigated at length, unsuccessfully, the authority of Indiana to reach them or to impose discipline upon them. *See, e.g., Sterns v. Lundberg*, 922 F. Supp. 164 (S.D. Ind. 1996) (out of state attorneys brought federal court action seeking to enjoin state disciplinary proceeding against them; court granted motion to dismiss on grounds of *Younger* abstention); *see also In re Coale*, 775 N.E.2d 1079 (Ind. 2002) (barring out-of-state lawyers from engaging in the practice of law in Indiana because they solicited potential clients in the state without complying with the Rules of Professional Conduct). These cases both involved solicitation of victims of a 1992 plane crash.

71. *Sterns*, 922 F. Supp. at 166. Indiana also disciplines in-state attorneys for violations of advertising rules. *See, e.g., In re Benkie*, 892 N.E.2d 1237 (Ind. 2008) (imposing public reprimand for descriptions of prior representations in advertising brochure); *In re Keller*, 792 N.E.2d 865 (Ind. 2003) (imposing public reprimand for prohibited television advertisements); *In re Anonymous*, 783 N.E.2d 1130 (Ind. 2003) (imposing private reprimand for improper use of specialist designations in print ads); *In re Anonymous*, 775 N.E.2d 1094 (Ind. 2002) (imposing private reprimand for deceptive newspaper advertising); *In re Pacior*, 770 N.E.2d 273 (Ind. 2002) (disciplining attorney for deceptive advertising); *In re Huelskamp*, 740 N.E.2d 846 (Ind. 2000) (discipline for misleading and improper solicitation materials that included testimonial); *In re Cole*, 738 N.E.2d 1035 (Ind. 2000) (discipline for false, misleading and deceptive statement in yellow pages advertising); *In re Wamsley*, 725 N.E.2d 75 (Ind. 2000) (disciplining attorney for misleading, deceptive, self-laudatory, and unfair claims in his ad on the back cover of a phone directory).

nonenforcement? One source of information about the underlying purposes of the regulations is the justifications asserted for them when the regulations are subjected to constitutional challenge.

Under the commercial speech doctrine articulated in *Central Hudson*,⁷² regulations on commercial speech are permissible if the speech that is regulated is false or misleading. If the speech is not false or misleading (or is only potentially misleading), the state, to regulate the speech, must show that there is a substantial state interest justifying the regulation, that the regulation directly and materially advances that interest, and that the regulation is narrowly tailored.⁷³ As applied by the courts, the analysis of these questions requires, first, the articulation of an interest that justifies the regulation.

Accordingly, if a court concludes that the state is regulating only potentially misleading speech, it must articulate the purposes behind the regulation. Cases in which advertising regulations are challenged on First Amendment grounds accordingly provide a potential source of information about the state's asserted purposes underlying its advertising regulations.⁷⁴ However, they do not always provide a statement of articulated justifications for regulation; if the court concludes that the speech at issue is actually misleading, it often concludes that the regulation is permissible without assessing its constitutionality, avoiding application of *Central Hudson* altogether.⁷⁵ At least in some cases, this

72. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

73. *Id.* at 564-65.

74. The fact that the state articulates a justification for regulation does not, of course, mean that the regulation was in fact motivated by that justification. Cognizant of the requirements of a constitutional restriction on advertising, well-advised jurisdictions may simply behave instrumentally, articulating what they know is likely to be an approved justification, regardless of the subjective purpose behind the restriction. At the very least, however, it seems reasonable to expect a jurisdiction to pursue policy that is consistent with its asserted justifications for its regulations once they have been articulated.

75. This was the case, for example, with regard to a challenge to the Indiana regulatory scheme. In *In re Keller*, the Indiana Supreme Court upheld discipline for a lawyer based on televising an advertisement prepared by a national marketing firm. 792 N.E.2d 865, 866 (Ind. 2003). The advertisement depicts a conference room where actors portraying insurance adjusters are discussing a claim. *Id.* An older man, the "senior adjuster," asks a younger man, the "junior adjuster," how the claim should be handled. *Id.* The junior adjuster describes the claim as ". . . a large claim, serious auto accident" and suggests they try to deny and delay to see if the claimant will "crack." *Id.* The senior adjuster then asks which lawyer represents the victim, whereupon the junior adjuster responds: "Keller & Keller." *Id.* A metallic sound effect follows and the senior adjuster, now looking concerned, states: "Keller & Keller? Let's settle this one." *Id.* The court held that the ads were deceptive and therefore were not protected by the commercial speech doctrine. *Id.* at 869. See also *In re Pavilack*, 488 S.E.2d 309 (S.C. 1997) (rejecting a claim that advertisements were protected commercial speech where advertisements suggested that the lawyer directed police

