

## NOTE

**A NEW FRONTIER OR MERELY A NEW  
MEDIUM? AN ANALYSIS OF THE  
ETHICS OF BLAWGS**

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*An Analysis of the Ethics of Blawgs*

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I. INTRODUCTION

The history of man’s ability to communicate is a history of technological innovation. The printing press, wire communications, the telephone; all revolutionized the way people are able to speak to one another. Now, in the throes of an “information revolution” that is reshaping how we acquire, analyze, and disseminate information, another technology is transforming global communication. The Internet has simultaneously shrunk the world to the size of a keyboard and expanded our horizons by making it far easier to find and distribute information. However, with this new luxury come substantial burdens which cannot

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be ignored. Today politicians, citizens, legal experts, and regulators face a growing list of thorny new issues prompted by the fantastically rapid rise of the Internet. As decision makers struggle to rein in some of the more problematic Internet-related issues, scholars and students must step back and question both the methods and rationales these decision makers employ.

One does not normally think of attorneys as being on the cutting edge of anything. Often pigeonholed as creatures curiously beholden to historical precedent, most view lawyers as grudging adapters to technology, rather than innovators. However, in the world of online web logs (or “blogs”), one of the Internet’s most recent innovations, lawyers are leading the way. Though some dispute the true motivations which underlie the adoption of this technology by many in the profession,<sup>1</sup> it is undeniable that lawyers are having a significant impact on the so-called “blogosphere.”<sup>2</sup> However, the enthusiastic adoption of this new technology by many lawyers gives rise to important questions which implicate the unique rules of ethics that guide lawyers. The purpose of this Note is to investigate those rules of ethics which interact with attorney blogs, placing a special emphasis on advertising rules. The central finding is that, under the Supreme Court’s current First Amendment jurisprudence, attorney blogs (or, more cleverly, “blawgs”) are not subject to regulation by the ethics codes of the ABA or the various state bars. Furthermore, if the Supreme Court were to, for some reason, construe blawgs as falling outside of First Amendment protection, evidence suggests that regulating this new medium would be neither desirable nor effective.

Part II outlines the historical framework which underlies regulation of attorney advertising, in an attempt to add some context to the debate over attorney blawgs. Part III compares current ethics rules and jurisprudence on the issue to what is known about blawgs thus far, concluding that blawgs neither fall under the purview of current ethics rules, nor are likely to be subjected to future restrictions given the Supreme Court’s First Amendment jurisprudence surrounding attorney advertising. Despite this conclusion, the Note conveys some important practical advice supporting the use of comprehensive disclaimers on attorney blawgs. Part IV advances a short public policy argument derived from an economics-based analysis of the blawgosphere. The Note advances the argument that attempts to regulate blawgs would not only stifle the medium, but could also make the medium more, rather than less, dangerous.

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1. See *infra* Part III.B (outlining various perspectives on how blawgs may be utilized as marketing tools).

2. See Blawg.com, <http://www.blawg.com/> (last visited Apr. 3, 2008), for a tracking of the number of lawyer blogs on the Internet. As of this writing, blawg.com tracks more than 2000 attorney blogs.

Part V uses the experience of blawgs to briefly explore the efficacy of restrictions on attorney advertising as a whole, concluding that the notion of the blawgosphere calls into question the true motives behind such restrictions.

## II. THE HISTORICAL FRAMEWORK<sup>3</sup>

In law school students are told that they are entering a venerated profession, as opposed to a “mere” occupation, and are admonished to conduct themselves ethically.<sup>4</sup> Yet, while lawyers publicly deride those who devalue their work, privately members of the bar seem content with the sniping and bickering that characterize many other professions.<sup>5</sup> It is this dynamic that, in part, makes the history of what is now known as Model Rules of Professional Conduct 7.1 through 7.3 so interesting. Ostensibly crafted nearly 100 years ago to raise the public’s general regard for lawyers,<sup>6</sup> the rules historically have more to do with the internal dynamics of the profession than protecting the rule of law and “officers of the court.”<sup>7</sup>

Legal advertising has not always been seen as a social faux paux. Lawrence Friedman notes, in his seminal work on the history of American law, the importance of legal advertising in the development of a legal industry in America’s frontier lands during the nineteenth century.

Friedman outlines:

Courtroom clients were a shifting if not shiftless lot. House counsel was unknown, though in time successful lawyers and affluent clients did enter into occasional retainer agreements. Most lawyers were constantly hunting for new business and were in constant need of advertisements for themselves. There was no prohibition against advertising in the literal sense, and lawyers

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3. Scholarship on the historical development of codes of ethics in general and legal ethics in particular is a rich area of inquiry which can span perspectives as wide and varied as economics, sociology, psychology, and historical narrative. This historical summary represents a brief overview of a very broad field.

4. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

5. See Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 ARK. L. REV. 703, 705–08 (1997).

6. HENRY S. DRINKER, *LEGAL ETHICS* 25 (1953) (“The consequent weakening of an effective professional public opinion clearly called for a more definite statement by the bar of the accepted rules of professional conduct.”); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41–42 (1976).

