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# The Cost of Humanitarian Assistance: Ethical Rules and the First Amendment

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# THE COST OF HUMANITARIAN ASSISTANCE: ETHICAL RULES AND THE FIRST AMENDMENT

JACK P. SAHL\*

I. Ethical Prohibitions on Lawyers Advancing Living Expenses.....	801
A. Historical Background: Advancing Client Expenses .....	803
B. Early ABA Consideration of Living Expense Advances .....	805
C. Current ABA Regulation of Living Expense Advances .....	806
1. Majority Rule: Living Expense Advances Prohibited .....	806
D. Justifications for the Majority Rule .....	809
1. Conflicting Role of Lawyer as Client's Creditor .....	809
2. Lawyers' Fear of Competitive Disadvantage ..	813
3. Solicitation and Other Related Concerns .....	815
E. Judicial Mitigation (or Second Thoughts) Regarding the Majority Rule.....	817
1. Recent Cases .....	817
II. A Minority Approach: Permitting Lawyers to Help Clients with Living Expenses .....	820
A. Judicial Decisions.....	821
B. Professional Conduct Rules .....	822
III. Current Advertising Prohibitions on Living Expense Advances and the First Amendment .....	827
A. History of Lawyer Advertising in United States ..	827

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B. <i>Bates v. State Bar of Arizona</i> and Its Progeny . . . .	832
C. The Retreat from <i>Bates</i> . . . . .	843
D. State Advertising Prohibitions on Living Expense Advances and Commercialism Concerns . . . . .	849
E. First Amendment Scrutiny of Anti-advertising Rules . . . . .	853
F. State Sanctioned Advertising of Living Expense Advances . . . . .	867
IV. Conclusion . . . . .	868

Survival in the competitive world of business requires companies to create marketing strategies and to expend valuable resources to maximize sales.<sup>1</sup> The importance of marketing courses in business schools, the global magnitude of the advertising industry,<sup>2</sup> and the prominence of marketing experts in the political arena<sup>3</sup> all underscore the significance of self-promotion.<sup>4</sup> In short, it is natural and necessary to advertise one's products and services and to solicit prospective consumers and clients.

These same principles apply to the legal profession, as evidenced by the advent of lawyer advertising, law firm employment of marketing experts, and the increased significance of law firm

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1. See generally Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1 (2002) (discussing the necessity of advertising); Stuart Elliott, *New Kind of Celebrity Promoter Says the Words and Has Her Say*, N.Y. TIMES, NOV. 25, 2002, at C1, 2002 WL 103088283 (discussing the corporate advertising campaign).

2. See Denise Flaim, *Where Everything Is Happening*, NEWSDAY, NOV. 11, 2002, at E3, 2002 WL 102169047 (reporting that in 2001 there was \$39 billion in gross advertising income worldwide according to the trade publication *Advertising Age*).

3. See Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 1 (2002) (noting that in hope of attracting voters, advertisers "sell imagery," for example, "[t]he honest politician, compassionate . . . and tough as nails on crime"); see also Lee Hockstader, *GOP Hopeful of Shutout Despite Tough Challenge*, WASH. POST, NOV. 6, 2002, at A27, 2002 WL 102569662 (discussing a successful marketing strategy and campaign in a Texas race for a U.S. senatorial seat); Dale Russakoff, *Toricelli Beats Opposition to the TV Spots*, WASH. POST, AUG. 3, 2002, at A5, 2002 WL 24825433 (reporting on the candidates' marketing campaigns for the U.S. senatorial race in New Jersey).

4. See Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 6 (2002) (discussing how "hostility toward self-promotion is in tension with the trajectory of modern commercial speech doctrine"); cf. Esther Schrader & James Gerstenzang, *Looking to Future of Defense Military*, L.A. TIMES, AUG. 21, 2002, at A10, 2002 WL 2498094 (reporting the need for the White House to promote the case both on Capitol Hill and internationally for military action in Iraq).

marketing committees and campaigns.<sup>5</sup> Yet lawyer advertising has generated substantial controversy both within and outside of the profession.<sup>6</sup> The controversy stems, in part, from the adverse reaction to lawyers' blunt appeals for clients and the poor creative

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5. See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* xv (3d ed. 2000) (underscoring that the "marketing of legal services is one of the megatrends of the legal profession" and reporting that David Margolick, a noted New York Times columnist on the legal profession, "observed that the most profound change of a profession with timeless qualities was the competition of the legal marketplace"); Wendy Davis, *Law Firms Rethink Ad Approaches*, *ADVERTISING AGE*, Apr. 2, 2001, at 33, 2001 WL 5298870 (noting that law firms and their marketing consultants have adjusted their marketing strategies and campaigns to reflect changes in the economy and that "[t]he majority of corporate law-firm spending is in print media"); see also 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, 81 (2002) (reporting that the Legal Marketing Association has 1,250 members from 43 states and 9 countries, and that many marketers have advanced degrees and earn up to \$400,000 in large law firms, many of which also have staff employees dedicated to client development and retention).

6. See ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 22 (1988) (noting that "[d]ifferent segments of the bar often take conflicting positions on questions of professional regulation, such as those involving lawyer advertising and the profession's ethical code"). Justice Sandra Day O'Connor has expressed serious concerns about lawyer advertising. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 481 (1988) (O'Connor, J., dissenting). Justice O'Connor contends that the ethical ideals of serving the legal needs of the public and promoting justice—and not commercial profit—should principally motivate the profession's work. *Id.* at 488-89. Lawyer advertising significantly erodes these ideals because its purpose is essentially to promote commercial interests. See Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 6 (1998) (stating that commercial pressures—the increasing focus on "the bottom line, . . . [a]nd making larger amounts of money" have diverted lawyers' attention from professionalism). In *Shapero*, Justice O'Connor wrote: "Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other." *Shapero*, 486 U.S. at 490 (O'Connor, J., dissenting). Justice O'Connor's views of professionalism are significantly different than "the majority of Justices in *Shapero*." GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1036 (3d ed. 1998) (regarding her view that lawyer advertising diminishes the public service orientation of the profession). See generally Chief Justice Warren Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 950, 953-56 (1995) (criticizing some lawyer advertising and suggesting that it undermines the profession's integrity and contributes to the profession's low standing in public opinion); Thomas J. Moore, Comment, *Attorney Advertising in the Wake of Florida Bar v. Went for It, Inc.: A Groundbreaking Maintenance of the Status Quo*, 101 DICK. L. REV. 451, 473 (1997) (juxtaposing former United States Supreme Court Chief Justice Warren E. Burger's view of lawyer advertising with Justice Anthony M. Kennedy's position in *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting)).

quality of much of the advertising.<sup>7</sup> Late night television commercials often epitomize this unsophisticated promotion.<sup>8</sup> The primary cause for the controversy, however, is the long-standing notion, especially among lawyers and judges, that lawyer advertising is distasteful and inconsistent with the way a learned profession should conduct its affairs.<sup>9</sup> The critics of lawyer advertising long for a bygone era when tradition and, more importantly, state ethics rules prohibited most advertising.<sup>10</sup>

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7. Cf. Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 208-12 (2002), WL 14 LAWLIT 207 (reflecting the multifaceted nature of the advertising controversy by contending that advertising bans limited the ability of new immigrant groups and minorities to penetrate the market for legal services and stating: "The way to keep the profession cleansed of these undesirables was to limit, and ultimately ban, lawyer advertising").

8. See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* 42 (3d. ed 2000) (indicating that some lawyers have advocated a ban on television advertisements because of the "conspicuousness of lawyers selling their services and the history of low-budget, undignified television commercials"); see also Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 506 (1992) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978)) (arguing that much of the information circulated by electronic media contains little informational value and "'may disserve the individual and societal interest . . . in facilitating informed and reliable decisionmaking' as in the case of in-person solicitation").

9. See COMM'N ON ADVERTISING, ABA, *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS* 38 (1995) (reporting that the ABA Advertising Commission found many critics of advertising consider it "'unprofessional'" conduct and noting that in the mid-1980s, "many leaders of the organized bar viewed advertising as inappropriate self-promotion, undermining the integrity of the profession and weakening the public's image of lawyers in general and the legal system"); see also WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* xv (3d ed. 2000) (commenting that Chief Justice Warren Burger "often said a person should *never* engage a lawyer who found it necessary to advertise"); Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 385 (1995) (asserting that lawyers' negative attitudes towards advertising stems from law schools that "emphasi[ze] . . . law . . . as [a] service and deemphasi[ze] . . . law as a profit making venture" and that the "'corporate cultures' of the law firms perpetuate the negative attitude" as well as attorneys who "have internalized . . . the belief that advertising is akin to selling unneeded products and is therefore undignified and demeaning"). See generally JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43 (1977) (noting that "[t]he prohibition[s] against advertising instructed lawyers that success flowed from their 'character and conduct,' not from aggressive solicitation" and that the bar "attributed inferior character and unethical behavior to attorneys who could not afford to sit passively in their offices awaiting clients").

10. See COMM'N ON ADVERTISING, ABA, *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS* 91 (1995) (discussing the interrelationship between commercialism and professionalism and stating: "If

Advertising prohibitions, some of which continue today, have limited the competition among providers of legal services by severely restricting their ability to communicate important information to the public.<sup>11</sup> Limiting access to information increases the risk that consumers will remain uninformed about their legal rights and responsibilities and will make uninformed decisions in selecting counsel.<sup>12</sup> Limiting information about legal services also increases the risk that low-income or indigent people will wrongly assume that they cannot afford to hire a lawyer or bring a lawsuit.<sup>13</sup>

For many Americans, the choice between affording legal assistance—a luxury item—and covering basic living expenses

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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”); 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, 59 (2002) (recognizing even in 1980 that “[l]awyers had been taught for nearly seventy years that lawyer advertising was wrong . . . and showing disdain for competition, they embraced a cultural bias against self-promotion”); see also *Shapero*, 486 U.S. at 490 (O’Connor, J., dissenting) (opining that “[t]radition and experiment have suggested a number of formal and informal mechanisms” including restrictions on advertising “to reduce competition . . . among members of the profession”). Justice O’Connor believes that restrictions on lawyer advertising and solicitation would achieve this goal. *Id.*

11. 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, 87 (2002) (stating “the public is more inclined to favor competition among legal service providers and is more receptive to lawyer advertising when compared to the legal profession’s sentiments regarding lawyer advertising”); see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43, 204-05 (1977) (chronicling that “[r]ules against solicitation and advertising . . . only benefited established lawyers and obstructed the provision of adequate legal services[ ]” and that “[t]he Canons especially impeded those lawyers who worked in a highly competitive urban market with a transient clientele”).

12. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43 (1977) (emphasizing that advertising prohibitions “penalized both [lawyers] . . . and their potential clients, who might not know whether they had a valid legal claim or where, if they did, to obtain legal assistance”).

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, 57 (2002) (discussing an ABA report documenting the need for affordable legal services and the extent to which people face legal problems without a lawyer); see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 287-88 (1977) (concluding that “constraints on publicity and advertising assured that knowledge would remain unevenly, and unfairly, distributed” and that ethical rules established a “professional double standard . . . ‘which aid[ed] some in protecting their right of access to the legal system while throwing obstacles in the path of others’”).

appears to represent a choice in name only.<sup>14</sup> Most states prohibit lawyers from providing clients with financial assistance to cover these living expenses. In a few states, lawyers may help clients with living expenses by advancing or guaranteeing financial assistance. Given accurate information about the availability of legal services, poor people may find themselves able to protect important legal rights.

In Part I, this Article reviews the origins of and reasons for the ban on lawyer advancement of living expenses to clients when litigation is pending or occurring.<sup>15</sup> It describes the current regulatory regimes governing the issue and the majority rule that prohibits lawyers from advancing living expenses to clients involved in litigation. Part I also examines some of the key reasons for the majority rule and concludes that they do not justify the current ban.<sup>16</sup>

Part II reviews the approach of a minority of states and the District of Columbia, which permit lawyers to advance living expenses. Most of these jurisdictions limit the ability of lawyers to communicate or advertise information about the expenses they provide.

Part III examines the recent history of lawyer advertising and the current state of the law regarding the advertising of living expenses. It argues that existing limitations on advertisements of advances violate the First Amendment and should be discarded. The Article concludes by recommending that the American Bar Association (ABA) and all states adopt a rule permitting attorneys

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14. 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, 57 (2002) (noting that those who are younger, minorities, less-educated, or less-affluent, are less likely to find lawyers who are able to handle their legal problems).

15. This Article only discusses lawyers who advance living expenses to clients in civil cases. Similar advances in criminal cases involve other issues that are beyond the scope of this Article. For example, the government assumes some of the non-litigation expenses for clients, such as medical costs for incarcerated clients awaiting trial. See Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1119 n.12 (1994) (discussing only lawyers who advance living expenses to clients in civil cases). In addition, criminal cases do not produce a monetary judgment that enables lawyers to recoup any advances for non-litigation expenses. *Id.*

16. See *infra* Part I.E.1. This later section assesses how some states deal with lawyers who violate the majority rule against providing non-litigation expenses to clients—an assessment that suggests these states may have second thoughts about the rule and impose minimal punishment for violations.

to advance living expenses to clients when litigation is pending or occurring. It also contends that the First Amendment protects lawyers who advertise financial assistance in states that currently allow lawyers to advance living expenses.

### I. ETHICAL PROHIBITIONS ON LAWYERS ADVANCING LIVING EXPENSES<sup>17</sup>

There is a strong tradition in the United States that a citizen can turn to his lawyer for help when dealing with a legal, business, or personal problem. Sometimes the client requests financial help, but even without a request, lawyers may offer financial assistance out of a sense of compassion. The decision to provide financial assistance to a client may expose the lawyer to professional discipline if he or she violates ethical rules in the process.<sup>18</sup> Even if the lawyer successfully avoids discipline, he or she may be required to report the disciplinary agency's actions to his or her professional liability insurance carrier. This reporting could have repercussions with insurance carriers.<sup>19</sup> Simply stated, a lawyer's generosity or compassion may be dangerous to the lawyer's professional well-being.

The financial relationship between lawyers and clients has attracted substantial attention in recent literature covering such topics as lawyers' billing practices, retention contracts, referral fees, and contingency fee agreements.<sup>20</sup> By comparison, the questions of when and how lawyers may advance financial assistance to cover

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17. Sections I and II of this Article are based on an article that first appeared in Jack P. Sahl, *Helping Clients with Living Expenses: "No Good Deed Goes Unpunished,"* PROF. LAW., Winter 2002, at 1, WL 13 No. 2 PROFLAW 1. The text and footnotes of that work have been augmented in this Article.

18. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2002) (permitting lawyers to advance certain expenses in pending or contemplated litigation).

19. See Telephone Interview with Christopher F. Copp, Vice-President, Daniels-Head Insurance Agency, Inc. (Dec. 31, 2002) (stating that "the reporting of disciplinary investigations could result in higher premiums or declinations depending on underwriting criteria").

20. See generally Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995) (discussing the economic and ethical concerns of lawyers sharing the risks of litigation with their clients and suggesting some contingent fee regulation); Gerald F. Phillips, *Reviewing a Law Firm's Billing Practices*, PROF. LAW., Fall 2001, at 2, 2, WL 13 No. 1 PROFLAW 2 (examining abusive billing practices by lawyers).



client expenses have generally received less attention.<sup>21</sup> The specific question of whether lawyers should be permitted to advance non-litigation expenses or living expenses to clients is often relegated to a footnote when examining the economic relationship between the lawyer and the client.<sup>22</sup> Non-litigation expenses, otherwise known as and referred to in this Article as living ex-

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21. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 645 n.103, 688 n.286 (1995). Lawyer financial assistance to clients is sometimes treated as a necessary but less significant component of these more popular topics. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 108 n.317 (1989) (contending that there would be a reduction in contingency fee rates if lawyers were permitted to bid against each other for clients by providing financial assistance contingent on the outcome of the case). But see Joseph W. Blackburn & Kelly Thrasher, *Deduction of Litigation Expenses: Trial Lawyers v. I.R.S.*, 28 N. KY. L. REV. 1, 3-23 (2001) (discussing the history of contingent fee arrangements and the deduction of litigation expense advances); Janet E. Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667, 1671 (1981) (discussing DR 5-103(B)'s failure to make client reimbursement of litigation expenses contingent on the outcome of the suit in a class action context); Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 555 (2001) (providing an excellent economic analysis of the profession's bans on financial assistance to clients and contending the bans are anticompetitive because they suppress price competition among lawyers).

22. See Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions to Require the Payment of Money*, 70 B.U. L. REV. 623, 632 n.29 (1990) (recognizing the concerns following restrictions barring attorneys from advancing living expenses to clients); see also Janet E. Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667 (1981) (excluding any discussion of lawyers advancing non-litigation expenses). There are some notable exceptions where the question of living expenses was the central focus of discussion. See generally Gerson H. Smoger, *Funding Contingent Fee Cases: Ethical Considerations*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 2849 (2001), WL Ann. 2001 ATLA-CLE 2849 (discussing lawyers' expenditures, including living expense advances, in national pharmaceutical and toxic tort cases, and urging lawyers to know the ethical rules in each state in which clients reside to avoid any ethical problems); John J. Vassen, *The Case for Allowing Lawyers to Advance Client Living Expenses*, 80 ILL. B.J. 16 (1992) (recommending that the Illinois Supreme Court change its interpretation of the Illinois Rules of Professional Conduct that prohibits lawyers from financially assisting their clients); Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 224 (1990) (advocating a modification of current restrictions prohibiting an attorney from financially assisting a client); Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 MINN. L. REV. 1091 (1982) (discussing an amendment to Minnesota's Code of Professional Responsibility, which now allows an attorney to guarantee loans to clients); Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117 (1994) (focusing article on analysis of living expenses); William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419 (1967) (discussing the division in the legal profession over the ethics of attorneys lending money to their clients for living expenses).

penses, may include the cost of medical care, housing, food, clothing, utilities, and transportation.

### A. *Historical Background: Advancing Client Expenses*

Under Roman and early English law, advocates before courts could not be compensated for their services but could receive donations.<sup>23</sup> Later at common law, when lawyers were entitled to compensation, champerty laws in England prohibited them and any nonparty from financially supporting a suit in return for a share of the party's recovery.<sup>24</sup> The laws of maintenance and barratry also prohibited lawyers from financially supporting a party's suit.<sup>25</sup> The reasons for the prohibitions were to prevent wealthy nonparties from oppressing the poor and obstructing the administration of justice by speculation and meddling.<sup>26</sup>

For the same reasons advanced in England, many states in America enacted statutes, while others relied on the common law, to prohibit champerty, maintenance, and barratry.<sup>27</sup> Although the laws were initially created to protect the poor in litigation, they later became an impediment to the poor who often needed financial assistance to pursue claims against powerful manufacturers and

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23. Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 35 (1989). It is unclear whether this also meant that lawyers could not be reimbursed for advancing litigation expenses to clients. See *id.* (failing to address reimbursement for advancing litigation expenses).

24. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 12-28 (3d ed. 2001) (recognizing that champerty consists of "'investing'" in another's cause of action "by buying a certain percentage of the hoped-for recovery – in effect discounting it"); see also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 490 (1986).

25. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 489 (1986) (explaining that barratry, maintenance, and champerty were common law crimes prohibiting the stirring up of litigation); see also Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 67 (1935) (noting that the suppression of these crimes promoted the public welfare). Barratry is the "[v]exatious incitement to litigation, esp[ecially] by soliciting potential . . . clients." BLACK'S LAW DICTIONARY 144 (7th ed. 1999). Maintenance is an offense where one invests in another's cause of action by "providing living or other expenses to a client so litigation can be" pursued. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 12-28 (3d ed. 2001).

26. Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 228 (1990).

27. *Id.* A complainant had to prove some wrongful intent on the part of the nonparty committing one of the offenses. *Id.*

transportation companies.<sup>28</sup> Contingent fees and advancing expenses became increasingly necessary so that impecunious citizens might have their day in court.<sup>29</sup>

Recognizing the need to provide the poor with access to the courts, some American judges permitted lawyers to advance money to clients for their living, medical, and other expenses on two conditions.<sup>30</sup> First, the lawyer could not promise such assistance before the lawyer-client relationship was formed;<sup>31</sup> and second, the client had to retain responsibility for repaying the advance.<sup>32</sup> Some of these judges commended lawyers for providing financial assistance during litigation, describing the practice as "common" and stating that "to denounce the practice as improper would be to [denounce] the daily acts of the most honorable members of the profession."<sup>33</sup> The assistance did not violate laws

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28. See Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 71 (1935) (stating that the growth of contingent fees coincided with the increase in negligence claims against transportation companies).

29. See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 37 (1989) (recognizing the argument that contingent fee agreements ensure access to the courts for plaintiffs who cannot afford to hire lawyers); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 628 (1995) (pointing out that contingent fee agreements enabled more plaintiffs to pursue their claims because they allowed the clients to hire lawyers); Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 70 (1935) (detailing the development of the notion of the contingency fee and its importance to a client with a cause of action but no money).

30. Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 225 (1990); Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1120 (1994); William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1421 (1967).

31. See *Hildebrand v. State Bar of Cal.*, 117 P.2d 860, 863-64 (Cal. 1941) (indicating that an attorney's loan to a client did not constitute solicitation because the loan was made after the client retained the attorney); *People ex rel. Chicago Bar Ass'n v. McCallum*, 173 N.E. 827, 831-32 (Ill. 1930) (finding that lending money to a poor client for living and medical costs during a case does not offend public policy); *In re Sizer*, 267 S.W. 922, 928 (Mo. 1924) (holding that an attorney may loan money to a client if the loan is not consideration for employment).

32. See *McCallum*, 173 N.E. at 831 (stating that "it is permissible for an attorney to advance costs and court charges for his client, with the understanding that the same are to be ultimately paid by the client"); *Johnson v. Great N. Ry.*, 151 N.W. 125, 127 (Minn. 1915) (explaining that a loan to a client from an attorney is not a void arrangement so long as the client remains responsible for repayment of the loan).

33. *Reece v. Kyle*, 31 N.E. 747, 750 (Ohio 1892); see also *Johnson*, 151 N.W. at 127; Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1122 (1994); cf. *Mahoning County Bar Ass'n v. Ruf-*

against champerty because the client remained responsible for repayment of the expense.<sup>34</sup> These judges still found lawyers guilty of champerty when they assumed sole and full responsibility for litigation expenses or tied their repayment to the outcome of the case.<sup>35</sup>

### B. *Early ABA Consideration of Living Expense Advances*

In 1928, the ABA adopted Canon 42, which tacitly recognized that lawyers were providing financial assistance to clients.<sup>36</sup> Canon 42 provided: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."<sup>37</sup> Canon 42 did not directly answer the question of whether lawyers could advance living expenses to clients and the question continued to be controversial.<sup>38</sup> Some courts construed Canon 42 to prohibit lawyers from lending money to clients for living expenses while other courts permitted the practice.<sup>39</sup>

Before 1955, the cases seemed to produce "a reasonably clear and consistent rule" that lawyers could advance living and medical

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falo, 199 N.E.2d 396, 398-99 (Ohio 1964) (holding that several Ohio decisions permitting living expenses, including *Reece*, are inapplicable because of Ohio's adoption of the ABA Canons of Professional and Judicial Ethics, especially Canon 42, and citing ABA Formal Opinion No. 228).

34. Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1119 (1994); see also *McCallum*, 173 N.E. at 831 (noting that lending to a poor client for living and medical costs does not offend public policy); Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 62-69 (1935) (providing a historical discussion of champerty).

35. Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 229 (1990) (citing *Sun Life Assurance Co. v. Casanova*, 260 F. 449, 453-54 (1st Cir. 1919) as an example). Model Rule 1.8(e) permits the repayment of litigation expenses to be contingent on the outcome of the case or for lawyers to pay indigent clients' litigation expenses without any promise of repayment. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2002).

36. William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1423-24 (1967). Canon 42 was added to the original canons adopted in 1908. *Id.*

37. MODEL CODE OF PROF'L RESPONSIBILITY Canon 42 (1928).

38. William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1422-23 (1967) (citing N.Y. City Opinion 20 (1925)) (noting that "[w]hile the courts were validating loans for living expenses," the New York City Bar Association was condemning them in Advisory Opinions).

39. Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1122 (1994).

expenses if the lawyer did not thereby induce the client to employ him and the client remained liable for the expenses.<sup>40</sup> In 1955, the ABA issued Formal Opinion 288, which effectively rejected the reasoning of the earlier cases that had upheld loans for living expenses.<sup>41</sup> Formal Opinion 288 narrowly interpreted the term "expenses" in Canon 42 to permit lawyers to pay only litigation expenses, and the opinion implicitly established a clear official policy of prohibiting lawyers from advancing their clients funds for living expenses.<sup>42</sup>

### C. Current ABA Regulation of Living Expense Advances

#### 1. Majority Rule: Living Expense Advances Prohibited

In 1969, the ABA adopted the Model Code of Professional Responsibility (Code). Reflecting longstanding concerns about champerty and lawyer independence, DR 5-103(A) prohibited lawyers from acquiring a proprietary interest in a cause of action or the subject matter of litigation, except that a lawyer could obtain a lien for his fees and expenses or accept a reasonable contingent fee in a civil case.<sup>43</sup> DR 5-103(B) also continued the ABA's implicit prohibition on lawyers advancing living expenses to their clients involved in litigation.<sup>44</sup> DR 5-103(B) permitted lawyers to advance litigation expenses.<sup>45</sup> All but a handful of states adopted the rules.<sup>46</sup>

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40. William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1421 (1967).

41. *Id.* at 1420.

42. Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1123 (1994).

43. ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 51:801, at 11 (1995).

44. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1983). In effect, DR 5-103(B) reaffirmed the 1955 position of the ABA as set forth in Formal Opinion 288. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 288 (1955).

45. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1983). It provides:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

*Id.* Some states permitted lawyers to pay litigation expenses without the client's promise of repayment when a client was clearly unable to pay such expenses. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 508 (1986) (citing *Baker v. American Broad. Co.*, 585 F. Supp. 291, 294-95 (E.D.N.Y. 1984)). Further, some states added language to DR 5-103(B) to mitigate the hardship on lawyers and clients who could not pay their client's litigation

In 1983, the ABA replaced the Code with the Model Rules of Professional Conduct (Rules).<sup>47</sup> The Rules continued the proscription on lawyers acquiring a proprietary interest in a cause of action or the subject matter of litigation with certain exceptions.<sup>48</sup> In addition, Rule 1.8(e) reflected the majority rule in language that implicitly prohibited lawyers from paying a client's living expenses.<sup>49</sup> A lawyer's "financial assistance to a client in connection with pending or contemplated litigation" was limited to "advanc[ing] court costs and the expenses of litigation."<sup>50</sup> Unlike DR 5-103(B), however, Rule 1.8(e)(1) provided that the client's repayment of litigation expenses could be contingent on winning the case.<sup>51</sup> Rule

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costs. For example, the New York Code provides: "Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client." NEW YORK CODE OF PROF'L RESPONSIBILITY DR 5-103(b)(2) (2001).

46. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 744 (2001), 2001 WL 901077 (reaffirming New York's general rule DR 5-103(b) that permits a lawyer to advance or guarantee the expenses of litigation provided the client remains ultimately liable for repayment); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (2000) (reporting that "[t]he great majority of jurisdictions bar lawyers from making any loan for nonlitigation expenses, such as living expenses"); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 509 (1986) (writing that "several jurisdictions have balked at the strictness of the Code and the economic straits in which it may leave some clients and have provided various measures of limited relief").

47. See JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES 3 (2002-03) (recognizing that the Model Rule replaced the Model Code).

48. MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2002).

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

*Id.*

49. *Id.*

50. See NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 53 (1998) (recounting that "[e]arly drafts of the Model Rules would have allowed lawyers to advance living expenses, but this proposal was rejected by Model Rule 1.8(e)").

51. MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(1) (2002) (stating "the repayment [of litigation expenses] . . . may be contingent on the outcome of the matter"). Rule 1.8(e)'s change from DR 5-103(B), making the repayment of expenses contingent on the outcome of the case, recognized what had become a reality of practice for many lawyers—clients would not reimburse them for expenses in unsuccessful litigation. See Joseph W. Blackburn & Kelly Thrasher, *Deduction of Litigation Expenses: Trial Lawyers v. I.R.S.*, 28 N. KY. L. REV. 1, 22 (2001) (reporting that the District of Columbia Bar wanted DR 5-103(B)'s client "ultimate liability clause" eliminated because, in part, it was "'widely ignored'"). Anecdotal information suggests that lawyers continue to advance non-litigation expenses to clients—ignoring existing ethical prohibitions. Like Model Rule 1.8(e)'s

1.8(e)(2) introduced another change from the Code. It permitted a lawyer to pay court costs and litigation expenses for indigent clients without any expectation of ever recovering them—essentially making a gift of the expenses.<sup>52</sup>

In 1997, the ABA decided to review the Rules and created the Commission on the Evaluation of the Rules of Professional Conduct, known as the Ethics 2000 Commission.<sup>53</sup> Among other reasons for the review, there was a concern that the Rules were not reflective of recent developments in the profession and society and that there was a need for greater uniformity among the states.<sup>54</sup> The Ethics 2000 Commission *proposed continuing* the ban on lawyers advancing living expenses to their clients.<sup>55</sup>

The Ethics 2000 proposal to continue the ban on such assistance was significant. It apparently rejected the recent decision of some states to permit lawyers to advance living expenses in certain situations.<sup>56</sup> It is doubtful that these states lightly embarked on a policy contrary to the ABA's clear position. It is also questionable whether these states will change their position and follow the Ethics 2000 proposal, since it mirrors the existing ABA policy that these states have rejected. The risk that some of these states will not follow the Ethics 2000 recommendation threatens one of the commission's key goals—promoting greater national uniformity of ethical rules.

In 2001 and 2002, the ABA approved substantial changes to the ABA Model Rules in response to the Ethics 2000 Commission's recommendations.<sup>57</sup> The ABA retained its ban on lawyers advancing living expenses as a result of Ethics 2000's position.<sup>58</sup> The ABA position is consistent with the American Law Institute's position

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change to permit repayment to be contingent on the outcome of the case, a rule change permitting nonlitigation expenses would similarly reflect what is already the reality of practice for some lawyers.

52. MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(2) (1983).

53. David W. Rack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules, Substantive Change of Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 233 (2000).

54. *Id.* at 233-34.

55. *Id.* at 249.

56. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 509 (1986).

57. THOMAS D. MORGAN & RONALD D. ROTUNDA, 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (2003).

58. *Id.* at 44.

prohibiting loans from lawyers to clients for purposes other than financing litigation.<sup>59</sup>

#### D. *Justifications for the Majority Rule*

##### 1. *Conflicting Role of Lawyer as Client's Creditor*

A principal justification for prohibiting a lawyer from advancing living expenses to clients is the concern that the lawyer is placed in the "conflicting role of a creditor and [that this] could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's."<sup>60</sup> The ABA and all states currently permit lawyers to advance the cost of their time or labor and the cost of litigation to provide clients with access to the courts.<sup>61</sup> Whenever a lawyer agrees to a contingent fee or advances litigation expenses, the lawyer acquires an interest in the client's litigation and assumes the conflicting role as the client's creditor.<sup>62</sup> This conflict may be especially acute in the contingency fee situation where a lawyer is confronted with the dilemma of advising a client about a settlement offer or seeking a larger award with a trial. The settlement provides the lawyer with a certain and reasonable return on his investment of time and expenses in the case, while losing the case at trial means no compensation for the lawyer. In

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59. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(2) (2000). It is worth noting that the proposed section 48 of the Restatement (which is now section 36) contained a more liberal position on lawyers advancing living expenses to clients. It allowed a loan for living expenses if necessary "to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle . . . a case because of financial hardship rather than on the merits." See Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 648 (1998) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48(2)(b)(i) (Proposed Final Draft No. 1, 1996) and providing, in part, an excellent and critical summary of the debate and the defeat of the proposed section 48)); see also Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1137 (1994) (citing the tentative draft of section 48 of RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS).

60. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (2000).

61. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(1) (2002) (permitting lawyers to advance costs).

62. See Attorney Grievance Comm'n v. Eisenstein, 635 A.2d 1327, 1337 (Md. 1994) (criticizing lawyer advances for non-litigation expenses because they "'smack[ ] of purchasing an interest in the subject matter of the litigation' in which the lawyer is involved"); see also Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 549 (2001) (noting that the lawyer "buys the rights to the client's legal claim" in a contingency fee arrangement).



addition to losing his fee, the lawyer might also forfeit the litigation expenses he advanced to the client because clients commonly refuse or are unable to reimburse their lawyers for such expenses upon losing a case.<sup>63</sup>

This "creditor conflict role" justification for the majority rule is therefore flawed on several grounds. First, it arbitrarily distinguishes living expenses from contingency fees and litigation expenses in defining the permissible financial interests that a lawyer may acquire in his or her client's litigation.<sup>64</sup> Second, depending on the case, the expense of the lawyer's time—and not the expense of paying the client's living expenses—may pose the greater threat to the lawyer's exercise of independent judgment on behalf of a client. In other cases, the lawyer's advance of litigation expenses to the client—and not the lawyer's payment of living expenses—may pose the greater threat to the lawyer's ability to act in the client's best interests.<sup>65</sup> It is unfair to assume that the advancement of living expenses generally presents a qualitatively different risk to lawyer independence than the risks posed by lawyers advancing litigation expenses or accepting contingency fees.<sup>66</sup> Third, the un-

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63. See Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 553 (2001) (recognizing that clients will sometimes not reimburse lawyers for loans obtained for litigation expenses, even when the client has clearly agreed to reimbursement); see also William Roger Strelow, Comment, *Loans to Clients for Living Expenses*, 55 CAL. L. REV. 1419, 1441 (1967) (stating that "the inability of unsuccessful clients to repay advances, has never been thought to make such advances champertous. No reason appears for treating loans for living expenses differently").

64. NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 52 (1998). The author also recognized the following:

A more modern rationale for the prohibition against lawyers advancing expenses other than expenses of litigation to their clients is that the lawyer becomes a creditor, with interests adverse to those of the client, and this interest may cause the lawyer to conduct the litigation to protect the lawyer's rather than the client's interest. This justification is weak, however, because contingent fee agreements also give lawyers an interest in litigation that may cause them to conduct the litigation to protect their interest over those of their clients.

*Id.*

65. See *Miss. Bar v. Attorney HH*, 671 So. 2d 1293, 1298 (Miss. 1995) (recognizing that money lent to clients, whether for litigation or living expense, has the same potential to affect the lawyer's judgment); see also *Attorney AAA v. Miss. Bar*, 735 So. 2d 294, 299 (Miss. 1999) (noting the "inconsistency of asserting that a lawyer's interest in recovering moneys lent . . . [for living expenses] would affect his judgment while the prospect of losing possibly vast sums . . . [for] litigation expenses would not").

66. NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 54 (1998) (stating that "[m]ost lawyers already have substantial financial interests in their cli-

fairness is especially troublesome because lending clients money for living expenses serves the same salutary goal that contingency fees and litigation expense loans seek to promote—opening the doors of courthouses to impecunious clients and ensuring equal access to justice.<sup>67</sup>

Fourth, this “creditor conflict role” justification also ignores the fact that lawyers are ethically obligated to represent their clients with undivided loyalty.<sup>68</sup> The ABA and state bars should focus their efforts on investigating and enforcing this fundamental principle rather than establishing an expansive rule that prohibits all lawyers from advancing living expenses.<sup>69</sup> The current ABA rule

ents’ cases under contingent fee and expense advancement agreements. Giving lawyers the additional interest resulting from making loans for living expenses is unlikely to reduce their independence”); see also Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 723 (1994) (noting that “[t]he risks of conflicts or baseless litigation,” when lawyers provide living and litigation expenses “are precisely the same as those arising from contingent fees”).

67. See Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117, 1121 (1994) (noting that some courts have recognized loans for living expenses advance public policy concerns regarding courthouse accessibility); see also *Shapley v. Bellows*, 4 N.H. 347, 355 (1828) (writing that lawyers who advance expenses permit indigent clients “to obtain justice in cases where, without such aid, [they] would be unable to enforce a just claim”).

68. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2002). Rule 1.7(a) prohibits a lawyer from representing a client “if the representation involves a concurrent conflict of interest.” *Id.* at 1.7(a). A concurrent conflict of interest may arise in several situations, including when the lawyer’s personal interests materially limit his representation of a client. *Id.* at 1.7(a)(2) & cmt. 10. A lawyer who may be “materially limited” in representing a client can nevertheless represent the client if:

(1) the lawyer reasonably believes that the lawyer [can] provide competent and diligent representation . . . ; (2) the representation is not [limited] by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation . . . ; and (4) each affected client gives informed consent, confirmed in writing.

*Id.* at 1.7(b)(1)-(4). A lawyer advancing litigation expenses to a client should discuss the potential for a conflict of interest if the amount advanced might impair the lawyer’s ability to recommend a course of action that is in the client’s best interests. *Id.* cmts. 4, 18, 19. See MODEL CODE OF PROF’L RESPONSIBILITY EC 5-7, EC 5-8, DR 5-105(A) (1983) (requiring a lawyer to decline employment if the lawyer’s own interests may reasonably affect his ability to exercise independent judgment for the client, except when the client consents after full disclosure); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000) (noting that the conflict of interest rule is designed to “assure clients that their lawyers will represent them with undivided loyalty”).

69. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 723 (1994) (suggesting that the “best response” to conflict of interest and other concerns “is greater regulatory oversight, not categorical prohibitions”).

unfairly sweeps within its prohibition lawyer conduct that may not involve any dilution of lawyer loyalty to the client.<sup>70</sup>

Fifth and finally, to the extent that the advancement of living expenses—like contingency fees and litigation expenses—places the lawyer in the conflicting role of a creditor, both the Rules and the Code permit the lawyer to continue representing the client when the lawyer reasonably believes the representation will not be adversely affected and the client consents after full disclosure.<sup>71</sup> A simple rule requiring lawyers to obtain the client's consent after fully disclosing any potential conflicts of interest stemming from the lawyer's advance of living expenses would adequately protect the client's interests.<sup>72</sup> The current rule that permits clients to waive potential conflicts in some circumstances, but not when it concerns lawyers advancing living expenses, appears arbitrary and paternalistic.<sup>73</sup> The rule also conveniently limits the potential up-front investment by the lawyer to litigation expenses and the lawyer's time. Recent commentators have criticized the ban on lawyer advances as anti-competitive devices designed to maximize the lawyer's return on a case.<sup>74</sup>

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70. See *id.* (indicating that “most experts believe that current restrictions” on lawyers financing litigation “sweep too broadly”).

71. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1)-(4) (2002). Model Rule 1.7(b)(4) requires the client's informed consent be confirmed in writing. *Id.* at 1.7(b)(4). The written waiver requirement should help lawyers and clients to be more circumspect about conflict of interest risks, including those associated with lawyers advancing living expenses. *Id.* cmt. 20.

72. Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 224 (1990) (proposing a full disclosure and consent requirement for lawyers advancing living expenses).

73. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 491-92 (1986) (questioning the distinction made in the ethical rules prohibiting the acquisition of an interest in litigated matters but permitting some lawyer-client business dealings). The lawyer's acquisition of an interest in a “client's cause of action [is] no more objectionable on conflicts grounds than is any other business dealing between lawyer and client,” if it “is made in a way that avoids the possibility of adverse impact upon [the] lawyer's exercise of judgment during the course of the representation, . . . the client consents and the transaction is fair and reasonable.” *Id.* at 492.

74. See Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 555 (2001) (providing an excellent economic analysis of the profession's bans on financial assistance to clients and contending that the bans are anticompetitive because they suppress price competition among lawyers); see also Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 646-51 (1998) (noting lawyers' comments that reflected anticompetitive reasons for the ban on living expense advances by lawyers to needy clients).

## 2. Lawyers' Fear of Competitive Disadvantage

Some practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance.<sup>75</sup> This fear may be unwarranted for several reasons. First, some lawyers in a position to advance living expenses may avoid the practice to minimize the law firm's capital investment in cases and to limit their financial involvement with clients. These lawyers may prefer instead to help clients connect with third-party lenders to provide the cost of living expenses—a practice that has attracted recent attention.<sup>76</sup> Other lawyers may simply reject the policy as unseemly and instead help clients obtain public assistance, disability payments, unemployment coverage, or new employment.<sup>77</sup>

It is possible that lawyers who offer to advance living expenses may increase their share of the client market. A loss of market

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and suggesting that the ban “is an instance in which lawyer self-interest appears to have prevailed over clients’ rights—here, the rights of the most vulnerable of clients”).

75. In *Attorney Grievance Commission of Maryland v. Kandel*, the lawyer advanced living expenses to the same client who was involved in two separate automobile accidents. *Attorney Grievance Comm’n of Md. v. Kandel*, 563 A.2d 387, 387 (Md. 1989). In approving a public reprimand of the lawyer, the court held that DR 5-103(B) serves the important public interest of “avoid[ing] unfair competition among lawyers on the basis of their expenditures to [their] clients.” *Id.* at 390. The court recognized that “[c]lients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys.” *Id.*

76. See N.J. Sup. Ct. Comm. on Attorney Advertising, Op. 691 (2001), 2001 WL 169754 (citing MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2000)) (stating that “[i]t is well settled that an attorney is prohibited from advancing funds to a client for living expenses”). The court also recognized that “RPC 1.8 does not expressly or impliedly prohibit a lawyer from helping a client to obtain financial assistance from another, as long as the lawyer has no financial interest in the individual or entity which secures or provides the funding.” *Id.* at 2; Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2001-03 (approving a law firm’s loan from a third-party financial institution and using the loan to advance litigation expenses in personal injury matter accepted on a contingency fee basis and then deducting the costs and interest fees of the loan from the client’s settlement as a litigation expense); see also Marilyn Lindgren Cohen, *Financial Assistance to Clients: The Do’s and Don’ts*, OR. ST. B. BULL., Aug./Sept. 1994, at 39, 40, WL 54-SEP ORSBB 39 (reporting that the Alabama State Bar Disciplinary Commission Opinion 89-75 permits a lawyer to obtain financing from a lending organization if the client is fully informed, agrees in advance to the loan, and the interest rate is not usurious). Oregon permits a lawyer unaffiliated with the client’s lawyer to loan the client money and for the client to repay the loan from his or her recovery. *Id.* at 49 (citing OSB Informal Ethics Opinion 92-1).

77. Marilyn Lindgren Cohen, *Financial Assistance to Clients: The Do’s and Don’ts*, OR. ST. B. BULL., Aug./Sept. 1994, at 39, 43, WL 54-SEP ORSBB 39.

share for some lawyers, however, is an insufficient reason for the profession to abandon its policy of making legal services available to all, including the poor.<sup>78</sup> Lawyers and clients should be free to structure an economic relationship to meet both of their interests, provided they do not violate fundamental principles of the lawyer-client relationship, such as loyalty and confidentiality. Living expense advances are not necessarily inconsistent with these principles—indeed, they pose no greater risk than do advancements for contingency fees and litigation expenses.

Lawyers unable or unwilling to advance living expenses to clients may choose to associate with other firms who provide such assistance, for example, by agreeing to co-counsel cases.<sup>79</sup> It is increasingly common for lawyers to enter into these strategic associations or alliances to fund and to provide representation. Assuming that more established firms are in a better position to advance living expenses, newer or smaller firms may provide better representation with the assistance of the more established firms' experience and financial resources. The more established or experienced firm has a strong financial incentive to act as a mentor and to ensure that the client receives effective representation. The firm wants to increase its share in the client's potential recovery and minimize its liability for the other lawyer's representation. Thus, the need for some lawyers to associate with more established firms for the purpose of advancement of living expenses may produce an indirect benefit for both lawyers and clients.

The current majority rule also incorrectly assumes that clients who need living expense advances will not reimburse lawyers for such expenses unless the client receives a recovery.<sup>80</sup> Although this may often be the result, lawyers can insist that clients remain liable for such advances irrespective of the outcome of the litigation. Furthermore, the client's need for living expenses may be

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78. Both moderate income clients and other clients might also seek to defer or shift some economic costs associated with their case, such as medical care, to lawyers who are probably in a better position to shoulder the burden of living expenses.

79. John J. Vassen, *The Case for Allowing Lawyers to Advance Client Living Expenses*, 80 ILL. B.J. 16, 37 (1992) (suggesting that some lawyers with inadequate financial resources might "do a disservice to [a] client by taking a case" and that these lawyers might "joint venture" the case with more established firms).

80. Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 238 (1990).

temporary and the client may be able to repay living expense advances before the case is resolved—when the client receives deferred compensation, for example, or resumes work.<sup>81</sup>

### 3. Solicitation and Other Related Concerns

The majority rule's restriction on lawyers advancing living expenses is also based on the possibility that lawyers may use financial assistance to solicit clients.<sup>82</sup> There is a fear that a lawyer's offer to pay living expenses will unfairly induce a client to select a lawyer for financial reasons rather than for competency and experience.<sup>83</sup> This concern is overstated.

The ABA and many states currently permit lawyers to advertise that they will accept a contingent fee or advance litigation expenses.<sup>84</sup> The bar has solicitation rules to prevent unfair inducements concerning contingency fees and the advances of litigation expenses—contexts that are very similar to lawyers who advance living expenses.<sup>85</sup> Current ABA solicitation rules prohibit lawyer communications that are false or misleading and direct mail solicitation that does not contain the words "Advertising Material" on the outside of the envelope.<sup>86</sup> These solicitation rules are also adequate to protect clients from unfair inducements in the context of advances for living expenses.

As with contingency fees and litigation expense advances, the lawyer's offer to pay living expenses furnishes important commercial information to a client, especially a poor client. A poor client who was injured by another's tortious conduct may have lost his or her employment and be unable to pay his or her living expenses.

81. *Id.*

82. See *In re Carroll*, 602 P.2d 461, 467 (Ariz. 1979) (stating that the rationale for the rule is to prevent attorneys from providing improper inducements to prospective clients); *Fla. Bar v. Taylor*, 648 So. 2d 1190, 1192 (Fla. 1994) (Grimes, C.J., dissenting) (claiming that the Florida rule is a prophylactic measure to prevent the promotion of business through such fee arrangements); *Toledo Bar Ass'n v. McGill*, 597 N.E.2d 1104, 1106 (Ohio 1992) (Holmes, J., dissenting) (noting that the justification for the rule is based upon concerns of attorneys utilizing the bait of monetary assistance to lure in clients).

83. Marilyn Lindgren Cohen, *Financial Assistance to Clients: The Do's and Don'ts*, OR. ST. B. BULL., Aug./Sept. 1994, at 39, 40, WL 54-SEP ORSBB 39.

84. See Model Rules of Prof'l Conduct R. 7.2 cmt. 2 (2002) (recognizing that lawyers may also advertise the basis upon which fees are determined).

85. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2002).

