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Optimal attorney advertising

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ABSTRACT

Attorney advertising routinely targets tort victims. This paper reviews legal services advertising restrictions in the United States and abroad. A theoretical model is developed which incorporates advertising intensity, litigation costs, and an endogenous number of lawsuits. Since advertising induces victims to bring suit, it increases the level of injurer care. However, litigation costs are also incurred. At the optimum, the marginal benefit of deterrence equals the sum of marginal litigation and advertising costs. Extensions of the model are considered, including the possibility that advertising stirs up frivolous lawsuits and that firms use advertising to rent seek. Fee shifting and alternative fee structures are also discussed. Although blanket prohibitions on attorney advertising are likely suboptimal, some regulations may be justified.
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1. Introduction

Attorneys utilize a variety of media to advertise their legal services, including television, the Yellow Pages, the Internet, billboards, and other outlets. Many of these advertisements target tort victims. Proponents of attorney advertising argue that it provides valuable information regarding legal services to the poor and uneducated segments of society. At the same time, opponents maintain, among other things, that advertising tarnishes the reputation of the legal profession and decreases the quality of legal services. This paper addresses the question of what is the optimal level of attorney advertising.

The argument is organized as follows. Section 2 discusses attorney advertising restrictions in various jurisdictions around the world, with particular emphasis placed on the United States. Before the United States Supreme Court's ruling in *Bates v. State Bar of Arizona* (1977),[1] advertising by attorneys was explicitly prohibited. However, since the *Bates* decision, which held that attorney advertising was a protected form of commercial free speech, attorney advertising expenditures have increased dramatically. Similar to the United States, many countries today permit attorney advertising, though there are some exceptions. Section 3 then provides a brief literature review of the economics of advertising with special attention to legal services. While there are many articles focusing on the empirical impact of advertising on the price and quality of legal services in the economic literature, it is devoid of a thorough theoretical analysis of the welfare implications of attorney advertising. Section 4 seeks to fill this gap by developing a theoretical model based on the trade-off between the informative effects of advertising, which enhances the deterrence benefits of the tort system, against the likely increase in litigation costs. We consider the possibility that advertising stirs up frivolous suits, evaluate the effect of advertising on competition for clients, investigate the impact of different fee structures as well as fee shifting, and explore the use of a negligence rule rather than strict liability. Section 5 discusses the policy implications of the model, and finally, Section 6 concludes.

2. Attorney advertising

2.1. In the United States

2.1.1. Constitutional background

Over roughly the last half century, there have been drastic legal changes regarding the permissibility of attorney advertising in the

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[1] 433 US 350 (1977).

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United States. Under the early English system, attorneys were not viewed as businessmen. Rather, they were considered public servants of a learned profession (Calvani, Langenfeld, & Shuford, 1988, p. 762). Tradition and etiquette, as opposed to formal regulations, governed the dignity of the bar (Calvani et al., 1988, p. 762). This custom was incorporated into the early American practice of law.

A unified prohibition on attorney advertising was first codified in 1908 when the American Bar Association explicitly prohibited the practice in Canon 27 of its *Canons of Professional Ethics* (Cebula, 1998, p. 503). The constitutionality of this prohibition was not an issue during the early-to-mid 20th century because commercial free speech was outside the purview of the First Amendment. As a result, Canon 27 was soon adopted by every state (Calvani et al., 1988, p. 763).[2]

In the 1970s, the United States Department of Justice brought an antitrust action against the American Bar Association alleging that its advertising restrictions were anticompetitive (Lidsky & Peterson, 2007, pp. 5–6). The suit was never resolved, however, because many states altered their advertising restrictions following the United States Supreme Court's ruling in *Bates v. State Bar of Arizona* (1977). In *Bates*, the Supreme Court held that attorney advertising was a protected form of commercial free speech, and accordingly, an Arizona advertising ban was struck down as unconstitutional.[3] For the first time, lawyers were afforded a constitutional right to advertise the prices at which certain routine legal services were to be performed.[4] This ruling effectively marked the end of blanket prohibitions on attorney advertising.

In the aftermath of *Bates*, a number of challenges arose.[5] These cases reasoned that while blanket prohibitions on attorney advertising were unconstitutional, states were nonetheless permitted to regulate advertising. For instance, in *Ohralik v. Ohio State Bar Association*,[6] the United States Supreme Court held that attorneys may be disciplined for the in-person solicitation of known accident victims, since such solicitations were likely to pressure potential clients for an immediate response.[7] On the other hand, in *In re R.M.J.*,[8] the Supreme Court struck down a Missouri rule that permitted attorneys to only advertise information contained in ten identifiable categories.[9] Other Supreme Court rulings permitted attorneys to target classes of persons with advertisements, including individuals injured by defective contraceptive devices,[10] persons charged with drunken-driving offenses,[11] women who had been sterilized in order to receive medical assistance,[12] and persons against whom foreclosure suits had been filed.[13] However, temporal restrictions on soliciting business from targeted victims have been upheld as constitutional.[14]