7. AUERBACH, *supra* note 6, at 41–42 (1976).

reached out for the public through notices (“cards”) in the newspapers.<sup>8</sup>

Indeed, advertising played an important role in the lives of lawyers for almost one hundred years. However, around the turn of the twentieth Century, the evolution of the American lawyer sparked concerns about the deprofessionalization of attorneys.<sup>9</sup> Prominent legal minds of the time worried that on one hand the creation of “white shoe” Wall Street law firms precipitated an image of lawyers as economically motivated barbarians willing to manipulate the law for their own financial gain.<sup>10</sup> On the other hand, legal scholars found unsettling the “ambulance chaser” image of some lawyers, as an entire legal industry had developed which served the great and growing population of the underclass in America.<sup>11</sup> Goaded by President Theodore Roosevelt’s landmark speech at the Harvard Law School in 1905, American Bar Association President Henry St. George Tucker led a group of ABA officials who, one year after Roosevelt’s speech, called for a formal attorney code of professional ethics.<sup>12</sup> The ABA committee, influenced by the overrepresentation of corporate lawyers in its ranks,<sup>13</sup> notably ignored half of Roosevelt’s charge. Rather than craft an even-handed code of ethics, the committee called for a code which blatantly favored big law firm lawyers, to the detriment of attorneys with smaller practices.<sup>14</sup> Thus began the wholesale reinvention of conventional wisdom with regard to lawyer advertising, as the bar turned dramatically from Friedman’s frontier lawyer mentality to one that rewarded power, prestige, and money.

The ABA consulted two primary sources to develop its new code of ethics for legal advertising.<sup>15</sup> First, it looked to George Sharswood’s *Essay on Professional Ethics*.<sup>16</sup> In his 1854 essay, Sharswood assumed an overtly moralistic, if not blatantly religious, tone in which he emphasized character, honor, and duty.<sup>17</sup> Sharswood concluded that “moral dignity” necessarily held that lawyers should not seek clients, but instead “let business seek the young attorney.”<sup>18</sup> According to one commentator, by the twentieth century this view of lawyers was simply outdated as it “presupposed the vanished homogenous community whose lawyers were

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8. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 230–31 (3d. ed. 2005).

9. AUERBACH, *supra* note 6, at 40.

10. *Id.*

11. *Id.*

12. *Id.* at 40–41.

13. LOUISE L. HILL, *LAWYER ADVERTISING* 43–44 (1993).

14. AUERBACH, *supra* note 6, at 41; HILL, *supra* note 13, at 44.

15. HILL, *supra* note 13, at 42.

16. AUERBACH, *supra* note 6, at 41.

17. *Id.*

18. *Id.*

known, visible, and accessible, and whose citizens recognized their own legal problems and knew where to turn for assistance.”<sup>19</sup> In reality, Sharswood’s view, and the rule adopted by the ABA as Canon 27 simply “served as a club against lawyers whose clients were excluded from that culture: especially the urban poor, new immigrants, and blue-collar workers.”<sup>20</sup> Second, the ABA looked to the Alabama Code of Ethics (1887), itself a product of Sharswood’s scholarship, to develop its canons.<sup>21</sup> Though the Alabama Code specifically prohibited the individual solicitation of clients, it did not go so far as to ban all forms of advertising.<sup>22</sup> Interestingly, the ABA as a whole failed to adhere to Alabama’s admirable exercise in restraint.<sup>23</sup>

In 1908 the ABA published its Canons of Professional Ethics, which included Canon 27 prohibiting all lawyer advertising.<sup>24</sup> As noted earlier, those lawyers charged with creating and administering the rule were overwhelmingly employed by “white shoe” law firms with settled practices.<sup>25</sup> The rule unsurprisingly benefited wealthy big-firm lawyers and punished attorneys with smaller practices.<sup>26</sup> This blanket prohibition on advertising existed in almost the exact same form until the ABA adopted its Model Code of Professional Responsibility in 1969.<sup>27</sup> However, the Model Code brought no major changes to the advertising prohibition of the Canons, and incorporated the same general sentiment into Disciplinary Rule 2-101.<sup>28</sup> Thus, the broad-based prohibition that began with Sharswood and the Canons of Professional Ethics remained in place for almost 70 years, until the Supreme Court issued its sweeping decision in *Bates v. State Bar of Arizona*.<sup>29</sup>

The first case in which the Supreme Court squarely addressed the issue of attorney advertising, *Bates* represented a dramatic shift in thought regarding the ethics of lawyer advertising. The facts of the case were relatively unremarkable. As was true with many state bars around the country, Arizona had promulgated a disciplinary rule, under the auspices of the Arizona State Supreme Court, which restricted the ability of attorneys to advertise their services.<sup>30</sup> The rule read, in part:

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19. *Id.* at 42.
  20. *Id.*
  21. HILL, *supra* note 13, at 42; DRINKER, *supra* note 6, at 23 n.7.
  22. HILL, *supra* note 13, at 42.
  23. *Id.* at 43.
  24. *Id.*
  25. *Id.*
  26. *Id.*
  27. *Id.* at 44.
  28. *Id.* at 45.
  29. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).
  30. *Id.* at 353.