86. *Id.* R. 7.3(c).

Once aware of an opponent's financial difficulties, a defendant may prolong litigation to force the unaided opponent to accept a premature and unfair settlement.<sup>87</sup> Permitting lawyers to advance living expenses would help to level the playing field between poor and wealthy litigants. The majority rule's approach is paternalistic and denies consumers access to a valuable financial benefit.

Additional support for the majority rule is the concern that lawyers who advance living expenses will stir up litigation.<sup>88</sup> This fear stems from the profession's historical concern about lawyers or other nonparties funding a suit that would permit a wealthy person to oppress an impecunious adversary in the courts or permit an intermeddler to obstruct justice.<sup>89</sup> Living expense advances by lawyers today do not oppress poor clients but instead empower them to prosecute their rights in court.<sup>90</sup> In addition, a rule that bans lawyer advances for living expenses to prevent intermeddling and the obstruction of justice is unnecessary in light of other remedies for such abuses. Judicial doctrines concerning standing and ripeness, ethical rules, like Rule 3.1's admonition against harassing or malicious claims, and procedural rules, like Rule 11 of the Federal Rules of Civil Procedure are better designed to prevent or to punish intermeddling and the obstruction of justice.<sup>91</sup>

A final justification for the majority rule is the concern that lawyers who provide living expenses to clients will demean the profession—that it is unseemly for lawyers to both fund and profit from their client's litigation.<sup>92</sup> This appearance-based concern is equally

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87. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 509 (1986) (noting a defendant's incentive to prolong litigation).

88. See *id.* (discussing methods of lawyer assistance to needy clients).

89. Marilyn Lindgren Cohen, *Financial Assistance to Clients: The Do's and Don'ts*, OR. ST. B. BULL., Aug./Sept. 1994, at 39, 39, WL 54-SEP ORSBB 39; see also Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 246 (1990).

90. See *State ex rel. Okla. Bar Ass'n v. Smolen*, 837 P.2d 894, 897 (Okla. 1992) (Kauger, J., dissenting) (supporting a lawyer providing assistance to a poor client).

91. MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2002); see also Janet E. Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667, 1675-76 (1981) (noting that there are "other measures . . . reasonably directed to deterring the nuisance suit—for example, summary procedures or imposition of defendants' counsel fee upon plaintiffs who press unmeritorious causes").

92. See *Attorney Grievance Comm'n v. Kandel*, 563 A.2d 387, 391 (Md. 1989) (upholding sanction of public reprimand for the improper advancement of monies to client for unrelated litigation and living expenses).

applicable to lawyers who accept contingency fees, advance litigation expenses, solicit, and advertise.<sup>93</sup> The profession has determined that this concern is outweighed by the longstanding ethical goal of making legal services available to all.<sup>94</sup> Lawyers who advance living expenses promote that ethical goal, as do lawyers who accept contingency fees or advance litigation expenses. Helping poor clients to litigate legitimate claims by covering their living expenses may represent acts of charity or compassion and enhance the public's perception of the profession.

#### E. *Judicial Mitigation (or Second Thoughts) Regarding the Majority Rule*

##### 1. Recent Cases

Lawyers who violate the majority rule's ban on advancing living expenses face the risk of discipline, including disbarment or suspension. Nevertheless, some lawyers are not deterred by the rule and continue to advance living expenses.<sup>95</sup> In part, this may be because some courts have imposed minimal punishment for violations and have expressed doubts about the ban.<sup>96</sup>

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93. See generally DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD* 102 (2d ed. 1998) (quoting JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 43-50 (1977) and reporting that "[c]ommercialization, speculation, solicitation, and excessive litigation were decried, but there was no mention of the contribution of contingent fees to the enforcement of legitimate claims otherwise denied by the victim's poverty . . . [—] [r]ules of ethical deviance were . . . applied by particular lawyers to enhance their own status and prestige").

94. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2002) (recognizing "[e]very lawyer . . . has a responsibility to provide legal services to those unable to pay"); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-1 (1983) (noting that "important functions of the legal profession are . . . to facilitate the intelligent selection of lawyers, and to assist in making legal services fully available"); see also *La. State Bar Ass'n v. Edwins*, 329 So. 2d 437, 445-47 (La. 1976) (asserting that advancement of living expenses to impoverished clients enables them to effectively assert their claims).

95. See *Edwins*, 329 So. 2d at 448 (recognizing that it is a common practice in maritime litigation for seamen to request and to receive larger advances to support their lifestyle pending a final disposition of high-award litigation; moreover, if Louisiana lawyers do not provide such advances, the clients will find lawyers elsewhere who will).

96. See *Attorney AAA v. Miss. Bar*, 735 So. 2d 294, 306 (Miss. 1999) (rejecting a request to suspend a lawyer for one year, but privately reprimanding the lawyer for violating an ethical rule by advancing living expenses and committing other violations). The state still had a rule that banned living expense advances when the lawyer made such advances. *Id.* at 295-96. The Mississippi court questioned the efficacy of the state rule and noted that at its urging the bar had recently modified the rule to permit advances for living



For example, the Ohio Supreme Court has customarily imposed public reprimands—it's least onerous sanction—for lawyers who only violate the ban against advancing living expenses.<sup>97</sup> In a recent case, *Cleveland Bar Ass'n v. Nusbaum*,<sup>98</sup> a lawyer advanced approximately \$26,000 in living expenses to a client who was severely injured in a motorcycle accident.<sup>99</sup> In publicly reprimanding the lawyer, Nusbaum, the Ohio Supreme Court cited several mitigating factors.<sup>100</sup> They included the absence of any previous disciplinary actions filed against him in his twenty-nine years of practice, the fact that his client was helped and not harmed by the loans, and the fact that Nusbaum's ex-wife filed the grievance.<sup>101</sup> The court also acknowledged its receipt of several letters, including one from his client, attesting to Nusbaum's good character.<sup>102</sup> The client reported that he had twenty operations since the accident, that he was unable to work, and he could not have survived without Nusbaum's advances for life's basic necessities.<sup>103</sup> He considered Nusbaum to be his friend and thought without the help he would have been forced to settle the case for less money.<sup>104</sup>

In *Attorney Grievance Commission of Maryland v. Kandel*,<sup>105</sup> the lawyer advanced living expenses, generally in increments of \$100, on nine different occasions for the same client who was involved in

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and medical expenses under certain conditions. *Id.* at 299-301; *see also infra* Part I.E.1 (discussing courts questioning or rejecting the majority rule).

97. *See Cleveland Bar Ass'n v. Mineff*, 652 N.E.2d 968, 970 (Ohio 1995) (reporting the public reprimand of an attorney who advanced living expenses to a client); *Toledo Bar Ass'n v. McGill*, 597 N.E.2d 1104, 1105-07 (Ohio 1992) (ordering a public reprimand).

98. 753 N.E.2d 183 (Ohio 2001) (*per curiam*).

99. *Cleveland Bar Ass'n v. Nusbaum*, 753 N.E.2d 183, 184 (Ohio 2001) (*per curiam*).

100. *Id.* at 184; *see also Mineff*, 652 N.E.2d at 970 (holding that mitigating factors included no financial harm to the client, the lawyer's violation was unintentional, and it did not interfere with his independent judgment in a case in which he loaned the client \$5,300 to avoid eviction and the loss of weight due to one meal per day).

101. *Nusbaum*, 753 N.E.2d at 184.

102. *Id.*

103. *Id.*

104. *Id.* One justice indicated in a separate and reluctant concurrence that a possible justification for DR 5-103(B)'s ban on lawyers advancing living expenses was to preclude litigants from "hold[ing] out for a larger settlement." *Id.* Additional support for this justification has not been found, and a handful of states have expressly rejected this justification in permitting lawyers to advance living expenses. *See La. State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976).

105. 563 A.2d 387 (Md. 1989).

two separate automobile accidents.<sup>106</sup> The advances funded medical treatment, transportation for medical care, and car repairs.<sup>107</sup> Kandel, a sole practitioner, represented numerous clients in a variety of cases over a thirty-five year period and had never been disciplined. The Maryland Court of Appeals noted that he was not motivated by personal gain to make the advances, that his client needed the money “due to his financial position and because of the necessity of continuing medical treatment,” and the client was not harmed by the living expense advances.<sup>108</sup> Although the court reaffirmed its policy against advancing living expenses, it rejected bar counsel’s recommendation of a ninety-day suspension, and instead the court ordered a public reprimand.<sup>109</sup>

Courts have occasionally suggested that their bar associations ought to reexamine the rule banning living expense advances.<sup>110</sup> *State ex rel. Oklahoma Bar Ass’n v. Smolen*<sup>111</sup> involved a lawyer who violated the state’s ban on advancing living expenses to clients during pending litigation by lending \$79,304 to 161 different clients during an 18-month period.<sup>112</sup> The non-interest-bearing loans were to destitute clients without the means and resources to obtain sustenance.<sup>113</sup> Recognizing that Smolen might be deserving of total

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106. Attorney Grievance Comm’n of Md. v. Kandel, 563 A.2d 387, 389-90 (Md. 1989). Unlike the earlier advances of \$100, the ninth advance was for \$200 and occurred after the case was settled. *Id.* at 390. The ninth advance was not a violation because litigation was no longer pending. *Id.*; cf. Attorney Grievance Comm’n of Md. v. Eisenstein, 635 A.2d 1327, 1329, 1337-38 (Md. 1994) (suspending a lawyer for two years, in part, for making personal loans to a “longstanding friend” and client in a pending case). Maryland Rule 1.8(e)’s ban on lawyers advancing non-litigation expenses reflects the majority view and prevents lawyers from buying an interest in the subject matter of the client’s litigation. *Id.* at 1337.

107. *Kandel*, 563 A.2d at 389-90.

108. *Id.* at 390-91.

109. *Id.* at 391.

110. See, e.g., Toledo Bar Ass’n v. McGill, 597 N.E.2d 1104, 1106 (Ohio 1992) (per curiam) (writing that “we find some merit in respondent’s assertion that DR 5-103(B) should perhaps be re-examined” with respect to Minnesota’s version of DR 5-103(B) that permits lawyers to guarantee living expense loans). Thus, the court rejected the board’s recommendation that the two respondents receive six-month suspensions on the condition that they not violate DR 5-103(B) in the future. *Id.*; cf. Cleveland Bar Ass’n v. Nusbaum, 753 N.E.2d 183, 184 (Ohio 2001) (per curiam) (adopting the findings of the board to publicly reprimand respondent); Cleveland Bar Ass’n v. Mineff, 652 N.E.2d 968, 970 (Ohio 1995) (concurring with board findings to publicly reprimand attorney).

111. 837 P.2d 894 (Okla. 1992).

112. *State ex rel. Okla. Bar Ass’n v. Smolen*, 837 P.2d 894, 902 (Okla. 1992).

113. *Id.* at 895.

exoneration based on the dissent's criticisms of the rule, the court nevertheless publicly censured him.<sup>114</sup> The court urged the bench, the practicing bar, and the academic legal community to consider changing the rule.<sup>115</sup> Although it is unclear whether such an examination was undertaken, the Oklahoma Supreme Court recently rejected a humanitarian exception for living expenses in another case involving Smolen.<sup>116</sup>

In 1995, the Mississippi Supreme Court urged the state bar to review its rule prohibiting advances for living expenses in *Mississippi Bar v. Attorney HH*.<sup>117</sup> In response to that request, the bar established an ad hoc committee to consider possible changes to the rule.<sup>118</sup> The bar ultimately adopted the committee's recommendation to permit lawyers to advance living expenses and reasonable and necessary medical expenses under certain conditions.<sup>119</sup> Today, Mississippi is one of the few states that allows lawyers to advance money to clients for living expenses.<sup>120</sup>

## II. A MINORITY APPROACH: PERMITTING LAWYERS TO HELP CLIENTS WITH LIVING EXPENSES

Two state supreme courts permit living expense advances on humanitarian grounds, notwithstanding contrary ethical rules.<sup>121</sup> At least eight states have ethical rules that expressly permit lawyers to either advance or guarantee loans for living expenses to clients.<sup>122</sup>

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114. *Id.* at 906.

115. *Id.* at 906-07.

116. 16 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 698 (Dec. 20, 2000) (reporting that the Oklahoma Supreme Court reaffirmed the rule against lawyers advancing living expenses & ordered a 60-day suspension for a lawyer, Smolen, who was publicly reprimanded in a prior case for advancing such expenses).

117. *Miss. Bar v. Attorney HH*, 671 So. 2d 1293, 1298 (Miss. 1995).

118. *See In re G.M.*, 707 So. 2d 931, 934 (Miss. 2001) (attributing the genesis of revised MISS. RULE OF PROF'L CONDUCT R. 1.8(e) as *Mississippi Bar v. Attorney HH*).

119. *See* MISS. RULES OF PROF'L CONDUCT R. 1.8(e) (1999) (providing an exception to the rule forbidding attorneys from advancing funds to clients unless for "reasonable and necessary living expenses incurred").

120. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (1998) (noting the few states which allow the advancement of living expenses).

121. *See* Fla. Bar v. Taylor, 648 So. 2d 1190, 1190-92 (Fla. 1995) (finding the advancement of living expenses proper despite ethical rules to the contrary); La. State Bar Ass'n v. Edwins, 329 So. 2d 437, 445-46 (La. 1976) (refusing to find a violation of disciplinary rules when a lawyer advances minor sums of funds to clients for minimal living expenses).

122. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 cmt. c (2000). States that allow lawyers to only guarantee loans for living expenses are Minnesota, North

Most of these states impose significant limitations on the advances. For example, lawyers may not advertise or promise to pay living expenses to obtain or maintain employment, and clients must remain liable for repayment of an advance.<sup>123</sup>

#### A. Judicial Decisions

In 1976 in *Louisiana State Bar Ass'n v. Edwins*,<sup>124</sup> the Louisiana Supreme Court held that lawyers were permitted to advance "minimal living expenses" to clients under four conditions, even though a state ethical rule prohibited the practice.<sup>125</sup> These conditions are: (1) lawyers must not promise advances to induce employment and must not make advances until after being retained; (2) the advances must be reasonable based on the facts; (3) clients must remain ultimately liable for repayment of advances; and (4) lawyers must not promote public knowledge of such advances for purposes of securing future employment.<sup>126</sup> The court viewed the living expenses advanced in *Edwins* as akin to litigation expenses that, along with contingency fees, were ethically sanctioned methods of facilitating access to the courts.<sup>127</sup> The court believed that a humanitarian exception to the state's ban on advancement of living expenses promoted access to the courts and prevented impecuni-

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Dakota, and Montana. *Id.* Lawyers in the following states may advance living expenses directly to clients: California, Florida, Louisiana, and Mississippi. *Id.* The ethical rules in Alabama, the District of Columbia, and Texas permit lawyers to guarantee loans and to make advances for client living expenses. *Id.*

123. See MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002) (providing an exception to the stringent rule prohibiting lawyers from granting advances to clients); see Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221, 235 (1990) (discussing the justification for forbidding lawyers from advancing funds to provide for a client's living expenses).

124. 329 So. 2d 437 (La. 1976).

125. *La. State Bar Ass'n v. Edwins*, 329 So. 2d 437, 445-46 (La. 1976) (determining that DR 5-103(B) was designed to implement Canon 5's policy of ensuring that lawyers exercise independent judgment on behalf of clients). The court interpreted DR 5-103(B) in light of two ethical considerations, EC 5-7 and EC 5-8, which permitted lawyers to enter contingent fee arrangements or to advance litigation costs to provide clients with access to the courts. *Id.* at 445-46. The court noted that living expense advances by lawyers may be "the only effective means" for impoverished clients "to enforce [their] cause of action." *Id.* at 446.

126. *Id.* at 446; see also *Dupuis v. Faulk*, 609 So. 2d 1190, 1193 (La. Ct. App. 1992) (holding that dire circumstances warranted the lawyer's advance of medical and living expenses to the client).

127. *Edwins*, 329 So. 2d at 446.

ous clients from being forced to accept inadequate settlements in protracted litigation.<sup>128</sup>

In a case of first impression, the Florida Supreme Court followed Louisiana's example in *Florida Bar v. Taylor*,<sup>129</sup> and determined that the prohibition against advances for living expenses was designed to prevent lawyers from obtaining or maintaining employment by promising clients living expenses.<sup>130</sup> The lawyer in the case had issued a single check for \$200 to an indigent client and her child for basic necessities.<sup>131</sup> He had also provided used clothing for the child.<sup>132</sup> The Florida Supreme Court held that the lawyer's conduct was not improper because it was not intended to maintain employment but rather was "essentially an act of humanitarianism" with no expectation of repayment.<sup>133</sup>

### B. Professional Conduct Rules

Unlike Louisiana and Florida, several other states have adopted professional conduct rules that permit lawyers to advance living expenses.<sup>134</sup> Alabama expressly permits lawyers to advance or guar-

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128. See *id.* (reaffirming the humanitarian exception, even though the state bar had not yet changed its ethical rules to permit living expense advances); see also *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So. 2d 1140, 1146 n.10 (La. 2001) (urging the "formation of a committee to study the revision of Rule 1.8(e)"). Until recently, a similar circumstance existed in Illinois. See John J. Vassen, *The Case for Allowing Lawyers to Advance Client Living Expenses*, 80 ILL. B.J. 16, 16-17 (1992) (discussing the harsh reality of Illinois Rules of Professional Conduct 1.8(d), which prohibits attorneys from advancing or guaranteeing loans to clients since the Rule discriminates in favor of wealthy defendants).

129. 648 So. 2d 1190 (Fla. 1995).

130. *Fla. Bar v. Taylor*, 648 So. 2d 1190, 1190-92 (Fla. 1995) (citing *Edwins*, 329 So. 2d at 437). The *Taylor* court also found helpful information for its ruling in the case of *Florida Bar v. Dawson*, 111 So. 2d 427 (Fla. 1959). But see Timothy P. Chinari, *Survey of Florida Law: Professional Responsibility Law in Florida: The Year in Review, 1995*, 20 NOVA L. REV. 223, 230 (1995) (criticizing the *Taylor* decision as being based on "unrealistic assumptions and presents a strained application of the ethics rules").

131. *Id.* at 1190.

132. *Id.* at 1191.

133. *Id.* at 1192.

134. Compare ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2001) (permitting advancement of emergency financial assistance to clients so long as not contingent on the outcome), with MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (1999) (allowing lawyers to advance a loan reasonably needed to withstand delay in litigation), and MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002) (permitting attorneys to guarantee a loan from a financial institution for the sole purpose of providing basic living expenses), and N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002) (permitting loans for living expenses, provided the client remains responsible for repayment regardless of the outcome).

antee emergency financial assistance to clients provided the clients remain ultimately liable for repayment of the advances irrespective of the outcome of the case.<sup>135</sup> A lawyer must not promise emergency financial assistance prior to employment.<sup>136</sup>

Minnesota's and North Dakota's rules permit lawyers to guarantee loans for living expenses to clients to enable them to withstand prolonged litigation and resist pressure to accept an inadequate settlement.<sup>137</sup> Clients remain liable for the repayment of the loans regardless of the outcome of the case.<sup>138</sup> Both Minnesota and North Dakota forbid lawyers to promise to guarantee loans for living expenses prior to the lawyer's employment.<sup>139</sup> Montana also permits lawyers to guarantee loans from regulated financial institutions for basic living expenses when the loans are "reasonably needed" to enable clients to settle cases on the merits rather than for reasons of financial hardship.<sup>140</sup> Again, clients must repay the

135. See ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2001) (stating "a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer").

136. *Id.*

137. MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(1)-(3) (1999). This rule provides:

[A] lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for . . . the loan without regard to the outcome of litigation case and . . . that no promise of . . . financial assistance was made to the client . . . prior to the employment of that lawyer by the client.

*Id.* The North Dakota rule provides:

A lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains liable for repayment . . . without regard to the outcome of the litigation and, . . . that no promise of financial assistance was made to the client . . . prior to the [client's] employment of that lawyer by the client.

N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002).

138. MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(1)-(3) (1999); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002).

139. MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(1)-(3) (1999); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002).

140. MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002). This rule provides:

[A] lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation

loans and lawyers can only promise the assistance after clients have retained them.<sup>141</sup>

Mississippi has the most detailed rule for lawyers "advancing reasonable and necessary" medical and living expenses to clients.<sup>142</sup> Advances may occur only 60 days after the client has signed a retention agreement and the lawyer may not promise such payments in any type of communication to the public.<sup>143</sup> Advances are limited to \$1,500 and the lawyer must diligently investigate the client's need for the assistance.<sup>144</sup> The lawyer must ensure that the client has not received assistance from other lawyers in the matter and that in the aggregate the assistance does not exceed the \$1,500 limit.<sup>145</sup> The lawyer may ask the Mississippi Bar's Standing Committee on Ethics for permission to exceed the \$1,500 limit.<sup>146</sup> If the

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that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains . . . liable for repayment . . . without regard to the outcome of the litigation and, . . . neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client.

*Id.*

141. *Id.* Proponents of a rule that only permits lawyers to guarantee loans from a third-party lender contend that the approach makes a client feel less psychologically indebted to the lawyer and therefore less inhibited about exercising control over the case. Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 MINN. L. REV. 1091, 1110-11 (1982). The concern about the client's sense of indebtedness may be overstated. For example, a client's sense of indebtedness may be greater in the contexts of a contingency fee arrangement or where the lawyer is advancing litigation expenses. It is unfair to arbitrarily force clients to turn to third-party lenders for living expenses but not for litigation-related expenses. Moreover, the lawyer's full disclosure of any risks concerning a direct advance of living expenses should adequately protect the client's interests, including the client's sense of control over his or her cause of action. Ideally, the disclosure should be in writing and signed by the client.

142. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2)(a)-(b) (1999) (providing that a lawyer may advance "[r]easonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and [r]easonable and necessary living expenses incurred"). Lawyers can advance minor sums "under dire and necessitous circumstances," including to prevent foreclosure or repossession or for necessary medical treatment. *Id.* at 2(b). Payments aggregating \$1500 or less must be reported to the Mississippi Bar's Standing Committee on Ethics within 7 days following each payment. *Id.*; see also Elizabeth J. Cohen, *Affairs of the Heart*, 87 A.B.A. J. 66, 66 (2001) (reporting that lawyers in Mississippi are not "categorically prohibit[ed] . . . from advancing medical insurance premiums to needy clients").

143. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2)(a) & (b).

144. *Id.*

145. *Id.*

146. *Id.*

committee denies permission, the lawyer may petition the supreme court for permission to pay more than \$1,500.<sup>147</sup>

The Mississippi approach raises several concerns. First, it arbitrarily limits advances in the first instance to \$1,500 and imposes transaction costs on lawyers by requiring due diligence on their part to ensure that the client has not received advances from other lawyers. After the due diligence, lawyers must report each payment to the bar, raising the specter of additional scrutiny by the bar and possible peer disapproval. Second, the rule essentially acknowledges the significance of such advances and then, like the rules of several other states, prohibits lawyers from informing the public that the advances may be available.<sup>148</sup> Third, the rule's restrictions may chill the humanitarian instinct of Mississippi lawyers.

A few states impose little or no limitations. California permits lawyers to advance clients money, including living expenses, upon the client's written promise of repayment.<sup>149</sup> Lawyers in Texas may advance "reasonably necessary medical and living expenses" and make repayment contingent on the outcome of the case.<sup>150</sup> In the

147. *Id.*

148. *See infra* Part III.E. (arguing that these limitations on lawyers communicating their willingness to advance living expenses violate the First Amendment).

