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BROADCAST ADVERTISING UNDER INDIANA'S NEW ATTORNEY DISCIPLINARY RULES

WILLIAM R. BUCKLEY*

Since the days of *caveat emptor* the American consumer has contemplated advertisements with considerable suspicion.[1] At the turn of the century advertising practices were so thoroughly perverted by dishonestly and misrepresentations[2] that the ABA elected in 1908 to prohibit attorneys from commercializing the profession.[3] During subsequent decades significant protective legislation has purified advertising endeavors so that "let the buyer beware" has been slowly superseded by a spirit of "let the seller be fair." As moral turpitude gradually has been expunged from commercials, lawyers have cautiously waded into the shallower advertising waters. Since *Bates v. State Bar of Arizona*[4] many states have amended their ethical mandates to accommodate broadcast advertising. In January 1984, Indiana joined this continuing trend by authorizing attorneys to utilize television commercials.[5]

Despite the promising prospects of these new modifications, many lawyers appraise broadcast commercials with consternation comparable to the Celtic horror of Grendel in the *Beowulf* legend. Past abuses in the advertising industry have etched cavernous skepticism in the

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1. R. ANDERSON & T. BARRY, ADVERTISING MANAGEMENT 478 (1979) [hereinafter cited as ANDERSON & BARRY]; Greyser, *Advertising: Attacks and Counters*, 50 HARV. BUS. REV. 22-28 (March/April 1972); Warne, *Advertising: A Critic's View*, 26 J. MARKETING 10-14 (Oct. 1962).

2. L. GORDON, ECONOMICS FOR CONSUMERS 184-85 (2d ed. 1944). "Untruthful and misleading advertising probably reached its height in the early part of this century. In 1906 it was estimated that 72 percent of newspaper advertising was doubtful and that 32 percent was definitely objectionable." *Id.* at 184.

3. ABA CANONS OF PROFESSIONAL ETHICS Canon 27 (1908). *See also* Annot., 39 A.L.R. 2d 1055, 1056-57 (1955).

4. 433 U.S. 350 (1977).

5. The Indiana Supreme Court adopted the modified ethical rules on January 17, 1984. *See* WEST'S INDIANA CASES, 459 N.E.2d No. 1, at XXVI-XLIX (March 7, 1984); 27 RES GESTAE 588-602 (June 1984).

The amended Code is currently undergoing constitutional challenge in Wilcox and Ogden v. Supreme Court of Indiana, No. 84-82 (S.D. Ind. filed Jan. 19, 1984). To date the court has ruled solely on the Plaintiffs' standing to litigate. Wilcox & Ogden v. Supreme Court of Indiana, No. 84-82 (S.D. Ind. July 12, 1984).

psyche of the bar. However, if one entertains the beast's perspective[6] advertising via the electronic media is much maligned and misunderstood by attorneys. Commercial communication need not become a leviathan if its users are scrupulous.

This article will examine the alterations of the Indiana Code of Professional Responsibility within the broadcast advertising context. Various probable consequences of the new regulations shall be posed, and the processes through which the attorney advertiser must venture will be outlined. Finally, the author will recommend a style of advertising that should survive ethical inspection while helping to excavate the practice of law from the public mire of misconception and mistrust.[7]

HIGHLIGHTS OF THE NEW ADVERTISING RULES

Among the Indiana Supreme Court's revisions in Canon Two were the explicit inclusion of television as a permissible attorney advertising medium and the deletion of geographic limitations to print and radio commercials.[8] No longer must lawyers limit their advertising to the regions in which they live or operate offices, or from which the bulk of their clientele reside.[9] Also, attorneys must preserve a

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6. *See* J. GARDNER, GRENDEL (1971).

7. An examination of the constitutional bases for broadcast advertising is beyond the scope of this article. For outstanding synopses of these issues, see, *e.g.*, L. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (rev. ed. 1981); Whitman & Stoltenberg, *The Present Constitutional Status of Lawyer Advertising—Theoretical and Practical Implications of In Re R.M.J.*, 57 ST. JOHN'S L. REV. 445 (1983); Note, *Attorney Advertising Over the Broadcast Media*, 32 VAND. L. REV. 755 (1979) [hereinafter cited as Note, *Broadcast Media*]; Annot., 30 A.L.R. 4th 742 (1984). For cases clarifying the constitutional protections afforded attorney advertisers, see *In re* R.M.J., 455 U.S. 191 (1982); *In re* Primus, 436 U.S. 412 (1978); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), *aff'd without op. mem.*, 698 F.2d 1218 (6th Cir. 1982). For a general analysis of the effects of broadcast advertising on the public, see Griffin, *Broadcast Advertising: What Has It Done to the Audience?*, 23 WASHBURN L.J. 237 (1984).

An excellent evaluation of current disciplinary developments has been collated by Fisher & Watts, *Professional Responsibility*, in *1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 283-300 (1984).

8. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (as amended through April 18, 1984), *reprinted in* the INDIANA RULES OF COURT (1984) [hereinafter cited as THE CODE].

9. Jackson, *An Overview of Ethics and Professional Responsibility*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES I-5 (1984) [hereinafter cited as Jackson, *An Overview*]. The elimination of this restriction could pose ethical dilemmas for multistate broadcasting of attorney advertisements. *See infra* notes 44-56 and accompanying text.

copy or recording of commercials for six years after dissemination as well as a listing of dates and carriers of the advertisements.[10] The tension between the solicitation ban and advertising has been relieved by a specific allowance for solicitation through permissible commercials.[11] As with prior versions the Code retains restrictions to advertisement content and format. Commercials cannot contain information that is "false, fraudulent, misleading, deceptive, self-laudatory or unfair"[12] and must be "done in a dignified manner."[13] The scope of facts that may be included in advertisements remains constrained to traditional biographical data, although the new provision's list of permissible examples of subjects for advertising offers guidelines rather than mandates.[14] Attorneys may now indicate that their practice involves specific areas of law.[15] However, lawyers cannot claim specialist status except in the historically acceptable categories of patent, trademark and admiralty law.[16] The trade name prohibition survives,[17] presumably because the "inherently misleading" qualities of such "catchy" or unusual firm names might be amplified through television or radio.[18]

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10. THE CODE DR 2-101(E).

11. *Id.* DR 2-103(E).

12. *Id.* DR 2-101(B). These terms are defined at *id.* 2-101(C).

13. *Id.* DR 2-101(B). According to one commentator, this requirement "is so broad and vague as to be possibly unconstitutional or otherwise incapable of enforcement." Elberger, *New Disciplinary Rules: As They Affect Radio & Television Advertising,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES IV-3 (1984) [hereinafter cited as Elberger, *New Disciplinary Rules*].