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.<sup>31</sup>

The rule included several exceptions which allowed for political advertisements, legal publications, and the like.<sup>32</sup> Subsequently, John Bates and Van O'Steen published an advertisement in the Arizona Republic which broadcasted "legal services at very reasonable fees" and listed their rates for certain routine matters.<sup>33</sup> Drawing some guidance from its ruling in *Virginia Pharmacy Board v. Virginia Consumer Council*,<sup>34</sup> the Court found that the advertisement created by Bates and O'Steen amounted to commercial speech and that, in general, "such speech serves individual and societal interests in assuring informed and reliable decision-making."<sup>35</sup> Somewhat bizarrely, the Court methodically picked apart every pro-restriction argument advanced by the State Bar of Arizona,<sup>36</sup> while it simultaneously emphasized the narrow nature of its holding.<sup>37</sup> Ultimately, the Court found that a state may not prevent a lawyer from publishing a "truthful advertisement concerning the availability and terms of routine legal services."<sup>38</sup>

In *Bates* the Supreme Court purposefully left certain major questions unresolved. However, the Justices were forced to confront some of the issues they sought to avoid in *Bates* only one year later in the companion cases of *Ohralik v. Ohio State Bar Association*<sup>39</sup> and *In re Primus*.<sup>40</sup> In *Ohralik* the Court encountered what seasoned trial attorneys call a "bad facts" case. Albert Ohralik was a licensed attorney practicing in Montville and Cleveland, Ohio. After learning about a car accident involving one Carol McClintock, Mr. Ohralik pursued both Ms. McClintock's par-

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31. *Id.* at 355.

32. *Id.*

33. *Id.* at 354.

34. *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976) (holding that so-called "commercial speech" was protected by the First Amendment, albeit on a somewhat diminished level).

35. *Bates v. State Bar of Ariz.*, 433 U.S. 350, at 364 (1977).

36. *Id.* at 368-79.

37. *See id.* at 367-68 ("The heart of the dispute before us today is whether lawyers also may constitutionally advertise the *prices* at which *certain routine services* will be performed.") (emphasis added); *Id.* at 384 ("The constitutional issue in this case is only whether the state may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services.").

38. *Id.* at 384.

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

40. *In re Primus*, 436 U.S. 412 (1978).

ents and the still-hospitalized Ms. McClintock, offering her legal advice and doing some initial investigative work.<sup>41</sup> Upon receipt of Ms. McClintock's contract for legal services, Mr. Ohralik proceeded to solicit business from Wanda Lou Holbert, McClintock's passenger at the time of the accident.<sup>42</sup> Though initially somewhat receptive to the idea of a lawsuit, Wanda Lou eventually decided not to pursue the claim.<sup>43</sup> Upon conclusion of the underlying claims, both McClintock and Holbert filed complaints with the county bar association which prosecuted Ohralik for violation of the State's anti-solicitation rule.<sup>44</sup> In its analysis the court noted that, even post-*Bates*, space existed for states to regulate "commercial activity deemed harmful to the public whenever speech is a component of that activity."<sup>45</sup> The Court expressed concern that "a lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests,"<sup>46</sup> and held that the Ohio State Bar Association could regulate an attorney's in-person solicitation of clients without running afoul of the First Amendment.<sup>47</sup> Interestingly, though dismissive of its analytical usefulness, the Court in its holding tipped its hat to the historical underpinnings of the rule as being one of "professional etiquette" rather than a "strictly ethical rule."<sup>48</sup> Perhaps this was the Court's subtle reminder that, despite the sweeping holding in *Bates*, it had not totally lost touch with history.

In a companion case to *Ohralik*, captioned *In re Primus*, the Court qualified its seemingly expansive endorsement of state regulation of attorney solicitation. The case involved one Edna Smith Primus, a civil rights lawyer employed by the "Carolina Community Law Firm," but who also contracted with the Columbia, South Carolina branch of the American Civil Liberties Union.<sup>49</sup> Ms. Primus volunteered to work with the ACLU in representing mothers on public assistance in the state who were forcibly sterilized as a precondition for receipt of public benefits.<sup>50</sup> Ms. Primus conducted a general meeting in search of representative cli-

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41. *Ohralik*, 436 U.S. at 449–50.

42. *Id.* at 451.

43. *Id.* at 452.

44. *Id.* 453–54. The rule in question, OHIO CODE OF PROF'L RESPONSIBILITY DR 2-103(A) (1970), provided in part that: "[a] lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer."

45. *Ohralik*, 436 U.S. at 456.

46. *Id.* at 461.

47. *Id.* at 468.

48. *Id.* at 460.

49. *In re Primus*, 436 U.S. 412, 414 (1978).

50. *Id.* at 415–16.

ents and eventually sent a letter to Mary Eta Williams offering her free legal representation.<sup>51</sup> Ms. Williams opted not to retain the ACLU and, based partially on Primus's letter to Williams, the Grievances Board for the Supreme Court of South Carolina filed an action against Ms. Primus.<sup>52</sup> The Supreme Court held that Primus's actions were protected by the First Amendment and distinguished its holding in *Ohralik* in two principle manners: First, it noted that Primus's solicitation of Williams took the form of a letter, "not in-person solicitation for pecuniary gain."<sup>53</sup> Second, the Court emphasized the underlying political motivations of Primus and the ACLU which the Court saw as fundamentally different than solicitation for the purpose of monetary reward.<sup>54</sup> As such, the Supreme Court viewed the speech of Primus and the ACLU as falling "within the generous zone of First Amendment protection reserved for associational freedoms"<sup>55</sup> and held that the First Amendment required case-by-case analyses, rather than a broad prophylactic rule.<sup>56</sup>

