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"Promoting Legal Services-The Texas Approach to Ethics and Disciplinary Rules of Professional Conduct"

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PROMOTING LEGAL SERVICES - THE TEXAS APPROACH TO ETHICS AND DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

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ABSTRACT

This paper examines the Texas Disciplinary Rules of Professional Conduct in defining what strategies attorneys may use to develop their practices. The purpose of this paper is to provide Texas attorneys with an understanding of the current legal landscape so that they can design marketing strategies that will be in compliance with current restrictions. While it is impossible to address an unlimited variety of marketing techniques, this paper provides a useful guide on the boundaries of acceptable marketing practices. In addition, the paper addresses the philosophical tension between maintaining the characteristics of a 'profession' and the related ethical considerations, and the right of the public to enjoy the benefits of a free and competitive professional services marketplace.

I. INTRODUCTION

Technology has increased the options that attorneys have for soliciting clients. Examples of new means of communication include the cell phone which permits a person to make contact during otherwise unproductive time (i.e. time spent in traffic jams). The wide availability of internet which enables a person to send literally hundreds of letters with one keystroke. The world wide web makes it possible for a solo practitioner to display an advertisement to multi-state and world wide audiences. Computerized telephone equipment permits callers to select from pre-recorded messages on various legal topics. The list is almost endless.

While state and local governments including regulatory agencies and legislative bodies oblige the legal profession with increasingly complex regulations and new opportunities to offer legal services, the reality is that the profession's supply of providers is quite robust making the market very competitive. State bar associations in the name of 'protecting the public' and enhancing the profession continue to define ethical standards and practices concerning the promotion of the legal profession. This paper examines the Texas Disciplinary Rules of Professional Conduct in defining what strategies attorneys may use to develop their practices. The purpose of this paper is to provide Texas attorneys with an
understanding of the current legal landscape so that they can design marketing strategies that will be in compliance with current restrictions. While it is impossible to address an unlimited variety of marketing techniques, this paper provides a useful guide on the boundaries of acceptable marketing practices. In addition, the paper addresses the

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philosophical tension between maintaining the characteristics of a 'profession' and the related ethical considerations, and the right of the public to enjoy the benefits of a free and competitive professional services marketplace.

II. REGULATION OF COMMERCIAL SPEECH

The First amendment provides that Congress shall make no law limiting the freedom of Speech.¹ The United States Supreme Court has failed to recognize the 1st amendment as a guarantee of absolute free speech by permitting federal and state governments to enact restrictions on certain types of speech. One of the types of speech that the Supreme Court had held that was not protected was commercial speech.² Professional associations of attorneys, lawyers, doctors, etc were free to enact professional rules and codes which barred certain marketing activities including advertising, direct solicitation of clients, and the use of direct mail as examples.

However, in 1976, the Supreme Court in 1976 decided to extend the 1st amendment to some types of commercial speech.³ In a case involving the prosecution of a Virginia pharmacist who placed an advertisement disclosing prices for various medicines in violation of a statute prohibiting such advertising, the Supreme Court ruled that the statute was an unconstitutional restriction of commercial speech. The Court found that the State's interest in protecting the image of pharmacist was out weighed by the public need to receive truthful

¹United States Constitution, First Amendment. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. The First amendment has been held to be applicable to the states through the Fourteenth Amendment due process clause.

²Valentine v. Chrestensen, 316 U.S. 52, 54 (1942)

information allowing them to make an informed decision. In 1977, the Supreme Court extended the protection of commercial speech to attorney advertising. Following the example of the Virginia pharmacist, a couple of attorneys placed an advertisement in a newspaper setting forth fees charged for routine legal services. The Arizona State Bar proceeded against them for violating the prohibition against lawyers advertising under the Arizona Disciplinary Rules of Professional Conduct. The Supreme Court extended the protection of commercial speech to that which serves individual and society's interest in "assuring informed and reliable decision making.\(^4\)