149. RULES OF PROF'L CONDUCT OF THE STATE BAR OF CAL. R. 4-210 (2002) (providing that a lawyer is not prohibited "[a]fter employment, from lending money to the client upon the client's promise in writing to repay such a loan"). Lawyers' loans under this rule, including living expenses, have apparently not produced significant disciplinary problems. *See* Telephone Interview with Jeff Dal Cerro, Assistant Chief Trial Counsel, Office of Chief Trial Counsel, State Bar of California (San Francisco) (Jan. 2, 2002) (stating that "as a stand alone violation, it has not created any significant problems but it could implicate conflict rules"). California also has a rule that does not prohibit lawyers from advancing all reasonable costs of litigation "or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter." RULES OF PROF'L CONDUCT OF THE STATE BAR OF CAL. R. 4-210(A)(3) (2002). It does not seem to cover lawyers advancing living expenses. *Id.* *See generally* Boccardo v. Comm'r of Internal Revenue, 56 F.3d 1016, 1017 (9th Cir. 1995) (holding litigation costs paid by California law firm under gross fee contracts with clients were properly deductible as reasonable and necessary business expenses under Internal Revenue Code, despite California Rules of Professional Conduct, which prohibit the advancing of costs); Los Angeles County Bar Ass'n, Formal Op. 495 (1998), <http://www.lacba.org> (discussing the advancement of litigation costs in the face of the client's refusal to pay the costs and acknowledging California Rule of Professional Conduct 4-210 that, in part, permits advances of personal expenses).

150. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.08(d)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 1998) (TEX. STATE BAR R. art. X, § 9) (providing that "a lawyer may advance or guarantee court costs, . . . and reasonably neces-



District of Columbia, lawyers may lend, or even provide clients with, funds for living expenses without any promise of repayment, provided the financial assistance is "reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding."<sup>151</sup>

The District of Columbia's approach is especially noteworthy because it offers advantages not present in some of the other minority jurisdictions. Lawyers are free to advance funds, and not just guarantee a loan, for any amount of living expenses reasonably necessary to help clients withstand protracted litigation without requiring them to repay the advance.<sup>152</sup> Lawyers are also free to communicate this important commercial information to the public both through advertisements and personal solicitations since, unlike many states, the District of Columbia does not have a blanket ban on in-person solicitation.<sup>153</sup> The approach recognizes that lawyers are capable of determining how much financial assistance is reasonably necessary to help a client, and the District has refrained from imposing burdensome reporting requirements on the good Samaritan lawyer.<sup>154</sup> The bar retains the authority to review a lawyer's judgment about what is reasonably necessary in any case and to ensure that he or she complies with the bar's solicitation rules.<sup>155</sup>

The District of Columbia bar association is one of the nation's largest, with approximately 76,000 members.<sup>156</sup> It is worth noting that the District's permissive approach concerning lawyer advances

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sary medical and living expenses, the repayment of which may be contingent on the outcome of the matter").

151. D.C. RULES OF PROF'L CONDUCT R. 1.8(d)(2) (1996) (providing that "a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or provide other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding").

152. *Id.*

153. See 18 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Careful Use of Internet 'Chat' is Allowed to Give Legal Information, Solicit Clients* 649, 667 (2002) (citing District of Columbia Bar Legal Ethics Committee, Opinion 316 (2002)) (reporting that there is no blanket ban on in-person solicitation in the District of Columbia and that it recently approved of lawyers "soliciting prospective clients through Internet Chat rooms and listservs, . . . in 'real time' or nearly real time, with Internet users who are seeking legal information").

154. D.C. RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (1996).

155. *Id.*; Telephone Interview with Wallace Shipp, Deputy Bar Counsel, District of Columbia (Jan. 4, 2002).

156. Telephone Interview with Wallace Shipp, Deputy Bar Counsel, District of Columbia (Jan. 4, 2002).

for living expenses has existed for a “long time and has not produced any official complaints.”<sup>157</sup> Nor has the approach caused the bar any “reason to be concerned.”<sup>158</sup> On the other hand, the approach offers several benefits. Individual clients gain financial assistance and more meaningful access to the courts; lawyers can engage in humanitarian acts; and the public learns that the legal profession seeks to assist all citizens in obtaining justice. The District’s approach provides the ABA and other states with a practical and worthy model for establishing a policy that permits lawyers to advance living expenses.

### III. CURRENT ADVERTISING PROHIBITIONS ON LIVING EXPENSE ADVANCES AND THE FIRST AMENDMENT

#### A. *History of Lawyer Advertising in United States*

Lawyers in the United States have a long tradition of advertising their services.<sup>159</sup> For example, in 1802 a lawyer in Tennessee published his business card in a newspaper, and similar advertisements commonly appeared until after the civil war.<sup>160</sup> Abraham Lincoln engaged in advertising and solicitation.<sup>161</sup> A number of his part-

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157. *Id.* Attorney Shipp has been bar counsel for twenty-one years and reported: “I can not remember docketing a complaint involving a lawyer overreaching in the context of this rule [permitting lawyers to advance expenses, including living expenses].” *Id.*

158. *Id.* One justification for the majority rule’s ban on living expense advances is that it restricts improper solicitation by lawyers. *Id.* Attorney Shipp has not seen lawyers advertising advancements of living expenses to solicit clients. Telephone Interview with Wallace Shipp, Deputy Bar Counsel, District of Columbia (Jan. 4, 2002).

159. See COMM’N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 29-42 (1995) (chronicling the history of lawyer advertising and reporting it was “common throughout the 19th Century”); see also 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, 51-64 (2002) (providing an excellent historical discussion of the development of the profession and its position on advertising). See generally DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 96 (2d ed. 1998) (recounting that “[l]awyers in ancient Greece and Rome were not shy about promoting their services” and “[n]either were distinguished eighteenth- and nineteenth-century American attorneys”); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 776 (1986) (positing that “[l]awyer advertising does not really have a history of its own; instead, most of the major moves and shifts in the area parallel closely those in other professional fields such as medicine, dentistry, and accounting”).

160. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 776 (1986) (citing D. CALHOUN, PROFESSIONAL LIVES IN AMERICA 82-83 (1965)).

161. COMM’N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 31-32 (1995).

nerships sponsored classified advertisements in the 1830s and 1850s.<sup>162</sup> He also reportedly solicited railroad companies that were considered to be the “most prestigious business in central Illinois.”<sup>163</sup> Lincoln’s career serves as a reminder that lawyers can successfully combine aspects of commercialism and professionalism.<sup>164</sup>

Historically, the supply and demand for legal services has significantly affected lawyer advertising.<sup>165</sup> In the colonial period, advertising was not common because there were few lawyers, and those who were in practice had been trained in England, where advertising constituted improper etiquette.<sup>166</sup> During the last half of the nineteenth century, however, “[r]elaxed admission standards and increased demand” for legal services prompted substantial growth

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162. *Id.* But 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, 51-53 (2002) (citing DAVID H. DONALD, LINCOLN 70-74, 145 (1995)) (suggesting that Lincoln was unaware and uninvolved in the newspaper advertisements).

163. 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, 53 (2002) (citing DAVID H. DONALD, LINCOLN 155 (1995)) (noting that the railroad companies were the “wealthiest and most prestigious business in central Illinois at that time”).

164. COMM’N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROF’L POL’Y CONSIDERATIONS 31-32 (1995). See generally ANTHONY KRONMAN, THE LOST LAWYER 3 (1995) (discussing the virtues and challenges to the lawyer-statesman ideal and identifying Abraham Lincoln as a “distinguished representative” of the ideal). Concerns about the effects of commercialism on conduct transcend the legal profession and permeate the popular press.

165. See LOUISE L. HILL, LAWYER ADVERTISING 40 (1993) (reporting it was “unnecessary for lawyers to actively seek business because there were few legal experts and many clients”); 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, 51 (2002) (noting the interrelationship between the demand and supply of legal services and lawyer advertising); Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 507-08 (1999) (discussing, in part, the effect of advertising and solicitation on the demand for legal services).

166. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (citing H. DRINKER, LEGAL ETHICS 210-11 & n.3 (1953) and noting that bans on solicitation arose as rules of etiquette); see also LOUISE L. HILL, LAWYER ADVERTISING 40 (1993) (stating that “in colonial America, it was customary for some young men desiring to be lawyers to . . . study law at the Inns of Court” in England “which discouraged overt client-getting activity” and upon returning to America they “helped to establish high standards of . . . performance for the legal profession”); 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, 51-52 (2002) (explaining the importance of etiquette in England and the lack of a need for advertising).

in the legal profession.<sup>167</sup> This growth in the profession heightened competition among lawyers to deliver legal services.<sup>168</sup> In hope of increasing market share, lawyers advertised their services in the classified sections of newspapers, in handbills and directories, and with business cards.<sup>169</sup>

During this same period, the legal profession promoted “a series of measures to limit its ranks and secure its position as a monopoly” by requiring the formal education of lawyers and the successful completion of bar examinations.<sup>170</sup> The profession also adopted ethical codes, the violation of which subjected lawyers to discipline, including disbarment.<sup>171</sup> States also enacted laws to criminalize the unauthorized practice of law.<sup>172</sup>

167. 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, 52 (2002); see also LOUISE L. HILL, *LAWYER ADVERTISING* 41 (1993) (chronicling this increase, and citing that in 1850, there were approximately 21,979 lawyers, and by 1900 that number grew to approximately 114,000).

168. LOUISE L. HILL, *LAWYER ADVERTISING* 42 (1993) (reporting that the “bar felt the ‘hot breath of competition’ from a commercial perspective”).

169. See WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* 1 (3d ed. 2002) (reporting that “[l]awyer advertising was common in the 19th century, when newspaper notices for law firms joined with those of banks, engineers, transportation companies, and surveyors”); Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 218 (2002), WL 14 LAWLIT 207 (noting that lawyers advertised in print during the nineteenth century).

170. 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, 53-54 (2002); see also Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 544 (1994) (providing a discussion of the profession’s methods for controlling the supply of legal services). The methods of supply control included:

(1) direct regulation of access to the profession (admission requirements such as legal education, bar examination, and character-and-fitness scrutiny); (2) the prohibition on the practice of law by nonlawyers (unauthorized practice); (3) restraints on the flow of information about legal services (restrictions on lawyer advertising and solicitation of legal business); (4) restrictions on the . . . participation in or ownership of law firms, and dual practice restrictions; and, finally, (5) a variety of particularized regulations such as the local admission and local counsel requirements that restrict[ed] multistate practice by licensed attorneys and the prohibition of many forms of pro bono practice by lawyers who [were] federal employees.

*Id.*

171. 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, 54 (2002).

172. *Id.* See generally RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY A STUDENT’S GUIDE* 613-14 (2002) (reporting that scholars have criticized the unauthorized practice rules as a pretext to limit competition).

The Alabama Bar Association established the first statewide code of ethics in 1887.<sup>173</sup> The Alabama code prohibited solicitation and some forms of advertising, but it permitted lawyers to advertise in newspapers and circulars as well as with business cards.<sup>174</sup> Incorporating some of the Alabama code, the ABA in 1908 enacted its first code of ethics, entitled the Canons of Ethics.<sup>175</sup> Although the ABA Canons did not completely ban all advertising, they were more restrictive than the Alabama code.<sup>176</sup> For example, Canon 27 expressly prohibited “‘circular advertisements, personal communications and indirect advertisement, whether by allied business or inspired newspaper comment.’”<sup>177</sup> The Canons generally limited the ability of lawyers to communicate their services, and emphasized that the best way to build business was by developing a strong reputation for skill and trust.<sup>178</sup> The Canon’s advertising limitations were not created because of lawyer overreaching or

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173. LOUISE L. HILL, *LAWYER ADVERTISING* 42 (1993).

174. 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, 54 (2002) (recognizing that as early as 1887, the Alabama Bar Association restricted solicitation but allowed some forms of advertising).

175. See JAMES E. MOLITERNO, *CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS* 25 (2000) (reporting that the canons are aspirational, except for rules on advertising and solicitation). The canons were almost drawn verbatim from the 1887 Alabama Code of Ethics, which was based on George Sharswood’s *An Essay on Professional Ethics*; arguably, the canons were fifty years out of date at the time of their adoption. *Id.*; see also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 54 & n.21 (1986) (commenting that the ABA Canons “were largely copied from the 1887 Alabama Code of Ethics,” and the “Canons originally consisted of thirty-two hortatory statements” insisting that lawyers “take the high road” and seemed to be “an assertion by elite lawyers in the ABA of the legitimacy of their claim to professional stature”); 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, 55 (2002) (discussing the history of the canons).

176. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 776 (1986); see also 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, 55 (2002) (noting that Canon 27 permitted business cards but banned their use in advertising or solicitation). However, the original version of Canon 27 permitted “‘the publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience.’” CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 776 (1986).

177. ABA CANONS OF PROF’L ETHICS Canon 27 (1969).

178. 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, 55 (2002) (citing CTR. FOR PROF’L RESPONSIBILITY, ABA, *COMPENDIUM OF PROF’L RESPONSIBILITY RULES AND STANDARDS* 322-23 (2001) and explaining that per Canon 27 the best form of advertising for a lawyer was a “well-merited reputation for professional capacity and fidelity to trust”).

other wrongful conduct associated with lawyer advertising.<sup>179</sup> Instead, the rules appear to have been created to preserve the profession's size and demographics and to promote its monopoly on the delivery of legal services.<sup>180</sup>

Many states followed the ABA's approach or even adopted more restrictive regulations concerning lawyer communications.<sup>181</sup> Thus, like the practice of lawyers who advanced clients living expenses before the adoption of the ABA Canons, lawyer advertising in newspapers and circulars, once permitted by states, quickly became impermissible.<sup>182</sup> State bar associations vigorously defended this professional norm for decades following the promulgation of the ABA Canons, disciplining lawyers who engaged in advertising.<sup>183</sup>

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179. 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, 55 (2002).

180. *Id.*; see also DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 102 (2d ed. 1998) (quoting JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 43-50 (1977) and contending that ethical rules limited competition for legal services and "penalized both [lawyers] and their potential clients who might not know whether they had a valid legal claim or where, if they did, to obtain legal assistance").

181. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 55-56 (1986) (citing, in part, *In re Cohen*, 261 Mass. 484, 159 N.E. 495, 496 (Mass. 1928) and stating that "the Canons came to be widely regarded as 'wholesome standards of professional action' or as 'guidelines,' which lawyers could ignore only at their peril"); see also WILLIAM E. HORNSBY, JR., MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES 4-5 (3d ed. 2000) (cautioning lawyers that "state ethics committees, courts, and sometimes bar disciplinary authorities have been much more conservative . . . toward legal services marketing than the U.S. Supreme Court and have shown a tendency to construe those decisions narrowly").

182. 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, 54 (2002) (discussing the activities banned by Canon 27); see also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50-52 (1977) (contending "[t]he ethical crusade that produced the Canons concealed class and ethnic hostility" and targeted new urban lawyers who "most closely approximated the traditional ideal of the accessible generalist"—lawyers who "had become the Abraham Lincoln 'gone urban'").

183. See *Barton v. State Bar of Cal.*, 289 P. 818-19 (Cal. 1930) (rejecting the argument that practice of law is a competitive business that justifies advertising). In *Barton*, the California Supreme Court reprimanded the lawyer for advertising in the newspaper, "D. Barton. Advice free, all cases, all courts. Open eves. Room 907, 704 Market Street, phone Douglas 0932." *Id.* at 818. The basis of the court's decision was that the legal profession has a special trust relationship with the public that is undermined by advertising and solicitation because both practices suggest that the legal profession is like other businesses. *Id.* at 818; see also *In re Sizer*, 267 S.W. 922, 924 (Mo. 1924) (providing an example of a case where lawyers were charged with several claims of unprofessional and other wrongful prac-

In 1969, the ABA replaced the Canons with the ABA Code of Professional Responsibility (the Model Code). Almost all of the states adopted the Model Code,<sup>184</sup> whose provisions largely continued the ABA's earlier limitations on lawyer advertising.<sup>185</sup>

B. *Bates v. State Bar of Arizona and Its Progeny*

In 1977, the profession experienced a seismic change in the regulation of lawyer advertising. Just one year after the Supreme Court of the United States first established that the First Amendment protected commercial speech, the Court decided the landmark case of *Bates v. State Bar of Arizona*.<sup>186</sup> In *Bates*, two lawyers violated Arizona's ethical rules by advertising in a newspaper the availability and cost of certain routine legal services, such as uncontested divorces and simple personal bankruptcies.<sup>187</sup> The Court held that

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tices, including the procuring of business); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 777 & n.26 (1986) (stating that the bar associations vigorously fought any expansion of advertising, including periodic anti-advertising campaigns to "snuff out lawyer advertising" and that approximately "half of the ABA's ethics opinions through the late 1960s dealt with advertising and related issues"); 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, 55-56 (2002) (discussing *State Bar of Cal. v. Barton*, 289 P. 818 (Cal. 1930)).

184. See LOUISE L. HILL, *LAWYER ADVERTISING* 45 (1993) (concluding, as with the ABA Canons, that "almost all of the jurisdictions have adopted the Model Code with minor alterations"); see also 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, 56 (2002) (reporting that the "vast majority of states" adopted the Model Code).

185. See MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101 to 2-103 (1969) (explaining disciplinary rules for lawyer advertising); LOUISE L. HILL, *LAWYER ADVERTISING* 45 (1993) (stating the Model Code's proscriptions on advertising and solicitation were similar to the ABA Canons); 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, 56-57 (2002) (explaining how the Model Code is based on the ABA Canons).

186. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 367 (1977); see also LOUISE L. HILL, *LAWYER ADVERTISING* 31 (1993) (reporting that *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), was the "first of several decisions to declare that commercial speech is entitled to partial First Amendment protection because of its informational value to individual consumers and the public"). See generally DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD* 96 (2d ed. 1998) (recounting that during the 1960s and early 1970s constituencies "both inside and outside the profession challenged traditional constraints on competition . . . [with] the rise of organized consumer movement, and a widening concern about access to legal services"); Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 373-86 (1995) (reviewing U.S. Supreme Court decisions concerning lawyer advertising).

187. See *Bates*, 433 U.S. at 354-55.

the First Amendment protects truthful advertising of prices for routine legal services.<sup>188</sup>

For the first time in *Bates*, the Court critically examined the profession's longstanding justifications for regulating lawyer advertising. The Arizona Bar asserted six reasons—some of which still resonate with opponents of advertising—for prohibiting the petitioner's advertising.<sup>189</sup> The bar first argued that price advertising would have an adverse effect on the profession by promoting commercialism that would undermine the dignity and self-worth of lawyers.<sup>190</sup> The Court rejected this argument, finding the connection between advertising and professionalism "to be severely strained."<sup>191</sup> The Court considered the notion that the lawyer-client relationship did not involve a misleading commercial dimension, especially since lawyers are ethically obligated to clarify their financial arrangements with clients at or soon after employment.<sup>192</sup>

The bar next contended that attorney advertising was inherently misleading because "legal services are so unique that fixed rates cannot meaningfully be established."<sup>193</sup> In rejecting the bar's position, Justice Blackmun noted that the bar sponsored a Legal Services Program in which lawyers agree to perform services at standardized rates similar to the services provided by the appellants.<sup>194</sup> The bar also argued that advertising would highlight irrelevant factors in the selection of a lawyer.<sup>195</sup> The Court believed that consumers were better off with some information for selecting

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188. *Id.* at 364. *Bates* did not involve solicitation or statements about the quality of legal services that might be misleading situations that justified bar regulation and oversight. *Id.* at 366-67; see also RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY A STUDENTS GUIDE 637 (2002) (reporting that "[a]ll commercial speech constitutional law cases dealing with lawyer advertising are the progeny of *Bates v. State Bar*"). Many of the Court's commercial speech cases have involved lawyer advertising, which caused some commentators to contend that, although it was "initially an area covered by mainstream commercial speech jurisprudence, . . . [lawyer advertising has] developed into its own distinct area of common law." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630 (1990).

189. *Bates*, 433 U.S. at 368-79.

190. *Id.*

191. *Id.*

192. *Id.* at 369; see also MODEL CODE OF PROF'L RESPONSIBILITY EC 2-19 (1983) (providing that "[a]s soon as feasible after a lawyer has been employed," it is desirable that he reach a clear agreement with his clients as to the basis of the fee charges to be made).

193. *Bates*, 433 U.S. at 373.

194. *Id.*

195. *Id.* at 372.



a lawyer than none at all, and that advertising provided only some of the information that consumers would use to select a lawyer.<sup>196</sup> Essentially, the Court thought advertising would facilitate the informed selection of counsel.

Writing for the majority, Justice Blackmun rejected the bar's third argument that lawyer advertising would stir up litigation.<sup>197</sup> Instead, he believed that advertising would serve the salutary purpose of informing citizens, especially "the middle 70% of our population . . . not being reached or served adequately by the legal profession," about possibly redressing their rights in the courts.<sup>198</sup> The bar also argued that lawyer advertising would increase overhead costs that would be passed on to consumers, resulting in higher fees, and that increased overhead costs would inhibit new lawyers from entering the market to compete with more established lawyers.<sup>199</sup> The Court found these arguments "dubious," reasoning that advertising may aid new competitors in penetrating the market position of more established attorneys by stimulating price competition that produces lower fees for consumers.<sup>200</sup>

The bar contended that lawyer advertising of a standard service at a set fee would encourage lawyers to engage in shoddy work because they might be inclined to provide the standard service rather than services that fit the client's needs but exceeded the set fee.<sup>201</sup> The Court responded that "[r]estraints on advertising, however, are an ineffective way of deterring shoddy work" and that "standardized procedures for routine problems" may actually "improve service by reducing the likelihood of error."<sup>202</sup>

Finally, the bar argued that it lacked the resources to adequately supervise lawyer advertising to ensure that it comported with the

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196. *Id.* at 374.

197. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375-76 (1977).

198. *Id.* at 376.

199. *Id.* at 375-76.

200. *Id.*; see also DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD* 98 (2d ed. 1998) (reporting that "[t]he limited research available generally suggests that advertising has a favorable effect on price and an uncertain effect on quality"); Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776-78 (1988) (contending that advertising promotes consumer demand for legal services, the informed selection of counsel, and the lowering of legal fees).

201. *Bates*, 433 U.S. at 378.

202. *Id.* at 378-79.

state's ethical code.<sup>203</sup> Justice Blackmun rejected the notion that striking down Arizona's rule would cause large numbers of lawyers to "seize the opportunity" to engage in misleading advertising.<sup>204</sup> He suggested that the vast majority of honest and candid lawyers as well as the bar might "assist in weeding out those few who abuse their trust."<sup>205</sup>

The *Bates* decision established two cardinal principles regarding lawyer advertising that still apply today. First, the informational function of lawyer advertising is an important societal value that is entitled to First Amendment protection.<sup>206</sup> Second, states have the power to protect the public from harmful commercial speech, for example, false or misleading speech.<sup>207</sup> It was inevitable that these two principles would collide as the profession struggled to adjust its advertising rules to reflect developments in the law and technology, and the Court attempted to fashion a coherent framework for protecting commercial speech.<sup>208</sup> This conflict, in part, caused "wide swings" in the Court's resolution of commercial speech cases and has prompted some commentators to describe the Court's

203. *Id.* at 379.

204. *Id.*

205. *Id.*

206. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 5, 14, 56 (2000) (noting that the Court "fashion[s] doctrine on the assumption that the First Amendment safeguards the informational function of commercial speech" and contending, in part, that "the 'subordinate' status of commercial speech is a consequence of the fact that [the] commercial speech doctrine expresses the theory, first articulated by Alexander Meiklejohn, that the constitutional function of communication is to inform an audience of citizens" and arguing that the "development of commercial speech doctrine closely tracks Meiklejohn's analysis").

