Jonathan K. Van Patten , Lawyer Advertising, Professional Ethics, and the Constitution, 40 S.D. L. REV. 212 (1995).

To say that lawyers and the legal profession have an image problem would clearly be an understatement, but it is a proposition that would command widespread agreement, both from within and outside the legal profession. The exact nature of the image problem, however, much less its causes or cure, is not a matter of agreement. There is no shortage of suspects. Lawyers are said to be greedy, dishonest, disruptive, manipulative, arrogant, abusive, obnoxious, obstructive, uncaring, unscrupulous, too powerful, too expensive, too busy, and not busy enough. In short, they act without conscience. Moreover, they do not return phone calls.

The anger, frustration, and ridicule directed at lawyers is rooted in a widely-shared perception that the legal system itself is failing - that it operates to protect the dangerous and the incompetent, while it oppresses the law-abiding and the productive. Sooner or later, these shortcomings are laid on lawyers. One need only note the recent, highly publicized trials, where the outcome appeared to bear no relation to the underlying facts. If the jury's verdict made no sense, who was it that misled them so? If the cost of operating a lawful trade or business is burdened with inordinately high insurance expense or with the threat of potential personal liability, who is responsible? If the tax system is illogical, incomprehensible, and unfair, who benefits from the perpetuation of that system? If we cannot compete with Japan, a country with remarkably few lawyers, who is to blame? Dan Quayle can tell you. <=2> n1

Even from within the legal profession, there is strong sentiment that lawyer advertising is a principal cause of the problem. The president of the Texas State Bar has stated, "I don't think anything has had such a detrimental effect on the image of lawyers as advertising." <=3> n2 The director of the American Bar Associations Communications Group has asserted, "If we can clean up lawyer advertising, we've cleaned up 25 percent of the legal professions negative standing with the public." <=4> n3 Writing in the ABA Journal, a South Carolina attorney recently argued that "televised lawyer advertising compromises the profession" and threatens to undermine [*213] whatever remaining confidence the public has in lawyers. <=5> n4

Some of these attacks on lawyer advertising might not be primarily concerned with the ethics of advertising, but might instead reflect the tactic of litigation pursued through other means. That is, they might be motivated more by a desire to shape public opinion in a way that will be favorable to their clients' position in court. <=6> n5 One may detect in some of the more aggressive attacks on lawyer advertising the presence of "plaintiff bashing," as well as a not so subtle attack on plaintiffs' lawyers. The ABA Journal article by a South Carolina attorney, E. Vernon F. Glenn, <=7> n6 has this character:

A recent town meeting on auto insurance issues in a small South Carolina municipality quickly disintegrated into a vocal and heated attack on lawyers, blaming lawyers for virtually all of society's ills. But the chief targets of that very real anger were the numerous lawyers who advertise their services on television and radio in that area.

An attorney in attendance ruefully noted, "The citizen speakers at the meeting believe these lawyers were basically nothing better than ambulance chasers who were stirring up needless litigation by promising financial rewards in cases where none was due."

This exemplifies the point: Television and other mass media advertising by lawyers is simply trolling for cases. It is a search for the easy case and easy money. It is designed to pump up cash flow. <=8> n7

Now, to whom might the statement "ambulance chasers who were stirring up needless litigation by promising financial rewards in cases where none was due" be referring? Insurance defense lawyers? I think not. Notice also that Mr. Glenn, either through inadvertence or demagoguery, tries to have it both ways. Lawyers who advertise are "trolling" for the easy case and thus easy money. In the personal injury area, these would typically be cases where liability is clear, not those where no financial reward is due. In other words, the problem with the ambulance chaser is not usually the problem of stirring up "needless" litigation, but the problem of undue or inappropriate influence. Thus, the characterization may be an attempt to establish a pre-disposition in the minds of jurors something like that which clearly exists on the criminal law side - that the defendant must have done something wrong or else he or she would not be here. The favorable pre-disposition on the civil side would be the reverse - that the [*214] plaintiff must be seeking something unreasonable or else he or she would not be here.

To the extent that the attacks on lawyer advertising are motivated by a sincere desire to improve the legal profession, there may also be an element of self-righteousness involved. According to Mr. Glenn, good lawyers do not need advertising, they "get clients the old-fashioned way ... by reputation, referral, recommendation and word of mouth." <=9> n8 The lazy and incompetent, however, must trick the public. "Many who advertise, though not all, are charlatans. What they lack in expertise and drive and experience they make up for in glitz and show." <=10> n9 Even good attorneys may be corrupted through reliance on advertising. "The tenacity of our plaintiff's [sic] bar and our commitment to quality service is eroded by the siren song of easy money." <=11> n10 Finally, the use of advertising is said to be counterproductive:

Do lawyers who advertise go to court and try cases? Most do not. Why? Many fear, in their innermost thoughts, that there is a public backlash against them. Their ads will be seen and resented by prospective jurors. Plus, it is easier to not go to court. Why be uncomfortable? And, they are "too busy" to go to court.