At the heart of these rulings is the Supreme Court's recognition that attorney advertising serves society's interest to ensure that consumers are well-informed regarding the availability, nature, and the prices of legal services.[15] As the Court stressed in *Zauderer*, states are not permitted to deny "citizens accurate information about their legal rights."[16] Attorney advertising is desirable, as the Court noted in *Bates*, since "[s]tudies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney."[17] Further justifying the need for the free-flow of information regarding legal services, the Court remarked in *Peel v. Attorney Disciplinary Comm'n of Ill.*[18] that "[a] principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems."[19] Therefore, information is desirable to facilitate "the consumer's access to legal services and thus better serves the administration of justice."[20]

Society's interest in the free-flow of truthful information regarding legal services, however, is trumped when a state regulation on attorney advertising satisfies the *Central Hudson* test.[21] Under this test, states may freely regulate attorney advertising that is false, deceptive, or misleading,[22] but they may not place an outright ban on *potentially* misleading advertising.[23] Thus, when an advertisement is truthful (despite being potentially misleading) and does not concern unlawful activity, it may be regulated provided the restriction satisfies a three-prong test. "First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn."[24] Hence, commercial speech restrictions are evaluated under intermediate scrutiny.

The Court has recognized a number of state interests that satisfy the first prong of the *Central Hudson* test. There is a compelling state

[2] It should be noted that in 1969, the American Bar Association revised its *Canons of Professional Ethics* by adopting a *Model Code of Professional Responsibility*. With respect to attorney advertising, the particular differences between these two authorities are, for the purposes of this paper, arguably negligible.

[3] The relevant facts of the *Bates* case, derived from Cox (1989, pp. 135–143), are as follows. The appellants were two recent admittees of the Arizona Bar who started their own legal clinic. Their business model was to provide legal services to individuals with limited means and routine legal problems. The clinic charged legal fees below that of most other firms and relied on heavy volume to survive. However, after two years of struggling to obtain sufficient revenue, the duo were faced with a difficult decision—either go bankrupt, or engage in costly advertising and face potential disbarment. They chose the latter and placed an advertisement in *The Arizona Republic*, a local newspaper. Roughly one week later, a disciplinary proceeding was initiating against them, and a Special Local Administrative Committee of the State Bar of Arizona recommended that they face a six-month suspension. The Board of Governors of the State Bar of Arizona did not heed to the recommendation and a suspension of one week was imposed. After an unsuccessful challenge at the Arizona Supreme Court, *see In re Bates*, 555 P.2d 640 (Ariz. 1976), the sanctioned attorneys appealed to the United States Supreme Court, where the Arizona advertising prohibition was struck down as unconstitutional and it was held that attorney advertising was a protected form of commercial free speech under the First Amendment. *Bates*, 533 US at 364.

[4] *Id.* at 367–368.

[5] *See* McChesney (1985, 1997) for discussions on this topic.

[6] 436 US 447 (1978). Perhaps most alarming about the *Ohralik* case was the sanctioned attorney's use of a concealed tape recorder to obtain an accident victim's assent to legal representation.

[7] Interestingly, the Court later distinguished in-person solicitation from printed advertisements and personalized mailings by stating "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored, or discarded." *Shapero v. Kentucky Bar Assn.*, 486 US 466, 475–476 (1988).

[8] 455 US 191 (1982).

[9] The Missouri rule only permitted attorney advertising to contain the lawyer's name, address and telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee for "routine" legal services.

[10] *Zauderer v. Office of Disc. Counsel*, 471 US 626 (1985).

[11] *Id.*

[12] *In re Primus*, 436 US 412 (1978).

[13] *Shapero*, 486 US at 466.

[14] *Florida Bar v. Went For It, Inc.*, 515 US 618 (1995) (*hereinafter* "*Went For It*"), where the United States Supreme Court held that a thirty-day restriction on soliciting business from known accident victims was constitutional.

[15] *See* Bates, 433 US at 374.

[16] *Zauderer*, 471 US at 643.

[17] *Bates*, 433 US at 370 n. 23. At the time of the *Bates* decision, it was noted that "the middle 70% of our population is not being reached or served adequately by the legal profession. . .Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer." *Id.* at 376 (internal citations omitted).

[18] 496 US 91 (1990).

[19] *Id.* at 110 n. 18.

[20] *Id.* at 110.

[21] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 US 557, 566 (1980).

[22] *Went For It*, 515 US at 623–624 (citing *Central Hudson*, 447 US at 563–564). *See also Friedman v. Rogers*, 440 US 1 (1979).

[23] *In re R.M.J.*, 455 US at 203.

[24] *Central Hudson*, 447 US at 624.

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