conclusion is not terribly convincing, but it avoids the obligation on the part of the bar to articulate a justification for its regulations.⁷⁶ Another possible source of information about the purpose of restrictive advertising regulations is information accompanying the issuance of new rules, in which courts adopting the rules sometimes elaborate on the purpose behind them.

Scanning the state interests asserted in combating constitutional challenges to high-regulatory schemes suggests that the permissible (and not coincidentally, the frequently articulated) justifications for such regulation relate to protecting consumers of legal services from misleading advertising, providing accurate information to assist in the selection of an attorney, and (perhaps) protecting the reputation of the bar.

In Florida, the bar in one case asserted that the purposes of its regulations were ensuring that attorney advertisements were not misleading and that the public had access to relevant information to assist in the comparison and selection of attorneys.⁷⁷ Elsewhere, Florida

officers in conducting the investigation of traffic accidents; the court held the ads were misleading and therefore not protected).

76. *See, e.g.*, *The Fla. Bar v. Pape*, 918 So. 2d 240 (Fla. 2005). There, a lawyer challenged discipline imposed upon him for using an advertisement which “featured an image of a pit bull wearing a spiked collar and prominently displayed the firm’s phone number, 1-800-PIT-BULL.” *Id.* at 242. The disciplinary authorities claimed that this advertisement constituted “characterizing the quality of the lawyer’s services” and was not “objectively relevant to the selection of an attorney,” features prohibited in the then-current version of the Florida advertising rules. *Id.* at 242-43. The court rejected a First Amendment challenge to the regulation without analyzing the question under the *Central Hudson* test, on the ground that First Amendment protection extends only to “accurate factual information that can be objectively verified,” and that “an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment.” *Id.* at 248-49.

77. *Mason v. Fla. Bar*, 208 F.3d 952, 956 (11th Cir. 2000). Mason wanted to publish an advertisement that stated that he was “‘AV’ Rated, the Highest Rating Martindale-Hubbell National Law Directory.” *Id.* at 954. The bar required him to add a disclaimer fully describing the way in which Martindale-Hubbell evaluated attorneys. *Id.* Mason brought suit, challenging the state’s regulation on First Amendment grounds. *Id.* The bar asserted the two interests described in the text, and a third: an interest in “encouraging attorney rating services to use objective criteria” for assessing lawyers. The court found the first interests to be substantial and rejected the third interest. *Id.* at 956; *see also* *The Fla. Bar: Petition to Amend the Rules Regulating the Fla. Bar—Adver. Issues*, 571 So. 2d 451 (Fla. 1991) (court’s approval, as consistent with commercial speech doctrine, of rule changes that limited the speaker, visual display, and sound permitted in an electronic media advertisement and prohibited “dramatizations” and “self-laudatory statements”). In response to claims that the new rules were unconstitutional, the bar asserted that “current lawyer advertising fails to fulfill the purpose of educating the public and, instead, relies on irrational and often misleading advertising techniques. It contends that the proposed rules will curb advertising abuses and encourage advertising which provides the public with the necessary information to make decisions regarding legal services.” *Id.* at 455. In addition, the bar claimed that its regulations

indicated that its justification for its high-regulatory rules—which followed an initial task force recommendation that “a complete prohibition on advertisements for legal services in the electronic media is ‘the only practical way to address the problems created by television advertising’”—was that lawyer advertising caused the public to lose respect for the fairness and integrity of the legal system.⁷⁸

Texas, similarly, asserted that its interest in more restrictive attorney advertising regulation was protecting “the public from false, deceptive, or misleading lawyer communications, or, stated another way, to ensure communications from lawyers flow both freely and cleanly.”⁷⁹