14. THE CODE DR 2-101(B). The list of "permissible areas" includes lawyers' or firms' names, general fields of law practiced, birth date and place, academic achievements, admission to state or federal bars, public offices held, military service, bar or professional association memberships, technical or professional licenses, foreign language ability, bank references, participation in prepaid or group legal programs, and fee and credit arrangements. *Id.* DR 2-101(B)(1)-(19). One observer suggests that the new rule "seems to leave open the possibility of [advertising] other permissible areas. . . ." Jackson, *An Overview, supra* note 9, at I-21 n.11.

15. THE CODE DR 2-104(A)(2). This provision is subject to the "fraudulent, misleading and self-laudatory" language of DR 2-101. *Id.*.

16. *Id.* DR 2-104(A)(1); Jackson, *An Overview, supra* note 9, at I-3, I-15 to -16; McCray, *Stating of Areas of Practice,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES III-1 to -4 (1984).

17. THE CODE DR 2-102(B).

18. Typically unusual firm names have been used merely to attract persons' attention, particulary with media advertising. McGill, *Traditional Methods of Communication,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES II-1 (1984). For a concise discussion of trade and firm names, see *id.* at II-1 to -7. Trade names prohibitions have passed constitutional muster. *See e.g.,* Friedman v. Rogers, 440 U.S. 1 (1979).

The new Code could provide the broadcast advertiser with greater flexibility in styling commercials. The previous prohibitions against using photographs, pictorials, background music, or sound effects—what this author terms *pizzazz*—have been deleted from the new provisions.[19] However, this does not license attorneys to inundate the media with typical Madison Avenue hype. Such sight and sound supplements still must be "dignified" and cannot violate the "fraudulent, misleading and self-laudatory" language of DR 2-101. Also, only the attorney herself or a fellow firm member may be pictured within the commercial.[20] The Ethical Considerations are swift to squelch the urge to over-commercialize:

> A lawyer should strive to communicate [advertised] information without undue emphasis upon style and advertising strategems which serve to hinder rather than facilitate intelligent selection of counsel.
>
> The public benefit derived from advertising depends upon the usefulness of the information provided the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope, or frequency which unduly emphasized unrepresented biographical information does not provide that public benefit.
>
> The non-lawyer is best served if advertisement's contain no misleading information or emotional appeal. . . .[21]

Given these precepts, attorneys are unlikely to romp about the media like a Disney cartoon. Still, there continues to be considerable apprehension over the prospect of "style-over-substance" attorney advertising. The new rules forebode several probable difficulties which the following sections shall discuss.

POSSIBLE CONSEQUENCES OF THE NEW RULES

A. *The Ogre of "Pizzazz"*

Most critics of lawyer advertising are quick to conjure the unethical prospects of gimmick commercials often associated with questionable late night mail-order television lures. There have been

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19. *Compare* THE CODE DR 2-101(B) (1983) (old rule) *with* THE CODE DR 2-101(B) (1984) (current rule). *See also* Jackson, *An Overview, supra* note 9, at I-2. *See infra* notes 22-43 and accompanying text for additional discussion of *pizzazz*.

20. THE CODE DR 2-101(D)(4).

21. *Id.* EC 2-8(A), 2-10, 2-10(A).

interesting instances in which attorneys have experimented with unusual advertising approaches. In one television commercial a Wisconsin lawyer donned scuba gear, emerged from a lake, and addressed potential bankruptcy clients with a clever attention-getter: "In over your head?"[22] Other tactics have included an attorney who drove a hearse to "dig up" probate customers and another who flew airplane banners at football games.[23] The courts have generally disallowed gimmickry of this variety.[24]

While there is little debate that blatant huckstering is inappropriate for lawyer advertising,[25] the same cannot be said for the employment of *pizzazz* now permitted under the amended Code.[26] Objections to the use of such advertising techniques rely upon the supposition that the potential for misrepresentation is greater with broadcast advertising because of television's subliminal capacities and historical overemphasis of style, as well as the transitory quality of televised messages.[27] However, there is no compelling evidence that the introduction of *pizzazz* into attorney commercials is inherently

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22. Middleton, *The Right Way to Advertise on TV,* 69 A.B.A.J. 893, 893 (1983).

23. Arthur, *New Disciplinary Rules as They Affect In-Person & Third Person Solicitation,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES VII-5 (1984) [hereinafter cited as Arthur, *Solicitation*].

24. Bishop v. Committee on Professional Ethics and Conduct of Iowa State Bar Ass'n, 521 F. Supp. 1219 (S.D. Iowa 1981), *vacated & remanded on other grounds,* 686 F.2d 1278 (8th Cir. 1982) (use of contrived drama and background sounds promotional and thus prohibited); Eaton v. Supreme Court of Arkansas, 270 Ark. 573, 607 S.W.2d 55 (1980), *cert. denied,* 450 U.S. 966 (1981) (advertising in discount coupon booklets impermissible); *In re* Duffy, 19 A.D.2d 177, 242 N.Y.S.2d 665 (1963) (use of neon signs at law offices disciplinary violation); *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978) (advertising by handbills, circulars, or billboards prohibited); *In re* Utah State Bar Petition for Approval of Changes in Disciplinary Rules on Advertising, 647 P.2d 991 (Utah 1982) (state restrictions against advertising by billboards or promotional items such as inscribed matchbooks, pens, and pencils, held constitutional); THE CODE EC 2-8, 2-8(A); Arthur, *Solicitation, supra* note 23, at VII-3 VII-5, VII-12 to -13.

25. The authorities generally concur. *See, e.g.,* Bishop, 521 F. Supp. at 1219 (adjectives such as "cut-rate, lowest, give-away, below-cost," and "special" not within First Amendment protection); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586 (D.D.C. 1971), *aff'd,* Capital Broadcasting Co. v. Acting Attorney Gen., 405 U.S. 1000 (1972); *In re* Petition, 564 S.W.2d at 638; Note, *Broadcast Media, supra* note 7, at 770.

26. *See supra* notes 19-21 and accompanying text.

27. *See* Capital Broadcasting Co., 333 F. Supp. at 586; Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* 1 AMERICAN BAR ASSOCIATION AND BUREAU OF NATIONAL AFFAIRS, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, *Current Reports,* at 182-83 (May 2, 1984) [hereinafter cited as ABA/BNA LAWYERS' MANUAL]; *ABA Code of Professional Responsibility Amendments, Report to the Board of Governors of the Task*

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misleading.[28] Nor has psychological research demonstrated that subliminal stimuli can alter people's attitudes or behavior.[29] The potential for deception exists in *all* advertising.[30] If the integrity of television advertisements is suspect, it is because commercial enterprises over the years have manipulated the medium in an overzealous attempt to persuade rather than to inform potential customers.[31] Past abuses in product advertising do not necessitate comparable results for lawyers' commercials. Even if attorneys flooded the airwaves with gimmickry, the prospect for mass delusion is remote. Emotional appeal in advertisements best affects viewers for products or services that they frequently purchase or with which the public is most familiar.[32] Since most persons rarely consult an attorney on a regular basis, emotional ploys will have been long forgotten by the time the average person needs legal advice.