In light of the above decisions growing numbers of attorneys began advertising using various methods. State bar associations continued to attempt to enforce their Disciplinary Codes and Attorney's Rules of Ethics which placed restrictions on advertising. The result of enforcement actions were appeals to the US Supreme Court which issued opinions dealing with the balance between the right of the professions to regulate their members activities and the right of members of the professions to exercise their commercial free speech rights. The US Supreme Court weighed the individual right to exercise speech against the interest of protecting society from certain types of marketing activities. The Ohio State Bar in a disciplinary proceeding suspended attorney Ohralk for direct solicitation of a couple of clients. Ohralk appealed to the United Supreme Court arguing, in reliance on the Bates case, the same right of protection for in person solicitation as the Court had allowed in Attorney advertising. The Court refused to extend the protection for commercial speech to "in-person solicitation" recognizing a difference from advertising which is passive as compared to "in-person solicitation" where the recipient is under pressure to make an immediate decision. The Court finding that the "in-person solicitation" might actually be contrary to the benefits found in Bates that gave the individual and society a more informed and reliable basis for decision making. The Supreme Court accordingly refused to extend the protection of the 1\(^{st}\) amendment to "in-person solicitation.\(^5\) The Court reasoned that the inability to review the "in-person solicitation, due to confidentiality and the simple lack of a record of the communication, would make oversight and regulation of attorney "in-person solicitation virtually impossible which is contrary to the State's interest of maintaining high standards for attorneys. The United States Supreme Court while allowing the state to limit the right of attorneys to engage in "in-person solicitation" extended the protection of the First amendment in a case involving direct mail solicitation. An ACLU attorney wrote a letter to an individual who had been sterilized by the state offering free representation. The state bar association charged the attorney with a violation of prohibitions against state law restricting direct mail solicitation. The Court found that the ACLU's letter was not an expression of commercial speech but an expression of political speech deserving of 1\(^{st}\) Amendment protection. The Court's reasoning was based on their finding that the attorney was not acting for personal pecuniary gain. The Court also found that the letter sent by the ACLU attorney was not misleading, overreaching, or coercive.\(^6\)


\(^6\) In re Primus 436 U.S. 412 (1978).
Commercial speech was examined by the United States Supreme Court in a case unrelated to attorneys but which has had a major impact on the way in which attorneys communicate with potential clients. *Central Hudson Gas and Electric Corp. v Public Service Commission of N.Y.* involved a challenge to a banned promotional advertisement by the electric Company. The Court in examining Commercial speech did not afford it the same degree of protection as political speech. The states were considered to have a legitimate interest in regulating commercial speech under certain circumstances. Restrictions must directly advance a state interest in the least intrusive manner. The Court defined permissible restrictions by setting forth a four part test to the balance individuals rights of free speech and the states interest in regulation of advertising. First, for commercial speech to come under the protection of the First amendment, it must relate to lawful activity and not be misleading. Second, the state must demonstrate a substantial interest in regulating commercial speech. Third, the regulation must directly advance the asserted state interest. Finally, the regulation should not be more extensive than necessary to serve the asserted state interest. So, while a state may regulate advertising, it may not prohibit advertising by members of licensed professions. The result of Supreme Court cases dealing with commercial speech and attorney advertising has been to force State Bar Associations that wish to restrict advertising and other means of soliciting clients to defend any such restrictions on the basis of serving the public interest.

**III. TEXAS REGULATION OF THE PROMOTION OF LEGAL SERVICES**

In Texas, the state constitution assigns the responsibility for oversight of the legal profession to the State Supreme Court. The Texas Supreme Court is responsible for authoring the Civil Rules of Procedure (a responsibility which the State Constitution also grants to the Legislature) and the regulations concerning the practice of law. Texas has a mandatory membership in the Texas Bar Association meaning that anyone wishing to practice law in Texas must not only fulfill licensing requirements but must also retain current membership in the State Bar of Texas. The State Bar of Texas performs a number of services including the investigation and enforcement of the Texas Disciplinary Rules of Professional Conduct promulgated by the Supreme Court of Texas. On July 29, 1995, a new set of advertising rules took effect in Texas. These rules are integrated into the Texas Disciplinary Rules of Professional Conduct, Part VII. The new Rules deal with both the content of advertising and procedures that must be followed by attorneys. The Rules created an advertising review committee as part of the State Bar of Texas. The advertising committee has published ‘opinions’ or guidance to the legal profession on what is prohibited under the rules and is responsible for pre-approving attorney advertising programs. The solicitation of clients through non-advertising strategies is also covered by the Texas Rules. Enforcement of the rules falls under the responsibility of the State Bar of Texas General Counsel’s office.