These sorts of attitudes 20 years ago would have been unthinkable and unethical. Now, for all intents and purposes, they are still sadly unethical and remarkably commonplace. Our independent judgment is clouded, and we cannot give the client the benefit of our total thinking. <=12> n11

One can sense a class bias underlying this type of criticism. Indeed, Mr. Glenn reserves special

contempt for lawyers who advertise on television:

Their advertising efforts, they are told and they know, are targeted to the low end of society - the poor, the lowest-waged, the uneducated, the needy, the ill-informed. The promise of something for nothing is oftentimes overwhelming to these people. Yet, are they courted in the name of the Constitution, in the name of justice? No, they are courted solely in the name of money. And we all know the educated, the well-informed are never going to fall for such cheap drivel and promises. <=13> n12

Having myself seen several television advertisements by Sioux Falls attorneys, I am shocked to learn that this is what they were up to. Shame on you, Bill Day.

With rhetoric on the issue running this high, it is difficult enough to [*215] deal with respective merits of the contending arguments, but there is the additional overlay of the First Amendment. Advertising is a form of communication and, as such, has come under the protection of the First Amendment as "commercial speech." In 1977, the United States Supreme Court held, in Bates v. State Bar of Arizona, <=14> n13 that a state may not prohibit the advertisement of prices at which certain routine legal services will be performed, nor may it discipline lawyers who so advertise. <=15> n14 This decision was said to have followed a fortiori from Virginia Pharmacy Board v. Virginia Consumer Council, <=16> n15 a case from the previous Term holding advertisement of prescription drug prices to be entitled to constitutional protection. <=17> n16

The protection of "commercial speech" is a lower level of constitutional protection than is accorded, for example, political speech. <=18> n17 Under the now well-established standard applied to lawyer advertising, "commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." <=19> n18 Given the generality of this standard, the courts will have considerable discretion, particularly in assessing the weight of the governmental interest, regarding the permissibility of restrictions on lawyer advertising.

Since Bates, the Supreme Court has struck down the following restrictions: on the solicitation of prospective litigants by a nonprofit organization that sought to further its political goals through litigation; <=20> n19 on the mailing of announcements regarding the opening of a law office to persons other than "lawyers, clients, former clients, personal friends and relatives"; <=21> n20 on the placing of a newspaper advertisement directed to persons with specific legal problems; <=22> n21 on the solicitation, through the mail, of potential clients known to face particular legal problems; <=23> n22 and on the listing on the lawyer's letterhead of a certification by the National Board of Trial Advocacy. <=24> n23

The Court has upheld sanctions imposed where the lawyer solicited clients in person, for pecuniary gain; <=25> n24 and where the advertisement of a [*216] contingent fee did not

disclose the potential liability of the client for legal costs. <=26> n25 In addition to these prophylactic measures, the Court has also emphasized that the state may take appropriate action in specific cases where the advertising is false, misleading, or deceptive. <=27> n26

The foregoing general description of the state of the law regarding lawyer advertising, although accurate, does not reveal the tenuous nature of its current authority. Throughout the Supreme Court cases, there has been a strong, persistent dissent from the fundamental proposition that lawyer advertising is entitled to the same constitutional protection as other forms of commercial speech. <=28> n27 Moreover, the dissenters - most recently, O'Connor, Rehnquist, and Scalia - have remained on the Court, while the strongest advocates of constitutionally-protected commercial speech - Brennan, Marshall, and Blackmun - have left the Court. The position of the newest members of the Court - Souter, Thomas, Ginsberg, and Breyer - on lawyer advertising is uncertain at this point. Recently, the Court granted certiorari and heard argument in a case dealing with what is probably the most emotionally-charged aspect of this area, involving direct solicitation of potential clients in personal injury or wrongful death cases. <=29> n28 Thus, there is a serious possibility that a significant shift in the Court's approach will occur.

Discussion of the appropriateness of restrictions on lawyer advertising often leads to consideration of more fundamental questions, such as the nature of the attorney-client relationship and the nature of the legal profession itself. It will be instructive to return to the debate in the Supreme Court and to compare the countervailing positions. Justice Blackmun's majority opinion in Bates will provide the framework for the discussion, while Justice O'Connor's dissenting opinion in Shapero v. Kentucky Bar Association <=30> n29 will be used to sharpen the differences.