Louisiana asserted its interest in regulating advertising as both “maintaining the standards of the legal profession and in protecting consumers from misleading or deceptive advertising.”⁸⁰ In analyzing a challenge to Louisiana’s advertising rules, a federal district court considered the preservation of the reputation of lawyers as a substantial state interest.⁸¹

These interests would seem to require enforcement of the rules against all lawyers, whether in-state or out-of-state.⁸² As one author has

would avoid “advertising that negatively affects the administration of justice [portrayed through] television and direct mail solicitation of accident victims.” *Id.*

78. Florida’s studies showed that “much lawyer advertising—especially television advertising—lowers the public’s respect for the fairness and integrity of the legal system.” Amendments to Rules Regulating the Fla. Bar, 762 So. 2d at 406 (Pariente, J., concurring in part and dissenting in part).

79. See *Texans Against Censorship, Inc. v. State Bar of Tex.*, 888 F. Supp. 1328, 1348 (E.D. Tex. 1995). The plaintiffs there claimed that this asserted interest was pretextual and that the real interest motivating the regulation was “the protection of the legal profession’s image, as well as the protection of those lawyers who are so well ensconced in the legal profession as not to need to advertise to attract clients.” *Id.* at 1348. The court rejected this claim, concluding that “real, and not merely illusory, concerns about false and misleading lawyer communications were the bases of the amended rules” and that this interest was substantial. *Id.* The court rejected constitutional challenges to, *inter alia*, the Texas prohibition on comparisons of quality that cannot be substantiated, *id.* at 1350, as well as the prohibition on the use of an actor in a television advertisement. *Id.* at 1356.

80. *Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539, 555 (E.D. La. 2009).

81. For example, the court discussed survey data presented by the bar which suggested that the public and Bar members would have “less confidence in the integrity of lawyers that use advertisements that include scenes of accidents or accident victims.” *Id.* at 557. It used that data as a basis for concluding that an outright prohibition on a dramatization was therefore constitutionally permissible. *Id.*

82. One Florida Supreme Court justice raised this concern with regard to differential enforcement:

I reiterate my strongly held view that we must not have advertising regulations which are not enforced or are selectively enforced. Commercial free speech is a valuable right, but it should be limited so that the courts receive the public respect which the functioning of

noted, the purposes of advertising regulation could not be served “if the consumer was only protected against the lawyers admitted in the consumer’s state, but not against the lawyers who are admitted in another state and are seeking business in accordance with the rules where those lawyers are admitted.”⁸³

As other scholars have recognized, failure to enforce advertising regulations results in the harms that the regulations are meant to avoid. Yet perhaps it is not surprising that states do little cross-border enforcement of advertising rules; this research confirms other scholarly work suggesting that states do little enforcement of advertising rules even against in-state lawyers.⁸⁴

One could posit many theories about why a jurisdiction might choose to underenforce its advertising rules. It might be a pure issue of resource allocation—it may seem more important to devote limited enforcement dollars to instances of misconduct that impose clear and immediate damage on identifiable clients.⁸⁵ It has also been suggested that ambivalence about advertising regulation and concern about the volume and complexity of the First Amendment litigation that is likely to result from vigorous enforcement generates an uneasy compromise, in which jurisdictions express their commitment to a robust regulatory regime purely through the articulation of largely unenforced rules.⁸⁶ This seems somewhat less likely in a high-regulatory state; most of these have demonstrated the capacity to defend their rules vigorously against constitutional challenge. In addition, their choices to opt for a more aggressive strategy of regulation might reflect a greater willingness to

the court system requires, and such limitation must fairly and effectively limit all Florida lawyers—not just those who voluntarily comply.

Amendments, 762 So. 2d at 405 (Wells, J., concurring in part and dissenting in part).

83. Hornsby, *supra* note 13, at 76.

84. Zacharias, *supra* note 19, at 999. Professor Zacharias began by reviewing his local Yellow Pages and applying to them the California Rules of Professional Conduct relating to attorney advertising. *Id.* Professor Zacharias’s conclusion was that of the 835 advertisements he reviewed, at least 257 were in actual or presumptive noncompliance with the governing rule. *Id.* at 978. Professor Zacharias went on to conclude that, in general, jurisdictions nationwide do little disciplinary enforcement of advertising rules. *Id.*

85. *Id.* at 1003-04.