**IV. COMMUNICATION METHODS**

The Texas Disciplinary Rules of Professional Conduct, Section Seven addresses the types of communication strategies attorneys are permitted or not permitted to use. For
example, the design and information contained in a firm's letterhead is regulated by the Rules. An advertisement is another communication method. Advertisements may appear on television, radio, in newspapers or magazines, on billboards and even on the internet as homepages. Direct personal contact is another method of solicitation as in approaching a widow at a funeral or telephoning some injured person in a hospital. Paying an individual to solicit clients is another method that is expressly prohibited by the Rules. Direct mail, law firm brochures, promotional videos, internet web pages, and face to face communications are all regulated activities.

V. IN-PERSON OR BY TELEPHONE

The solicitation of clients in-person or by telephone is directly addressed in Texas Disciplinary Rules of Professional Conduct sections 7.03 and 7.05. Section 7.03 (a) prohibits the direct in-person or by telephone contacting of a person, seeking professional employment arising out of a particular event or chain of events where the attorney has as a significant motive of pecuniary gain. The prohibition does not extend to family members or past and present clients. It is a violation of the Code to call survivors listed in newspaper obituaries to offer them assistance in probate court, for example. This provision is an unconditional prohibition for lawyers contacting persons with whom they have no relationship. The State sees a need to protect the public from potential abuse that can result from solicitation following a serious or catastrophic event. A person being contacted after an event who might need legal services may not be in a state of mind to deal with an attorney offering their legal services. It must also be remembered that the attorney is trained in persuasive methods creating an even greater opportunity for overreaching with the potential client. For example, a victim of an accident who might benefit from legal representation is thought to need protection from lawyers soliciting them in their hospital bed.

Not all direct communication by attorneys are prohibited. Attorneys for non-profit organizations may communicate with members for the purposes of educating the members to understand the law, recognize legal problems, selection of legal counsel, or the use of legal counsel. It is important to note that this section address the rights of the attorney for non-profit organizations to communicate with members of the organization, not communications with the public.

The issue of non-profit organizations communicating with the general public through direct mail was the subject of a US Supreme Court case. The U. S. Supreme court In re Primus (1978) recognized the right of an attorney for a non profit organization to mail a letter of direct solicitation to a non member where the attorney was not seeking pecuniary gain. Contact is denied even to those for whom in-person and telephone communication is permitted if it is coercive, fraudulent, overreaching, harassing or intimidating; prohibited under section 7.02(a) of these rules; or contains a statement or claim that is fraudulent, misleading, intimidating, or false.

7 Supra
Returning to the accident victim in a hospital bed, it is illegal for an attorney to hire or pay a referral fee to medical personnel in exchange for recommending that attorney to their patients. Section 7.03 (b) provides that an attorney is to not pay or give anything of value to a person who is not licensed to practice law for soliciting or referring prospective clients. Section 7.03 (c) prevents an attorney from paying, giving or advancing anything of value, in order to solicit professional employment, to the prospective client or any other person. This does not exclude payment to a legitimate referral fee as permitted by paragraph (b) by lawyer referral service which is discussed below. These two sections 7.03 (b) & (c) prohibit the conduct commonly referred to as barratry.  

Texas lawyers must also be aware of Section 38.12 of the Texas Penal Code making barratry conduct criminal. Texas Disciplinary Rules of Professional Conduct Rule 8.04 provides that a violation of 38.12 Texas Penal Code as an act of misconduct by the attorney. The 77th Legislature has passed legislation providing that the use of information contained from an accident report form for the direct solicitation of business, employment, or pecuniary gain to be a class B misdemeanor punishable by up to a $25,000 fine. In addition to the misdemeanor, the rules state that the attorney is not allowed to charge any fees from any client obtained through means prohibited by Section 7.03 (a), (b) or (c).