Since the Supreme Court warned in *Bates v. State Bar of Arizona*[33] of the "special problems of advertising on the electronic broadcast media,"[34] many members of the judiciary, legislature and bar seem to have concluded that lawyer commericals on radio and televison must receive stricter ethical regulation than print advertisements. But "advertising is advertising irrespective of the device or instrumentality employed."[35] Even the *Bates* Court recognized that most attorneys electing to advertise "will be candid and honest and

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Force on Lawyer Advertising, 46 U.S.L.W. 1, 2 (Aug. 23, 1977); Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation,* 13 AM. BUS. L.J. 171 (1975); Note, *Broadcast Media, supra* note 7, at 764, 767-70; Note, *Lawyer Advertising in Kansas: Expanding Marketing of Legal Services,* 21 WASHBURN L.J. 626, 639 (1982) [hereinafter cited as Note, *Kansas Advertising*]. For discussions of subliminal advertising, see ANDERSON & BARRY, *supra* note 1, at 398; *Subliminal Seduction,* 70 A.B.A.J. 25-27 (July 1984).

28. Andrews, *The Model Rules and Advertising,* 68 A.B.A.J. 808, 810 (1982). *Contra,* Bishop, 521 F. Supp. at 1228-29. The Federal Trade Commission has defended the permissability of *pizzazz* approaches in cases in Iowa and Alabama. *See* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *News and Background,* at 47 (Feb. 8, 1984); *Id., News Notes,* at 288 (June 27, 1984).

29. S. DUNN & A. BARBAN, ADVERTISING: ITS ROLE IN MODERN MARKETING 227 (5th ed. 1982) [hereinafter cited as DUNN & BARBAN].

30. Kentucky Bar Ass'n v. Stuart, 568 S.W.2d 933, 934 (Ky. 1978).

31. Note, *Broadcast Media, supra* note 7, at 772.

32. H. BALDWIN, CREATING EFFECTIVE TV COMMERCIALS 9 (1982) [hereinafter cited as BALDWIN].

33. 433 U.S. 350 (1977). For an illustration of the advertisement utilized by the Appellants, see DUNN & BARBAN, *supra* note 29, at 141.

34. Bates, 433 U.S. at 384 (1977).

35. *In re* Petition, 564 S.W.2d at 643. This court specifically rejected the *Bates* "special problems" language. *Id.*

straightforward,"[36] if only to avoid disciplinary sanction. State requirements such as Indiana's six-year-retention-of-commercial rule can easily preserve the fleeting broadcast signal for closer disciplinary scrutiny.[37]

The fear that dramatization, background sound, music, color, animation, and graphics will inevitably distort and mislead suggests a fundamental misunderstanding of the nature of communication. *Pizzazz* opponents apparently assume that viewers will absorb broadcast bilge and become swept away by the commercial Pied Piper's song and dance. In reality very few people are so easily mesmerized by advertisements. Audiences actively assimilate communications by interpreting the data using numerous cognitive processes.[38] Viewers first must receive the message, and often perception is impaired by transient attention spans and myriad distractions.[39] Even with attentive audiences, the recipient of the information tends to retain those facts which most readily conform to existing motives, attitudes, and predispositions.[40] These conceptions are heavily influenced by an individual's education, economic status, geographical orientation, and identification with a certain social class or subculture, religion, race, nationality or ethnic origin.[41] Sociological and psychological studies have indicated how consumers analyze communications prior to adopting or rejecting a new idea. This diffusion process involves several stages: awareness, interest, evaluation, trial, and adoption.[42] Numerous other factors influence the effectiveness of the commercial, such as the perceived expertise and credibility of the communicator and whether the audience is positively or negatively aroused by the

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36. Bates, 433 U.S. at 379.

37. *See generally* Note, *Broadcast Media, supra* note 7, at 770-71; Elberger, *New Disciplinary Rules, supra* note 13, at IV-2.

38. ANDERSON & BARRY, *supra* note 1, at 44-45; Schramm, *Nature of Communication Between Humans,* in THE PROCESS AND EFFECTS OF MASS COMMUNICATION 3-53 (Schramm & Roberts 1971); Greyser, *supra* note 1, at 24.

39. DUNN & BARBAN, *supra* note 29, at 305-07; S. WORCHEL & J. COOPER, UNDERSTANDING SOCIAL PSYCHOLOGY 90 (rev. ed. 1979) [hereinafter cited as WORCHEL & COOPER].

40. BALDWIN, *supra* note 32, at 10-11, 13-14; DUNN & BARBAN, *supra* note 29, at 219, 226-27.

41. DUNN & BARBAN, *supra* note 29, at 235-37; J. KLAPPER, EFFECTS OF MASS COMMUNICATIONS 3 (1961) [hereinafter cited as KLAPPER]. *See generally* E. HEIGHTON & D. CUNNINGHAM, ADVERTISING IN THE BROADCAST AND CABLE MEDIA 113 (1984) [hereinafter cited as HEIGHTON & CUNNINGHAM].

42. DUNN & BARBAN, *supra* note 29, at 234-35, 305-12.

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message.[43] Thus, it seems improbable that commercials with *pizzazz* should dupe individuals into impulsively selecting counsel.

B. The Threat of Interstate Transmission

With the introduction of cable networks and satellite communication, television and radio[44] signals frequently transcend state boundaries.[45] Even prior to such regional broadcasting viewers in neighboring states could receive Indiana stations via a standard roof antenna.[46] Many border-city broadcasters openly cater some of their programming to their out-of-state markets.[47] This "spill-over" presents no problems for typical commercial advertising and in fact can boost state-line cross-over consumer purchasing. With attorney advertising, however, interstate broadcast transmissions pose several dilemmas.

Consider the prospect of a Chicago law firm advertising to Gary residents. From the commercial's context, it might not be clear to the layperson that the Chicago counsel could not represent a Hoosier client absent admission to practice in Indiana. Assuming that none of the practitioners of this hypothetical firm was licensed in Indiana, the multistate advertisement could falsely represent that these attorneys could dispense legal advice in our state, posing an unauthorized practice of law scenario. A similar case has arisen in which a New York lawyer not certified in Florida advertised in the state on behalf of his Miami-based offices. The court held that the attorney's commercials tended "to mislead the public into believing he was a member of The Florida Bar" and consequently was an unauthorized practice of law.[48]

Suppose that these hypothetical Chicago lawyers operated affiliate offices in Indiana under the same firm name. Conceivably an interstate commercial could satisfy Illinois' ethical precepts and still

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43. KLAPPER, *supra* note 41, at 3; WORCHEL & COOPER, *supra* note 39, at 73-79, 81-86.

44. Utilizing a television cable system, one can boost FM-radio reception multifold. In this way the author has easily received out-of-state stations based in Illinois, Ohio and Michigan.