The common ground between the two views is the agreement that lawyer advertising is entitled to at least some First Amendment protection. There is also agreement on the general standard to be applied to determine the extent of permissible regulation of lawyer advertising: "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." <=31> n30 What divides the members of the Court is the relative weight to be accorded to the state's assertion of a substantial governmental interest. The [*217] advocates of First Amendment protection are more skeptical of the asserted justifications; the supporters of greater regulation are much less skeptical. The six justifications offered in Bates in support of the ban on advertisement of prices for routine legal services will provide the framework for discussion here.

1. The Adverse Effect on Professionalism. The state, acting through the state bar, is said to have a substantial interest in regulation because of the asserted adverse effects that advertising will have on the legal profession:

The key to professionalism, it is argued, is the sense of pride that involvement in the discipline

generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession's service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client's trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client's welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession. <=32> n31

Justice Blackmun acknowledged the importance of professionalism, but believed that the asserted connection between advertising and loss of professionalism was "severely strained." <=33> n32 The argument that commercialism will undermine professionalism rests on an image of a legal profession hereto unsullied by the forces of the market place. The image, of course, does not hold up very well. Indeed, counsel for the State Bar of Arizona conceded at oral argument, "We all know that law offices are big businesses, that they may have billion-dollar or million-dollar clients, they're run with computers, and all the rest. And so the argument may be made that to term them noncommercial is sanctimonious humbug." <=34> n33 As noted by Justice Blackmun, the ABA's Code of Professional Responsibility advised attorneys to reach a clear understanding with the client regarding the fee arrangement and to do so "as soon as feasible after a lawyer has been employed." <=35> n34 If the economic aspects of the attorney-client relationship were to be settled as soon as possible after the relationship had been formed, it was "inconsistent," argued Justice Blackmun, "to condemn the candid revelation of the same information before [the client] arrives at that office." <=36> n35

Justice Blackmun also questioned the notion that advertising would erode the trust that the client places in the attorney or that advertising [*218] would diminish the reputation of the lawyer in the community. <=37> n36 Bankers and banks, doctors and hospitals, advertise without appearing to lose their dignity. Justice Blackmun even suggested that the absence of advertising might be a sign that the legal profession has failed "to reach out and serve the community." <=38> n37 He added that although the established bar had long condemned advertising, it had also condoned the cultivation of social and civic contacts in order to meet potential clients. In fact, it would be a fair conclusion that "the ban of advertising originated as a rule of etiquette and not as a rule of ethics." <=39> n38

Justice O'Connor argued, on the other hand, that the Court took a wrong turn in Bates and had thereafter followed the flawed logic of that decision. <=40> n39 She rejected the attempt to look at the issue primarily in terms of economics generally or consumer benefits specifically. "The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justification for their regulations." <=41> n40 Whatever economic benefits may be realized in the short run through removal of restrictions on lawyer advertising, the long-term effects on the legal profession will be bad. "The economic argument against these restrictions ignores the delicate role they may play in preserving the norms of the legal profession." <=42> n41 What professional balance is jeopardized by lawyer advertising? The exercise of professional judgment - providing clients with complete and disinterested advice -

may be corroded by economic self-interest. "Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless force of economic self-interest." <=43> n42 Justice O'Connor viewed the struggle against self-interest as the distinguishing feature of what it means to be a profession:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. <=44> n43

If the standards of conduct cannot be enforced by legal fiat or through market forces, they must come through the profession - and the profession must have greater tools at hand than sermonizing. "Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce [*219] competition (in the narrow economic sense) among members of the profession." <=45> n44 Thus, restrictions on advertising are intended to serve as a brake on the pursuit of narrow self-interest. Justice O'Connor further stated:

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. <=46> n45

Because they are anti-competitive, however, indeed intentionally anti-competitive, "they should not be thoughtlessly retained or insulated from skeptical criticism." <=47> n46

What divides Justice Blackmun and Justice O'Connor regarding the effects of advertising on the legal profession is the difference between short-term and long-term perspective. Justice Blackmun views the immediate effects of advertising as beneficial to the consumer and the arguments against it as rooted in tradition, in etiquette. Justice O'Connor is willing to tolerate a certain amount of short-term inefficiency in order that the precarious balance of professional service and self-interest be preserved.