VI. LAWYER REFERRAL SERVICES

Section (e) of Rule 7.03 provides that the attorney shall not participate in or accept referrals from a lawyer referral service unless the lawyer knows or reasonably believes that the lawyers referral service meets the requirements of Article 320d, Revised statutes. Article 320d Revised Statutes which was repealed by the 76th legislature in 1999 and replaced with Texas Occupational Code. The Occupational Code states that to operate as a “lawyer referral service” the person must hold a certificate issued under the code. The Code imposes limits on client fees and the manner in which the lawyer and the referral service share the fee. So, simply forming a group of attorneys to fund advertisements that invite the public to call a free referral service is not a legitimate referral service. “Lawyer referral services,” does not include organizations or groups of “lawyers who jointly advertise their services in a manner that clearly shows that the advertising is intended to solicit clients for those lawyers.”

VI. ADVERTISING IN THE PUBLIC MEDIA

8 Blacks Law Dictionary 190 (4th ed 1968) “the offense of frequently exciting and stirring up quarrels and suits, either at law or otherwise.”


Texas attorneys are permitted to advertise in telephone directories, legal directories, newspapers, periodicals, outdoor displays or billboards, radio, and television. Copies or recordings of the advertisements as well as the dates and location of their use must be kept by the attorney for four years after their last use. All advertisements used in the public must be reviewed and approved by the attorney prior to its use.\textsuperscript{12} In advertisements using audio or visual images that are presented as portraying the attorney, the recordings and persons shown must be the attorney. This rule prohibits the use of actors to portray the attorney by image or vocalization.

An attorney may not pay for the advertising for a lawyer not in a same firm unless the advertisement discloses the name and address of the financing attorney. This rule is designed to prevent an attorney from advertising under another’s name and then benefit by referrals. If an advertisement is made by an attorney and he knows or should have known that he will refer the case to another, a conspicuous statement to that effect must be made. If an attorney decides to join a ‘co-op’ advertisement, the advertisement must disclose the names of all the members of that group and that it is not a single law firm but a ‘co-op’ type of advertisement.\textsuperscript{13} Any such cooperative advertisement listing several attorneys must also comply with the disclosure rules concerning specialization.

\section*{VI. CONTENT OF THE MESSAGE}

The content of the message is regulated in sections 7.01, 7.02, and 7.04. Rule 7.02 focuses on the content of the message and is used in conjunction with all the other sections of the rules. Section (a) of Rule 7.02 prohibits an attorney from making false or misleading communications about the qualification or services of any lawyer or the firm. Section (a) defines five types of misleading communications. First, a communication is misleading if it contains a material misrepresentation of a fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading. For example, an attorney who advertises as a “trial lawyer” who has never tried a case would be in violation of section (a) of rule 7.02. Another example would be an attorney who solicits clients in another jurisdiction offering to represent them in relation to job related injuries who is not licensed in that jurisdiction but fails to disclose that he is only licensed in Texas would be in violation by failing to disclose a material fact that would make the communication misleading. The second form of misleading communication is if an attorney creates an unjustified expectation about results the lawyer will achieve. An attorney guaranteeing successful results in litigation is an example of unjustified results. A third type of misleading communication occurs if an attorney compares his services to the services of other attorneys unless he can substantiate the comparison by verifiable data. For example, claims of the “Best”, “Most Experienced in the County” are all comparisons to other attorneys. While manufacturers of tangible products are allowed to advertise as “the best,” “the most reliable,” a “great bargain,” such puffery is not permitted in communications to the public from

\textsuperscript{12}Texas Rules of Disciplinary Procedure Section 7.04(g).

\textsuperscript{13}Ibid Section 7.04 (o)
attorneys. Attorneys are held to a different standard than commercial businesses that engage in "puffing" their product with exaggerated claims.

A fourth type of prohibited communication is the claim that the lawyer is able to influence improperly or upon irrelevant grounds a tribunal, legislative body or government officials. Such claims are prohibited under section (a) of rule 7.02. An attorney who advertises that he "has known all the judges in the County all his life" may be held to have violated this rule where the advertisement leads the reader to believe the attorney will have better success with the court.