45. For example, Indiana viewers at least as far south as Bloomington can receive WGN-Channel Nine (Chicago) with cable television services.

46. Neighboring Kentucky, Illinois, Ohio and Michigan citizens can readily tune in television programming originating from Evansville, Terre Haute, Fort Wayne, or South Bend.

47. *See, e.g.*, WTWO-Channel Two, Terre Haute, Indiana (television newscasts for "Illiana").

48. The Florida Bar v. Kaiser, 397 So. 2d 1132, 1133-34 (Fla. 1981).

violate Indiana Code standards.[49] Other than the possible unauthorized practice complication, it is unclear whether such an out-of-state broadcast could constitute an ethical *faux pas* under our Code, if the Indiana members of the Chicago-based operation did not participate in the improper advertising. Even if no disciplinary breach occurred, arguably such a multistate transmission might provide the Indiana branch with an unfair advantage over competing firms whose advertisements more strictly conformed to the Code's mandates. There is sparse caselaw on this issue[50] but in one instance the New Jersey Supreme Court ruled that such interstate beaming of commercials "could give [a New York firm with New Jersey offices] a substantial competitive advantage" and subsequently disallowed the advertisements.[51]

Another wrinkle is the possibly deceptive aspect of "spill-over" broadcast advertising. Courts have concluded that television and print commercials which appear in several metropolitan areas can mislead the public into believing that an attorney appearing in the commercial personally practices at numerous office locations while he actually is present in name alone.[52] Persons viewing such advertisements could select a firm in one city expecting to be represented by a counselor whose practice is fully restricted to another region out-of-state or across the state.

As a practical matter advertisements which comply with the

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49. For example, Illinois does not prohibit the use of trade names, while Indiana does. *Compare* ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1984) [hereinafter cited as ILLINOIS CODE] and *Id.* DR 2-102 Comments to Rule 2-102 *with* THE CODE DR 2-102(B).

50. *See generally* Elberger, *New Disciplinary Rules, supra* note 13, at IV-6 to -7 (citing only the New Jersey case below).

51. On Petition for Review of Opinion 475 of the Advisory Comm. on Professional Ethics and DR 2-102(C), 89 N.J. 74, 78-79, 88-89, 444 A.2d 1092, 1094, 1099-1100 (1982), *Appeal dismissed sub nom* Jacoby & Meyers v. Supreme Court of New Jersey, 459 U.S. 962 (1982). This case concerned a New York law firm which was broadcasting into New Jersey at a time when New Jersey prohibited any television advertising. *Id.* at 88-89, 444 A.2d at 1099. The Court recommended reconsideration of that ban. *Id.* at 78, 444 A.2d at 1094.

52. *See, e.g., In re* Sekerez, _____ Ind. _____, 458 N.E.2d 229, 241, 243 (1984) *cert. den.* 83 L.Ed.2d 116, 53 U.S.L.W. 3239 (1984). (lawyer used trade name and own name in print advertising in numerous cities) ("The entire manner of operation of Respondent's legal clinics [with offices in several cities] . . . suggests that there was in fact a great deal of misunderstanding as to the identity, responsibility and status of those practicing and working in the legal clinics."); Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports,* at 182-83 (May 2, 1984).

disciplinary provisions of Illinois,[53] Kentucky,[54] Ohio,[55] and Michigan[56]

53. Illinois permits radio and television advertising so long as the communication is "in a direct, dignified and readily comprehensible manner" and does not "contain any false or misleading statements or otherwise operate to deceive." ILLINOIS CODE DR 2-101, 2-101(a)-(c). Illinois lists eight information categories that the commercial may discuss, as contrasted with Indiana's 19 "suggested" areas. *Compare Id.* 2-101(a) *with* THE CODE DR 2-101(B)(1)-(19). Illinois' and Indiana's classifications encompass virtually the same range of data, however. There is some confusion as to whether the Illinois Rules restrict advertisement elements to the eight classes given in DR 2-101(a) The Code states, "Such [advertising] communication *shall be limited to* one or more of the [eight categories indicated]." ILLINOIS CODE DR 2-101(a) (emphasis added). But the accompanying Committee Comments sharply contradict this language and suggest the list is merely a guide and does not limit advertising to specific disclosures. *Id.* DR 2-101 Comments to Rule 2-101. Even if the eight elements were exhaustive, which the Committee clearly discounts, the listing has a "catch-all" provision allowing "other information. . . which a reasonable person might regard as relevant in determining whether to seek the lawyer's services." *Id.* DR 2-101(a)(8).

The primary discrepancy between the Illinois and Indiana Rules concerns advertising under trade names. *See supra* note 49.

54. Kentucky allows broadcast advertising that is "designed to inform the public" but is not "misleading," "deceptive," "unfair," or "self-laudatory." KENTUCKY SUPREME COURT RULES, Rule 3.135(2)(a), (4) (1984) [hereinafter cited as KENTUCKY RULES]. Advertisements cannot contain "a misrepresentation of fact or law" and cannot omit "a fact necessary to make the [commercial's] statement considered as a whole not misleading." *Id.* Rule 3.135(5)(a)(i). Kentucky's Rules outline 26 items that may be included in an advertisement, and these essentially mirror the Indiana scroll. *Compare id.* Rule 3.135(6)(a)(i) *with* THE CODE DR 2-101(B)(1)-(19). If an attorney advertises specific areas of practice, the commercial must state the following: "Kentucky law does not certify specialties of legal practice." KENTUCKY RULES Rule 3.135(5)(b)(ii).

On May 9, 1984, the Board of Governors of the Kentucky Bar Association, which administers the State's disciplinary rules, approved a regulation that would forbid lawyers' use of the term "reasonable" in advertisements to describe fees. 48 KY. BENCH & B. 4 (1984). The Board felt that the adjective was too vague and misleading to the public. *Id.*

For an excellent evaluation of the perplexing quirks in the Kentucky Rules regarding solicitation, see Gaetke, *Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky*, 70 KY. L.J. 707 (1981-82). See also Gaetke & Casey, *Professional Responsibility*, 70 KY. L.J. 325 (1981-82), for a critique of the Kentucky Supreme Court's inconsistent application of disciplinary mandates.

55. In Ohio lawyers advertising on television or radio must avoid "any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(A) (1984). This section's language is identical to paragraph one of Indiana's DR 2-101(B). Broadcast commercials must "be presented in a dignified manner *without* the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice." *Id.* DR 2-101(B) (emphasis added). Attorneys must derive their advertisements' contents from an *exclusive* slate of 20 acceptable subjects duplicative of the Indiana examples. *Compare id.* DR 2-101(B)(1)-(20) *with* THE CODE DR 2-101(B)(1)-(19). Given Ohio's stricter standards, the danger of ethical infringements due to multistate transmissions is greater from Hoosier commercials beamed into Ohio rather than vice versa.

