On Pitbulls, Piranhas & Other Creatures: Why Attorney Advertising Makes Us Gnash Our Teeth and Wring Our Hands and What Can Be Done About It

Victoria V. Kremski
On Pitbulls, Piranhas & Other Creatures: Why Attorney Advertising Makes Us Gnash Our Teeth and Wring Our Hands and What Can Be Done About It

By Victoria V. Kremski

This article posits that rude and distasteful attorney advertising is a professionalism issue, not an ethics issue and that the rules of professional conduct are insufficient for addressing such advertising. Actual cases of attorney discipline are used to illustrate the premise that the rule of professional conduct prohibiting false, fraudulent and misleading advertisements is not an effective tool for addressing rude and objectionable attorney advertising. The article explores the question of whether prosecuting attorneys for advertising violations has an unintentional, de facto, discriminatory consequence. Educational and preventative alternatives are suggested as a partial solution for addressing objectionable attorney advertising.

I. Introduction
II. Examples of advertising cases prosecuted under the false-fraudulent-and misleading standard
   A. You’ll never be a pitbull!
   B. Martindale Hubbell is misleading?
   C. If it is on t.v. it must be misleading…. 
   D. An advertising Rorschach test?
   E. “No make believe friends” is a good rule.
III. The disparity in prosecutions for attorney advertising and its constitutional implications
IV. How to more effectively address attorney advertising issues
V. Conclusion
I. Introduction

“Many A Small Thing Has Been Made Large By The Right Kind of Advertising.”

-Mark Twain

Some may argue that there is more truth than humor in Mark Twain’s observation about advertising. Regardless, enough truth, humor, and irony exists in modern attorney advertising to greatly amuse Mr. Twain, were he alive today.

Most every lawyer has an opinion about attorney advertising, often strongly held and quickly voiced if asked. The most strident position belongs to those attorneys believing that attorney advertising has contributed to, and even caused the negative image of the profession in the eyes of the American public. Their argument is that attorney advertising diminishes the “professional” aspect of practice and in turn emphasizes the business or “ambulance chasing” aspect of lawyers trying to succeed financially in a competitive marketplace.

The opposing view, and the current legal precedent on the issue, holds that truthful attorney advertising is a form of commercial speech entitled to constitutional protection. As stated by the United States Supreme Court in Bates v. State Bar of Arizona, attorney advertising:

. . . serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role. . . .In short, such speech serves individual and societal interests in assuring informed reliable decision making.\(^1\),\(^2\)

\(^2\) Id. at 364.
Both camps agree that some attorney advertising is distasteful and reflects poorly on the profession. The issue is what can, and should, be done about it.

Regulation of attorney advertising is left largely to the states, through state bar rules and rules of professional conduct. Most states have a rule of professional conduct prohibiting false, fraudulent and misleading advertising. This article asserts that rules of professional conduct prohibiting “false or misleading advertisements” are poor tools for addressing essentially truthful, but rude and distasteful advertising, as the issue is inherently one of professionalism and not ethics. Further, the negative reaction to certain types of attorney advertising is partially elitist, and finally, rather than using a system designed essentially to regulate attorney conduct, that distasteful attorney advertising can, and should be, addressed, in part, through educational and preventative measures.

This article explores and discusses specific prosecutions of attorney advertising under the false – fraudulent - and misleading standard to illustrate its ineffectiveness as a tool. An exploration is also made into a dynamic in our profession, which is that attorney prosecutions for advertising cases may have a discriminatory, elitist consequence. Finally, as a solution for partially addressing advertising issues, educational and preventative alternatives are discussed.

In no way should this article be construed as a criticism of my respected colleagues and good friends in the National Organization of Bar Counsel, all of whom strive daily to preserve justice and integrity in the legal system. Rather, this article illuminates and critiques long-standing and entrenched mind-sets and dynamics in the culture of the legal profession that need reconsideration.

3. AMERICAN BAR ASSOCIATION MODEL RULES OF PROF’L RESP. 7.1 states: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”
My good friend and colleague Professor Devin Schindler, and my mentor and colleague Dean Nelson Miller have my heartfelt gratitude for their comments and suggestions regarding this article. Thanks also to Stephanie Schilling, who will, someday soon, be a very good lawyer, for her assistance.