2. The Inherently Misleading Nature of Attorney Advertising. The next argument against lawyer advertising criticizes the difficulties of providing advertising that is not deceptive or misleading. Advertising of legal services is said to be inherently deceptive and misleading:

(a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal

services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill. <=48> n47

Justice Blackmun argued that, although many legal services were unique and thus incapable of descriptive pricing, certain "routine" legal services could advertised a specific prices without becoming misleading. <=49> n48 Moreover, there were two examples in the record that ran counter to the argument that pre-employment pricing was inherently misleading. First, the Arizona Bar sponsored a legal services program "in which participating attorneys agreed to perform services like those advertised by the appellants at standardized rates." <=50> n49 In addition, before the Supreme Court's decision in Goldfarb v. Virginia State Bar, <=51> n50 it was not uncommon for state and local bar associations to promulgate "suggested" fee schedules for its [*220] members. No one then seemed to have difficulty understanding the meaning of the various legal service descriptions.

The argument that the consumer cannot make an informed judgment about what services are needed without first consulting a lawyer was also rejected by Justice Blackmun. Given the level of generality to which advertising lends itself, i.e., the "routine" services such as an uncontested divorce or bankruptcy, the consumer can identify these areas without knowing all the details. <=52> n51

The contention that lawyer advertising would mislead through misplaced emphasis was given more credence by Justice Blackmun. The argument is premised on an assumption that the consumer is essentially unable to discern what is important in choosing a lawyer. According to Justice Blackmun, if the consumer lacks sufficient information to choose a lawyer, prohibiting advertising only serves to restrict the amount of information available; even incomplete information is better than no information at all. <=53> n52

Justice O'Connor conceded that some lawyer advertising might not be deceptive or misleading, but that possibility was so narrow and qualified so as to make virtually all advertising subject to reasonable regulation. <=54> n53 Even advertising of prices for "routine" legal services was potentially misleading because neither the client nor the lawyer can determine in advance whether the particular case is "routine." <=55> n54 The potential for deception is even greater with direct solicitation because the client's predicament may make he or she more vulnerable to one who shows an interest in the situation and who promises to rectify it. Finally, where the lawyer offers a "free sample" - in Shapero, an initial consultation for no fee - the deceptive potential therein justifies a ban on such solicitation. <=56> n55

3. The Adverse Effect on the Administration of Justice. Opponents of lawyer advertising believe that it has an insidious effect on the legal system itself:

Advertising is said to have the undesirable effect of stirring up litigation. The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims.

Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling societal repose. There is even a sug [*221] gestion of barratry. <=57> n56

The argument here is that the system has a built-in balance achieved, in part, because it is not "user friendly." Unless a certain threshold of personal grievance is met, it is better not to stir things up. If people have to be told that they have been injured, then they must not be seriously injured.

Justice Blackmun rejected the "notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." <=58> n57 The Bar itself has acknowledged that a large proportion of our population is not being served adequately by the profession, with fear of the cost and inability to find a suitable lawyer cited among the reasons. <=59> n58 Advertising serves to provide this type of information. The lack of information has curtailed access to legal services, particularly for the "not-quite-poor" and the less knowledgeable.

Neither Justice O'Connor in Shapero nor Justice Powell in Bates, to their credit, raise this argument against lawyer advertising. Before leaving this argument, it should be noted that it shares much with current calls for tort reform. We saw the two together in the Glenn article discussed earlier. <=60> n59 The system is said to be failing because greedy lawyers stir up needless litigation by recruiting litigants from the ranks of the previously contented. Besides being a gross distortion of the dynamics of litigation, <=61> n60 it is ironic that the argument regarding the administration of justice explicitly favors an under-utilization of the judicial system.

4. The Undesirable Economic Effect of Advertising. Next, there are the asserted economic effects of advertising itself:

[It] will increase the overhead costs of the profession, and that these costs will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members. <=62> n61

Justice Blackmun made short work of these two arguments. The first argument assumes that advertising expenses simply add to the cost of providing legal services; it assumes that the cost of legal services is a given and that advertising must be additional. Justice Blackmun noted, however, that the difficulty of discovering the lower cost seller most likely has an inflationary impact on the price quoted for legal services. Studies conducted with respect to the sale of products indicates fairly clearly that advertising actually reduces the cost to the consumer. <=63> n62 With respect to advertising [*222] raising the barriers to entry, the argument does not work because in the absence of advertising, the attorney must rely on the type of contacts that clearly favor those who are more established. <=64> n63 Neither Justice O'Connor nor Justice

Powell in his dissent in Bates raised this part of the argument.