56. Michigan advertising cannot be "false," "fraudulent," "misleading,"

should also meet Indiana's requirements. Therefore, the possibility of an undue competitive advantage such as that found by the New Jersey Court is greatly minimized, since such a commercial edge would more easily be acquired for an out-of-state broadcaster if Indiana attorneys were still prohibited from competing on television. If other Hoosier law offices can utilize that medium to advertise with comparable style, the multistate commercial would stand on equal ground with its domestic counterpart. The potential unauthorized practice tickler can easily be avoided if attorneys insert a geographic reference into their commercials to identify which state they serve.

C. Positive Developments Under the New Rules

The Code's new provision permitting attorneys to advertise the general fields of law in which they practice should assist persons in selecting appropriate counsel. A national survey conducted by the American Bar Foundation and the American Bar Association has demonstrated that as much as 83 percent of the public felt that "people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems."[57] Commercials listing areas of practice should alleviate this stigma. Also, enabling attorneys under the new rules to clarify the scope of their pursuits bolsters their attempts to reach those most in need of their specific services. Many lawyers consider themselves to be limited practioners and prefer to attract clientele within certain specialized areas. Another national study indicated that 65 percent of young attorneys responding to the survey "considered themselves specialists,"[58] and 73 percent devoted over 40 percent of their efforts to a single legal subject.[59] The complexities of the modern legal arena necessitate acknowledgement of practice specialization. There is a substantial social value to be achieved through guiding the public in its selection of qualified counselors, and advertising fields of practice serves to accomplish this goal.

"deceptive," or "self-laudatory." MICHIGAN CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1984). Pursuant to a Michigan Supreme Court Administrative Order, attorneys may advertise using "any form of public communication" which satisfies the above restrictions and the general requirements of the State's ethical precepts. 3 MICHIGAN LAW PRACTICE ENCYCLOPEDIA *Attorneys & Counselors* § 65, at 382 (West 1970).

57. Andrews, *supra* note 28, at 809. *See also* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC, PRELIMINARY REPORT 94 (1974) (over 70 percent surveyed agreed with this statement); Note, *Broadcast Media, supra* note 7, at 780; Note, *Kansas Advertising, supra* note 27, at 626.

58. Andrews, *supra* note 28, at 810.

59. *Id.*

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Other benefits will accrue from the introduction of televised commercials. Broadcast advertising of fee schedules will augment the print media's efforts to reduce public anxiety and misunderstanding of legal expenses.[60] Price competition through advertising will continue with the application of the electronic media, resulting in more affordable legal assistance to larger segments of the public.[61] The volume of clientele for all lawyers also should expand as more people become aware of the availability of economical legal aid. Fear of high costs prevents many citizens from ever consulting attorneys.[62] A major benefit of televised commercials is the reduction of that fear.

Another plus is that use of television will provide information regarding legal services for those persons who are typically isolated from published communications—namely, the illiterate, the undereducated, and the vision-impaired.[63] Actually *overall* public cognizance will improve from television commercials. As one commentator concisely stated, "Broadcast attorney advertising is the most effective means of disseminating" details concerning fees and the existence and essence of legal guidance.[64] More importantly, televised commercials will stimulate viewers about the law *before* they may realize that they need counsel. It is easy for an individual to consult the telephone directory when he already appreciates his legal quandaries. However, many laypersons rarely ponder their legal rights or duties and might not recognize the need to make a timely visit to an attorney. After seeing or hearing a television or radio advertisement, the subject of "the law" would at least briefly flicker through the audience's thoughts.

Whether or not broadcast advertising will engender any of these benefits or burdens will depend primarily upon the directions in which the commercial is developed. The subsequent sections will attempt to tunnel through the complex morass of delivering the message to the potential client.

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60. Attorney Grievance Comm'n v. Hyatt, Nos. 83-1479, 83-1845 (Prince George's County, Md. Cir. Ct., April 11, 1984), *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports*, at 183 (May 2, 1984). *See generally* Bates, 433 U.S. at 376, 377 n.35; Note, *Broadcast Media*, *supra* note 7, at 761-62, 766.

61. *See generally* Bates, 433 U.S. at 377; Note, *Broadcast Media*, *supra* note 7, at 780.

62. Note, *Broadcast Media*, *supra* note 7, at 766, 780.

63. Grievance Comm. for Hartford-New Britain Judicial Dist. v. Trantolo, No. 10775 (Conn. Jan. 3, 1984), *reprinted in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Current Reports*, at 30 (Feb. 8, 1984); *In re* Petition, 564 S.W.2d at 643-44; ABA/BNA LAWYERS' MANUAL, *supra* note 27, *Practice Guide*, at 81:502 (1984); Note, *Broadcast Media*, *supra* note 7, at 766.

64. Note, *Broadcast Media*, *supra* note 7, at 766.

A BROADCAST ADVERTISING PRIMER

A. *To Advertise or . . . That is the Question*

In *Bates* the Supreme Court did not instantly exorcise the profession's lengthy repugnance toward lawyer advertising. Since 1977 attorneys have been extremely hesitant to advertise far beyond the Yellow Pages.[65] Much of this reluctance stems from the dread of impropriety, discipline, or disapproval of one's colleagues.[66] After seventy years of prohibition, prejudicial perceptions of advertising perpetuate among the bar. Lawyers today might summarily dismiss the prospect of broadcast commercials simply because of this amorphous stigma. If a firm wishes to incorporate electronic advertising into its arsenal of client communication, this demon must first be dispelled.

Why should attorneys advertise? Despite the lofty inspiration of the Code and caselaw, there remains one *honest* answer: to encourage the customer to purchase one lawyer's services over another's. This admission does not betray the public interest. Rather, it dispatches the hypocrisy that a lawyer's primary purpose in practicing is to resolve society's interpersonal conflicts. That might be, or perhaps should be, the quixotism toward which attorneys strive; however, few firms actually view their daily activities so philanthropically. If they did, then the majority of their clientele would be represented pro bono. Since the *business* of practicing law is an accepted attitude among the bar, then *advertising one's law business* must be viewed with a comparable perspective. There is ample opportunity to incorporate the idealism of the profession into the commercial message. In deciding whether or not to advertise, attorneys must always distinguish the purely *economic* analysis from the *ethical* implications of the communication's contents. Fear of the latter's abuse should not fog the former.

B. *Marketing Decisions*

Once a lawyer has decided to consider advertising she must initially decide whether to employ a professional advertising agency to create a commercial campaign. Depending upon the proposed breadth of one's advertising and the depth of one's pocketbook, hiring

65. "Since June 1977, approximately ten percent of attorneys have advertised." Note, *Kansas Advertising, supra* note 27, at 626 (citing *Lawpoll*, 67 A.B.A.J. 1618 (1981). However, this was a substantial increase from three percent in 1979. Slavin, *Lawyers and Madison Avenue*, 6 BARRISTER 46,47 (Summer 1979).