The Supreme Court resumed its assault on advertising prohibitions for lawyers in the case of *In re R.M.J.*<sup>57</sup> The lawyer in the case, a member of the Missouri bar, sent announcement cards to select addresses and placed advertisements in the yellow pages and local newspapers publicizing the opening of his office and listing both the jurisdictions in which he practiced and his areas of specialization.<sup>58</sup> Several of these methods of advertising violated a Missouri disciplinary rule which specifically delineated the words attorneys were allowed to use in advertisements.<sup>59</sup> Relying heavily on the fact that none of the lawyer's advertisements appeared false or misleading, the Court found for the attorney in question and held that "States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive."<sup>60</sup> However, the Court carefully limited the scope of its holding noting that "[i]f experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be 'inherently' misleading, the Court must take such experience into account."<sup>61</sup>

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51. *Id.* at 416.  
52. *Id.* at 417.  
53. *Id.* at 422.  
54. *Id.*  
55. *Id.* at 431.  
56. *Id.* at 437.  
57. *In re R.M.J.*, 455 U.S. 191 (1982).  
58. *Id.* at 196-97.  
59. *Id.* at 194-95.  
60. *Id.* at 203.  
61. *Id.* at 201 n.11 (emphasis added).



After four high-profile cases involving attorney advertising and solicitation, the Supreme Court had done its part to change the dialogue on these issues and the ABA was forced to react. In 1983 the ABA adopted its first major overhaul of attorney ethics rules when it published the Model Rules of Professional Conduct.<sup>62</sup> In the wake of the Supreme Court's jurisprudence on attorney advertising and solicitation, "[r]ather than approaching lawyer advertising from a regulatory format, and designating that which could be contained in a publication, the Model Rules chose to approach the matter more liberally, prohibiting only false or misleading communications."<sup>63</sup> To this end, the ABA adopted Model Rules 7.1, 7.2, and 7.3, which allowed non-misleading advertisements but prohibited in-person solicitation of clients.<sup>64</sup> The Supreme Court had finally forced the ABA to take a dramatic step away from its big firm favoritism.

By the early 1980s the Supreme Court had compelled the ABA to change its stance on some of the most significant issues in the area of attorney advertising. As such, the Court turned to more narrow concerns. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*<sup>65</sup> the Court took up the case of a rather tactless Ohio attorney who ran two newspaper ads which contained illustrations, including one offering to represent women harmed by the Dalkon Shield Intrauterine Device.<sup>66</sup> The Court held that the attorney's use of illustrations in his advertisements was constitutionally protected speech.<sup>67</sup> In a piece of analysis somewhat neglected by most commentators, the Court also upheld Zauderer's right to dispense legal advice in his advertisements, declaring that "[t]he State is not entitled to interfere with that access [to our system of justice] by denying its citizens accurate information about their legal rights."<sup>68</sup>

The Court next turned its attention to the use of direct mail advertisements. In *Shapiro v. Kentucky Bar Ass'n* the Court rather easily dispensed of concerns of overreaching by attorneys when it struck down

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62. AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 ix (2006).

63. HILL, *supra* note 13, at 50.

64. ABA, *supra* note 62, at 894-98.

65. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

66. *Id.* at 630-31.

67. *Id.* at 642-43.

68. *Id.* at 643. The Court goes on to say that it need not rule on the "theoretical" question of whether a state may make a prophylactic rule banning all legal advice in advertisements. *Id.* at 644-45. However, the dicta quoted in this Note and the tenor of the Court's analysis suggests it is extremely skeptical of such a prophylactic rule.

Kentucky's broad-based ban on the use of direct mail.<sup>69</sup> Interestingly, the Supreme Court seemed to retreat from this holding seven years later in *Florida Bar v. Went For It, Inc.*<sup>70</sup> In *Went For It* the Court encountered a Florida rule which required personal injury Plaintiff's lawyers to wait 30 days before contacting an accident victim via direct mail solicitation.<sup>71</sup> Significantly, this rule did not apply to defense lawyers and was promulgated by the State Bar of Florida, one of the most restrictive state bars in the country in terms of lawyer advertising.<sup>72</sup> Despite the Court's ruling in *Shapero*, a new Court held that Florida's rule was constitutional. In her analysis Justice O'Connor resurrected an old line of argumentation, presenting harm to the reputation of the legal profession, rather than potential for overreaching or deception by attorneys as a justification for the disciplinary rule.<sup>73</sup>

Though the Court has not taken up a case involving attorney advertising in the last thirteen years, the ABA has not been so quiet. In 2002 the ABA made a small, but important change to its advertising rule, MRPC 7.2. Striking its laundry list of permitted mediums in which attorneys can advertise, the ABA simplified its rule merely to read: "[A] lawyer may advertise services through written, recorded *or electronic* communication, including public media."<sup>74</sup> This was the first time the ABA recognized electronic media in its ethics rules.<sup>75</sup> Importantly, the Committee also separated out "electronic communication" as deserving of specific mention. Query whether the ABA chose to highlight such communications so as to assure they were not overlooked or because the Committee's underlying assumption was that electronic communications (such as email) were not the same as other "written" or "recorded" forms of communication. Specific notes regarding electronic communications were also added to comments 3 and 5 to Rule 7.2.<sup>76</sup> Furthermore, the ABA added an amendment to Rule 7.3(a) prohibiting "real-time electronic contact" to solicit clients.<sup>77</sup> Though these changes represent the ABA's admirable awareness of the rapidly evolving nature of electronic attorney advertising, Part III below reveals that many questions remain.<sup>78</sup>

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69. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988).

70. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

71. *Id.* at 620–21

72. *See id.*

73. *Id.* at 624–28

74. ABA, *supra* note 62, at 720 (emphasis added).

75. *Id.* at 722–23.

76. *Id.* at 721–22.

77. *Id.* at 752.

78. *See also* Louise L. Hill, *Change is in the Air: Lawyer Advertising and the Internet*, 36 U. RICH. L. REV. 21, 23–24 (2002) ("Generally speaking, the proposed revisions to the Model Rules leave open a number of questions regarding what constitutes a misleading com-

The purpose of this extensive historical review has been to demonstrate both the proclivity of “establishment” attorneys to attempt to limit advertising that is more likely to help the “small-time” lawyer and the tendency of the Supreme Court to fight the ABA in its moves to constrain attorney advertising. From this perspective, regulation of attorney advertising is better viewed as a realist power struggle rather than a battle over the moral center of the profession. This is important because, as Part III below demonstrates, lawyer blawgs do not fit into neat boxes easily labeled as “ideas,” “free speech,” “commercial speech,” “advertising,” or “solicitation.” As such, an understanding of how the ABA and the Supreme Court have framed these issues in the past likely will inform how they will react to the radical new medium of lawyer blawgs in the future.

### III. BLAWGS—A RADICAL NEW MEDIUM

#### A. Defining Blawgs

The “Internet revolution” continues to transform itself on an almost daily basis. Enamored with the speed of information-gathering and communication that the Internet now affords its users, “netizens” are continually developing new ways to communicate with one another. Perhaps one of the greatest recent inventions of the Internet community is the web log or “blog.” A blog is “nothing more than a web site that is updated frequently and offers different mechanisms for reading the content other than a traditional web browser. The ‘blogger’ writes a short article or blurb using blog software to ‘post’ the entry to a web site.”<sup>79</sup> Stated more parochially, “a blog is a web site dedicated to the postings of someone who may or may not have something to say. The word blog is a contraction of ‘web log.’ A blawg is a blog dedicated to law-related topics.”<sup>80</sup> Denise Howell, a lawyer and herself the author of a very popular blawg,<sup>81</sup> coined the word “blawg.”<sup>82</sup> Attorneys blawg about a

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munication. In addition, Ethics 2000 has declined to address whether lawyers may employ devices that can be used to give a law firm’s Web site priority placement during an Internet search.”).

79. David Gulbransen, *Welcome to the Blawgosphere*, 20 CBA REC. 36, 37 (Apr. 2006).

80. Lawrence M. Friedman, *Knee Deep in the Blawg Bog*, 19 CBA REC. 46, 46 (May 2005).

81. Denise Howell, *Bag and Baggage*, <http://bgbg.blogspot.com/> (last visited Apr. 3, 2008).

82. Gulbransen, *supra* note 79, at 37.

wide array of topics from discreet issues such as patent law<sup>83</sup> and real estate law,<sup>84</sup> to broader issues such as the Supreme Court's docket<sup>85</sup> or law firm marketing.<sup>86</sup> Estimates as to the number of blawgs in existence today vary wildly, although by one measure they exceed two thousand.<sup>87</sup> Importantly, blawgs are a creature of the Internet—a rapidly evolving, highly malleable, tremendously reputation-contingent publishing tool.

### B. *Blawgs as Advertising*

The legal profession is known for many things, but being on the “cutting edge” is not one of them. Lawyers are often characterized as slow to adapt to new technology and methods. However, in the area of blogging, lawyers are leading the charge. Perhaps one explanation for this dynamic is the typical lawyer's constant need to network and market himself. Some go so far as to call blawgs “the next great thing in legal marketing.”<sup>88</sup> The purpose of this section is to explore the truth of this statement and also to outline the ways in which blawgs might function as forms of advertising.

Experts present many arguments as to why blawgs may serve as effective marketing tools. One author summarizes the arguments in favor of blogs thusly: First, blogs help lawyers hone their writing skills by publishing blog entries on a regular schedule. Second, blogs help attorneys communicate with clients without speaking to each individually. Third, blogs function as powerful online networks, marketing an attorney's services to other practitioners in the field.<sup>89</sup> To this one might add that a popular blawg brings to its author increased name recognition and exposure in the legal world. Indeed, because blawgs are largely unregulated and unreviewed, the currency of the blogosphere is reputa-

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83. Dennis Crouch, Patently-O Patent Law Blog, <http://www.patentlaw.typepad.com/> (last visited Apr. 3, 2008); Pierce Law Center, Pierce Law IP New Blog, <http://www.ipnewsblog.com/> (last visited Apr. 3, 2008).

84. Stephen E. Meltzer, Meltzer Law Offices, <http://meltzer.blogs.com/meltzerlaw/> (last visited Apr. 3, 2008); Michael H. Erdman, Real Estate, Real Competition & the Law, <http://rerclaw.blogspot.com/> (last visited Apr. 12, 2007); Robert H. Thomas, Inversecondemnation.com, <http://www.inversecondemnation.com/> (last visited Apr. 3, 2008).