5. The Adverse Effect of Advertising on the Quality of Service. If advertising adversely affects the practice of law generally, it is also said to adversely affect those lawyers who use it. Justice Blackmun stated that "the attorney may advertise a given "package' of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs." <=65> n64

Justice Blackmun noted that restraints on advertising "are an ineffective way of deterring shoddy work." <=66> n65 Attorneys who are inclined to practice in that manner are likely to do so regardless of any kind of rule on lawyer advertising. Moreover, although the "standard package" will not fit everyone's needs, it does not mean that standardization to some extent is undesirable. It may actually increase the level of service by reducing the likelihood of error. Finally, the increased use of pre-paid legal services programs suggests that the assertion of an adverse relationship between set price and quality of service is overstated.

Extending the argument that advertising corrupted the legal profession generally, Justice O'Connor argued that it also corrupted those individuals who utilized it:

Such advertising practices will undermine professional standards if the attorney accepts the economic risks of offering fixed rates for solving apparently simple problems that will sometimes prove not to be so simple after all. For a lawyer to promise the work that such matters as uncontested divorces can be handled for a flat fee will inevitably create incentives to ignore (or avoid discovering) the complexities that would lead a conscientious attorney to treat some client's cases as anything but routine. <=67> n66

With respect to solicitation of clients, she argued, "Soliciting business from strangers who appear to need particular legal services, when a significant motive for the offer is the lawyer's pecuniary gain, always has a tendency to corrupt the solicitor's professional judgment." <=68> n67 Tempering self-interest is crucial, therefore, because unrestrained self-interest will taint the lawyer's professional advice.

6. The Difficulties of Enforcement. Finally, a broad-based prohibition against lawyer advertising is said to be necessary because of the diffi [*223] culties inherent in enforcing rules on a case-by-case basis. Justice Blackmun stated:

Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the

overseeing of advertising will be burdensome. <=69> n68

Justice Blackmun did not believe that lawyers who had taken an oath to uphold the integrity and honor of the legal profession could be assumed to seize every opportunity to mislead and deceive the public. <=70> n69 "Weeding-out" the few who abuse their trust would be a more narrowly-tailored remedy, as opposed to imposing a broad-based ban on the entire profession. Justice O'Connor was concerned that without meaningful sanctions to deal with misleading and deceptive advertising, the bar would be relegated to "sermonizing." <=71> n70 In addition, she believed the Court's First Amendment framework was too blunt an instrument to deal with the unique problems and delicate ethical balance of the legal profession. She therefore urged greater deference by the Court to the states in their fashioning of specific rules. <=72> n71

The foregoing review of the arguments concerning lawyer advertising suggests that the respective sides often argue past one another. Justice Blackmun's application of "commercial speech" analysis to lawyer advertising was well within established First Amendment principles. Justice O'Connor, on the other hand, believed that the analysis should start with recognition of the unique circumstances of the legal profession. Lawyers have specialized knowledge that can be manipulated against the best interests of their clients, often with little chance of detection. The lawyer's duty to serve the client's interests encompasses a duty to curb one's self-interest. Restrictions on lawyer advertising serve to remind lawyers that they are part of a profession. The ethical balance is upset when these restrictions are subjected to the same analysis as the advertising of other commercial products.

One interesting point of difference is the view of how the market forces work in this situation. Justice Blackmun is more willing to trust the market to facilitate matches between consumers and providers; Justice O'Connor is more protectionist. This is the reverse of their usual posi [*224] tions. <=73> n72 Blackmun is not unmindful of professionalism, but he is skeptical of the arguments offered by the established bar. He works through the issue using a First Amendment framework, rather than a governmental regulation of business framework. Justice O'Connor is not unmindful of the market, but she sees the problem as more than a matter of economics. Her description of the precarious ethical balance includes non-economic factors. Moreover, the market mechanisms are often inadequate in this situation because consumers may lack the ability to discern whether they have purchased a "lemon" and, even if they do recognize their lawyers' mistakes, the "one-shot" nature of many legal services makes customer satisfaction less important.

Another underlying difference concerns their respective views of lawyers. For Justice Blackmun, it does not make sense to impose significant burdens on all lawyers when the abuses can be dealt with on a case-by-case basis. Lawyers are, for the most part, ethical and, when the step over the line, violations can be detected and dealt with relatively easily. For Justice O'Connor, the struggle runs through the heart and mind of every lawyer. The ethical restrictions help to shape the lawyer toward the practice of what de Tocqueville called "self-interest rightly understood." <=74> n73

If we take a comparative perspective, the problem of self-interest exists in part because we do not have a split between solicitors and barristers. In America, the lawyer can solicit the case he or she tries. Solicitation by lawyers raises hackles. Retired South Dakota Supreme Court Justice Frank Henderson has cited "the outrageous solicitation of business" as the primary reason for the low esteem in which lawyers as a profession are held. <=75> n74 Whether or not this is true, it is illustrative of the depth of feeling that accompanies the issue. In any event, restrictions on solicitation and advertising serve to curb the naked pursuit of self-interest that can distort the lawyer's professional judgment. Even if the restrictions on advertising are more properly viewed as rules of etiquette, they are meant to civilize those who have tremendous power.