And finally, the attorney under Section (a) of 7.02 may not designate areas of law he practices unless he is competent to handle legal matters in those areas of the law. For example, an attorney who has no experience or training in Bankruptcy should not list it as an area of practice. These five specific types of communications set forth above are delineated in the statute. They should not be considered as all inclusive but rather as illustrative of the kinds of behavior considered misleading and inappropriate. It is clear that by implication and incorporation the concept of false and misleading communication is part of all the rules relating to attorneys communicating with reference to their services.

In Texas with a growing Hispanic population the desire to advertise a Spanish language communication ability may lead an attorney into ethical and rule violation difficulty. If the attorney puts part of his communication in a language other than English, any required disclaimers or statements must also be in that foreign language. For example, a communication that "Se habla espanol aqui" (Spanish is spoken here) is perfectly legal if the attorney does speak Spanish. But it would be misleading if the attorney relied on a Spanish interpreter. Such a claim by the non Spanish speaking attorney would have to be accompanied by the statement in Spanish that the attorney does not speak Spanish but would rely on an interpreter so as not to be misleading.

Rule 7.01 prohibits lawyers from practicing under a trade name or a name that is misleading as to his identity. The firm's name may contain LLC, Professional Corporation or even the names of deceased partners of the firm. Office sharing arrangements cannot be labeled under a firm name. If a lawyer holds a judicial or executive position, it shall not be used in a firm name unless they are actively practicing in the firm. Lawyers shall not advertise in the public media using a fictitious name or trade name.

In Commission for Lawyer Discipline v. C.R., an attorney took out an advertisement titled "Accident Injury Hotline" under the newspaper section called "attorney referral information." The advertisement offered free 24 hour recorded legal answers and provided a telephone number with a list of topics. Each topic had a four digit code. The advertisement did not identify CR's name or office. A caller would receive a recording describing the most frequently asked questions about accidental injuries to help accident victims protect their rights. The greeting was followed by an explanation that there was no charge for the service. Then they were informed that they could reach an attorney any time by pressing "0". Then the caller was prompted to choose one of the four digit codes or they could press "0" to have a free consultation about their case with an attorney. If the caller pressed any of the four digits, they received some general legal advice about the topic chosen. At the conclusion of the message, they were told that a free consultation with an attorney was available by

pressing "0." The could also press given digits to return to the main menu for a verbal description of more topics and numbers. If there was no response, the phone would disconnect. If they pressed "0," they were connected to the offices of attorney CR. Upon pressing "0", they would hear the message that the attorney is not certified by the Texas Board of Legal Specialization and that the message is an advertisement prior to being connected. If the caller responded during after hours, the message explained that the office was closed but that the attorney could be reached in an emergency. They were asked to leave their name, address, phone number, description of the accident, people involved and injury sustained. If the caller believed that they were in an emergency situation, they were advised to press "*" and leave their phone number and to wait by that number for an hour.

The question of law was over whether the attorney was practicing under the trade name "Accidental Injury Hotline" and that was misleading because the advertisement was placed under attorney legal referrals rather than under Attorneys. A trial court had entered an order in favor of the attorney and the Disciplinary Committee appealed. The Appellate Court remanded the case for trial on the basis that there was sufficient showing of evidence to justify a trial for violations of Texas Professional Disciplinary Rules. While this case does not firmly set the boundaries of whether CR violated the rules or not, it does show that certain activities will raise the ire of the Disciplinary Commission.

VII. LEGAL SPECIALIZATION

In Texas, lawyers cannot hold themselves out to be a specialist unless they have been certified by the Texas Board of Legal Specialization with some limited exceptions.\footnote{Texas Professional Disciplinary Rules Section (a),(b) of 7.04} This communication includes both advertising and other forms of communications such as direct mail or firm brochures. Attorneys who have been certified by the Texas Board of Specialization may inform readers or viewers of that fact. If an attorney chooses to run a commercial that discusses a particular area of law such as probate or trusts, for example, he or she would be required to discuss that they are Board Certified in Estate Planning or that they are not certified by the Texas Board of Legal Specialization they must use a negative disclaimer. The negative disclaimer is "Not Certified by the Texas Board of Legal Specialization." In print communication, the disclaimer may be presented at the end of the document or advertisement. In television or radio advertisements, the negative disclaimer may also be presented at the end of the spot.