II. Examples of Advertising Cases Prosecuted Under the False, Fraudulent and Misleading Standard

The following cases all involve prosecutions under the false-fraudulent-misleading standard and illustrate why the standard is or is not an effective tool for prosecuting certain types of attorney advertising.

A. You’ll never be a pitbull!

B.

The most entertaining, if not leading opinion involving attorney advertising is *Florida Bar v. Pape & Chandler.* John Pape and Marc Chandler are Fort Lauderdale attorneys who utilized a pit bull theme in their marketing campaign. The firm’s logo featured an image of a pit bull wearing a spiked collar. The firm’s phone number was 1-800-PIT-BULL.

The State Bar of Florida filed disciplinary proceedings against Pape & Chandler for violating the then existing version of Rules Regulating the Florida Bar 4-7.2(b)(3) and 4-7.2(b)(4) which state:

(3). Descriptive Statements. A lawyer shall not make statements describing or characterizing the quality of the lawyer’s services in advertisements and written communication; provided that this provision shall not apply to information furnished to a prospective client at that person’s request or to information supplied to existing clients.


---

*Florida Bar v. Pape & Chandler, 918 So. 2d 240 (Fla. 2005).*
or verbal descriptions, depiction or portrayals of persons, things or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading or manipulative.

The referee found no violation of the rules by Pape & Chandler, also holding that the ad in question was constitutionally protected speech. The Florida Supreme Court reversed the referee’s decision, holding that advertisements characterizing attorneys as providers of “pit bull style” representation are ads that “characterize the quality of the lawyer’s services” and thus violate Rule 47.2(b)(3).

The court’s ruling that the ad was manipulative, misleading and inherently deceptive, highlights the difficulty and even absurd results that can occur when ethical rules are manipulated to respond to what is essentially an issue of professionalism:

These advertising devices would suggest to many persons not only that the lawyers can achieve results, but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information.\(^5\) (emphasis added)

What exactly is deceptive about this advertisement? Does the Florida Supreme Court believe the ads might mislead a member of the public, because the poor hapless citizen cannot verify that Pape and Chandler do indeed behave like pit bulls? Does the court believe that the clients hiring Pape & Chandler would be surprised and disappointed by Pape and Chandler advocating their cases by filing briefs and making oral arguments, as opposed to Pape & Chandler jumping on opposing counsel and biting them repeatedly? Or snarling and growling at the judge and jury?

\(^5\) Id. at 78.
The Pape & Chandler case illustrates how good intentions can lead to absurd results in regulating attorney advertising. Although the goal of ethics rules governing advertising is to protect the public, there is more than a hint of condescension in the opinion about the capability of Florida citizens to discern the difference between “image” and “substance” in attorney advertisements. Surely most Florida citizens understand that the risk they take in hiring an attorney based on “image” is that the attorney may not live up to the projected image – just as the laundry soap or toothpaste they purchase may not meet the claimed characteristics of those products.

C. Martindale Hubbell is misleading?

Steven Mason is a Florida attorney who submitted his yellow page advertisement to the Florida Bar for an ethics advisory opinion. His advertisement stated: “AV Rated, the Highest Rating Martindale-Hubbell National Law Directory.” The Florida Bar issued an opinion that Mason’s advertisement violated Florida Bar Rule 4-7.2(j) prohibiting lawyers from making statements that are self-laudatory or statements describing or characterizing the quality of the lawyer’s services. The Florida Bar argued that absent a full explanation within the advertisement regarding the AV rating and Martindale-Hubbell’s methods and process for listing and rating attorneys, the ad would “mislead the unsophisticated public.”

After exhausting his administrative appeals, Mason filed suit against the Florida Bar in federal court. The Eleventh Circuit, applying a healthy dose of common sense in addition to the standard constitutional test governing restrictions on commercial speech contained in the *Central Hudson* case (a discussion of applicable constitutional precedent is contained later in this article), held:

. . .consumers need not be familiar with, nor fully understand, Martindale-Hubbell’s rating system in order to find it useful and not misleading. A rating, like a claim of certification, “is not an

---

6 Mason v. Florida Bar, 208 F.3d 952, 955 (11th Cir. 2000).
unverifiable opinion of the ultimate quality of a lawyer’s work or a promise of success, but is simply a fact, albeit one with multiple predicates, from which a consumer may or may not draw an inference of the likely quality of an attorney’s work.8

Thankfully the Eleventh Circuit had more faith in the ability of Florida citizens to navigate legal advertising claims than the State Bar of Florida.