If one accepts Justice O'Connor's view that the curbing of self-interest is an ethical problem that faces all lawyers, then it could be said that restrictions on advertising do not go far enough. Why limit the focus to media advertising? Why not scrutinize all contacts with potential clients? Indirect solicitation of clients through speeches to community groups or direct solicitation of clients on the golf course involve the same potential for self-interested contacts. Why limit the focus to initial contacts? Sometimes it may be the ongoing contacts after the client trust has been won that should be questioned. Why such condemnation of the "free sample" of an [*225] initial consultation for no charge while there is no condemnation for the entertainment of clients at the Superbowl?

One can detect a class bias underlying the criticism of lawyer advertising. Advertising is tacky. The more established lawyer may get clients the old-fashioned way - by joining Rotary or a country club. <=76> n75

This option may not be readily available to the recent law school graduate, who may be hindered by the financial pressures of repaying student loans or, in the case of women, by the cultural pressures against breaking into the "boy's club." Restrictions on advertising may also help the established bar in much the same way as limitations on campaign spending aid incumbents. There are two ways to win a race - either run faster than your competitors or make sure your competitors do not run faster than you.

The criticism of lawyer advertising is part of a larger critique of the civil justice system and shares with that critique an anti-plaintiff bias. Why should there be any lawyer advertising when the courts are already too congested to handle additional cases? If people are not sufficiently aggrieved to seek out a lawyer on their own, why should they be encouraged? If contingency fees make litigation more feasible, why should this fact be advertised? The underlying assumption here is that litigation should be discouraged. But a decrease in the number of lawsuits should not be an end in itself. The end should be justice and only if we were to conclude that fewer lawsuits means more justice could we end the analysis.

It is hard to say in the abstract whether more or fewer lawsuits are preferable. One would have to know the merits of the particular dispute. In the personal injury context, the lawsuit is usually the result of a failure of the plaintiff and the defendant's insurance company to agree on liability and/or the amount of damages. Litigation represents the conclusion of one or both sides that a decision rendered by the judge or jury is preferable to what can be agreed to by the parties. It is

difficult to draw any general conclusions about the failure to agree on a settlement. We cannot even say who is responsible for the lawsuit. It may well be that the defendant is most responsible for the failure to reach a settlement.

The concern with court congestion may mistake symptom for cause. Why are the courts so congested? The answer I would suggest has more to do with the decline of moral behavior generally and specifically with the failure to keep promises. In the context of personal injury claims and litigation, this means that some defendants (and here I mean particularly insurance companies) will allow litigation to go forward because it is more cost effective than keeping a promise - whether it be a promise to indemnify or to perform some other obligation that the law clearly recognizes. Many cases wind up in court, not because the defendants are involuntarily [*226] brought there by over-zealous plaintiffs, but because defendants prefer to use the delay inherent in the system to forestall payment of just claims. The pressure is on the plaintiff to survive whatever economic or emotional toll the delay exacts. Court congestion becomes a self-fulling prophecy if one of the sides benefits from delay. The system does not provide sufficient disincentive to defendants who have no real defense, nor does it effectively sanction the lawyers who aid them. <=77> n76

The underlying problem is an ethical one, but a lack of professional ethics is not limited to plaintiff's counsel. The "scorched earth" defense is all too common today in larger cases. Are abuses in discovery any less a tactic of aggressive defense lawyers? Are not pretrial motions motivated primarily to wear down the other side a common part of the "game?" Even in smaller cases, the ability to generate expenses on the other side is a powerful tool.

The American rule on attorney's fees protects the defendant who is using the system to delay paying a just obligation. <=78> n77 Moreover, whatever the truth to the asserted connection between contingent fees and unethical conduct on the plaintiff's side, there is also potential for abuse on the defendant's side. The more activity that can be generated against the plaintiff's case, the higher the fee for the defense lawyer. In the securities industry, this is called "churning." In the legal context, churning may also serve the client's interest, so long as it does not exceed the return on the money. Thus, interrogatories may be asked and objected to and motions are filed or resisted, not for their contribution to the development of the case, but to the wearing down of the other side and to the enhancement of fees.