207. See *Bates*, 433 U.S. at 383 (asserting that limitations on false, deceptive, or misleading advertising are not prohibited by the present holding). While the Court held that lawyer advertising could not be subject to blanket suppression, it clearly affirmed the right of states to regulate lawyer advertising. *Id.* The Court further cautioned that states might restrict in-person solicitation and lawyer advertisements that describe the quality of legal services because of their potentially misleading nature. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366, 383-84 (1977); see also 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, 57 (2002) (referring to the Court's indication in *Bates* that states have an obligation to oversee lawyer advertising for the protection of public interests).

208. 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, 58 (2002) (discussing how the organized bar anticipated the *Bates* ruling and its efforts to modify standards to comply with it); cf. LOUISE L. HILL, *LAWYER ADVERTISING* 60 (1993) (concluding that while the ABA reacted quickly to *Bates*, individual jurisdictions were more hesitant and slow in modifying their ethical bans on advertising).

commercial speech doctrine as “a notoriously unstable and contentious domain of First Amendment jurisprudence.”<sup>209</sup> The Court’s decisions have nevertheless generally acknowledged the importance of providing valuable commercial information to consumers to make informed choices in the marketplace.<sup>210</sup>

While it is beyond the scope of this Article to rationalize the Court’s decisions in the commercial speech area or to propose a new structure for deciding commercial speech cases, it is important to examine some lawyer and non-lawyer commercial speech cases to better appreciate the Court’s concern for consumer access to commercial speech. To the extent that this concern shapes the Court’s decision in the commercial speech area, it suggests that the Court may protect lawyers who advertise advances of living expenses. Consumer access to this kind of important commercial information may equate with access to justice.

A year after *Bates*, in *Ohralik v. Ohio State Bar Ass’n*,<sup>211</sup> the Court rejected a lawyer’s claim that the First Amendment protected his in-person solicitation of an eighteen-year-old accident victim in the hospital.<sup>212</sup> The Court ruled that prophylactic anti-solicitation rules were necessary to protect the public from problems of undue influence, overreaching, and other “vexatious conduct” inherent in in-person solicitation.<sup>213</sup> Unlike the public advertising in *Bates*, where information is provided and the person is free to accept or reject it, “in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection.”<sup>214</sup>

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209. See Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2, 5, 34-42 (2000) (describing the development of the commercial speech doctrine and the Court’s application of the *Central Hudson* test).

210. See, e.g., *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995) (recognizing that, based on a line of cases following *Bates*, the protection of lawyer advertising as commercial speech is now well established).

211. 436 U.S. 447 (1978).

212. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978) (holding the state could discipline the lawyer). While the lawyer conceded that the state had an important interest in regulating in-person solicitation, he argued that Ohio could not punish in-person solicitation per se. *Id.* at 458.

213. *Id.* at 462.

214. *Id.* at 457. In-person solicitation creates a potentially coercive situation where the lawyer provides the client with a one-sided presentation and pressures the client to make a speedy and uninformed decision about his or her case and selection of a lawyer.

Justice Marshall's often-overlooked concurring opinion in *Ohralik* would have permitted "benign" commercial solicitation.<sup>215</sup> Benign solicitation consisted of "advice and information that is truthful and that is presented in a noncoercive, nondeceitful, and dignified manner to a potential client who is emotionally and physically capable of making a rational decision either to accept or reject the representation with respect to a legal claim or matter."<sup>216</sup> The majority opinion neither endorsed nor rejected Justice Marshall's view.<sup>217</sup>

In a companion case to *Ohralik*, *In re Primus*,<sup>218</sup> a lawyer addressed a group of women at a meeting who had been sterilized as a condition to receiving continued medical assistance under the Medicaid program.<sup>219</sup> The lawyer advised the women of their rights and suggested the possibility of initiating a lawsuit.<sup>220</sup> The South Carolina Supreme Court disciplined the lawyer for soliciting one of the women by mail to file suit on her behalf.<sup>221</sup> Writing for the majority, Justice Powell concluded that the First Amendment protected lawyer solicitation by letter that was not motivated by pecuniary gain, but by a desire to further political and ideological

*Id.* There is no opportunity for detached reflection and disinterested advice from the bar or friends. *Ohralik*, 436 U.S. at 457.

215. *Id.* at 472 n.3 (Marshall, J. concurring). Solicitation is one of those dirty words in the practice of law. It is almost universally condemned per se as a bad practice that warrants almost total prohibition and high enforcement vigilance. See *id.* at 472 (recognizing solicitation as an evil that can be prevented). But see MODEL RULES OF PROF'L CONDUCT R. 7.3(a)(2) (2002) (recognizing a limited exception to the general ban on in-person solicitation when it involves the lawyer's family members, a close friend, or someone with whom the lawyer has a prior professional relationship).

216. *Ohralik*, 436 U.S. at 472 n.3 (Marshall, J., concurring). The District of Columbia approach that permits in-person solicitation arguably endorses Justice Marshall's position that "benign" commercial solicitation is acceptable speech. *Id.*; see also RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY A STUDENTS GUIDE 685 (2002) (discussing Justice Marshall's concurrence in *Ohralik*); 18 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Careful Use of Internet 'Chat' is Allowed to Give Legal Information, Solicit Clients* 649, 667 (2002) (reporting that there is no blanket ban on in-person solicitation in the District of Columbia).

217. RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY A STUDENTS GUIDE 685 (2002).

218. 436 U.S. 412 (1978).

219. *In re Primus*, 436 U.S. 412, 412 (1978).

220. *Id.* at 416.

221. *Id.* at 421. The South Carolina Supreme Court publicly reprimanded the lawyer, who appealed to the Supreme Court of the United States claiming that the First and Fourteenth Amendments protected her conduct. *Id.* at 417, 421.

goals through associational activity.<sup>222</sup> Citing *Ohralik*, the Court ruled that a state may proscribe, in prophylactic fashion, all in-person solicitation that proposes a commercial transaction because of the potential danger of undue influence, overreaching, misrepresentation, or invasion of privacy.<sup>223</sup> Where political expression is involved, the state cannot have such a broad prophylactic prohibition, but it "must regulate with significantly greater precision" by punishing lawyers only if they actually engage in misconduct.<sup>224</sup>

In 1980, the Supreme Court decided a non-lawyer speech case, *Central Hudson Gas & Electric Corp. v. Public Service, Commission of New York*.<sup>225</sup> *Central Hudson* is especially noteworthy because it established a four-pronged analytical test that has since determined the constitutional validity of restrictions on commercial

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222. *Id.* at 422, 439.

223. *In re Primus*, 436 U.S. at 437-39.

224. *Id.* at 434, 437-38. Some commentators have questioned "[t]he Court's assumption that 'commercial' speech is really different in kind from 'political' speech and deserving of lessened protection." See Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 101 (2002) (discussing the difficulties in conceptualizing commercial speech and stating that the distinction between the two forms of speech is not self-evident); see also Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093, 1119 (1991) (asserting that "the court's inability to fashion a coherent definition of commercial speech undermines its usefulness"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630 (1990) (addressing the history of commercial speech). See generally MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 18-22 (2001). Others "have attacked the political/commercial distinction" but "for purposes of this analysis, [have] accept[ed] its existence." Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 102 (2002). The line between commercial and political speech is especially tenuous when dealing with advertisements about living expense advances because the speech implicates the political issue of access to justice. Richard A. Posner, *Free Speech in Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 10-11 (1986) (stating that "I am skeptical whether [commercial advertising] can be placed below political speech by reference to differences in value"); Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 102-03 (2002) (quoting U.S. CONST. amend I and criticizing the assumption "that lawyer advertising is 'commercial speech' even if the purpose . . . is to enable persons to find lawyers" to exercise their constitutional right to "'petition the Government for a redress of grievances'").

225. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) (noting that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising").

speech.<sup>226</sup> The first prong of the test focuses on whether the commercial speech is false or misleading.<sup>227</sup> False or misleading speech can be prohibited. If the speech was not false or misleading, then under the second prong, the court examines whether the state has a substantial interest in restricting the commercial speech.<sup>228</sup> If the state's interest in restricting speech is insubstantial, the restriction is impermissible.<sup>229</sup> Assuming the state has a substantial interest in restricting the commercial speech, the state then has the burden of demonstrating that its regulation materially and directly advances the state's substantial interest.<sup>230</sup> Finally, the fourth prong of the *Central Hudson* test requires the state to show that its restriction is narrowly drawn to further its substantial interest.<sup>231</sup>

In 1982, the Supreme Court had the opportunity to clarify what constituted false or misleading lawyer advertising in *In re R.M.J.*<sup>232</sup> In *In re R.M.J.*, the Missouri Bar disciplined a lawyer who had violated its advertising rules by listing practice concentrations.<sup>233</sup> The lawyer advertised that he practiced "personal injury" and "real es-

226. *Id.* at 566 (holding that "[i]n commercial speech cases, then, a four-part analysis has developed"); see also Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 53-55 (2000) (concluding, in part, that "[t]he inability of the *Central Hudson* test [to] carefully . . . assess the impact of state regulation on the circulation of information constitutes a serious deficiency").

227. *Cent. Hudson*, 447 U.S. at 564.

228. *Id.* at 564 (holding that "the regulatory technique must be in proportion to [the state's substantial] interest . . . [and] the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose").

229. *Id.*

230. *Id.* (stating that "if the governmental interest [can] be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive").

231. *Id.* at 566. The fourth prong of the test was modified in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989). In *Fox*, the Court decided that the fourth prong did not require the state to demonstrate that its restriction was the "least restrictive means" for achieving the state's substantial interest. *Fox*, 492 U.S. at 469-70. This test was too difficult to meet because it is often possible to argue that another means of restriction is less restrictive. All that is required under this prong is a "reasonable fit" between the state's substantial interest and its restriction on commercial speech. *Id.* at 470.

232. *In re R.M.J.*, 455 U.S. 191 (1982); see also WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* 88 (3d ed. 2000) (recounting that the Court first applied the *Central Hudson* four prong test in *R.M.J.*). See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 780 n.49 (1986) (stating that "*R.M.J.* joins the wax museum of Supreme Court cases whose curious names reflect the need to provide some measure of privacy to litigants in an otherwise mercilessly public proceeding"). "In *R.M.J.* anonymity was dictated by the sanction imposed by the Missouri Supreme Court—an assertedly 'private' reprimand." *Id.*

233. *In re R.M.J.*, 455 U.S. at 197-98.

tate" law; he did not use the state-approved terms of "tort" and "property" law.<sup>234</sup> He mailed announcement cards to people not on the state-approved list of "'lawyers, clients, former clients, personal friends, and relatives,'" and he also listed licensure in both Missouri and Illinois.<sup>235</sup> Applying the *Central Hudson* test for the first time to lawyer speech, the Court struck down the lawyer's discipline because the lawyer's advertising was not deceptive.<sup>236</sup>

In 1983, approximately a year after the Court's decision *In re R.M.J.*, the ABA adopted the Model Rules of Professional Responsibility (Model Rules) to address many of the criticisms of the earlier Code to ensure that the profession's ethical standards reflected jurisprudential developments since the Code's enactment almost a decade earlier.<sup>237</sup> The Model Rules discarded many of the Code's Byzantine regulations on lawyer advertising, opting for a simpler standard in Model Rule 7.1. The new Model Rule prohibited "false or misleading communications about the lawyer or the lawyer's services"—a prohibition that was consistent with Supreme Court decisions.<sup>238</sup> Some states quickly adopted the Model Rules, and most others had adopted them in some form by the end of the century.<sup>239</sup>

Following the adoption of the Model Rules, the Court decided *Zauderer v. Office of Disciplinary Counsel*.<sup>240</sup> *Zauderer* involved a lawyer who had advertised in the newspaper that he was available to represent women injured by the Dalkon Shield intrauterine device.<sup>241</sup> The advertisement contained a drawing, legal advice that claims might not yet be time barred, and a statement "that 'if there is no recovery, no legal fees are owed.'"<sup>242</sup> Writing for the major-

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234. *Id.*

235. *Id.* at 196-97 (citation omitted).

236. *Id.* at 206-07.

237. See LOUISE L. HILL, *LAWYER ADVERTISING* 90 (1993).

238. MODEL RULES OF PROFESSIONAL CONDUCT R. 7.1 (2002). The Ethics 2000 Commission did not amend this particular language of 7.1. *Id.* Thus, the new 2002 version of the Model Rules reflects the same general standard barring "false or misleading communications." *Id.*

239. The few jurisdictions that still follow the 1974 Code of Professional Responsibility have sometimes amended their ethical standards to incorporate some of the principles in the Model Rules. See, e.g., OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-111 (2002).

240. 471 U.S. 626 (1985).

241. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 626 (1985).

242. *Id.* at 652.

ity, Justice White held that under the First Amendment, a state could not discipline a lawyer who solicits specific business in newspaper advertisements that contain nondeceptive illustrations and truthful legal advice.<sup>243</sup> The majority also concluded that the statement, “if there is no recovery, no legal fees are owed” was misleading because in a contingent fee case the client may be liable for substantial litigation costs.<sup>244</sup>

In another significant lawyer speech case, *Shapero v. Kentucky Bar Ass’n*,<sup>245</sup> the Court invalidated a blanket restriction by the state bar on lawyers sending targeted direct-mail solicitation letters to prospective clients.<sup>246</sup> Kentucky based its restriction on Model Rule 7.3, which at the time prohibited direct-mail solicitation as a form of in-person solicitation.<sup>247</sup> The restriction, which made little sense, highlighted the contorted reasoning underlying the bar’s position on lawyer advertising and solicitation. The Kentucky rule permitted lawyers to mass mail letters advertising their experience and soliciting business but barred them from mailing to a smaller, targeted group of consumers who were more likely interested in their particular legal services.<sup>248</sup> The rule’s inefficiencies were obvious—it produced a needless waste of time, money, and paper.<sup>249</sup> The “mass mail” requirement also increased the likelihood of inconveniencing consumers who were not interested in the advertisement and unlikely to benefit from the information.

The *Shapero* Court emphasized that the mode of communication “makes all the difference” in assessing the potential for lawyer

243. *Id.* at 652-53.

244. *Id.* at 652.

245. 486 U.S. 466 (1988).

246. *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 467 (1988).

247. MODEL RULES OF PROF’L CONDUCT R. 7.3 (2002). The rule provides that “a lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person, or otherwise, when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.” *Id.*

The term ‘solicit’ includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.

*Id.*

248. KY. SUP. CT. RULE 3.135(5)(b)(i).

249. RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY A STUDENTS GUIDE 689 (2002).



abuse and that “targeted, direct-mail solicitation generally—‘poses much less risk of overreaching or undue influence’ than does in-person solicitation.”<sup>250</sup> The Court noted that its recent decisions had emphasized the importance of the free flow of commercial information and that a total ban on communication was not warranted simply because some possibility for abuse existed.<sup>251</sup> The First Amendment protected the right of lawyers to solicit legal business and the state must find a less intrusive method than a total ban for minimizing the likelihood of abuse—“distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.”<sup>252</sup>

The Supreme Court decided in 1990 that the First Amendment protected a lawyer’s truthful statements about his certification in a particular field.<sup>253</sup> In *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,<sup>254</sup> the National Board of Trial Advocacy (NBTA) awarded the appellant-lawyer a “Certificate in Civil Trial Advocacy” based on standards approved by a board of judges, scholars, and practitioners.<sup>255</sup> The lawyer’s professional letterhead

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250. *Shapero*, 486 U.S. at 475 (observing that the Court’s lawyer advertising cases have never “distinguished among various modes of written advertising to the general public”). Justice Brennan stated: “Ohio could no more prevent Zauderer from mass-mailing to a general population his offer to represent women injured by the Dalkon Shield than it could prohibit his publication of the advertisement in local newspapers.” *Id.* at 473.

251. *See id.* at 474, 479 (quoting, in part, *In re R.M.J.*, 455 U.S. 191, 203 (1982), and stating that “[t]he relevant inquiry is not whether there exist potential clients whose ‘condition’ makes them susceptible to undue influence, but whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility” and noting that “[s]tates may not place an absolute prohibition on certain types of potentially misleading information . . . if the information may also be presented in a way that is not deceptive”). The Court has continued this theme in post-*Shapero* decisions. *See Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 626 (1995) (emphasizing that “mere speculation or conjecture” of harms is insufficient to justify restrictions on commercial speech). Dissenting in *Went for It*, Justice Kennedy wrote “we do not allow restrictions on speech to be justified on the ground that the expression might offend the listener . . . these ‘are classically not justifications validating the suppression of expression protected by the First Amendment.’” *Id.* at 638 (quoting *Carey v. Population Serv. Int’l*, 431 U.S. 687, 701 (1977)).

252. *Shapero*, 486 U.S. at 478 (citation omitted).

253. *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 99-106 (1990).

254. 496 U.S. 91 (1990).

255. *Peel v. Attorney Registration & Disciplinary Comm’n of Ill.*, 496 U.S. 91, 96 (1990). The standards required training, experience as lead counsel in jury and non-jury cases, participation in approved continuing legal education programs, a writing skills demonstration, and a daylong examination. *Id.*

referred to the NBTA certification.<sup>256</sup> The Administrator of the Attorney Registration and Disciplinary Commission of Illinois charged him with violating a state ethical rule that prohibited him from holding himself out as a certified legal specialist.<sup>257</sup> The commission also claimed that Peel's certification reference on his letterhead was misleading.<sup>258</sup>

The Court found Peel's statement about his certification to be truthful, and rejected as "paternalistic" the state's assertion that "the average consumer" would be unable to understand that the NBTA certification was not an Illinois certification or be unable to assess the value of the certification.<sup>259</sup> The Court noted that even if the NBTA certification on the "letterhead may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public."<sup>260</sup> Citing *Shapero*, the Court held that the state's imposition of a complete prophylactic against any claim of specialty was "'broader than reasonably necessary to prevent the' perceived evil."<sup>261</sup>

### C. *The Retreat from Bates*

In the eighteen years following *Bates*, the Supreme Court upheld and steadily expanded the right of lawyers to advertise and to solicit clients except in person.<sup>262</sup> However, in 1995, the Court abruptly departed from that path in *Florida Bar v. Went for It, Inc.*<sup>263</sup> Justice O'Connor, who had written a strong dissent in *Shapero*, au-

256. *Id.*

257. *Id.* at 97.

258. *Id.*

259. *Peel*, 496 U.S. at 106.

260. *Id.* at 109.

261. *Id.* at 107 (quoting *In Re R.M.J.*, 455 U.S. 191, 203 (1982)).

262. See 18 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Careful Use of Internet 'Chat' is Allowed to Give Legal Information, Solicit Clients* 649, 667 (2002) (reporting that there is no blanket ban on in-person solicitation in the District of Columbia). The District of Columbia appears to be the only jurisdiction that does not prohibit in-person solicitation. But see *In re Primus*, 436 U.S. 412, 447 (1978) (extending constitutional protection to in-person solicitation when the primary purpose was not pecuniary gain but political beliefs).

263. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 644 (1995) (Kennedy, J., dissenting) (writing "[i]t is most ironic that, for the first time since *Bates v. State Bar of Arizona*, the Court now orders a major retreat from the constitutional guarantees for commercial speech").

thored the five to four majority opinion in *Went for It*,<sup>264</sup> in which the Court upheld a Florida Bar rule that prohibited only the plaintiff's bar from sending direct-mail solicitation to victims or their relatives for thirty days following an accident or a disaster.<sup>265</sup>

Justice O'Connor wrote that "[i]t is now well established that lawyer advertising is commercial speech" and "[enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."<sup>266</sup> The Court reviewed the thirty-day advertising ban under the intermediate scrutiny test established in *Central Hudson*.<sup>267</sup> Since *Went for It*'s advertising was not false or misleading, Florida had to demonstrate under the *Central Hudson* test that it had a substantial governmental interest in regulating the speech; that the regulation directly and materially advanced that interest; and finally, that the regulation was narrowly drawn.<sup>268</sup>

The bar successfully argued that it had a "substantial interest in protecting the privacy" of accident victims who might be especially sensitive and vulnerable to intrusive, unsolicited, and deplorable lawyer contact.<sup>269</sup> Justice O'Connor noted that states have broad powers to regulate professions within their boundaries "to protect the public health, safety, and other valid interests."<sup>270</sup> She also wrote that Florida had a substantial governmental interest in protecting the privacy of its citizens.<sup>271</sup>

Florida had argued that its thirty-day direct-mail ban materially advanced its interest in protecting its citizens' privacy by "forestall[ing] the outrage and irritation with the . . . legal profession that the practice of direct solicitation only days after accidents has

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264. *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 480 (1988) (O'Connor, J., dissenting); *Went for It*, 515 U.S. at 620.

265. *Went for It*, 515 U.S. at 635. See generally Jack W. Kennedy Jr., Comment, *The Widespread Embrace of the Waiting Period Upheld in Florida Bar v. Went for It, Inc.*, 75 TUL. L. REV. 777 (2001) (providing a recent discussion of the *Went for It* decision).

266. *Went for It*, 515 U.S. at 623. But see *id.* at 636 (Kennedy, J., dissenting) (noting as an oversimplification the court's consideration that the banned communications involve "commercial speech and nothing more" because they "may be vital to the recipients' right to petition the courts for redress of grievances").

267. *Went for It*, 515 U.S. at 623-35.

268. *Id.* at 623-24.

269. *Id.* at 624-25.

270. *Id.* at 625 (citation omitted).

271. *Id.* at 625-28, 635.

engendered.”<sup>272</sup> A two year study commissioned by the bar supported this argument.<sup>273</sup> Justice O’Connor found the study persuasive, noting that it provided “unrefuted” empirical and anecdotal data that there was demonstrable harm to citizens’ privacy when they received direct mail from lawyers within days of accidents.<sup>274</sup>

The Court also ruled that the bar’s thirty-day direct-mail ban was a narrowly drawn regulation and that it satisfied the last prong of the *Central Hudson* test.<sup>275</sup> *Went for It* had argued that the ban prevented citizens who were ready and willing to use the lawyer’s advice from obtaining it.<sup>276</sup> In rejecting this argument, Justice O’Connor did not contend that there were less burdensome alternatives to Florida’s rule.<sup>277</sup> She found the state’s temporary thirty-day ban “reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession.”<sup>278</sup> The Court observed that there were many alternative ways for Floridians to learn about the availability of legal services, including the yellow pages, television commercials, mass mailings, and word of mouth.<sup>279</sup>

Although *Went for It* was the Court’s last lawyer speech decision, several recent decisions by the Court suggest that it may not signal a full-scale retreat from expanding lawyer advertising.<sup>280</sup> Instead

272. *Went for It*, 515 U.S. at 631.

273. *Id.* at 620.

274. *See* Fla. Bar v. *Went for It, Inc.*, 515 U.S. 618, 626-28 (1995) (describing the anecdotal portion of the bar study as “noteworthy for its breadth and detail”). Justice O’Connor stated that the harm to the privacy of Florida’s citizens was as much a function of the timing of the direct mail as the mail’s contents. *Id.* at 631. *But see id.* at 640-41 (Kennedy, J., dissenting) (stating that the bar study is unscientific and described the anecdotal portion of the study as “noteworthy for its incompetence”).

275. *Id.* at 633.

276. *Id.* at 632.

277. *Went for It*, 515 U.S. at 633.