66. Laev, *The Right Way to Advertise*, in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES X-2 to -3 (1984) [hereinafter cited as Laev, *The Right Way*].

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consultants may prove beneficial to the development of effective commercials.[67] The greater the saturation of the media, the more valuable the agency's guidance. Whether a law firm opts for professional or "in-house" production of advertisements, several considerations must be assessed in selecting the appropriate advertising media.[68]

A frequently overlooked criterion in choosing a commercial medium is the lawyer's goals to be achieved through advertising. Until his objectives are clearly formulated the direction of his advertising cannot be properly initiated. While the primary directives must be determined by the individual, some generalizations can be suggested. For example, the central purpose of all commercials is persuasion, and advertisements typically are generated "to create awareness, to promote understanding, to shape attitudes, to enhance recall, and to motivate action."[69] With these functions in mind, an attorney can begin to evaluate which types of commercials within a constrained budget would most efficiently communicate to potential clients the nature of her practice.

Perhaps the single most crucial matter the potential advertiser must confront is how to channel commercials toward prospective customers. There are various classification schemes used to segment target audiences.[70] Populations may be categorized in terms of the legal crises they encounter, the media to which they are exposed, the types of media material that they prefer (such as the varieties of television programs they watch or sections of the newspaper they read), or the time of day or frequency with which they use the media.[71] Advertising agencies often conduct extensive research to isolate target markets. Data regarding consumer demographics,[72] sociopsychological qualities[73] and service usage

67. *See id.* at X-10 to -20 (factors to evaluate in selecting advertising agency).

68. For an analysis of considerations in choosing advertising media, see *id.* at X-1 to -38.

69. HEIGHTON & CUNNINGHAM, *supra* note 41, at 62 (emphasis in original deleted). *See also* ANDERSON & BARRY, *supra* note 1, at 244-45.

70. Targeting is sometimes referred to as market segmentation. *See* ANDERSON & BARRY, *supra* note 1 at 225-27.

71. *See* DUNN & BARBAN, *supra* note 29, at 49, 59.

72. Demographic data include age, sex, income, education, occupation, family size and orientation, geographic location, race, and religion of the average consumer for a given good or service. *See* ANDERSON & BARRY, *supra* note 1, at 84, 227; BALDWIN, *supra* note 32, at 47-48; DUNN & BARBAN, *supra* note 29, at 206, 243-51; HEIGHTON & CUNNINGHAM, *supra* note 41, at 67-68, 82.

73. Such qualities as one's motivations, perceived affiliation with a certain social class or subculture, personality traits ("such as leadership, independence, compulsiveness, conformity, and gregariousness"), and life-style indicators can assist the advertiser in devising a commercial aimed at a certain section of the populace. *See* DUNN & BARBAN, *supra* note 29, at 219-23, 251. *See also* ANDERSON & BARRY, *supra* note 1, at 84,

trends[74] enable the advertiser to tailor the commercial to address those particular groups most likely to engage or require a select legal service. Unfortunately, most attorneys will lack sufficient financial fortitude to underwrite such elaborate research ventures. However, many broadcast facilities and advertising agencies have already accumulated much of this information and might permit advertisers to access their stockpiles, particularly for a small consideration.

Once the attorney knows who and where his possible clients are, he must elect a *media mix* which can most cogently contact the target audience.[75] The broadcast media clearly are more pervasive than publications. As of 1980, 98 percent of American households owned a television, and 99 percent had a radio.[76] Moreover, the average American family watches over six hours of television each day, and the typical adult listens to over three hours of radio daily.[77] Broadcasting obviously has the reach, but will the *desired* target groups be exposed to its commercials? Persons at work or in transit are more likely to tune in radio than television,[78] though radio listeners frequent only a few specific stations that offer a limited programming fare, such as news, rock-and-roll, or country music.[79] Television viewers "channel-hop" in search of favorite shows,[80] particularly with the increasing popularity of cable systems. Newspapers and magazines are often only diversions to be skimmed as readers await other engagements or enjoy a meal. Consequently, various media must be employed at different times utilizing diverse styles if contact is to be made with particular portions of the populace.[81]

The frequency with which an advertisement is broadcast or printed will heavily influence its effectiveness even if several media

277; BALDWIN, *supra* note 32, at 48-49; HEIGHTON & CUNNINGHAM, *supra* note 41, at 69-70, 82.

74. *See* ANDERSON & BARRY, *supra* note 1, at 84, 227; BALDWIN, *supra* note 32, at 49; DUNN & BARBAN, *supra* note 29, at 251-54; HEIGHTON & CUNNINGHAM, *supra* note 41, at 67.

75. DUNN & BARBAN, *supra* note 29, at 497.

76. *Id.* at 547, 565.

77. *Id.* at 561, 569; HEIGHTON & CUNNINGHAM, *supra* note 41, at 86, 89.

78. DUNN & BARBAN, *supra* note 29, at 569. Automobile drivers play the radio "60 percent of the time the car is in use." HEIGHTON & CUNNINGHAM, *supra* note 41, at 89.

79. *See* DUNN & BARBAN, *supra* note 29, at 486; HEIGHTON & CUNNINGHAM, *supra* note 41, at 89-91; Kahn, *The Practical Experience of Radio Advertising,* in INDIANA CONTINUING LEGAL EDUCATION FORUM, LAWYER ADVERTISING RULE CHANGES VIII-3 (1984) [hereinafter cited as Kahn, *Practical Experience*].

80. HEIGHTON & CUNNINGHAM, *supra* note 41, at 88-89.

81. "Communicators, even at their best, reach only a fraction of the total potential audience." DUNN & BARBAN, *supra* note 29, at 59.

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are engaged. Often commercials must be transmitted numerous times before the bulk of the target audience has been exposed, and further repetition is essential before the communication "sinks into" the public memory.[82] Generally, the greater the reach of the media, the less often an advertisement must be run.[83] Thus, with broadcasting, fewer commercials would have to be developed and purchased.

Matching market segments with media carriers necessitates a keen evaluation of the communicator's capabilities. Some stations or periodicals can be eliminated quickly because of their restricted subject matter that appeals to very few people. Conversely, a narrow reader- or viewership might be the attorney advertiser's primary pool from which possible clients may emerge. Given the increasing number of cable systems that specialize programming, some lawyers might prefer such media to reach targeted viewers.[84] Obviously broadcasting provides sight-and/or-sound stimulus that the written word cannot, and therefore more individuals may encounter a T.V. or radio commercial even while pursuing other endeavors than would a person who has only a few minutes each day to devote to reading. Unfortunately, this "viewer/listener flexibility" can also doom fleeting broadcast commercials that must compete with attentions focused elsewhere.[85] Thus, complex over-the-air explanations of legal services could confuse an audience[86] while a similar published commercial would provide the reader time for reflection.