D. If it is on t.v. it must be misleading. . .

Joseph Trantolo and Vincent Trantolo are Connecticut attorneys. In September of 1978, they launched a series of t.v. ads. The court described the ads as follows:

The “Divorce Case” scene showed a couple discussing the division of their property. After they agree to split everything “right down the middle”, the husband uses a power saw to cut through a table and a sofa while their dog looks on soulfully, possibly with some concern that he may suffer the same fate. The announcer then states:

When a marriage gets in trouble, everyone wants to be fair. But that’s not always so easy. The law offices of Trantolo and Trantolo can help you through those difficult times. Because we understand that people facing a divorce don’t need any more problems than they already have. The Law Offices of Trantolo and Trantolo.

The Mumbo Jumbo ad shows a judge and a lawyer in a courtroom saying only the words “Mumbo” and “Jumbo” to each other. The announcer then says:

When you’re faced with a bankruptcy, divorce or possible criminal charges, you don’t have to be confused by the law.

You can be helped by it. Because our courts are designed to serve ordinary people. So are The Law Offices of Trantolo and Trantolo……

The Trantolos were reprimanded for violating the then existing Connecticut Code of Professional Responsibility which, ostensibly, prohibited all television advertising. The Grievance Committee also alleged that the ads were false, fraudulent and misleading, . . . and that they were “presented in an extravagant format and in an undignified manner.”  

The Connecticut Supreme Court rejected the rule’s blanket prohibition against advertising in electronic media, and, in addressing the false-fraudulent and misleading issue, stated:

The advertisements inform the listener of the value of professional legal assistance in certain situations and make known that the defendants are willing and able to provide such services. Thus they are informative and in no way misleading or deceptive. If some members of the audience find them distasteful, such consumers might very well react by shunning the service offered , thereby imposing an informal sanction more effective than any formal regulation.

The Trantolo case, though not recent, is illustrative of the conservative and reactionary response the profession often takes towards attorney advertising. Technology and creativity often push the generally accepted standards of professional decorum. The profession sometimes equates something “new” with being “inappropriate.” Just because something is novel does not mean it is inappropriate. Today, television advertising is common place and generally accepted as a legitimate means of attorney advertising, even if considered “déclassé.” In Trantolo, the underlying objection was in large part the expansion of attorney advertising from print to media, not just the substance of the advertising. This underlying objection to expanding attorney advertising to different mediums is

10 *Id* at 231.
11 *Id* at 234.
evidenced today by the resistance to, and desire to regulate, on-line attorney advertising and its various permutations.

E. An advertising Rorschach test?

Scott Benkie and Douglas Crawford are Indiana lawyers who, between 1996 and 2004, developed and disseminated a marketing brochure entitled “When You Need A Lawyer.” The pamphlet contained the words “Legal Advertisement” on every page of the brochure. The two were found to have violated Indiana Professional Conduct Rule 7.3[c] which prohibits an attorney from engaging in . . . “solicitation of professional employment without the words “Advertising Material.”

In finding that the attorneys violated Indiana’s Rule 7.3 and should be disciplined, the Indiana Supreme Court stated:

Respondents admit that their use of the phrase “Legal Advertisement” rather than “Advertising Material” was a rule violation, but they contend that it was merely technical and inadvertent. Although the violation was inadvertent, we do not consider it to be a mere technicality. Use of the phrase “legal advertisement” may create the impression that the Commission or some other body had reviewed it and found it to be “legal.”

It seems to be a stretch to argue that the majority of the public would first assume that the language “legal advertisement” would connote that the ad comported with Indiana advertising law, rather than simply be identifying the brochure as a lawyer’s marketing brochure.