278. *Id.*

279. *Id.* at 633-34.

280. *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001) (invalidating a Massachusetts law that banned advertisements for smokeless tobacco and cigars); *see also* Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 12-14 (2002) (providing a good summary of *Lorillard* and other commercial speech cases). Massachusetts banned the advertising within 1,000 feet of a school or playground and similar advertising at the point of sale that was not five feet above the ground. *Lorillard*, 533 U.S. at 536. The Commonwealth also banned the display of these products in open areas where they were available to consumers without an employee’s assistance. *Id.* at 534. The Court noted that

*Went for It* may represent a momentary blip in the Court's steady adherence to the ideal that the public is benefited by the free flow of truthful commercial information about lawful activities.<sup>281</sup> The

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it was lawful to sell these products to adults, but it also recognized that the state had a substantial governmental interest in preventing underage tobacco use. *Id.* at 556. Yet the advertising limitation was not sufficiently tailored or narrowly drawn to advance that interest. *Id.* at 562. The law was too geographically broad, and it effectively precluded any advertising in substantial portions of many metropolitan areas. *Id.* Indeed, in some cities it amounted to a total ban. *Lorillard*, 533 U.S. at 573. The result was an undue burden on the speaker's right to communicate information about the lawful sale of products and the right of adult consumers to receive the information. *Id.* at 574-75. The *Lorillard* case was unlike *Went for It* because there were no satisfactory alternatives to on-site advertising for informing passer-bys that the retailer proposes an immediate and spontaneous commercial transaction. *Id.* at 570.

The Court also found in *Lorillard* that requiring advertisements to be five feet above the ground or higher was not narrowly fitted to materially and directly advance the government's substantial interest in preventing underage tobacco use. *Id.* at 567. First, many children are more than five feet tall and second, those who are less than five feet can easily look up and view the advertisement. *Id.* at 568. However, the Court upheld the state's restriction on placing smokeless tobacco and cigars in open displays or other places available to underage customers, as well as the requirement that all customers contact a salesperson before obtaining the products. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001). The Court recognized the danger that underage persons might obtain the products if they were left in the open and unattended and found that the regulation was narrowly drawn to prevent this problem. *Id.* As in *Went for It*, "ample [alternative] channels of communication" existed for advertising these products—for example, displaying empty packages in the open. *Id.* at 569-70. These alternative methods suggested that Massachusetts's rule would not "significantly impede adult access" to the products. *Id.* at 569.

In *Thompson v. Western States Medical Center*, the Court invalidated a section of the Food and Drug Administration Modernization Act of 1997 (FDAMA) that prohibited the providers of drugs from advertising or promoting particular compound drugs—an altered or mixed medication specifically tailored for the needs of individual patients. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 377 (2002). The Court accepted the government's argument that the advertising ban reflected the government's substantial interest in preserving the integrity of the FDAMA's drug approval process and its goal of protecting the public health. *Id.* at 359. The Court also assumed for the purpose of the third prong of the *Central Hudson* test that the advertising ban directly advanced the government's interest. *Id.* Nevertheless, the Court held that the ban was unnecessarily broad and unconstitutional. *Id.* The Court identified "[s]everal non-speech-related means" for advancing the government's interests and found that the government had not met its burden of showing that the FDAMA ban on "advertising was a necessary as opposed to merely convenient means of achieving its interests." *Id.* at 373. "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373. The Court also reaffirmed its position that the First Amendment does not permit the government to ban truthful commercial information to prevent consumers from making bad decisions with it. *Id.* at 374.

281. See Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 10-11 (2002) (stating it is important to remember that the vote in *Went for It* was five to four when assessing the degree of weight to accord the decision).

*Went for It* decision manifests the cardinal principle in *Bates* that states can regulate advertising to protect the public from harm—the less traveled path in the Court’s jurisprudence involving lawyer advertising since *Bates*.<sup>282</sup> However, the Court’s recent nonlawyer speech decisions continue to reflect the other cardinal principle in *Bates*—the free flow of commercial information is an important value subject to First Amendment protection.<sup>283</sup> These decisions bode well for lawyers who seek to advertise the advances of living expenses and promote greater access to justice.

In summary, the Supreme Court has established several guiding principles for evaluating the constitutionality of regulations governing lawyer advertising. First, although commercial speech is entitled to First Amendment protection, it is not as valued as political speech, and is therefore potentially subject to more intensive regulation.<sup>284</sup> Second, states are specifically permitted to regulate and proscribe advertising that is false or misleading.<sup>285</sup> Third, the state must demonstrate a substantial interest in regulating the speech and that the “harms it recites,” as the justification for the regulation, “are real.”<sup>286</sup> The state bears the burden of proving that the lawyer advertising is subject to state regulation.<sup>287</sup> The Court has found empirical evidence, both statistical and anecdotal, to be very helpful in resolving this point.<sup>288</sup> Fourth, the regulation must mate-

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282. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (recognizing state regulation of advertising).

283. E.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

284. *Cent. Hudson*, 447 U.S. at 563.

285. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 636 (1995); *Cent. Hudson*, 447 U.S. at 564.

286. *Went for It*, 515 U.S. at 626. In discussing the need for evidence of real harm in *Went for It*, Justice O’Connor noted that the Court had recently invalidated a Florida ban on in-person solicitation by certified public accountants in *Edenfield v. Fane*, 507 U.S. 761 (1993). *Went for It*, 515 U.S. at 626. The State Board of Accountancy presented no studies or other anecdotal evidence in Florida or other states to support its contention that the in-person ban was necessary to protect clients from “‘fraud, overreaching, or compromised independence.’” *Id.* (quoting *Edenfield*, 507 U.S. at 771).

287. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 781 (1986) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 350 (1997) and *In re R.M.J.*, 455 U.S. 191, 191 (1982)).

288. See *Went for It*, 515 U.S. at 635 (highlighting the Florida Bar’s 106 page study containing both statistical and anecdotal evidence that citizens found direct-mail solicitation in the wake of accidents to be an intrusion upon their privacy and detrimental to the profession’s image). In *Lorillard*, the Court reported that the state provided ample evidence that found there is a problem with underage tobacco consumption. *Lorillard*, 533

rially and directly advance the state's interest in preventing the real harm—"mere speculation or conjecture" about the regulation's effect is insufficient.<sup>289</sup> Fifth, the regulation must be narrowly tai-

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U.S. at 528; *see also* *Edenfield*, 507 U.S. at 771 (criticizing the Accountancy Board for not presenting studies, anecdotal information, or other evidence to support its claim that the direct-mail solicitation ban was necessary to protect clients from overreaching and potential abuses).

289. *Went for It*, 515 U.S. at 626. The Supreme Court of the United States recently refused to review an advertising case. *Borgner v. Fla. Bd. of Dentistry*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 688 (2002) (mem.). In *Borgner*, the Eleventh Circuit Court upheld the constitutionality of section 466.0282 of the Florida statutes that required dentists to include disclaimers when advertising specialties or certifications not recognized or approved by Florida or the American Dental Association. *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002), *cert. denied*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 688 (2002) (mem.). The circuit court noted that Florida had amended an earlier version of the statute that totally banned advertising of non-approved state specialties. *Id.* at 1207. The circuit court held that Florida had met its burden of satisfying the *Central Hudson* four-prong test. *Id.* at 1216. Florida argued that it had a substantial interest in restricting dental advertising to protect the public from misleading ads and incompetent dentists. *Id.* at 1210. In requesting the Court's review, the petitioner questioned the circuit court's reliance on two telephone surveys for finding that Florida had complied with *Central Hudson's* third prong—that the regulation directly and materially advances the state's substantial interest. *Borgner v. Fla. Bd. of Dentistry*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 688, 689 (2002) (mem.) (Thomas, J., dissenting). Justices Thomas and Ginsburg dissented from the denial of certiorari, in part, because the Court had never "sufficiently clarified the nature and the quality of the evidence a State must present to show that the challenged legislation directly advances the governmental interest asserted." *Id.* (Thomas, J., dissenting).

The Court has consistently focused attention on the type of evidence the state presents in defense of restrictions on commercial speech. In *Went for It*, Justice O'Connor found the evidence, including a 106-page summary of a two-year study of lawyer advertising and solicitation, persuasive in concluding that Florida's thirty-day advertising ban complied with the *Central Hudson* test. *Went for It*, 515 U.S. at 626. She described the anecdotal portion of the study as "noteworthy for its breadth and detail" while Justice Kennedy criticized it as "noteworthy for its incompetence." *Id.* at 627; *id.* at 640-41 (Kennedy, J., dissenting). The evidentiary dispute in *Went for It* supports Justice Ginsburg and Thomas's concern in *Borgner* that the Court should decide what nature and quality of evidence the state must present under the third prong of the *Central Hudson* test to justify restricting commercial speech. *Borgner v. Fla. Bd. of Dentistry*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 688, 689 (2002) (mem.) (Thomas, J., dissenting). A recent case illustrates the importance of the nature and quality of evidence necessary for successfully challenging a commercial speech restriction. *See Hayes v. Zakia*, No. 01-CV-09077E(SR), 2002 WL 31207463, at \*6 (W.D.N.Y. Sept. 17, 2002) (denying a preliminary injunction, and rejecting the lawyer's assertion that the state failed the third prong of the *Central Hudson* test because it did not present a study or empirical evidence that his advertising claims of specialization without the necessary disclaimers created any harm).

One solution to the evidentiary dispute in *Went for It* is for the Court to require the state to demonstrate by clear and convincing evidence that its restriction directly and materially advances the state's substantial interest in regulating the commercial speech. The higher evidentiary standard reflects the Court's traditional interest in the free flow of commercial

lored to accomplish the state's substantial interest without unduly impinging on other constitutional interests.<sup>290</sup> The substantive, durational, and geographical scope of any governmental limitation on speech should fit the interest that the government seeks to directly advance.<sup>291</sup>

#### D. *State Advertising Prohibitions on Living Expense Advances and Commercialism Concerns*

States vary in the type of prohibitions they place on lawyers advertising living expense advances. Montana's and Mississippi's ethical rules expressly prohibit lawyers from advertising the availability of advances for living expenses.<sup>292</sup> In Mississippi, lawyers cannot make or promise advances in any amount until sixty days after the client retains the lawyer.<sup>293</sup> The ethical rules in Alabama, Minnesota, and North Dakota implicitly prohibit the adver-

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information. It also underscores the need to carefully consider the benefits and costs of imposing, and later defending, questionable commercial speech restrictions. Legal challenges to commercial speech restrictions may increasingly involve a "battle of the experts" given the Court's recent reliance on empirical studies and anecdotal evidence. The clear and convincing evidentiary standard may promote more efficient resolution of these challenges when the cases involve close questions about the nature, quality, and sufficiency of the evidence.

290. *Went for It*, 515 U.S. at 635.

291. See *Lorillard*, 533 U.S. at 525 (invalidating a law that prevented tobacco advertising within 1,000 feet of a school). The Court found the prohibition's geographical scope and range of communications too broad and unconstitutional because it effectively precluded any advertising in some communities. *Id.* at 563. The Court also stated that the 1,000 feet regulation was too broad and "demonstrated a lack of narrow tailoring." *Id.*

292. MISS. RULES OF PROF'L CONDUCT R. 1.8(e)(2)(b) (2002) (providing, in part, that a lawyer may advance "[r]easonable and necessary living expenses" but "counsel cannot promise any such payments in any type of communication to the public"); MONT. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002) (stating that a lawyer can "guarantee a loan from a regulated financial institution" for "basic living expenses" provided "neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client").

293. *In re G.M.*, 797 So. 2d 931, 936-38 (Miss. 2001) (applying the state's new living expense exception in Rule 1.8(e) for the first time and ruling that it is sufficiently broad to cover lawyer advances of monthly medical insurance payments, but it requires the bar committee to scrutinize and closely monitor such requests). The Mississippi Supreme Court construed Rule 1.8(e) to prohibit the promise of any advance until sixty days following the lawyer's employment. *Id.* at 934; see also 18 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Mississippi Tort Reform Restricts Advertising by Out-of-State Lawyers* 731, 752 (2002) (noting, in part, criticisms of a new tort reform law that "forbids out-of-state lawyers [from] advertis[ing] in Mississippi 'for the purpose of soliciting prospective clients' for civil litigation unless they first associate local counsel").



tising of advances for living expenses by prohibiting lawyers from *promising* to advance living expenses until after the client employs them.<sup>294</sup> The Louisiana and Florida Supreme Court decisions that permit lawyers to advance living expenses similarly prohibit lawyers from offering to pay or to guarantee living expenses until after employment.<sup>295</sup>

The prohibition against advertising advances of living expenses is rooted in the profession's longstanding bias against lawyer adver-

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294. ALA. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2001) (permitting living expenses, "provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer"); MINN. RULES OF PROF'L CONDUCT R. 1.8(e)(1)-(3) (1999) (permitting lawyers to guarantee loans for advancement of living expenses if "no promise of such financial assistance was made to the client . . . prior to the employment of that lawyer by that client"); N.D. RULES OF PROF'L CONDUCT R. 1.8(e)(3) (2002) (allowing lawyers to guarantee loans for advancement of living expenses if "no promise of financial assistance was made to the client . . . prior to the [client's] employment of that lawyer"). Authoritative sources in these states confirm that the spirit of the rules prohibit advertising, although these states have not officially considered the question of lawyers advertising the advances of or the guarantees of loans for living expenses. Telephone Interview with L. Gilbert Kendrick, Assistant General Counsel, Alabama State Bar (Dec. 16, 2002) (emphasizing that advances have to be for legitimate emergency and stating: "Advertising the availability of financial assistance would violate the spirit of the rule which prohibits the offering of financial assistance as an inducement to employment"); Telephone Interview with Kenneth Jorgensen, Director, Office of Lawyers Professional Responsibility, State Bar of Minnesota (Dec. 16, 2002) (cautioning that some attorneys would use advertising to attract cases and stating: "The rule [concerning lawyers guaranteeing loans for living expenses] implicitly prohibits advertising and if a lawyer were to advertise, there would be an issue warranting an investigation at a minimum"); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002) (acknowledging that they have not really thought about the issue in North Dakota and stating: "In my opinion, the rule prohibits lawyers from advertising that they can guarantee a loan to meet the financial hardship standard in the rule").

295. See *Chittenden v. State Farm Mut. Auto Ins. Co.*, 788 So. 2d 1140, 1145 (La. 2001) (citing *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976), when explaining that lawyers should not offer to advance living expenses for the purpose of acquiring or maintaining clients and holding that "advances cannot be promised as an inducement to obtain professional employment, nor made until after the relationship has commenced; . . . [and] the attorney [can] not encourage public knowledge of this practice as an inducement to secure the representation of others"); see also Fla. Bar v. Taylor, 648 So. 2d 1190, 1191-92 (Fla. 1994) (citing *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976) and *Florida Bar v. Dawson*, 111 So. 2d 427 (Fla. 1959) to implicitly require the lawyer's employment before promising living expenses when noting the referee's finding that the lawyer's financial assistance—providing clothing—was not for establishing or maintaining employment). The vote in *Taylor* was close, four to three with two justices recusing themselves. *Taylor*, 648 So. 2d at 1192. The dissent in *Taylor* wrote: "In order to prevent attorneys from promoting business through the practice of subsidizing their clients pending the outcome of their lawsuits, The Florida Bar enacted a prophylactic rule" prohibiting living expenses. *Id.* at 1192 (Grimes, C.J., dissenting).

tising as a form of overt commercialism.<sup>296</sup> This commercialism is considered to be inconsistent with the profession's traditional ideals of honor, trust, and public service.<sup>297</sup> Some critics of advertising believe it openly signals to the profession and to the public that the profession's focus is not solely client-centered but is also lawyer-centered.<sup>298</sup> In the lawyer-centered model, the lawyer's financial, political, and other self-interests generally predominate over competing interests—for example, the lawyer's obligation as an officer of the court in governing his or her work.<sup>299</sup> The degree of lawyer

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296. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 605 (1994) (stating that "[l]aments by bar leaders . . . over the 'commercialism' of the bar and [the] 'declin[e in] professionalism' have been staples of professional discourse throughout the 20th Century"); William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326 (1996) (asserting that the profession tends to blame its poor public image on increased commercialism).

297. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326, 331 (1996) (contending that "[t]he profession needs [advertising and other commercial] restrictions to preserve its culture or 'professional milieu,' and to perpetuate the belief that the profession is a necessary, self-regulating monopoly that serves the public interest"). Concerns that commercialism threatens or distorts traditional values in a field or activity is not limited to the legal profession. For example, there has been a long and robust debate, often attracting national attention, over the effects of commercialism in college sports. See Robert Lipsyte, *Economics Remain No. 1 in the Business of College Sports*, N.Y. TIMES, Dec. 15, 2002, at 11, 2002 WL 103948530 (critically reporting on a two-day forum that examined the role of business in college sports). This business includes the marketing of college sports programs as brands; similarly, Sean McManus, the president of CBS, stated: "Commercialism is not the opposite of integrity." *Id.*

298. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 490 (1988). See generally ANTHONY T. KRONMAN, *THE LOST LAWYER* 295-96 (1995) (discussing large law firm culture and its increasing preoccupation with money as evidenced by the "open use of advertising and other market-oriented techniques to boost firm revenue").

299. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 326-36 (1996) (discussing the tension between advancing the profession's ideal of serving the public interest while surviving in the commercial marketplace). Sometimes lawyer behavior is significantly influenced by more altruistic desires, such as protecting the poor and vulnerable—for example, the lawyer who represents a homeless person seeking admission to public housing. More often there is a mixture of altruism and lawyer-self interest in client representation, and even when the lawyer-self interest predominates, lawyers tend to cloak their concerns or conduct in the selfless and noble guise of protecting their clients' interests. Jonathan D. Glater, *A Legal Uproar over Proposals to Regulate the Profession*, N.Y. TIMES, Dec. 17, 2002, at C, 2002 WL 104478103 (quoting Professor Roger C. Cramton and reporting the corporate bar's concern over the new Securities and Exchange Commission rules that threaten the attorney-client privilege). Glater notes that many states already ethically allow lawyers to disclose corporate-client fraud and suggests that this lawyer con-

self-interest in any case is contingent on a variety of factors, such as the lawyer's familiarity with the client, the favorable or negative publicity attending the client's legal matter, and the amount and certainty of the lawyer's financial gain.<sup>300</sup> Survival in a competitive legal profession necessarily dictates that the lawyer's self-interest over the long term is the dominant factor in the delivery of legal services.<sup>301</sup> Financial gain, for example, is a legitimate concern and is compatible with ethical practice.<sup>302</sup> Nor should the lawyer's interests be avoided as topics for public discussion or examination.

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cern reflects, in part, lawyer self-interest in "prefer[ing] less enforcement over more" of the ethical rules. *Id.* Burdens of private practice often militate against lawyers engaging in this altruistic decision-making. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 291-307 (1995) (discussing increased commercial pressures on lawyers, including a longer working day, that undermines the altruistic impulses "by encouraging lawyers to pay more-vigilant attention to the financial consequences of their work"; it is this "culturally reinforced pre-occupation with money makes it more difficult to sustain the kind of self-forgetfulness required to deliberate for and with another person").

300. See Andrew Ross Sorkin & Jonathan D. Glater, *A Top Lawyer in Antitrust at Giant Firm Joins a Rival*, N.Y. TIMES, Dec. 17, 2002, at C1, 2002 WL 104478131 (underscoring the importance of financial concerns by reporting that the Clifford Chase firm, one of the world's largest, recently received a memo from its junior lawyers criticizing the firm's culture and "describing a 'profound problem' at the firm[,] . . . a requirement that associates bill more than 2,400 hours a year" which "encourages lawyers to pad their hours and work slowly rather than quickly").

301. *Shapero*, 486 U.S. at 490 (stating that "[i]mbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest"). As a large association, the legal profession, like other professions, emphasizes ideals such as public service, trust, and honor because they promote the profession's vaulted societal position and state approved monopoly for distributing legal services. However, there is often a stark dissonance between this abstract level of discourse and the actual practice of law where both individual lawyers and clients sometimes perceive lawyers' ideals as self-serving. JETHRO K. LIEBERMAN, *THE TYRANNY OF EXPERTS* 70 (1970) (reporting a "basic tension between two fundamental motivations of the professional – the desire to serve and prosper while so doing"). See generally *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 644-45 (1995) (Kennedy, J. dissenting) (concluding that "[t]here is no authority for the proposition that the Constitution permits the State to promote the public image of the legal profession by suppressing information about the profession's business aspects").

302. See JETHRO K. LIEBERMAN, *THE TYRANNY OF EXPERTS* 70-71 (1970) (concluding that "the professional must realize wealth in practice" in order to have adequate time to consider problems fully); Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 217 (2002), WL 14 LAWLIT 207 (emphasizing that there is nothing inherently inappropriate about "lawyers seek[ing] to earn fees" and that "[t]here is a certain business component to every professional endeavor"). See generally MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM* 63 (1977) (asserting that in the culture of professions there exists "a potential for permanent tension between . . . 'protection of society' and the securing of a market, between intrinsic and extrinsic values of work").

Justice Kennedy voiced a similar view: "Obscuring the financial aspect of the legal profession from public discussion . . . is not a laudable constitutional goal."<sup>303</sup> Instead, an open debate about the inevitable interface of commercialism and professionalism should help the bar maintain a healthy balance between the two competing interests in delivering legal services.

#### E. First Amendment Scrutiny of Anti-advertising Rules

Lawyer advertisements about living expense advances are commercial speech and are entitled to some measure of First Amendment protection.<sup>304</sup> The standard for commercial speech restrictions is a four-prong test established in *Central Hudson*.<sup>305</sup> Thus, states that prohibit lawyer advertisements bear the burden of showing that the restrictions pass the *Central Hudson* test.<sup>306</sup>

The first prong permits states to regulate and ban false or misleading commercial speech.<sup>307</sup> There is nothing inherently false, misleading, or even complex about lawyers advertising their willingness to advance living expenses. Paternalistic concerns that consumers are unable to adequately evaluate lawyer advertisements about advances of living expenses are unwarranted.<sup>308</sup> Companies and service providers commonly offer financial assistance as

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303. See *Went for It*, 515 U.S. at 644 (Kennedy, J., dissenting) (criticizing the Court's decision to uphold a thirty-day ban on direct-mail solicitation because the restriction on commercial speech was "at the expense of the least sophisticated members of society").

304. *Id.* at 623 (explaining that "[n]early two decades of cases have built upon the foundation laid by *Bates*" in establishing "that lawyer advertising is commercial speech"); see also LOUISE L. HILL, *LAWYER ADVERTISING* 57-72 (providing a scholarly discussion of the Court decisions holding that lawyer advertising has partial First Amendment protection); S. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* 52 (1990) (noting that lawyer advertising provides important commercial information).

305. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

306. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 781 (1986) (discussing the state's burden to demonstrate that its regulation directly and materially advances the state's substantial interest in restricting commercial speech).

307. See *Went for It*, 515 U.S. at 623-24 (pointing out that the Court had previously found that a state is free to regulate misleading commercial speech and commercial speech that pertains to unlawful activity).

308. See Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 509 (1999) (contending that even in the in-person solicitation context, it is unfair to presume "that consumers cannot resist persuasive, beguiling attorneys").

incentives to customers or clients.<sup>309</sup> Lawyer advertisements about advances involve essentially the same principles and conduct as in other service occupations. The advertisements are not misleading simply because they involve the sale of legal services, concern living expenses, or may extend over a period of time.<sup>310</sup> Thus, the advertisements pass the first prong of the *Central Hudson* test.