85. Akin, Gump, Strauss, Hauer & Feld, LLP, SCOTUS Blog, <http://www.scotusblog.com/wp/> (last visited Apr. 3, 2008).

86. Tom Kane, Legal Marketing Blog, <http://www.legalmarketingblog.com/> (last visited Apr. 3, 2008); Larry Bodine, LawMarketing Blog, <http://blog.larrybodine.com/> (last visited Apr. 3, 2008).

87. See Blawg.com, *supra* note 2.

88. Friedman, *supra* note 80, at 46.

89. Gulbransen, *supra* note 79, at 40.

tion.<sup>90</sup> Therefore, a popular blawg, almost by definition, is beneficial to its author's professional reputation.<sup>91</sup>

Though the primary advertising tool utilized by blawgs is a reputational one, increasing the author's professional network, name recognition and esteem within the profession, blawgs may employ other advertising mechanisms as well. Most obviously, blawg writers may put actual ads on their pages. These ads can take at least two forms: the banner ad and the link (which can point to a law firm web site or other formal entity). Therefore, while the "service" being offered is the blawger's regular posts, the payoff for the author is, at least in part, remunerative. Some suggest that blawgs are also effective marketing tools because of the relative weight given to them by popular search engines such as Google.<sup>92</sup> Search engines employ complicated algorithms which tend to reward devices such as blogs due to their regularly updated content, specificity of subject area, and number of links to outside sources.<sup>93</sup> In this view, blawgs are a powerful tool for Internet attorney shoppers to find legal services.

Given all the marketing advantages which exist in blawgs, many scholars as well as a fair share of state bars have called on lawyers (especially of the small firm or solo practitioner variety) to begin writing blawgs.<sup>94</sup> They argue that blawgs are a cheap, easy, and effective way for lawyers to increase their exposure and gain new clients. As one pioneer of blawging opines,

Clients want to know what is in your head, what and how you think about the legal issues that affect them, and, perhaps most importantly, why you might be a useful counselor or persuasive advocate. Blogs and related tools are perhaps the most powerful vehicles toward this end in your marketing arsenal.<sup>95</sup>

One scholar even trumpets the revolutionary potential of blawgs, arguing that blawgs have the ability to break up traditional, oppressive

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90. See Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 212 (2006); Donald J. Kochan, *The Blogosphere and the New Pamphleteers*, 11 NEXUS 99, 103 (2006).

91. See Penelope Trunk, *Blogs 'Essential' to a Good Career*, BOSTON GLOBE, Apr. 16, 2006, at G1.

92. See Hill, *supra* note 78, at 40–41.

93. See *id.* at 39–40.

94. See, e.g., Steven A. Meyerowitz, *Legal Tech 2006: Joining the Blog Boom*, 28 PA. LAW. 26 (2006); Toby Brown, *Tune In and Blog On: New Marketing Technology for Lawyers*, 53 R.I. BAR J. 19 (2005); Sarah Kellogg, *Do You Blog?*, 17 S.C. LAWYER 30 (2005).

95. Denise M. Howell, *Blog You*, 11 NEXUS 69, 72–73 (2006).

hierarchies within the legal profession.<sup>96</sup> These hierarchies, incidentally, are the same hierarchies historically facilitated by rules of ethics, as outlined in Part II above. Despite all the hype regarding the ability of blawgs to garner clients for lawyers, evidence to date suggests that this is a false hope. As one writer reports,

Almost everyone agrees that if blogging is a potential gold mine when it comes to recruiting clients, then the vein of gold has yet to be tapped. Though many bloggers hold out hope that the Internet will generate new clients who feel comfortable attorney shopping on the Web, most of them have not seen it reflected in their lists of new clients.<sup>97</sup>

### C. *The Problem of Categorizing Blawgs*

Even if one concedes the unproven fact that blawgs function as effective marketing tools, it is too cynical to suggest that the sole function of blawgs is marketing. Instead, blawgs fill a space in American media somewhere between formal legal publications, mainstream journalism, and water cooler gossip. As one commentator notes:

A blog devoted to the law is not as informal as a juror's notes taken during an ongoing trial, nor is it as formal as a law journal article. It is not as detached as a courthouse journalist's stories should be (and sometimes are), and unlike a lawyer's brief, it will not always be as committed to one side in a legal controversy. Because it is in its early and formative years, the legal blogosphere is not exactly sure what it is; it is defined now by having no definition, each blog essentially self-identifies.<sup>98</sup>

Statements such as this demonstrate the difficulty in categorizing blawgs. While many commentators, and even a few courts, have struggled to characterize normal blogs for the purposes of the journalist's

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96. Franklin G. Snyder, *Late Night Thoughts on Blogging While Reading Duncan Kennedy's Legal Education and the Reproduction of Hierarchy in an Arkansas Motel Room*, 11 NEXUS 111, 123 (2006).