The U.S. Supreme Court in Bates (citing Virginia Pharmacy Board v. Virginia Consumer Council), cautioned against taking a paternalistic view of the public in regulating professional advertising:

12 In re Benkie, 892 N.E.2d 1237, 1240 (Ind. 2008)
13 Id. at 1240.
...[i]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision....Moreover the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. 14

F. “No Make Believe Friends” is A Good Rule

Contrast these cases with the prosecution of Karlena Zachary. Ms. Zachary was a Massachusetts lawyer, who, believing that she needed reinforcements, entitled her firm: “Zachary and Williams.” The problem was that Ms. Zachary was a sole practitioner – and the “Williams” – was a figment of her imagination. Ms. Zachary also listed two attorneys as “of counsel” to her firm, without bothering to seek their permission, and ignoring the fact that they were not associated with her or her firm. 15

Here, prosecuting Ms. Zachery under the false - fraudulent - and misleading standard was effective and appropriate. These statements were not statements suggesting a certain image, culture or approach of the firm, but rather constituted material misrepresentations of objective, provable facts. Prosecutions of this sort make sense as false statements of fact genuinely contribute to public confusion regarding attorneys and the firms they are affiliated with.

15 Massachusetts Board of Br Overseers, PUB. REPRIMAND NO. 2007-3.
In short, the false-fraudulent-misleading standard is not a useful tool for addressing attorney advertising that is distasteful and objectionable but does not contain false statements of provable facts.

II. The Current Trend Regarding Prosecutions for Attorney Advertising and the Constitutional Implications

In preparation for a panel presentation on attorney advertising at the ABA National Conference on Professional Responsibility in May of 2008, Donald Lundberg, the highly regarded Executive Secretary of the Indiana Disciplinary Commission, conducted an informal anonymous survey of discipline counsel across the United States regarding the enforcement of ethical rules governing advertising. What he found was a lack of consensus from state-to-state about how advertising enforcement is pursued, although a plurality of states take a moderate, non-interventionist or “hands off” approach. (Florida and Iowa have traditionally taken a more assertive approach to regulating attorney advertising.)

Most states cite a lack of consumer generated complaints about attorney advertising and the level of constitutional protection afforded commercial speech as factors underlying their moderately non-interventionist approach. Nevertheless, seven states self-report taking a significant enforcement posture regarding attorney advertising, from selectively reviewing advertisements and self-initiating enforcement actions, to examining all or nearly all attorney advertisements in a comprehensive fashion.

Like other forms of commercial speech, attorney advertising is afforded some degree of constitutional protection. Commercial speech is analyzed under what has come to be known as the “Central Hudson test:”

---

17 Id. at 7
18 Id. at 5.
Central Hudson states that a state may not regulate commercial speech, (including attorney advertising) unless its reason for doing so amounts to a substantial government interest, its regulation “directly advances” that interest and the manner of regulation is “not more extensive than necessary to serve the interest.”

In specifically addressing potentially misleading commercial speech, the U.S. Supreme Court has held:

States may not place an absolute prohibition on certain types of potentially misleading information. . . . if the information also may be presented in a way that is not deceptive. . . . the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation.

Arguably, prosecuting distasteful attorney advertising (not outright factually false advertising like the Zachary case) “up front” based strictly on the substantive content of the ad, under the false, fraudulent and misleading standard, may constitute a violation of Central Hudson. The appellate courts have fairly consistently supported the public’s interest in access to information regarding lawyers services.

Bates and the U.S. Supreme Court’s other cases on attorney advertising illustrate the balancing of two legitimate competing interests: free speech and public protection.

Clearly states have a significant interest in maintaining high standards in the legal profession. After all: “…lawyers are essential to the primary government function of administering justice and have historically been officer of the court.” “While lawyers act in part as ‘self-

---

employed businessmen’ they all act as ‘trusted agents of their clients and as assistants to the court in search of a just solution to disputes.” 22

However, as attorney advertising is commercial speech afforded some degree of constitutional protection, it is important to take care in determining which ads are truly false and misleading as opposed to those ads which consist of “puffery.” “Puffery” is generally defined as: “…exaggerated statements of bluster or boast upon which no reasonable consumer would rely; and vague or highly subjective claims of product superiority, including bald assertions of superiority.” 23

The 8th Circuit, in analyzing puffery in product advertising also provided a test helpful in distinguishing which types of attorney advertising should be prosecuted and which should not:

If a statement is a specific measurable claim or can be reasonably interpreted as being a factual claim, i.e. one capable of verification, the statement is one of fact. Conversely, if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery.24

Under this test, it is clear that the pitbull theme constitutes puffery, as by the Florida Supreme Court’s own admission, it is impossible to prove whether the attorneys conduct themselves like pitulls. Likewise, the Benke and Crawford advertisement seems quite straightforward.