For "bottom-liners" advertising costs will dictate the choice of most lawyers. Media prices vary depending upon frequency, time slot, duration, and geographic coverage.[87] Most television commercials run 30-seconds, though 10- and 60-second versions are also utilized.[88] As one would anticipate, 60-second advertisements are twice as expensive as half-minute commercials and four times the cost of the ten-second variety.[89] Thirty second radio advertisement rates are only 25 to 30 percent lower than the minute figure.[90] Very few lawyers could bankroll network commercials, as these regularly require tens of

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82. ANDERSON & BARRY, *supra* note 1, at 483.

83. HEIGHTON & CUNNINGHAM, *supra* note 41, at 92.

84. *See generally id.* at 87.

85. *See* DUNN & BARBAN, *supra* note 29, at 432; HEIGHTON & CUNNINGHAM, *supra* note 41, at 88-89, 91.

86. DUNN & BARBAN, *supra* note 29, at 432. *See generally* BALDWIN, *supra* note 32, at 10; HEIGHTON & CUNNINGHAM, *supra* note 41, at 85.

87. *See* Kahn, *Practical Experience, supra* note 79, at VIII-3 to -4.

88. BALDWIN, *supra* note 32, at 187; DUNN & BARBAN, *supra* note 29, at 490; HEIGHTON & CUNNINGHAM, *supra* note 41, at 96.

89. HEIGHTON & CUNNINGHAM, *supra* note 41, at 97.

90. *Id.*

thousands of dollars to produce.[91] Volume discounts are available for both local television and radio, although they tend to be more substantial with the latter medium.[92] Undoubtedly television advertisements carry the steepest price tag, even at the local level. Most product manufacturers take solace by dissecting large television expenditures into cost-per-units-sold analysis,[93] and this interpretation can make mammoth outlays palatable. For attorneys, however, unit pricing has little practical application, as post-advertising sales increases cannot be easily tabulated for legal services as for many consumer goods. Since there may be a considerable time lag between initial media purchases and an influx of new clients, a lawyer must carefully consider how much revenue she can afford to sink into her commercial ventures. Local radio and cable television programming might be the most economical investment for the novice advertiser, as their prices rival newspaper classifieds in terms of relative affordability.[94] Much money can be saved if studio facilities or the firm's law offices are used to film or record the commercial.[95] Videotaped advertisements are also less expensive than those filmed, and they also can be instantly reviewed and reshot if necessary.[96]

Despite these bleak prospects attorneys should avoid exaggerating the spectre of expense. The objective is *extensive* communication, and the exposure delivered by the electronic media often justifies a heftier payment.

Having struggled through this labyrinth in adopting a suitable advertising campaign, the lawyer must proceed to formulate the commercial itself. Styles obviously will vary per an individual's tastes or lack thereof. There are several proper advertising methods available. Yet, as this article will suggest in the following section, there is one

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91. *See, e.g.,* BALDWIN, *supra* note 32, at 187-89; Middleton, *supra* note 22, at 894-95.

92. HEIGHTON & CUNNINGHAM, *supra* note 41, at 235.

93. ANDERSON & BARRY, *supra* note 1, at 275; DUNN & BARBAN, *supra* note 29, at 551; HEIGHTON & CUNNINGHAM, *supra* note 41, at 95. This analysis has been applied to radio commercials as well. DUNN & BARBAN, *supra* note 29, at 567.

94. *See generally id.*; HEIGHTON & CUNNINGHAM, *supra* note 41, at 20, 41, 90.

95. *See* HEIGHTON & CUNNINGHAM, *supra* note 41, at 148-49. One of radio's central advantages is this ease with which commercials can be produced. *Id.* at 137-38, 142.

96. BALDWIN, *supra* note 32, at 94; DUNN & BARBAN, *supra* note 29, at 475; HEIGHTON & CUNNINGHAM, *supra* note 41, at 155. Videotape is becoming increasingly popular among large advertisers. BALDWIN, *supra* note 32, at 93; DUNN & BARBAN, *supra* note 29, at 474. Attorneys are also utilizing videotape to tackle numerous legal chores. *See* Buckley & Buckley, *Videotaped Wills*, 89 CASE & COM. 3 (Nov.-Dec. 1984); Buckley & Buckley, *Videotaping Wills: A New Frontier in Estate Planning*, 11 OHIO N.U.L. REV. 271 (1984).

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technique which best accommodates the intentions of the Disciplinary Rules and the purposes of advertising.

C. *Educational Broadcast Advertising*

Regardless of the format of an attorney's commercials, several principles apply to all advertising. Simplicity of content is paramount, especially with broadcasting. Subtlety is artistic but will lose the vast majority of any audience. An effective commercial arouses the person's attention with simple, familiar messages that are sufficiently intriguing to retain that attention.[98] The introduction of *pizzazz* into an advertisement may capture the viewers' interest, though the verbal and visual communications should be closely correlated if television is employed.[99] What is seen should supplement the narrative, as it is vital that the audience comprehends the message expressed rather than fixate on an irrelevant visual component such as a dancing hippo or synchronized swimmers. Perhaps most significant for attorney advertising is spokesperson attractiveness and credibility.[100] The counselor appearing in the television commercial should exude confidence, composure, and trustworthiness.[101] Obviously, if on radio the lawyer's voice should express these qualities and should also be clearly articulate.

The commerical's eventual time slot may influence the preparation of the substance of the message. Many attorneys advertise during television's "graveyard shift" as several potential clients who are kept awake at night because of nagging economic or marital difficulties view the early morning offerings.[102] Other lawyers elect slots during popular local programming, such as the late night news,[103] presumably because audiences tune in to such shows primarily to acquire information. Viewers frequenting each time slot will probably desire different legal information, and commercials must be devised accordingly.

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97. BALDWIN, *supra* note 32, at 15-16; DUNN & BARBAN, *supra* note 29, at 431.

98. BALDWIN, *supra* note 32, at 14-16.

99. *Id.* at 16.

100. "There is extensive literature that shows that people tend to agree with those whom they like more than those they dislike." ANDERSON & BARRY, *supra* note 1, at 255. *See also* McQuire, *Source Variables in Persuasion,* in HANDBOOK OF COMMUNICATION 225-32 (1973). Even though identical information is conveyed by two sources, one may be accepted as superior authority merely because of the impression made upon the recipient of the communication. For example, law review editors and judges frequently frown upon legal encyclopedia references while praising string citations of cases which, coincidentally, happen to appear in the encyclopedia.

101. *See* ANDERSON & BARRY, *supra* note 1, at 50.

102. Slavin, *supra* note 65, at 50.

103. *See, e.g.*, Middleton, *supra* note 22, at 895.