Assuming that lawyer advertising of living expense advances is truthful and not misleading, states must next demonstrate a "substantial interest" in regulating the speech under the second prong of *Central Hudson*.<sup>311</sup> The Supreme Court recognized in *Went for It* "that States have a compelling interest in the practice of professions within their boundaries" and that they have broad powers to regulate those professions "to protect the public health, safety, and other valid interests."<sup>312</sup> The Court nevertheless held that states "must demonstrate that the harms [they] recite[ ] are real" and not "mere speculation or conjecture."<sup>313</sup>

The harms associated with lawyer advertisements of living expenses are similar to the harms that opponents of the advances cite as reasons for banning this form of assistance.<sup>314</sup> The harms include the following: the fear that lawyers who do not advance living expenses will be at a competitive disadvantage,<sup>315</sup> the concern that there is a conflict of interest when the lawyer is both the client's fiduciary and a creditor;<sup>316</sup> the risk of facilitating improper solicitation;<sup>317</sup> and the possibility of demeaning the profession's

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309. For example, mortgage advisors and medical professionals may offer reduced or no fees in the beginning in return for doing business with them.

310. See generally Telephone Interview with Stephen Moyik, Assistant Disciplinary Counsel, State Bar of Texas (Dec. 18, 2002) (stating that "[a]lthough it may depend on the context of the advertisement, the Texas rule permits lawyers to advertise the advancement of reasonably necessary medical and living expenses" and noting that currently some lawyers advertise the advancement of medical examinations).

311. *Went for It*, 515 U.S. at 624 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980)).

312. *Went for It*, 515 U.S. at 625.

313. *Id.* at 626. The Court in *Went for It* relied heavily on empirical and anecdotal evidence to uphold a thirty-day ban on solicitation by the plaintiff's bar as necessary to prevent harm to the privacy of its citizens and the legal profession's reputation. *Id.* at 626-28.

314. See *supra* Part I.D.1-3 (critically discussing the validity of the traditional justifications for banning lawyers' advances of living expenses).

315. See *supra* Part I.D.2.

316. See *supra* Part I.D.1.

317. See *supra* Part I.D.3.

reputation.<sup>318</sup> States that permit lawyers to advance living expenses have arguably rejected these justifications, but they still prohibit lawyers from advertising the advances.<sup>319</sup> The inconsistency that results is more apparent than real—those states have simply retained, to a degree, their concerns about harms traditionally associated with living expenses.<sup>320</sup> They have recognized the need to permit lawyers to advance living expenses to help clients initiate and maintain litigation. They have balanced that need with the state's substantial interest in minimizing the harms traditionally associated with advances of living expenses, such as improper solicitation.<sup>321</sup> This balancing process produces an ethical rule that per-

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318. *See id.*

319. Assuming the sufficiency of these arguments as constituting a substantial interest, a state still has to show under the third prong of *Central Hudson* that its ban on advertisements materially and directly advances its interest. *See Cent. Hudson*, 447 U.S. at 564 (declaring that limitations on commercial speech must be carefully designed to meet the state's goals and interests).

320. *See, e.g.*, Telephone Interview with Gilbert Kendrick, Assistant General Counsel, Alabama State Bar Association (Dec. 17, 2002) (expressing a concern that without an advertising ban, lawyers would use advances of emergency assistance to induce clients to sign with an attorney); Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002) (cautioning that financial hardship assistance would make it more difficult for clients to seek new counsel if they owed a lawyer for guaranteeing loans for living expense advances); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002) (cautioning that lawyers may guarantee loan advances to obtain clients).

321. In recent discussions, authorities in these states have uniformly expressed one or more concerns as justifications for their bans on advertising advances of living expenses. Telephone Interview with Gilbert Kendrick, Assistant General Counsel, Alabama State Bar Association (Dec. 17, 2002); Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002). The authorities indicated that while the specific question of advertising advances has not arisen in their jurisdictions, and they do not have the final word on the interpretation of their ethical rules, they believe that advertising is contrary to the spirit of the rule. Telephone Interview with Gilbert Kendrick, Assistant General Counsel, Alabama State Bar Association (Dec. 17, 2002); Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002). Several indicated that they would proceed with a disciplinary investigation if a lawyer advertised such expenses or, if asked to prepare an advisory opinion, they would advise that their ethical rules prohibited advertisements of living expense advances. Telephone Interview with Gilbert Kendrick, Assistant General Counsel, Alabama State Bar Association (Dec. 17, 2002); Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002).

mits the advances of living expenses in limited circumstances while imposing a blanket ban on advertisements about them.

The belief that advertising transforms traditional reasons for prohibiting advances of living expenses into a new harm that justifies a blanket ban on advertising is questionable.<sup>322</sup> The Court has invalidated blanket bans on advertising when the reason is to limit competition.<sup>323</sup> A primary benefit of advertising in a free market economy is that it increases competition, which promotes consumer welfare, including expanding the market for legal services and lowering legal fees.<sup>324</sup> Thus, states lack a substantial interest in

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322. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995) (invalidating a federal law prohibiting brewers from advertising the alcoholic content on beer labels for fear that it would cause "strength wars" among brewers in which they would increase the potency of their beer to promote sales). The Court held that the First Amendment does not permit a ban on "the dissemination of truthful, nonmisleading information about an alcoholic beverage merely because the message is propounded in a commercial context." *Id.* at 493 (Stevens, J., concurring). Advancing living expenses, like selling beer, should be lawful conduct. Banning advertisements about such advances should not be permitted under the First Amendment because of the fear of bidding wars among lawyers for clients or other improper solicitation, nor should advertising bans on advances of living expenses be permitted merely because the message is "propounded in a commercial context." *Id.* at 492-93; see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (invalidating an advertising ban on liquor prices aimed at reducing alcohol consumption because the state failed to demonstrate that the ban directly and materially advanced the state's interest; a restriction will not be upheld "if it provides only ineffective or remote support for the government's purpose"). But see *Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 340-41 (1986) (indicating that although gambling was lawful conduct, the Court upheld a ban on the advertising of casino gambling aimed at Puerto Rican residents because of the harmful social effects that gambling posed to them). The *Posadas* decision has been heavily criticized. MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* 15-18 (2001) (describing *Posadas* as the "low point" in post *Virginia Board* case law and noting that the Court has "expressly repudiated" its theory that was the basis for the *Posadas* decision); Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of the Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 136 n.284 (2002) (discussing the *Posadas* decision); William Van Alstyne, *Quo Vadis, Posadas?*, 25 N. KY. L. REV. 505, 525 (1998) (criticizing *Posadas* and contending that the First Amendment does not support the suppression of "accurate information respecting the availability of a lawful product or service").

323. See, e.g., *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that the State cannot protect pharmacists from competition "by keeping the public in ignorance of . . . lawful terms that competing pharmacists are offering").

324. See Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 222 (2002), WL 14 LAWLIT 207 (reporting that advertising promotes the distribution of more goods and services and that lawyer advertising serves the salutary purpose of limiting lawyer fees); see also Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV.

banning advertisements about advances to alleviate the fear of lawyers who refuse to provide advances from being placed at a competitive disadvantage.<sup>325</sup>

The state might argue a substantial interest in preventing conflicts of interest associated with living expense advances. The potential conflicts of interest concern arises once the lawyer makes the advance, irrespective of whether the client retains the lawyer because of an advertisement or simply learns about advances subsequent to retaining the lawyer. Advertising may cause more living expense advances, but it is important to remember that the state has already approved this conduct. An increase in acceptable conduct—providing living expenses—should not be morphed into unacceptable conduct merely because consumer demand for it increases.

The paternalistic concern that advertising advances will cause clients to select lawyers for the wrong reason—that is, based on the advance, instead of the lawyer's character and competency—is overstated.<sup>326</sup> Consumers are accustomed to selecting services and

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C.R.-C.L. L. REV. 487, 508 (1999) (quoting a 1984 Federal Trade Commission study that found that lawyers who advertise a specific service charge less for it than lawyers who do not advertise). See generally GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1038 (3d ed. 1999) (citing, in part, Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983) and stating that “[e]conomic analysts generally conclude that advertising is an efficient means to market legal services that are capable of standardization but not those that require highly individualized treatment); John R. Schroeter et al., *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49 (1987) (providing empirical support that lawyer advertising produces lower fees).

325. See William Van Alstyne, *Quo Vadis, Posadas?*, 25 N. KY. L. REV. 505, 528-29 (1998) (contending the First Amendment firmly sets its countenance against the suppression of information to prevent persons from engaging or competing in a lawful activity). See generally COMM'N ON ADVERTISING, ABA, *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS* 88-89 (1995) (reporting that anecdotal information reveals that most complaints about lawyer advertising originate not from consumers but from “competing lawyers who find themselves at a competitive disadvantage with those lawyers who are allegedly making unethical representations”).

326. See Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 216 (2002), WL 14 LAWLIT 207 (criticizing Justice O'Connor's concern in *Shapero* “that the public's will and judgment might be overpowered” by lawyer advertising when the public seems to “manage[ ] very well with the typical daily bombardment of advertising . . . in all media forms”); Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 509 (1999) (asserting that consumers are capable of protecting their interests when dealing with lawyers).



products based on price and quality factors and are capable of assessing the benefits and detriments of retaining a lawyer who advances living expenses. The related fear that advertising will also encourage lawyers to use advances to bid for or to steal clients from other lawyers is also overstated.<sup>327</sup> In a free market economy, service providers commonly confront the prospect that their clients may move to a competitor for a variety of reasons, including better financial benefits. States do not have a substantial interest in banning advertisements that enhance the likelihood of consumers selecting legal services tailored to meet their economic needs.<sup>328</sup> Consumers should be free to retain counsel of their choice even when it involves terminating one representation for another. States should encourage lawyer advertisements that reach consumers and inform them about valuable assistance in pursuing their claims. Thus, it is disputable whether states have a substantial interest in banning advertisements because of improper solicitation.<sup>329</sup>

There is also a concern that advertising advances of living expenses may demean the profession.<sup>330</sup> In addition to adverse publicity from possible conflicts of interests and improper solicitation, some believe that advertisements about advances are inherently unseemly.<sup>331</sup> The advertisements highlight the commercial aspect

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327. See generally *Bates v. State Bar of Ariz.*, 433 U.S. 350, 378-79 (1977) (refusing to assume that striking down Arizona's rule limiting advertising would cause large numbers of lawyers to "seize the opportunity" to engage in improper conduct and believing that the vast majority of honest lawyers and the bar might "assist in weeding out those few who abuse their trust"); Jack P. Sahl, *Helping Clients with Living Expenses: "No Good Deed Goes Unpunished,"* PROF. LAW., Winter 2002, at 1, WL 13 No. 2 PROFLAW 1 (discussing lawyers' financial involvement with their clients).

328. See Terry Calvani et al., *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 778 (1988) (contending that advertising promotes consumer demand for legal services, the informed selection of counsel, and the lowering of fees for routine legal services).

329. See Sonja J.M. Cooper, *Comments on Lawyer Advertising Papers*, 14 LAW & LITERATURE 207, 222 (2002), WL 14 LAWLIT 207 (emphasizing "[t]his is a market driven economy in all its numerous aspects, including the seeking of justice").

330. See *id.* (questioning the historic concern that advertising threatens the profession's image). See generally Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780-83 (1993) (asserting that the First Amendment does not countenance the regulation of commercial speech because it involves a profit motive or is otherwise socially unpopular).

331. See Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 385 (1995) (questioning the legitimacy of law-

of practicing law and undermine public respect for the profession and the administration of justice.<sup>332</sup> Some commentators have challenged the validity of this concern and have suggested other reasons that account for the public's low regard for lawyers.<sup>333</sup> In addition, there is evidence and commentary that suggests advertising enhances the public's perception of the profession, especially when viewed through the prism of public service—providing legal assistance to people of moderate and lesser means.<sup>334</sup>

It is unclear whether these concerns constitute a substantial interest under *Central Hudson*. Although the Court has recognized that states have broad discretion to regulate professions, traditional justifications for prohibiting living expense advances are anachronistic and suspect.<sup>335</sup> These concerns are equally suspect and inadequate as a basis for prohibiting lawyer advertising about advances.<sup>336</sup> Restrictions on commercial speech cannot be pre-

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yers' concerns that advertising demeans the profession's image and noting that "[t]here is ample evidence that lawyers generally have significantly different opinions about lawyer advertising than consumers").

332. See generally COMM'N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 3 (1995) (emphasizing that "public confidence in the profession is essential . . . to sustain our justice system but questioning the role of lawyer advertising in causing the public's poor image of the profession").

333. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 325-26 (1996) (discussing that the public most frequently cites "corruption, greed and selfishness as factors contributing to this [profession's] poor image").

334. Jack W. Kennedy Jr., Comment, *The Widespread Embrace of the Waiting Period Upheld in Florida Bar v. Went for It, Inc.*, 75 TUL. L. REV. 777, 793 (2001); see also Kandi L. Birdsell, Current Development, *Legal Advertising: Finding Timely Direction in the World of Direct Solicitation, Waiting Periods and Electronic Communication*, 15 GEO. J. LEGAL ETHICS 671, 671 (2002) (discussing the regulation of direct mail advertising and its implication to emerging technologies, for example, the use of websites and chat rooms by lawyers).

335. See Fla. Bar v. Went for It, Inc., 515 U.S. 618, 625 (1995) (noting the State's interest in the regulation of professions); see also Jack P. Sahl, *Helping Clients with Living Expenses: "No Good Deed Goes Unpunished,"* PROF. LAW., Winter 2002, at 1, 4-6, WL 13 No. 2 PROFLAW 1 (criticizing justifications for bans on lawyers advancing living expenses).

336. NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 54 (1998). See generally GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 1038 (3d ed. 1999) (citing, in part, Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983) and stating that "[e]conomic analysts generally conclude that advertising is an efficient means to market legal services that are capable of standardization but not those that require highly individualized treatment").

mised on the mere possibility of harm, such as the possibility of placing some lawyers who do not advertise living expense advances at a competitive disadvantage.<sup>337</sup> In defending their advertising bans, states will need to present empirical or anecdotal evidence to support their position that they have a substantial interest in preventing “real harms” associated with lawyers advertising living expense advances.<sup>338</sup>

Assuming the states succeed in showing a substantial interest in regulating advertisements about advances of living expenses, they must still comply with the third prong of the *Central Hudson* test. That prong requires the state to demonstrate that its “restriction on commercial speech directly and materially advances” the government’s substantial interest in “alleviat[ing]” the harms identified as the basis for the restriction.<sup>339</sup> It is unclear whether the advertising bans comply with the third prong. The total advertising ban arguably diminishes the risk of some of the harms associated with advances of living expenses.<sup>340</sup> If lawyers cannot advertise their willingness to advance living expenses, it is less likely that lawyers who do not provide the advances will fear a competitive disadvan-

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337. *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 748 (1976) (rejecting economic protectionism as a basis for banning commercial speech); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374-75 (2002) (noting that “[i]n *Virginia Bd. of Pharmacy*, the State feared that if people received price advertising from pharmacists, they would ‘choose the low-cost, low-quality service and drive the ‘professional’ pharmacist out of business’ and would ‘destroy the pharmacist-customer relationship’ by going from one pharmacist to another”). The Court further provided: “We found these fears insufficient to justify a ban on such advertising.” *Id.* at 375.

338. See *Went for It*, 515 U.S. at 626 (explaining that a state seeking to limit commercial speech has the burden to show real harm and how the restrictions will provide material relief); see also *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (invalidating a rule that prohibited certified public accountants from engaging in in-person solicitation, and noting that the State Board of Accountancy presented no studies or other anecdotal evidence in Florida or from other states to support its contention that the in-person solicitation ban was necessary to protect clients from “fraud, overreaching, or compromised independence”).

339. *Went for It*, 515 U.S. at 624, 626.

340. See William Van Alstyne, *Quo Vadis, Posadas?*, 25 N. KY. L. REV. 505, 522-23 n.54 (1998) (suggesting that “a total ban on . . . advertising would have much greater effect than some half-way measure” concerning the application of the third prong of the *Central Hudson* test to a particular commercial advertising problem); cf. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1154 (2000) (quoting *Ruben v. Coors Brewing Co.*, 514 U.S. 476 (1995) and noting that a law that completely banned the display of alcoholic content on beer labels did not “directly and materially advance” the government interest in the welfare of its citizens “because of its ‘overall irrationality’”).

tage.<sup>341</sup> A total advertising ban may diminish damage to the profession's reputation that would result from the alleged unseemliness of the advertisements and their aura of commercialization.<sup>342</sup> A complete ban may also materially and directly diminish the risk of improper solicitation in which lawyers unfairly induce clients to select them on the basis of financial assistance rather than some other basis, such as competency.<sup>343</sup> The solicitation concern—commonly described as buying clients with financial advances—is a popular justification for banning both the actual advances of living expenses and advertisements about them.<sup>344</sup>

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341. At least one state supreme court acknowledged this concern in reviewing the ethical propriety of a lawyer advancing living expenses. See *In re G.M.*, 797 So. 2d 931, 935 (Miss. 2001) (recognizing that many lawyers cannot afford “to pay ‘lifestyle’ expenses” for clients and that this creates “an [un]even playing field among attorneys in getting or keeping clients”).

342. See *Attorney AAA v. Miss. Bar*, 735 So. 2d 294, 299 (Miss. 1999) (emphasizing that the “unregulated lending” of living expenses by lawyers to clients “would generate unseemly bidding wars for cases and would inevitably lead to further denigration of our civil justice system”). A total advertising ban does not address, however, the traditional harm involving conflicts of interest. That harm inevitably arises once the lawyer promises to advance living expenses irrespective of whether the lawyer has advertised a willingness to make advances. See *In re G.M.*, 797 So. 2d at 935 (recognizing “a potential conflict of interest” because the attorney advancing living expenses may “consider the recoupment of advanced expenses against what would otherwise be a reasonable settlement for the client”); cf. NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 54 (1998) (suggesting that advances of living expenses are unlikely to compromise lawyer independence).

343. See *In re G.M.*, 797 So. 2d at 935 (stating that “[i]n choosing an attorney, a client’s judgment should always be based on his confidence in the character and capability of the attorney”); see also *Taylor*, 648 So. 2d at 1192 (noting that ethical prohibitions on lawyers providing financial assistance to clients stems from the concern that they will be used to establish or continue employment). The court in *In re G.M.* recognized that the advancement of living expenses may distract the client from this basis; therefore, the state’s ban on the “public communication” of living expense advances is designed to keep the focus on the humanitarian purpose for the advances instead of using them as a tool for attracting clients. *In re G.M.*, 797 So. 2d at 935.

344. The disciplinary and bar counsel and other staff interviewed for this Article were all concerned with lawyers using advances of living expenses as an unfair inducement to obtain clients. See Telephone Interview with Gilbert Kendrick, Assistant General Counsel, Alabama State Bar Association (Dec. 17, 2002); Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002); Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002). At least one counsel expressed some concern that the practice of buying clients may already be occurring and that it is difficult to learn about these violations and to successfully discipline the violators. See Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002). Another counsel suggested that these cases are difficult to prosecute because the investigation

The solicitation justification for blanket bans on advertising is impractical and troubling for a couple of reasons. First, the current rules require that no promise of an advance occur until after employment. That requirement assumes that the formation of the lawyer-client relationship is always neatly compartmentalized into separate stages, permitting the lawyer to put off the question of living expense advances while negotiating other employment terms. In reality, the formation of the lawyer-client relationship is more complicated than that. Common sense suggests that clients will seek to resolve the important issue of living expense advances before employing the lawyer, especially if the client already knows that lawyers may advance expenses, or even that this lawyer has advanced them.<sup>345</sup> It is unfair to place both the client and lawyer in the awkward position of having to agree on employment before resolving the question of advances.<sup>346</sup>

Second, the lawyer is ethically obligated to reach an early and clear understanding with the client about the nature, scope, and basis for his or her representation.<sup>347</sup> This understanding should be

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produces a situation where both the lawyer and the client will state that there was no "promise" of an advance until "after employment." See Telephone Interview with Paul Jacobson, Disciplinary Counsel, State Bar of North Dakota (Dec. 17, 2002). Thus, there is no rule violation, even if the loan guarantee or advance occurs the same day as the signing of the employment agreement. *Id.*

345. See William C. Becker, *The Client Retention Agreement—The Engagement Letter*, 23 AKRON L. REV. 323, 323 (1990) (discussing written agreements between the lawyer and the client and asserting "that even lawyers who do not use written agreements must discuss the matter of fees and objectives with the client at an early time"); see also Tim W. Hrastar, *Eye on Marketing: Easy Steps to Reduce Client Apprehension*, CLEV. B.J., Dec. 2002, at 30, 30 (reporting that "[l]awyers aren't necessarily concerned with costs but . . . one of the first things a client wants to know is how much . . . [c]lients need [to know] at least a range of what their expected outlay will be in order to measure cost versus return and to budget for the expense").

346. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) (questioning under the First Amendment a state's interest in "keep[ing] people in the dark for . . . their own good"); see also William Van Alstyne, *Quo Vadis, Posadas?*, 25 N. KY. L. REV. 505, 528 (1998). Van Alstyne states that

the First Amendment, may not require the government to support any kind of commerce, or . . . particular kind of speech, but it firmly sets its countenance against regimes of government censorship to deny, or steer . . . information out of public view lest those to whose attention it might otherwise come might presume to find something in it the government would prefer they not so freely be allowed to know.

*Id.* (citation omitted).

347. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-19 (1983) (stating that "[a]s soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement

memorialized in writing and it should address essential terms, including fees and expenses.<sup>348</sup> This ethical obligation provides a powerful incentive for lawyers to become involved in discussions about expenses and to resolve the matter before accepting employment.

Lawyers may feel compelled to ignore ethical rules dealing with living expenses given the commercial realities of practice and the temptation to resolve the question of living expense advances before employment. How does the moral lawyer ignore client requests for information about advances to help with food, medical care, and housing? Does the lawyer simply advise the client to first sign on the dotted line in the retention agreement and then he or she will discuss the important issue of living expenses advances? Impractical, unfair, and anachronistic rules breed a general contempt for ethical codes and may cause lawyers to ignore other more valid rules.<sup>349</sup> This contempt undermines individual self-esteem and the profession's ability to engage in successful self-regulation.

State regulatory regimes banning the advertisement of living expenses fail the fourth prong of the *Central Hudson* test, which requires the states to show the regulations are narrowly drawn.<sup>350</sup>

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with his client as to the basis of the fee charges to be made"); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002) (requiring lawyers to quickly resolve the question of fees and expenses, "preferably in writing, before or within a reasonable time after commencing the representation"); *id.* cmt. 2 (stating that "[i]n a new client-lawyer relationship, . . . an understanding as to fees and expenses must be promptly established").

348. See MODEL CODE OF PROF'L RESPONSIBILITY EC 2-19 (1983) (stating that "[i]t is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent"); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2002) (providing that "the basis . . . of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation"); *id.* at 1.5(c) (requiring contingent fees to be in writing and signed by the client).

349. See Timothy P. Chinaris, *Professional Responsibility Law in Florida: The Year in Review*, 1995, 20 NOVA L. REV. 223, 231 (1995) (suggesting that the Florida Supreme Court's refusal in *Taylor* to apply "the plain language of the rule" banning lawyers' advances for living expenses will create disrespect for the rules); see also Lloyd B. Snyder, *Rhetoric, Evidence, and Bar Agency Restrictions on Speech by Attorneys*, 28 CREIGHTON L. REV. 357, 385-86 (1995) (evidencing, in part, the dissonance between the reality of the marketplace for legal services and ethical bans on advertising by stating "[a]ngry clients do not generate complaints about attorney advertising," and that "[i]t is rare for clients to initiate grievances about advertising").