In our modern world, it is dubious to say that the public needs to be protected from attorney advertising that is suggestive of a particular image or culture.

23 American Italian Pasta Company v. New World Pasta Company, 371 F.2d 387 (8th Cir. 2004)
24 Id. at 391.
It is implicit or assumed that commercial speech is not as easily “chilled” as political speech because the lure of profits constitutes a substantial incentive to engage in commercial speech. 25 However, it is logical to assume that an attorney who may face disciplinary charges for engaging in a marketing theme consisting of puffery, but that is not false, fraudulent or misleading, may quite easily be chilled from using such an advertisement.

The false, fraudulent and misleading standard used to prosecute non-factual violations may serve as a de facto prior restraint on advertising without corresponding proof that the rule directly and materially advances the goal of public protection. The standard is certainly not “narrowly drawn” as requiring disclaimers and explanations are far more narrowly drawn requirements than outright prohibitions.

Further, because states differ in their reaction to the constitutional protection afforded attorney advertising, an advertisement that may subject an attorney to discipline in Florida may not be seen as a violation, or pursued for other reasons, in Michigan. This geographically and substantively inconsistent approach is perilous to lawyers, unfair to consumers and may not comport with Supreme Court standards.

III. The Disparity In Prosecutions For Attorney Advertising

Although there is debate as to why, and whether it truly reflects a bias, there is little dispute among attorney discipline offices that solo and small firm practitioners are subject to more disciplinary complaints and are prosecuted more frequently, for all ethical violations, than their larger firm colleagues.

Here are statistics from two recent studies:


<table>
<thead>
<tr>
<th>Law firm size</th>
<th>Number of Attorneys Prosecuted</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>63</td>
<td>78.37%</td>
</tr>
<tr>
<td>2-10</td>
<td>40</td>
<td>19.23%</td>
</tr>
<tr>
<td>11+</td>
<td>5</td>
<td>2.40%</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Law firm size</th>
<th>Percentage of Total Attorneys Disciplined</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>67%</td>
</tr>
<tr>
<td>2-10</td>
<td>22%</td>
</tr>
<tr>
<td>11-25</td>
<td>1.5%</td>
</tr>
<tr>
<td>26+</td>
<td>2%</td>
</tr>
<tr>
<td>Govt./Judicial</td>
<td>12%</td>
</tr>
<tr>
<td>Corp. In house</td>
<td>10%</td>
</tr>
<tr>
<td>Other/No practice</td>
<td>18%</td>
</tr>
</tbody>
</table>

Attorney discipline experts argue that prosecutions of solo and small firm practitioners reflect certain immutable dynamics of the practice of law. 28They argue that Solo and small firm practitioners do not have the staff and institutional support that their large firm and governmental colleagues enjoy. If a solo lawyer is in trial, sick or goes on vacation, staff is often the only person designated to deal with the continual flood of letters, phone calls and crises that arise in practice. Solo and small firm practitioners often end up taking too much work, as they never know when the next client will walk in the door. As a result, they sometimes end

---

26 Minority/Small Firm/Sole Practitioners in the Lawyer Discipline Process – Dispelling the Myths and Addressing the Realities, 2007 NAT’L ORG. OF B. COUNS. REP BY THE ST. B. OF CAL.
up overworked, neglecting cases, and in the worst case, missing important deadlines. Solo and small firms rarely have institutional checks and balances systems in place, especially in the financial/accounting area. The lack of checks and balances makes it much easier for the solo/small firm practitioner to “cross the line” and “borrow” money from the client trust account. Large firms usually have at least one attorney designated to provide other firm members ethical advice if they find themselves in an ethical dilemma. Once a complaint is filed against an attorney, large firm lawyers still fare better, as sometimes the firm hires disciplinary counsel for them, and they have sufficient documentation in their files to support their positions, as opposed to solo and small firm practitioners, who often do not have documentation to substantiate their positions, even if legitimate. 29

Also cited, and perhaps the most compelling factor, is that large law firms generally represent large institutional or business clients. When these institutional clients are dissatisfied, they can afford to change attorneys, negotiate for a reduction in fees or litigate – unlike members of the public who invoke the discipline process to redress their complaints. 30

Whether the prosecution of solo and small firm lawyers results from inevitable and immutable factors, it results nevertheless in a de facto, if unintended bias against solo and small firm practitioner in those states that prosecute for advertising violations.