Television and radio advertisements typically can be categorized by their essential ingredients: singing, demonstration, testimonial, dramatization, dialogue, humor, animation, or narrative.[104] While each style has its merits or flaws, the narrative has been the lawyer's favorite over the years. Predictably, this "preference" largely has been a function of the past and present Disciplinary Rules which have virtually eliminated the other varieties from an attorney's repertoire. While any of these techniques possibly may be combined to produce an ethical commercial under the Code, there is one species that has proven historically acceptable and dignified. This is the educational or "public service" advertisement. This approach has been pursued successfully be several practitioners.[105]

For decades Ethical Opinions have permitted and encouraged the profession's use of broadcast media to conduct educational programs in which a myriad of legal issues has been explained to the public.[106] A critical distinction must be made between commercials that tutor and educational pursuits such as Terry English's legal newspaper columns in the Bloomington Herald-Telephone/Sunday Herald-Times and Alfred Buckley's *On the Law* segments on WRTV-Channel Six (Indianapolis) and WASK-AM radio (Lafayette).[107] These are *purely*

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104. ANDERSON & BARRY, *supra* note 1, at 250-51; DUNN & BARBAN, *supra* note 29, at 433-35, 440-49.

105. *See, e.g.*, Middleton, *supra* note 22, at 893-97; Note, *Kansas Advertising, supra* note 27, at 650-51.

106. *See, e.g.*, Belli v. State Bar of California, 10 Cal. 3d 824, 112 Cal. Rptr 527, 519 P.2d 575 (1974), *application for stay denied,* 416 U.S. 965 (1974) (radio and television); ABA Comm. on Professional Ethics, Formal Op. 298 (1961) (radio); ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938) (radio); ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935) (radio); ABA Comm. on Professional Ethics, Informal Op. 1179 (1971) (television); ABA Comm. on Professional Ethics, Informal Op. C-764 (1964) (radio); ABA Comm. on Professional Ethics, Informal Op. 528 (1962) (radio); Dallas Ethics Op. 1980-5, *as summarized in* ABA/BNA LAWYERS' MANUAL, *supra* note 27, at 801:8402 (1984) (radio); Mississippi Ethics Op. 74, *as summarized in id.* at 801:5103 (1984) (television); New York City Ethics Op. 80-8, *as summarized in id.* at 801:6303-04 (1984) (radio); Oregon Ethics Op. 465, *as summarized in id.* at 801:7108 (1984) (television); *Giving Human Interest to the Lawyers' Message: Two Successful Experiments,* 23 A.B.A.J. 939, 940-41 (1937) (radio dramatizations).

107. Terry L. English practices law in Bloomington and has written a legal-consumer affairs newspaper column since 1977. Letter from Terry L. English to the author (Sept. 11, 1984). Alfred W. Buckely is a partner of the law firm of Buckley, Buckley & Buckley in Lafayette and has broadcast his *On the Law* series since 1982, initially with WFTE-AM radio (Lafayette). He has also published an *On the Law* column in Farmweek, a central Indiana newspaper.

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public affairs presentations intended to enlighten and heighten individual cognizance of important legal matters. Advertisements, whether informational or otherwise, are still designed to solicit customers.[108] Yet applying the educational motif embosses legal commercials with a scholarly ornament that transcends the supposedly "lesser" or vulgar commercial ilk presented by other businesses. A public need and an advertising pursuit can be simultaneously accomplished. As one commentator aptly expressed, "Lawyer advertising at its best can inform people about their legal rights and help them make an informed choice of attorneys to exercise those rights."[109]

Public service advertising usually strives to generate goodwill for both institutional and individual services and often corrects popular misconceptions about organizational projects or policies.[110] Commercials of this mold typically are least infested with the advertising abuses most dreaded among the bar. Educational advertisements most closely correspond with the spirit of the Code's Ethical Considerations[111] while possibly shielding the lawyer from potential disciplinary sanction.

The informational format affords a plethora of topics to discuss. Regrettably, one cannot engage in lengthy elaborations within a half-minute commercial. Still, a tersely phrased advertisement can supply the audience with a comprehensible if minute summary of a certain point of law. More importantly, a pedagogical commercial entices the viewers and listeners at least momentarily to consider general legal problems and perhaps ponder their own personal legal concerns. So the message need not exhaustively explain legal concepts to produce the desired positive results.

Of course, advertising that does not embody such scholastic goals is no less satisfactory, ethical, or beneficial to the layperson. People also will prosper from commercials which increase awareness of the diversity of practice among competing law firms or which clarify that one need not mortgage the homestead for generations to consult an attorney. But educational overtones best dissociate legal commercials from the gimmickry of other advertisements while appearing to contribute a valuable service to the public well-being. As the ABA Committee on Professional Ethics and Grievances stated forty-six years ago:

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108. ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938).

109. Andrews, *supra* note 28, at 809.

110. DUNN & BARBAN, *supra* note 29, at 647, 649, 651-52, 659; R. SIMON, PUBLIC RELATIONS: CONCEPTS AND PRACTICES 9, 11-12 (2d ed. 1980).

111. *See supra* note 21 and accompanying text.

> Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public and enable the lawyer to render a more desirable and beneficial professional service. . . . [B]ecause of the trouble, disappointments, controversy, and litigation it will prevent, it will enhance the public esteem of the legal profession and create a better relation between the profession and the general public. . . .It will lessen the instances in which the lay public may feel that a person's honest intentions and desires have been frustrated by what the layman chooses to call the "technicalities" of the law. It will result in the public acquiring a higher regard for the legal profession, the judicial process, and the judicial establishments.[112]

Despite the fact that advertising remained forbidden fruit for attorneys for 39 more years, the Committee's lesson is applicable today with equal vigor. Considering the continuing popular impression of lawyers is often bloated with suspicion and distrust, any advertising that dispels public misinterpretations seems welcome and long overdue.

CONCLUSION

Television commercials could become an indispensable tether between attorneys and the public unless rigid interpretations of the revised Code squelch pioneering efforts. While some degree of regulation will be necessary to tackle perplexities such as the interstate transmission problem, the Supreme Court must guard against excessive enforcement. Otherwise the Code's new freedoms would become hollow options. Broadcast advertising initially promises to be an expensive and arduous undertaking that will never flower into an effective mode of client communication should early users be throttled into submission. With the electronic media large portions of the population that have rarely consulted a lawyer will increasingly discover that appropriate legal assistance can be affordable. Broadcast law commercials will prominently contribute to advertising's continuing elimination of prejudice and misunderstanding which an uninformed public has assembled since 1908. Whether the modified Rules become a panacea or a Pandora's Box depends entirely upon the path the profession elects. "Advertising does not corrupt—it communicates."[113] Practitioners throughout the state should harvest the vast opportunities now available through broadcast advertising.

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112. ABA Comm. on Professional Ethics and Grievances, Formal Op. 179 (1938).

113. Laev, *The Right Way, supra* note 66, at X-32 (emphasis in original deleted).

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