350. See *Michel v. Bare*, 230 F. Supp. 2d 1147, 1154 (D. Nev. 2002) (providing an example of a recent case involving commercial speech by lawyers and the application of

The state need not prove it has employed the "least restrictive means" to achieve its substantial interest.<sup>351</sup> All that is required "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends."<sup>352</sup> The fit does not have to be perfect, but it must be reasonable.<sup>353</sup> The means need not be the only one imaginable.<sup>354</sup>

A total ban on all advertising for living expenses advances is not a good "fit" for alleviating potential harms associated with the advances.<sup>355</sup> Even assuming that the blanket ban directly and materially advances the state's substantial interest in protecting the bar and public from harms, alternative and more effective methods exist for accomplishing that purpose.<sup>356</sup> The bar could focus its efforts on investigating and disciplining lawyers who have allegedly

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the *Central Hudson* four-prong test). In *Michel*, Chief Judge Phillip M. Pro found that a new Nevada bar rule that banned lawyers in private practice from using trade names in most circumstances violated the First Amendment. *Id.* at 1160. Rule 199, titled "Firm Names and Letterhead" provided:

A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 195. The firm name shall contain the names of one or more living, retired, or deceased members of the law firm. No trade names shall be used other than those utilized by non-profit legal services organizations; however, phrases such as 'the law offices of' or 'and associates' shall be permissible.

*Id.* at 1148. Since trade names constitute commercial speech, Chief Judge Pro examined Nevada's ban under the *Central Hudson* four-prong test. *Id.* at 1153-55. The ban failed prong three because it did not directly and materially advance the asserted governmental interests. *Id.* at 1154. Nevada's ban also failed the fourth prong because it was not narrowly drawn, and Nevada's blanket restriction on the use of tradenames was "'more extensive than is necessary to serve th[e] [state's asserted] interest.'" *Michel*, 230 F. Supp. 2d at 1154 (quoting *Cent. Hudson*, 447 U.S. at 566). The court found the existing rule restricting the use of false, deceptive, and misleading tradenames was sufficient to protect the public and to hold lawyers accountable. *Id.* at 1154-55.

351. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995).

352. *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989).

353. *Id.*

354. *Id.*

355. *Went for It*, 515 U.S. at 632, 634 (concluding that the Court's prior cases do not require states to impose the least restrictive alternative when regulating commercial speech, but instead there must be "'a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable'").

356. *Id.* at 632-33 (disagreeing with the respondents—the majority did not see "'numerous and obvious less-burdensome alternatives'" to Florida's short temporal ban and ruling that "[t]he Bar's rule is reasonably well tailored to its stated objective of eliminating targeted mailings whose type and timing are a source of distress to Floridians, distress that has caused many of them to lose respect for the legal profession"); *cf.* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-72 (2002) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490-91 (1995) and noting the existence of various alternatives for "advanc[ing]

engaged in improper solicitation, have compromised their loyalty due to a conflict of interest, or have demeaned the profession. The profession's image suffers from lawyers representing unpopular clients, charging high fees, failing to communicate with clients, and the adversarial nature of legal proceedings, as much as it does from lawyer advertising.<sup>357</sup> The Court in *Shapero* specifically recommended this approach as opposed to Kentucky's blanket ban on targeted, direct-mail solicitation,<sup>358</sup> writing "that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful."<sup>359</sup>

Instead of a total ban, bar associations could create standard agreements for living expense advances that would clearly identify and explain critical terms, such as the interest rate.<sup>360</sup> The agreement could contain a clause reciting that the client was fully informed about the details of the loan and that it was not the only reason for employing the lawyer. The agreements could inform clients of their right to rescind the agreement at any time.<sup>361</sup> Stan-

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the Government's asserted interest in a manner less intrusive to . . . First Amendment rights,' indicated that the law was 'more extensive than necessary'").

357. See Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 502 (1999) (describing the bar's assertion that it can protect the profession's reputation by banning in-person solicitation as "logically flawed" given other reasons for the profession's poor image).

358. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 466 (1988). In *Shapero*, the Court was not persuaded that a total ban on targeted, direct-mail was necessary just because it presents lawyers with opportunities for mistakes and abuses. *Id.* at 476. The Court held that there were "far less restrictive and more precise means" to prevent or minimize such abuses, "the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, giving the State ample opportunity to supervise mailings and penalize actual abuses." *Id.* (citation omitted).

359. *Id.* at 478.

360. This would remedy the problem of lawyers drafting poor agreements that might be a trap for the unwary. Furthermore, a lawyer may not be readily familiar with his or her state law governing such agreements. See Telephone Interview with Kenneth Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility (Dec. 17, 2002) (raising the concern about lawyers preparing appropriate contracts). Even if the lawyer was not expecting the client to repay an advance of living expenses, the bar could still provide a standard agreement reflecting that intention of the parties.

361. See Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 511 (1999) (arguing that in-person solicitation is good public policy and protected by the First Amendment). Busa and Sussman suggest retention agreements following in-person solicitation could provide a designated period in which the client could rescind without paying



dard agreements or provisions dealing with living expense advances would also encourage lawyers to memorialize their employment agreement in writing. The bar could review the agreements on a one-time basis or periodically to ensure their fairness.<sup>362</sup> In addition, the bar could sponsor Continuing Legal Education (CLE) programs to educate lawyers about the various aspects of living expense advances. Finally, the bar could vigorously investigate and discipline miscreant lawyers who violate existing ethics rules when making improper advances.<sup>363</sup>

Ethical rules already exist in states to protect the clients from false or misleading statements or other overreaching by lawyers to obtain employment. Conflict of interest rules already protect clients from lawyers whose loyalty and independence are compromised.<sup>364</sup> Similar ethical rules protect the profession's image from certain demeaning conduct. Ethical rules do not exist—nor should they—to protect some lawyers from feeling at a competitive disadvantage because they elect not to advance living expenses. Thus, a prohibition of advertising or communicating information about living expense advances until after the lawyer's employment is broader than necessary for safeguarding clients' and the profession's welfare.<sup>365</sup>

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any compensation since clients are generally liable to lawyers for the reasonable value of their services. *Id.* at 511. This suggestion represents another possible alternative to the bar's ban on the advertising of living expense advances provided it is limited to the lawyer's time. Clients would have to remain liable for any advances made by the lawyer to protect lawyers from unscrupulous clients who might obtain living expenses and then discharge the lawyer.

362. See Telephone Interview with Ray Cantu, Director, Attorney Compliance Division, State Bar of Texas (Jan. 21, 2003) (reporting that under Part 7.07 of the Texas Disciplinary Rules of Professional Conduct, lawyers must submit certain advertisements for approval and stating that many lawyers submit even exempt materials for approval to obtain a "comfort level" regarding the ethical propriety of their conduct). Ray Cantu's responsibilities include directing the Advertising Department of the State Bar of Texas. *Id.*

363. For example, lawyers are generally subject to discipline if they solicit in-person clients with living expense advances or fail to exercise independent judgment in a matter because of a client's obligation to repay living expenses. See *Ohralik*, 436 U.S. at 468 (upholding discipline of attorneys).

364. See MODEL RULES OF PROF'L CONDUCT R. 1.7 to 1.11 (2002); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-101-107 (1983); see also *Michel v. Bare*, 230 F. Supp. 2d 1147, 1159-60 (D. Nev. 2002) (holding that a new Nevada rule banning tradenames was not narrowly drawn and noting that current rules more narrowly addressed the asserted concerns of the state).

365. *Michel*, 230 F. Supp. 2d at 1159.

### F. State Sanctioned Advertising of Living Expense Advances

In assessing states' reasons for prohibiting advertisements concerning advances of living expenses, it is important to remember that California,<sup>366</sup> the District of Columbia<sup>367</sup> and Texas<sup>368</sup> permit lawyers to advertise the advances. The District of Columbia even

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366. RULES OF PROF'L CONDUCT OF THE STATE BAR OF CAL. R. 4-210(A)(2) (1989) (providing that a lawyer can advance living expenses only "[a]fter employment"). Although California Rule 4-210(A)(2) has the same "after employment" language that is contained in the Alabama, Minnesota, Mississippi, Montana, and North Dakota rules, it does not implicitly prohibit advertising as in the later states. See Telephone Interview with Randall Difuntorum, Director, of Professional Competence Programs, State Bar of California (Dec. 18, 2002) (explaining that legislative history reflects the state's intention to permit the advertising of advances of legal expenses because language in the predecessor rule prohibiting advertising was deleted); see also THE OFFICE OF PROF'L STANDARDS, STATE BAR OF CAL., REQUEST THAT THE SUPREME COURT OF CALIFORNIA APPROVE AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, AND MEMORANDUM AND SUPPORTING DOCUMENTS IN EXPLANATION (Dec. 1987). The document states:

27. Proposed Rule 4-210. Payment of Personal or Business Expenses Incurred by or for a Client.

(Current Rule 5-104)

Proposed rule 4-210 continues the limitations and exceptions found in current rule 5-104 on an attorney advancing and paying personal or business expenses incurred by or for a client.

A proposed amendment to paragraph (A) of the rule would delete language prohibiting an attorney from entering into a discussion or other communication with a prospective client regarding payment of personal or business expenses incurred by the client. A client should know the terms and conditions of employment prior to retaining the lawyer so that [the] client may knowingly and intelligently determine whether to pursue litigation and choose an appropriate attorney. The proposed rule, like present rule 5-104, permits an attorney to advance funds on behalf of the client; *it makes no sense to prohibit the member from explaining this to the client before the attorney is retained.*

In light of the amendment to paragraph (A), paragraph (C), which expressly permitted an attorney to show rule 5-104 to a prospective client, would be stricken as unnecessary. No substantive change is intended by the deletion of paragraph (C).

....

No substantive changes are proposed to subparagraph (A)(2), which permits an attorney to lend money to the client if the client promises in writing to repay it."

*Id.* (emphasis added). The "after employment" language in the current California rule, 4-210 (A)(2), should be narrowly construed to mean that a lawyer cannot advance or pay someone money until after they are the lawyer's client. See Telephone Interview with Randall Difuntorum, Director, of Professional Competence Programs, State Bar of California (Dec. 18, 2002). However in addition to advertising, common sense and fairness dictate that the lawyer and potential client discuss advances before they enter into an employment agreement. *Id.*; see also Telephone Report From Pamela Hill of the State Bar of California Ethics Hotline (Dec. 20, 2002) (indicating that she was unable to find any case or rule that prohibits lawyers from truthfully advertising advances of living expenses).

permits lawyers to solicit clients in person and to offer them living expense advances.<sup>369</sup> It is interesting to note that these states do not report any problems or widespread advertising campaigns highlighting lawyers' willingness to make the advances.<sup>370</sup> The experiences of these states suggest that the alleged harms that form the basis for blanket bans on the advertising advances of living expenses are speculative and overstated, and that the bans are unconstitutional.

#### IV. CONCLUSION

The bar must establish rules that reflect both aspirations and the real challenges that lawyers face.<sup>371</sup> Those challenges are inevitably shaped by the real problems confronting society, including the

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367. See D.C. RULES OF PROF'L CONDUCT R. 1.8(d)(2) (1996) (providing that "a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide . . . [o]ther financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding").

368. TEX. DISCIPLINARY R. PROF'L CONDUCT R. 1.08(d)(1) (providing that "a lawyer may advance or guarantee court costs, . . . and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter"); see also Telephone Interview with Stephen Moyik, Assistant Disciplinary Counsel, State Bar of Texas (Dec. 18, 2002) (stating that "[a]lthough it may depend on the context of the advertisement, the Texas rule permits lawyers to advertise advances of reasonably necessary medical and living expenses").

369. See 18 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Careful Use of Internet 'Chat' is Allowed to Give Legal Information, Solicit Clients* 649, 667 (2002) (citing District of Columbia Bar Legal Ethics Committee, Op. 316 (Sept. 12, 2002) and reporting that there is no blanket ban on in-person solicitation in the District of Columbia and that it recently approved of lawyers "soliciting prospective clients through Internet Chat rooms and listservs, . . . in 'real time' or nearly real time, with Internet users who are seeking legal information").

370. See Telephone Interview with William Ray Bravenec, Investigator, Office of Chief Disciplinary Counsel, State Bar of Texas (Dec. 18, 2002) (commenting that lawyers advertise on television and in print that they will advance the expense of a medical examination to determine if the client should consider filing an asbestos-related health claim); see also Telephone Interview with Ray Cantu, Director, Attorney Compliance Division, State Bar of Texas (Jan. 21, 2003) (stating that "[w]e have not seen large scale lawyer advertising campaigns involving the advances of living expenses"). Responsibilities of Ray Cantu include directing the Advertising Department of the State Bar of Texas. *Id.*

371. Fla. Bar v. Went for It, Inc., 515 U.S. 618, 645 (1995) (Kennedy, J., dissenting) (noting that the profession's objective should be "to ensure that 'the ethical standards of lawyers are linked to the service and protection of clients'"); see also COMM'N ON ADVERTISING, ABA, *LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS* 15 (1995) (conducting hearings on advertising, the ABA Commission on Advertising reported that "those attending its hearings advised it that the organized bar could do no greater disservice to itself, members, or the public than to promote or en-

inability of many people to afford legal services.<sup>372</sup> Changing the majority rule that prohibits lawyers from advancing living expenses would not produce a major shift in the way the bar renders legal services.<sup>373</sup> This is evidenced by the fact that some lawyers ignore the current ban and assume the risk of advancing living expenses to their clients.<sup>374</sup> Some lawyers ignore the ethical rule, in part because it ignores the poverty in society and prevents them from taking moral action—advancing necessary living expenses.<sup>375</sup> Broad

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courage unconstitutional regulations governing lawyer advertising and other aspects of communication of legal services”).

372. See GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 1124-25 (3d ed. 1999) (citing *ABA Consortium on Legal Services and the Public's Legal Needs: Comprehensive Legal Needs Study* (1994)) (reporting “a vast, untapped demand for legal services” because “the legal needs of low-and-moderate income Americans . . . are not being handled;” and that “three-fourths of the legal needs of low-income households and two-thirds of those of moderate-income households were not taken to the civil justice system”); Amy Busa & Carl G. Sussman, Note, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 488, 506-07 (1999) (demonstrating the difficulty of providing adequate access to legal services).

373. See Interview with Edward Cleary, Director, Minnesota Office for Lawyer Professional Responsibility (Jan. 2, 2002) (reporting that the issue of lawyers advancing living expenses to clients is not “a significant problem area” and noting that a number of lawyers have been privately admonished over the past several years for paying clients’ living expenses instead of guaranteeing loans for the expenses).

374. See *In re Arensberg*, 553 N.Y.S.2d 859, 860 (N.Y. App. Div. 1990) (censuring lawyers for advancing living expenses and refusing to excuse their conduct because other lawyers make such advances); Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1308 n.6 (1998) (“suspect[ing] that noncompliance with this particular disciplinary rule, privately and as a matter of conscience, is common”). See generally Timothy P. Chinaris, *Professional Responsibility Law in Florida: The Year in Review, 1995*, 20 NOVA L. REV. 223, 231 (1995) (discussing the Florida Supreme Court’s refusal in *Taylor* to discipline a lawyer who advanced living expenses).

375. See Bruce A. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORDHAM L. REV. 1307, 1308 & n.6 (1998) (discussing in part, the ethical ban on lawyers advancing living expenses). Professor Green described two instances that indicate why lawyers ignore the current ban. The first involved a poverty lawyer who arranged for a friend to loan living expenses to the lawyer’s impoverished client. *Id.* The lawyer subsequently reimbursed the friend to avoid violating the ethical ban against such advances. *Id.* In this way, the poverty lawyer was able to accomplish what he believed was morally correct. *Id.* The second situation involved a speech by a disciplinary prosecutor. *Id.* at 1308. Afterwards, a lawyer in the audience described a situation where the lawyer felt compelled to loan money to a distressed client. *Id.* “The disciplinary counsel’s response was, in substance, ‘Give him the money. Just don’t tell us about it.’” *Id.*; see generally Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 723 (1994) (citing, in part, *Louisiana State Bar Ass’n v. Edwins*, 329 So. 2d 437, 446 (La. 1976) and suggesting that “[b]ans on humanitarian medical and

ethical rules that ignore important social realities or lack moral credence diminish the legitimacy of the entire code of professional ethics.

The ABA and all states should reject the majority rule that proves the adage that no good deed goes unpunished. They should adopt a more generous approach by permitting lawyers to do more to help poor clients litigate their claims.<sup>376</sup> Lawyers should not be compelled to provide living expenses, of course, but nor should they run the risk of professional discipline for humanitarian acts.<sup>377</sup>

The ABA and all states should also permit lawyers to advertise the availability of advances for living expenses.<sup>378</sup> It is wrong to keep the public, in particular, those who are less sophisticated or financially solvent, in the dark about valuable financial aid to help them pursue their legal rights and responsibilities in the justice system.<sup>379</sup> Clients remain free to reject the lawyer's offer of assis-

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living assistance" have an "inhumane . . . effect, particularly for injured claimants lacking health insurance").

376. See Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 12 (1998). There is no shortage of exhortation concerning the profession's obligation to provide legal services to the poor, and, as such, Justice O'Connor has urged the bar to do more to meet the "great and crying need for legal services for the poor." *Id.* Justice O'Connor cited a study that reported "eighty-five percent of the poor's legal needs go unmet" and that "a substantial number of citizens believe . . . that justice is for 'just us'—the powerful, the educated, the privileged." *Id.* Permitting lawyers to advance living expenses and to inform the public about the availability of the advances may help, in part, to change the belief that justice is not for all. The humanitarian aspect of living expense advances, especially for that part of society least able to obtain justice, should enhance the profession's reputation.

377. See NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 54 (1998) (noting that some states permit lawyers to advance living expenses for "humanitarian reasons"). To be sure, some lawyers and law firms will ignore any policy shift that permits the advertising of advances. See LOUISE L. HILL, LAWYER ADVERTISING 186 (1990) (noting that some lawyers and law firms simply take a position against advertising, while others engage in sponsoring CLE events and other activities but describe this as marketing instead of advertising).

378. See William E. Hornsby, Jr. & Kurt Schimmel, *Regulating Lawyer Advertising: Public Images and the Irresistible Aristotelian Impulse*, 9 GEO. J. LEGAL ETHICS 325, 358 (1996) (suggesting that both the public and the profession may be better served "through limited" regulation of lawyer advertising).

379. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1160 (6th ed. 2000) (criticizing the majority opinion in *Went for It* for upholding the Florida rule that "keep[s] clients in the dark for 30 days while being fair game for defense lawyers, who can contact them"). But see Chief Justice Warren Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 955 (1995) (acknowledging "that people need a lawyer to ensure access to justice," but stating: "[I]t would be absurd to claim that advertising is necessary"). Chief Justice Burger argued that lawyer referral services offer an effective alterna-

tance.<sup>380</sup> Moreover, the bar and state courts are free to punish false or misleading advertisements.

By advertising living expense advances, lawyers promote the profession's goals of providing legal services to all members of society, including those who can least afford it.<sup>381</sup> Helping disadvantaged clients "can be one of the most rewarding experiences in a lawyer's life."<sup>382</sup>

Scholars in other fields remind us that just because a "practice or behavior is widely accepted at some point in history doesn't make it right."<sup>383</sup> The controversy involving lawyers advancing and ad-

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tive to the "huckster-shyster" advertising that is "slick" and otherwise unprofessional. *Id.* at 953-55. One problem with Justice Burger's approach is that it ultimately requires the profession to determine what is "slick" or otherwise distasteful advertising. The determination risks censoring advertising that may be effective for a specific segment of the public.

380. See MODEL RULES OF PROF'L CONDUCT R. 7.3(b)(1) (2002) (requiring a lawyer to cease soliciting professional employment once the lawyer learns of the client's wish not to be solicited).

381. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002) (providing that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay"). "In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means." *Id.* at (b). Furthermore, "[t]hose persons unable to pay for legal services should be provided needed services." MODEL CODE OF PROF'L RESPONSIBILITY EC 8-3 (1983); see also JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES: ABA, A LAWYER'S CREED ON PROFESSIONALISM (D) 676 (2002) (stating that "[w]ith respect to the public and to our system of justice: 5. I will be mindful that the law is a learned profession . . . and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance"); COMM'N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 91-96 (1995) (noting the ABA is "dedicated to improving access to the legal services" and arguing that lawyer advertising facilitates access).

382. MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. 1 (2002); see also ANTHONY T. KRONMAN, THE LOST LAWYER 365-66 (1995) (concluding that "public-spiritedness within the profession today is dismally low and needs to be increased" for example, by providing "pro bono representation of worthy causes and clients" and that such representation offers lawyers a "measure of intrinsic satisfaction" in their work.); cf. Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 6 (1998) (noting that "[m]ore than half of all practitioners report dissatisfaction with the profession").

383. See Jeffrey Gettleman, *Southern Liberals Had Lott Moments, Too*, N.Y. TIMES, Dec. 22, 2002, at 3 (discussing racism and politics in the context of Senator Lott's resignation as majority leader of the United States Senate and quoting Michael J. Sandel, a political philosopher at Harvard). "A whole society can be wrong. . . . in the 20th century Western society steadily expanded the moral demands on itself. This suggests that behavior deemed acceptable today – may be found wholly unacceptable or immoral in the future." *Id.* One example that the profession's current normative standards for behavior may not be "right" is the fact that over the last thirty years many of the organized bar's restrictions on lawyer advertising were found unconstitutional. COMM'N ON ADVERTISING,

vertising living expenses promises to persist for the near future because of financial cuts in legal aid and other programs designed to provide the poor with access to justice.<sup>384</sup> As Justice Kennedy observed in *Went for It*, “[t]he guiding principle, . . . is that full and rational discussion furthers sound regulation and necessary reform.”<sup>385</sup> The time has arrived to reform outdated ethical rules that chill the humanitarian instincts of lawyers and preclude them from advancing and advertising living expenses.

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ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 15 (1995).

384. This funding for these programs may be reduced even further if the Supreme Court of the United States rules in *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), that current IOLTA programs that provide significant financial support to legal service organizations are unconstitutional because they violate the takings clause of the Fifth Amendment. *See generally* COMM’N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 91-96 (1995) (noting the ABA is “dedicated to improving access to the legal services” and arguing that lawyer advertising facilitates access). Richard Cordray submitted an amicus brief on behalf of the National Association of IOLTA Programs that represents forty-nine state bar associations. *Id.* After noting that “Congress reduced [funding] for federal legal services a number of years ago,” Cordray emphasized: “States have been able to devise this mechanism, which is a stop gap and which has been a steady, consistent source of funding. If removed, it will be a huge blow. This case is essential for the funding of legal services.” *Id.* at A1-A10; *see also* COMM’N ON ADVERTISING, ABA, LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 35 (1995) (reporting that it became clear in the early 1970s that people, “particularly those of low and moderate incomes, had problems obtaining affordable legal representation” because of three reasons—one being the “difficulty in finding information about the costs of those services”); WILLIAM E. HORNSBY, JR., *MARKETING AND LEGAL ETHICS: THE BOUNDARIES OF PROMOTING LEGAL SERVICES* 1 (3d ed. 2000) (concluding that research in the 1970s “demonstrated the that many citizens had difficulty finding affordable legal services”).

385. *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 642 (1995).