VIII. ADVERTISING
Texas attorneys may advertise in a variety of media, but in 1995, the Advertising Committee of the State Bar of Texas issued new regulations. Some types of advertising must be filed ahead of time to the advertising committee. A filing, however, is not the same as an approval. If an attorney or firm want to have advertisements reviewed, they must submit the application form, samples and fee at least thirty days prior to the first dissemination of the material. Pre-approval opinions are binding in favor of the attorney in any subsequent disciplinary proceeding.\(^{16}\) The Advertising Review Committee will review the ad for violations and an application form, signed by the attorney responsible for the advertisement, a filing fee of $75 and copies of prospective advertisements must be filed with the committee.\(^{17}\) Two copies of printed advertisements or one copy of audio or video are required. The failure to file non-exempt advertisements is a violation of the rules.\(^{18}\) The types of communications requiring a filing and formal approval include: letters and envelopes sent to prospective clients and any advertisement in the form in which it appears or will be disseminated to include video, audiotape, or photo of the billboard.

In Medlock v. Commission for Lawyer Discipline,\(^{19}\) an attorney sent a letter addressed to a four year boy whose parents had been in a traffic accident attempting to solicit business for her firm. A grievance was filed for failure to submit a letter for review (section 7.07 (a) and for barratry under section 8.04(a) (9)).\(^{20}\) The attorneys defense was that someone else in her firm had sent the letter without her knowledge. The Appellate Court ruled that she had failed to submit the solicitation letter and upheld the trial court’s judgment against her.

If the advertisement carries only basic information about the firm and no real “advertising message” then no advance approval is required. For example, simple Yellow Page advertisements with the name of the firm, address and phone number do not require advance approval. Advertisements that list the following do not require review: attorneys name, office address, telephone numbers, office and telephone service hours, fax numbers, and designation of the profession such a attorney, lawyer, law office or firm, the fields of law in which the lawyer or firm advertises specialization and any required negative disclaimers, the date of admission of the lawyer or lawyer to the State Bar of Texas, to particular federal courts and to the bars of other jurisdictions, any technical or professional licenses granted by Texas, foreign language ability, fields of law in which one or more lawyers are certified or designated, identification of prepaid or group legal service plans in which the lawyer participates, the acceptance or nonacceptance of credit cards, any fee for the initial consultation and fee schedule, that the lawyer or firm is a sponsor of a charitable, civic, or


\(^{17}\) Ibid. Section 707.


\(^{20}\) Texas Disciplinary Rules of Professional Conduct.
community program or event, or is a sponsor of a public service announcement.\textsuperscript{21}

\textsuperscript{21}Texas Disciplinary Rules of Professional Conduct, Section 7.07.
Advertising of fees is also regulated, requiring a disclosure of the responsibility for court cost and other expenses if advertisement of a contingent fee arrangement is offered. The advertising of a fee percentage in contingent fee arrangements must disclose whether the fee calculated before or after expenses are deducted from the recovery. Fees advertised for a set service are to be honored for the expected life of the advertisement. If an attorney advertises in the yellow pages a fee of $150 will be charged for a simple will he shall honor that fee until the next edition of the yellow pages is published. In advertisements that are in publications that circulate on a more frequent basis the advertised fee shall be charged during the publications expected life of the circulation not to exceed one year. The attorney can limit the time he is obligated to honor a published fee by stating the period that such fee will be honored.\textsuperscript{22}

Texas attorneys are prohibited from revealing on the outside of an envelope the nature of the legal problem of the prospective client or non-client. For example, it would be a violation of the rules to address a letter promoting estate planning with an envelope that has a title that reads “Don’t leave your family without an estate... see inside for details.” Another example would be to obtain a list of traffic violators and mail an envelope stating “Congratulations, you will be hammered for your traffic violation unless you read the enclosed.”\textsuperscript{23} If the enclosed letter refers to particular incident or was prompted by a specific occurrence involving the recipient of the communication or a family member of a recipient, the letter must divulge how the attorney learned of the incident.\textsuperscript{24}