Solo and small firm practitioners are more likely to engage in the type of advertising that is widely disseminated and designed to appeal to the “lowest common denominator” of the consuming public – i.e. the pitbull marketing campaign - and come to the attention of regulators. Another dynamic is the fact that very few consumers file complaints with attorney discipline agencies about attorney advertising, rather they are filed mostly by other attorneys. 31

29 Id. at 10-13.
30 Id. at 12.
31 Lundberg, supra note 16 at 6.
This does not mean, however, that large firms do not engage in false and misleading advertising. There are two very glaring examples. The first is Vinson and Elkins, the prestigious Texas firm that represented Enron. Hired to investigate alleged accounting irregularities regarding Enron partnerships, lodged by an Enron insider, the firm failed to talk to obvious key witnesses, asked few tough questions and issued a report blessing the controversial partnerships one day before Enron restated its financials due to the failure of the partnerships. 32 Vinson and Elkins eventually settled with Enron’s estate for 30 million dollars in return for the estate waiving threatened civil litigation against the firm for “aiding and abetting fraud” in the collapse of the company. 33

Despite this glaring ethical failure, the Vinson and Elkins website contains a listing of “First Principles” which include the following statements:

2. Our reputation and our people are our principle assets, and our success depends on maintaining an impeccable professional reputation…”

3. “We are committed to the highest ethical standards, both in our service to clients and in our personal lives. 34

How are these statements any less misleading to the average consumer, many of whom had their life savings wiped out when Enron collapsed, than pitbull logos? If Vinson and Elkins is truly committed to the highest ethical standards, which include refraining from engaging in misleading advertising, it would have a spot on its website entitled: “What We Learned From Representing Enron and Why You Can Be Assured It Won’t Happen Again.” Such a statement would be far more truthful and non-deceptive, and meaningful, than the lofty sounding aspirations that it glaringly failed to attain.

Another example is the website of Milberg LLP, formerly Milberg Weiss. Milberg Weiss, was indicted (the firm itself, along with several named partners) for allegedly paying plaintiffs 11.4 million in illegal kickbacks and then lying to investigators about it. Nevertheless, the firm’s home page proudly boasts:

“Experts in protecting victims of corporate fraud and other public misconduct.”

One imagines that in order to make Milberg’s home page non-deceptive and not misleading, a disclaimer should be added, stating: “Except Our Own.”

If the purpose of banning false and misleading advertising is to protect the public consumer, why are these sorts of statements and advertisements not prosecuted? These statements are far more false and misleading to the average consumer than pitbull logos and Martindale Hubble ratings, yet they go unaddressed. The answer should not rest on the fact that few complaints are filed against large firms. These examples, unfortunately, suggest an unintended, de facto bias in the discipline system against solo and small firm practitioners who come to the attention of regulators through their advertising. Perhaps large firms

36 http://www.milberg.com
are too difficult and expensive to prosecute, as opposed to solo and small firm practitioners are may be easier and cheaper to prosecute for budget-strapped discipline agencies.

One may claim that the Vinson & Elkins and Milberg advertisements also constitute puffery and are not subject to discipline, but the point is that the playing field should be equal for lawyers whether they are in big firms or solo firms.

IV. How To More Effectively Address Attorney Advertising Issues

Some attorney advertising is rude and distasteful. Prosecuting attorneys for distasteful advertising, on the basis that such advertising is misleading and confusing, is not an effective, successful or economical approach.

Many attorneys engage in such advertising because they believe it increases their business and most solo and small firm lawyers have anecdotal evidence that this assumption may be correct - if “success” is defined by sheer volume of clients alone. Unfortunately, in competitive economic times, urging attorneys to be “professional” and adopt a “higher standard of conduct” is usually met with skepticism and resistance. If attorneys view the situation as a choice between economic survival and professionalism, professionalism often loses, and this is precisely the mindset of many attorneys today.