We all have discovery "horror" stories. I once served as co-counsel for a defendant in an antitrust action. One of the other defendants was well-known for its national chain of convenience stores. Included among the interrogatories was: What is the full legal name of your company? This interrogatory was objected to by its counsel on the ground on confidentiality. Confidentiality for the name of a Fortune 500 company whose stock was traded on the New York Stock Exchange? The only purpose to this objection (as well as many of the others asserted) was to serve notice that information would not come easily or maybe not at all unless there was a strong commitment of time and resources.

In spite of this, the right to defend by any means necessary goes largely uncriticized in the current debate on "reform" of the civil justice system. Any reform will not succeed until the real

problems are accurately identifi [*227] ed and dealt with. One of the most important of these problems is a lack of honor - on the part of the parties and their lawyers. As Lee Marvin said after his well-publicized palimony trial, "I lied, the other side lied, the lawyers lied. Everyone lied." <=79> n78 Until we deal with that, no real reform is possible.

Similarly, the debate over lawyer advertising will not reach a satisfactory resolution until the real problems are identified and dealt with. Until then, there will be far too much self-righteous condemnation or, as counsel for the Arizona State Bar in Bates characterized it, "sanctimonious humbug." <=80> n79 Concern over lawyer advertising should not be the occasion for more "plaintiff bashing" or for one-sided lectures on the ethics of others. Sincere concern should start with self-assessment.

The question of lawyer advertising forces a consideration of fundamental questions - particularly what it means to be a professional. Justice O'Connor's dissent in Shapero is an admirable portrayal of the delicate ethical balance of personal and professional interests. While Justice Blackmun's First Amendment framework is appropriately skeptical of the established Bar's justifications, it is not sufficiently sensitive to the unique problems presented by lawyer advertising. If the McHenry v. State Bar of Florida <=81> n80 case provides the occasion for a shift toward Justice O'Connor's approach, I hope that greater deference to the states will not be regarded as a blank check for the established bar. The bar has a responsibility to shape the ethical discussion and a duty to admonish and deal with those whose conduct falls below the standards. It should not use this role, however, to ensure that some will not run faster than members of the established bar.

FOOTNOTES:

n1. Dan Quayle, Civil Justice Reform, 41 Am. U. L. Rev. 559 (1992). See also Dan Quayle, Remarks at the American Bar Association Meeting in Atlanta (Aug. 13, 1991) in Legal Times, Aug. 19, 1991, at 9.

n2. James Podgers, Image Problem, ABA Journal 66, 67 (Feb. 1994).

n3. Id. at 68.

n4. E. Vernon F. Glenn, A Pox on Our House - Televised Lawyer Advertising Compromises the Profession, 79 ABA Journal 116 (Aug. 1993).

n5. The assertion of a medical malpractice "crisis," for example, has been instrumental in creating a favorable climate for defense interests in medical malpractice cases. For a discussion of the medical malpractice "crisis" in South Dakota, see Gail D. Eiesland, Miller v. Gillmore: The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations, 38 S.D. L. Rev. 672, 684-88 (1993).

n6. Perhaps true to his stated principles, the author does not have a biographical entry in the Martindale-Hubbell Directory of Lawyers. I do not know whether the author is a trial lawyer and,

if so, whether he represents primarily plaintiffs or defendants, but he sings the insurance defense tune on key.

n7. Glenn, supra note 4, at 116.

n8. Id.

n9. Id.

n10. Id.

n11. Id. I have learned, first in church, later in faculty meetings, and more recently in politics, that when someone purports to make a pronouncement using "we" and "our," the speaker usually means "you" and "your." The last sentence quoted especially confirms that principle.

n12. Id. Everything in this quote, including the lack of appropriate punctuation, is, in the words of Richard Mitchell, "absolutely sic."

n13. 433 U.S. 350 (1977).

n14. Id. at 382-84.

n15. 425 U.S. 748 (1976).

n16. Bates, 433 U.S. at 365.

n17. See, e.g., Cass R. Sunstein, Democracy and the Problem of Free Speech 123-26 (1993).

n18. Zauderer v. Office of Discipinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 638 (1985) (citing Central Hudson Gas Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980)).

n19. In re Primus, 436 U.S. 412, 439 (1978).

n20. In re R.M.J., 455 U.S. 191, 206-07 (1982).

n21. Zauderer, 471 U.S. at 647.

n22. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 476-80 (1988).

n23. Peel v. Attorney Disciplinary Comm'n of Illinois, 496 U.S. 91, 110-11 (1990).

n24. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978).

n25. Zauderer, 471 U.S. at 653.

n26. See, e.g., Zauderer, 471 U.S. at 638; Bates, 433 U.S. at 38.