\textbf{IX. ETHICS AND SELF-INTEREST}

Most articles on the subject of attorney advertising suggest that the profession's Professional Rules define ethical boundaries. This review of the Texas Rules suggests that the ethical dimension is more complicated. On one side is the issue of how attorneys can maintain or earn the public's respect as a 'profession.' Defending the profession may sound like a laudable goal, but is in the public's interest or is it a shield to defend high fees?\textsuperscript{25} Some would argue that while the Texas Rules place some restrictions on attorney communication/marketing efforts, they do not really defend the profession because there is lots of room for fairly tasteless communication. These critics regard public solicitation of potential defendants by class action specialists as being particularly crass, unprofessional, and reinforcing of attorneys as parasites. Others regard the same communications as a functioning of the marketplace where marketing communications and advertising is a means

\textsuperscript{22}Texas Disciplinary Rules of Professional Conduct Sections (h),(i) 7.04

\textsuperscript{23}Ibid. 7.05, (6).

\textsuperscript{24}Ibid. 7.05, (7).

\textsuperscript{25}Barton, Benjamin Hoorn "Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation" 33 Ariz. St. L.J. 429, Summer 2001 discusses this question on some detail.
of providing the public information. Clearly, however, solicitation of those who have suffered injuries to phone a certain law firm is not done in public service but in order to line up potential clients. Critics of any general advertising (other than the Yellow Pages) argue that what is tasteless and self-serving is unprofessional and unethical. They prefer "professional services marketing" or "practice development strategies" such as public speaking, etc to enhance the profession whereas using paid media shared by food companies, detergents and other consumer products to denigrate the profession.

These authors suggest that the Texas Rules do not define rigid boundaries of ethical behavior in the context of attorney advertising or marketing practices. The Texas Rules carry the force of law but laws do not encompass the entire universe of ethical behavior. Rather, the real issue is what is a profession during the age when information and advice is being converted into a commodity? If a profession is merely the set of people who have been granted permission to practice law due to their education and licensing, then does that status as a member of a profession have any meaning outside the licensing process? To what extent may a profession exist in the harsh marketplace of commercial activity? If we believe in the sanctity of the marketplace, is the market the best place to determine what is ethically acceptable in terms of marketing/advertising strategies? Or, does the profession have a responsibility to conduct its marketing strategies to avoid abusing the public with deceitful or deceptive advertising strategies? Where does bad taste bump into bad ethics?

These issues suggest that the Texas Rules were designed with concurrent but different objectives: (1) protecting the public from 'flagrant' and intrusive communications where such communications might well be regarded as blatantly in poor taste (a good example comes from the movie The Verdict starring Paul Newman where the attorney attends funerals just to hand out his business card.). (2) limiting attorney behavior from practices that may denigrate the 'profession', (3) preventing outright fraudulent misrepresentation (consistent with standards imposed on other commercial entities). The authors suggest that the 'ethics' of attorney practice development and advertising strategies was not the driving incentive for the rules nor was the other objective of 'commercializing' the practice of law. Rather, Supreme Court opinions and conflicting views of what is and is not proper behavior for members of a profession, plus creative advertising/marketing strategies forced policy makers to design rules that would be enforceable. There is lots of evidence to suggest that ethics and professionalism were elements in the debate over rules, but to suggest that the Rules embody and define ethical behavior in advertising and marketing practices goes too far.

The tension therefore between the self-interest of the 'profession' and those who would commercialize the activities of lawyers to a commodity marketplace continues. Each new case involving violations of the Texas Rules reveals new technology, new creativeness and new attempts by attorneys to distinguish their firm and their services from their competition. Some activities will be deemed violations, some not. But the need to reconcile what value a 'profession' is to society versus what ethical standards the legal profession should be held to will continue to foster controversy both in and out of the courthouse.