86. *Id.* at 1004. Maine’s recent adoption of a purely aspirational advertising rule, discussed *supra* note 17, may reflect precisely these concerns; on the one hand, the rule contains extensive suggestions about how advertising might “be more effective and reflect the professionalism of the legal community”; on the other hand, the rule expressly recognizes that the rule is “not to be enforced through disciplinary process.” Maine’s rule 7.2-A(b) and the Reporter’s Notes describe the goal of the rule: to “encourage lawyers who advertise to do so in a dignified and professional manner without infringing on the First Amendment’s protection of commercial speech.” ME. RULES OF PROF’L CONDUCT R. 7.2-A(b) (2009).

back up the underlying goals of these rules with a vigorous enforcement effort. But the fact of sparse enforcement remains.

Beyond the more general concerns about underenforcement that these issues reflect—that underenforcement encourages noncompliance and reduces respect for law⁸⁷—it is worth focusing specifically on the cross-border component of underenforcement. If we assume that many lawyers in high-regulatory states will make a good-faith effort to comply with their own rules—which most would suggest is the purpose of those rules—the existence of non-compliant advertising from out-of-state lawyers does two things. First, it undermines any goal of shielding the consumer from misleading communications or communications that undermine the observer’s respect, such as it may be, for lawyers and the legal profession. Second, it disadvantages in-state lawyers. To the extent that in-state lawyers feel—even in the absence of aggressive disciplinary enforcement—some pressure to comply with the heightened standards of the high-regulatory states, they will find themselves at a disadvantage relative to out-of-state lawyers, who will experience no such constraints.⁸⁸ The end result is that in-state lawyers experience a competitive disadvantage relative to out-of-state lawyers.⁸⁹ Faced with a compassionate lawyer in a well-scripted and well-produced dramatization of the sort permitted in low-regulatory states, versus the stiff and stilted list of recited credentials that constitutes permissible advertising in a high-regulatory state, the choice to the consumer may seem clear.

That, in turn, might cause us to wonder about the efficacy of the underlying proposition: that differential regulation schemes in high-regulatory states have a salutary effect. One author has suggested that

87. Zacharias, *supra* note 19, at 1005–06.

88. See Wolfram, *supra* note 53, at 1058. If a local jurisdiction cannot discipline out-of-state lawyers, then:

out-of-state lawyers who are not subject to local regulation may attempt to take advantage of their relatively greater immunity from effective local regulation to take risks with the limits of those regulations that a local practitioner, if known to be more likely vulnerable to local regulation, would not take. The resulting state of affairs breeds opportunities for out-of-state lawyers to push the regulatory envelope and beyond, with consequent enhancement of the risk that locally required protections for clients, third parties, and public institutions will suffer in the process.

Id. While Professor Wolfram was arguing for disciplinary authority rather than exercise of discretion, the concerns that he discusses are similarly applicable here.

89. This concern was noted in a New Jersey case when commenting about New York advertisers whose advertisements would be seen in New Jersey. “We are mindful that whatever lines we draw may economically disadvantage New Jersey lawyers in relation to unscrupulous lawyers from unregulated jurisdictions. We cannot, however, establish our attorney discipline at the lowest common denominator of ethics.” *In re Anis*, 599 A.2d 1265, 1271 (N.J. 1992).

the difficulty of enforcing advertising rules against interstate advertisers might produce “a sense of hopelessness about the ability to enforce the rules fully and fairly,”⁹⁰ which dissuades bar authorities from enforcing the advertising rules at all. Another suggests that the inconsistent and, at the same time, expansive nature of state-by-state regulation of advertising behavior invites noncompliance;⁹¹ firms are “faced with a choice: to comply fully and limit their ability to compete in the global marketplace, or to disregard the rules and assume the risk that their lawyers may face disciplinary charges for the firm’s failure to comply with the ethics rules.”⁹² In short, no one thinks that the regime is enforceable across jurisdictional borders, and as a result, no one much tries. There is a cost to this, and imposing the costs of regulatory failure on those lawyers trying most assiduously to obey the rules seems of dubious benefit.

90. Zacharias, *supra* note 19, at 1004.

91. Hornsby, *supra* note 13, at 50.

92. *Id.*