However, this is a superficial and incorrect assumption that such attorneys make. It is safe to surmise that the type and quality of the clients that respond to distasteful advertising is questionable at best. Attorneys who analogize themselves to pitbulls, piranhas, sharks and other predatory creatures are highly unlikely to attract clients interested in fairly resolving their disputes and who believe their opposing party should be treated with dignity and respect. Most importantly for the attorney, such clients are not likely to view the attorney’s efforts on their behalf fairly and objectively, without resorting to the discipline system to address the slightest disappointment. Attorneys who utilize distasteful advertising may have a high “quantity” practice, but it is unlikely that they enjoy a high “quality” practice populated with the appreciative and
trusting clients that attorneys desire and who make their professional lives easier.

An attorney who has to spend much of her or his time dealing with suspicious and untrusting clients, or who are trying to reign in a hostile client bent on “punishing” the opponent, is not going to have a good quality of life. Dealing with hostile and suspicious clients every day, five days a week, four weeks a month, twelve months of the year will takes a toll on the emotional and psychological health of an attorney. Time that could be spent on other matters, or better yet, with family or personal pursuits is instead expended on high maintenance/high risk clients. Is the small amount of money resulting from a “volume” practice worth this price?

State and local bar associations can play a key role in providing low cost seminars and materials that educate attorneys about the link between the type of advertising they utilize, the type of clients it attracts and the resulting quality of life for the lawyer, both personally and professionally. Most state and local bars already have an existing continuing legal education structure in place. Offering educational seminars – “Why Rambo Advertising Will Do You More Harm Than Good” might be a good place to start.

Law schools, already criticized by the Carnegie Report for turning out legal “technicians” devoid of an ethical/moral framework girding their legal analysis and knowledge, 37 should devote meaningful instruction in advertising, going far beyond the mere learning of the rules of professional conduct. Courses should include an exploration of the likely consequences of the types of advertising a future lawyer utilizes.

It is with our current law students that the ethical and moral future of the profession lies and our techniques in educating them should match that critical and profound reality.

Don Lundberg, the Executive Secretary of the Indiana Disciplinary Commission wisely suggests that attorney prosecutorial agencies, when receiving a request for investigation against an attorney, also investigate the type of advertising the attorney engages in. If the attorney makes claims in their advertising as to the quality of their services, they should be subject to discipline if there is proof that their services were not as the attorney advertised. In other words, instead of prosecuting attorneys “up front” under the false – fraudulent and misleading standard, prosecutions could be initiated, ‘after the fact” if the evidence supports a prosecution. This makes much more sense and is much fairer, than trying to speculate up front from the advertisement what type of conduct the attorney might engage in and whether it might pose a risk of harm to the public.

V. Conclusion

Given the significant differences among the states in regulating attorney advertising, and the disproportionate impact it has upon lawyers who are geographically located in a jurisdiction that takes an assertive approach, coupled with the already acknowledged impact the discipline process has upon solo and small firm lawyers, it is time for the profession to meaningfully review and revise the cultural and procedural approach it takes towards attorney advertising.

The profession should examine, keeping in mind the constitutional dictates regarding commercial speech, exactly what sort of advertisements can we, and not just “what we want to,” ban “up front.” As rules of professional conduct can come perilously close to being a prior restraint and prosecutions may have a chilling effect on speech, the category of prohibited advertisements, and prosecutions for advertising issues, should be limited. The false - misleading - and confusing standard should be reserved to those instances where the advertisements are truly and significantly factually misleading. States ought to adopt the better “Lundberg” approach where advertising violations are prosecuted after the fact, i.e. those situations where a client was not served in the fashion that was promised them in the attorney’s advertisements.

Integrity, fairness and public protection requires the profession to exam whether large firms are held to different standards regarding
attorney advertising and states should provide the political support and financial resources needed to confront and address advertising violations by large firms.

Finally, as the current caretakers of the legal profession, we should invest in, and help our young and soon to be lawyers, acquire the knowledge and skills they need to develop effective and professional advertising. We cannot change the fact that law is indeed a business and that lawyers inevitably will advertise. It is time to embrace that reality and develop the systems necessary to produce better attorney advertising in the future.