n27. See, e.g., Peel, 496 U.S. at 119 (O'Connor, J., dissenting); Shapero, 486 U.S. at 480 (O'Connor, J., dissenting); Bates, 433 U.S. at 389 (Powell, J., concurring in part and dissenting in part); Bates, 433 U.S. at 404 (Rehnquist, J., dissenting in part).

n28. McHenry v. State Bar of Florida, 21 F.3d 1038 (11th Cir.), cert. granted, - U.S. - , 115 S. Ct. 42 (1994).

n29. 486 U.S. 466 (1988).

n30. See Zauderer, 471 U.S. at 638, and Shapero, 486 U.S. at 485 (O'Connor, J., dissenting).

n31. Bates, 433 U.S. at 368.

n32. Id.

n33. Id., n. 19.

n34. Id. at 369 (citing Code of Professional Responsibility EC 2-19 (1976)).

n35. Id.

n36. Id.

n37. Id. at 370.

n38. Id. at 371.

n39. Shapero, 486 U.S. at 480 (O'Connor, J., dissenting).

n40. Id. at 487.

n41. Id. at 488.

n42. Id. at 490.

n43. Id. at 488-89.

n44. Id. at 490.

n45. Id.

n46. Id. at 491.

n47. Bates, 433 U.S. at 372.

n48. Id. at 372-73.

n49. Id. at 373.

n50. 421 U.S. 773 (1975).

n51. Bates, 433 U.S. at 374.

n52. Id.

n53. Shapero, 486 U.S. at 485 (O'Connor, J., dissenting).

n54. Id. In his dissent in Bates, Justice Powell stated:

The [impossibility of identifying in advance the nature and scope of the problem] is well illustrated by appellants' advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property; tax refunds, tax liabilities; and the disposition of other property rights.

Bates, 433 U.S. at 192-93 (Powell, J., concurring in part and dissenting in part).

n55. Shapero, 486 U.S. at 486 (O'Connor, J., dissenting).

n56. Bates, 433 U.S. at 375-76.

n57. Id. at 376.

n58. Id.

n59. See supra notes 4-11, and accompanying text.

n60. See, e.g., Herbert M. Kritzer, The Justice Broker, Lawyers and Ordinary Litigation (1990).

n61. Bates, 433 U.S. at 377.

n62. Id.

n63. This is the typical end of an argument that essentially is grounded on "we know what is better for you." The argument that advertising hurts those who are new to the profession is inherently implausible.

n64. Bates, 433 U.S. at 378.

n65. Id.

n66. Shapero, 486 U.S. at 485-86 (O'Connor, J., dissenting).

n67. Id. at 486.

n68. Bates, 433 U.S. at 379.

n69. Id.

n70. Shapero, 486 U.S. at 490 (O'Connor, J., dissenting).

n71. Id. at 486.

n72. See e.g., South Dakota v. Dole, 483 U.S. 203 (1987); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

n73. Alexis de Tocqueville, Democracy in America 525-28 (J.P. Mayer ed. 1969).

n74. The Honorable Frank Henderson, Remarks at the Annual Banquet for the South Dakota Law Review, April 21, 1995.

n75. Before canceling your subscription to this publication, answer this: do you deduct your dues? Is the same true for meals and entertainment with clients? In what sense are these expenses "ordinary" and, more particularly, "necessary?"

n76. See Jonathan K. Van Patten & Robert E. Willard, The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation, 35 Hast. L.J. 891 (1984).

n77. The recent effort to mandate by federal law the adoption of the English - "the loser pays" - rule was quietly dropped when its potential impact on garden-variety personal injury cases was considered. Reynolds Holding, House Legal Reformers Find Surprise Foes - Republicans, S.F. Chron., Feb. 13 1995, at A4; Debra J. Sauders, The Other Side of Lawsuit Abuse, S.F. Chron., Dec. 5, 1994, at A25.

n78. The following note appeared shortly after the conclusion of the Marvin palimony trial:

The Lee Marvin - Michelle Triola Marvin "palimony" case was closed this month when Los Angeles prosecutors said there wasn't enough evidence to prosecute either the actor or his former live-in friend for perjury, a charge that both sides had leveled. Michelle Marvin's attorney, Marvin Mitchelson, wanted Lee Marvin tried for perjury after Marvin told columnist Jimmy Breslin that the palimony trial had taught Marvin how to lie. Later Marvin's lawyer claimed Michelle committed perjury during the trial.

Sam Heilner, Names ... Faces, Boston Globe, Aug. 8, 1980. See also Mark Curriden, The Lies Have It, ABA Journal 68 (May 1995).

n79. 433 U.S. at 369, n. 19.

n80. 21 F.3d 1038 (11th Cir.), cert. granted, - U.S. - , 115 S. Ct. 42 (1994).