97. Kellogg, *supra* note 94, at 35.

98. Lyle Denniston, *Legal Blogs: The Search for Legitimacy*, 11 NEXUS 17, 17 (2006).

“privilege,”<sup>99</sup> defamation law,<sup>100</sup> and even political campaign finance laws,<sup>101</sup> legal blawgs present even more troubling questions. The nature of legal blawgs spans the gambit of analysis, opinion, speculation, and outright gossip. As such, defining the “space” within the marketplace of ideas in which blawgs function is a difficult, if not impossible, task. This section outlines the parameters of these “spaces” and the potential benefits blawgs bring to them. In an attempt at even-handedness, this section also outlines some ethical concerns potentially implicated by various characterizations of blawgs.

The first substantive function blawgs serve is to inform the general public about developments in the law in a manner that is approachable and interesting. Fueled by the “information revolution” and the development of the Internet, Americans are demanding more and more knowledge about the world around them. Surely the legal arena has not, and will not become immune to this condition, as clients demand greater information about what is going on with their cases or what legal rights they may have if they feel wronged. In this respect, lawyers are in a unique position to provide a valuable service to the public by comprehensively reporting on cutting edge or “niche” topics not typically covered by the mainstream media.<sup>102</sup> Juxtaposed against this desire for information are the very real barriers attorneys have self-interestedly erected in order to keep out certain types of practitioners and their

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99. See, e.g., *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 981 (D.C. Cir. 2005) (C.J. Sentelle *concurring*) (“if we extend [the reporter’s privilege] to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?”); Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 432–37 (2006); Howard Fineman, *Who is a “Journalist”?*, 4 FIRST AMEND. L. REV. 1 (2005); Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007); Nathan Fennessy, *Comments, Bringing Bloggers into the Journalistic Privilege Fold*, 55 CATH. U. L. REV. 1059 (2006); See also Joseph S. Alonzo, Note, *Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 751 (2006); Laura Durity, Note, *Shielding Journalist-“Bloggers”: The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 11 (2006); Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 VAND. J. ENT. & TECH. L. 609 (2006); Note, *Developments in the Law—The Law of Media: II. Protecting the New Media: Application of the Journalist’s Privilege to Bloggers*, 120 HARV. L. REV. 996 (2007).

100. See, e.g., Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U.L. REV. 1447 (2006).

101. See, e.g., *Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28 (2004) (discussing the efficacy of FEC rules excluding the “Internet” from campaign finance laws); Matthew Fagan, Legal Update, *The Federal Election Commission and Individual Internet Sites After Shays and Meehan v. FEC*, 12 B.U. J. SCI. & TECH. L. 159 (2006).

102. Howell, *supra* note 95, at 72.

clients.<sup>103</sup> Simply put, while clients and potential clients are demanding more information today than ever before, their demands are not being met by avenues of traditional legal scholarship and representation. Blawgs offer a way for attorneys to fill this information gap.<sup>104</sup> Not only are blawgs a cheap, effective way to speak to clients en masse, but they also help to inform those who feel wronged about their legal rights in an understandable fashion. In this vein, blawgs reintroduce a sense of democracy to a justice system that often appears hierarchical and closed.

Though some blawgs unquestionably provide valuable information to the general public, some may argue the relative worth of other speech is suspect. In contrast to journalists and scholars who are subject to some sort of standardized peer review, blawgers are free to opine and analyze as they see fit, a freedom which may result in “knee-jerk commentary.”<sup>105</sup> More pointedly, they are free to be wrong. While reputational checks on blawgers ensure that no blawger can be wrong often and still maintain a popular site,<sup>106</sup> the fact remains that when someone publishes information on the Internet, right or wrong, it remains in existence indefinitely. This circumstance is coupled with a second problem; the weight members of the general public attribute to the written or spoken word of an attorney. What sets blawgers apart from other bloggers and mainstream journalists is that when lawyers write, their words carry an added credibility.<sup>107</sup> This added credibility has the dangerous potential to cause consumers to approach attorney blawgs with a less critical eye than they might other Internet sources, attributing to the blawg more weight than it deserves. As such, a line drawing problem arises in which it is difficult to determine the difference between legitimate (protected) speech, deceptive speech, and advertising. In this light, some may argue, it is unclear exactly how much deference should be given to blawgs.

The second function of blawgs is to inform other practitioners of substantive developments in the law and to build relationships between legal professionals.<sup>108</sup> Perhaps a secondary effect of this dynamic is to

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103. See Fred S. McChesney, *Commercial Speech in the Professions, The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 91 (1985) (explaining that advertising bans prevent the entry of new firms and less established lawyers into the market, a phenomenon which sheds light on the reason why large firms have historically opposed rescinding advertising restrictions).

104. See Kochan, *supra* note 90, at 99 (“The blogosphere has become the new avenue for individuals to ‘spread the word’ or spread ideas or opinions. . . . And for the past several years, the blogosphere’s scope—in production and consumption—has been increasing exponentially.”).

105. Kochan, *supra* note 90, at 103.

106. Kochan, *supra* note 90, at 103; Ribstein, *supra* note 90, at 192.

107. Kellogg, *supra* note 94, at 31–32.

108. See Kochan, *supra* note 90, at 102–03; Howell, *supra* note 95, at 70.



generate scholarship through the free exchange of ideas online.<sup>109</sup> Indeed, some of the most well-known, effective blawgs to date are those run by law professors and judges, people who have an incentive to promote their work but lack a direct pecuniary interest.<sup>110</sup> Blawgs, when they operate at a high level, are an incredible source of information and analysis about legal topics. From explication of contract law to discussion of recent Supreme Court opinions, this is exactly the sort of marketplace of ideas our founders envisioned when they penned the First Amendment.

However, one could argue, even with blawgs that function mostly as clearinghouses for information shared between legal professionals, the potential for deception of the public remains. One can view *Ohralik*, and to a lesser extent even *Bates*, as demonstrating the Supreme Court's concern over the potential for attorney "overreach." Though the creation of blawgs post-date the Court's ruling in *Ohralik*, the exchange of ideas in a forum such as a blawg still implicates some of the same concerns. The world of legal scholarship and information has always been a fairly closed one, almost by design. As such, the Court could not have possibly imagined in the 1970s a forum in which members of the general public might "overhear" the legal musings of attorneys by viewing their exchanges of ideas. While it is true that members of the public must actively seek out blawgs in order to obtain the knowledge that springs from them, it is equally apparent that the potential for deception, or at least confusion, of the general public is a possible concern.

The third primary function of blawgs is to entertain. Blawgs draw their audience not only from their analysis of issues, subject area, or attentiveness, but also from their readability. While people may turn to the mainstream media for the "facts" of a recent legal event, or (optimistically) look to a treatise to find if their slip and fall is actionable, Blawgs garner an audience by supplying this information in a useful, entertaining manner.

Blawgs as a whole cannot be pigeonholed into any one of these roles. In fact, most blawgs serve many of the above mentioned functions simultaneously. Of course, for the purposes of ethics regulations and first amendment analysis, it would be much easier if one could attribute to any given blawg a particular role (i.e. "this blawg appears to be only about advertising," or "this blawg offers a strict analysis of the law of contracts in the state of Florida"). Unfortunately, blawging as a medium does not allow one to draw such neat distinctions. Furthermore, even if

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109. Alfred L. Brophy, Response, *Law [Review]'s Empire: The Assessment of Law Reviews and Trends in Legal Scholarship*, 39 CONN. L. REV. 101, 106-07 (2006); Cass R. Sunstein and Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 224 (2005).

110. Ribstein, *supra* note 90, at 196-97.

one were able to intelligently categorize blawgs, the preceding discussion demonstrates that conclusions as to the ethics of blawgs as a medium would still be far from clear. As such, scholars should be loath to create a *per se* category for blawgs in the blind hope that such a heuristic will help to create bright line rules for regulating the conduct of blawgs.

#### D. *The Concerns of Legal Ethics Experts*

Given the inability of courts, ethicists, and this author to definitively categorize the role of blawgs in the spectrum of advertising, journalism, gossip, and scholarship, perhaps a more effective analytical tool is to explore why ethicists might be concerned about blawgs in the first place. Generally speaking, legal ethics experts point to three potential concerns with respect to blawgs: their relationship to advertising rules, the potential for direct solicitation problems, and unauthorized practice of law issues. This portion of the Note discusses each of these concerns in turn.

The first issue is the one most comprehensively covered by this Note: a concern over blawgs' role as tools for advertising. From this perspective, ethicists argue that blawgs have the potential to be deceptive, inaccurate, or both.<sup>111</sup> As mentioned at length in Part III.B above, lawyers use blawgs as tools for advertising in at least three ways. First, lawyers use blawgs to build up their reputation in the community and within the profession.<sup>112</sup> Second, authors include in their blawgs links to law firms, legal services providers, or other law blawgs which effectively function as advertisements.<sup>113</sup> Third, writers place banner ads on their web sites which promote various legal services providers.<sup>114</sup> These ethical concerns will be analyzed in Part III.E below.

The second concern some ethicists point to is the potential for impermissible direct solicitation to take place via blawgs. In their recent amendments to Model Rules 7.2 and 7.3, the ABA recognized the potential ethical concerns of Internet-based communications.<sup>115</sup> In so doing, the ABA noted that, while email does not implicate concerns of attorney overreach, direct real-time chats online are more suspicious.<sup>116</sup> While the

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111. See Troiano, *supra* note 100, at 1474–75 (arguing that bloggers should be subject to traditional defamation analysis because bloggers “purport to have trustworthy information” but do not always live up to that standard); Meyerowitz, *supra* note 94, at 28 (discussing the potential for lapses in quality with regard to information posted on a blog, given the informal nature of the medium); see also *supra* Part III.C.

112. See Ribstein, *supra* note 90, at 212; Kochan, *supra* note 90, at 103.

113. Ribstein, *supra* note 90, at 196.

114. See *id.*

115. ABA, *supra* note 62, at 720.

116. See Hill, *supra* note 78, at 33.

ABA did not explicitly create regulations for blawgs, scholars have used the ABA's implicit logic to express concern about the common blawg practice of allowing users to "comment" on blawg entries.<sup>117</sup> The "comment" feature allows users to post (sometimes anonymously, sometimes not) their reactions to the blawger's various entries.<sup>118</sup> Generally, the web site's author posts his "story" to the "home" page of the site while commentators post their reactions to a second-order page linked to the blawg entry itself. In these comment "threads" users are free to interact with each other and the blawger, a situation which often stimulates interesting discussion.<sup>119</sup> Some may argue that this sort of dialogue is similar to that of a real-time conversation and ought to be regulated.<sup>120</sup> However, given the lack of real-time communication in blawg comment features, the better analogy is to the back and forth of normal, everyday "snail mail" for which the ABA has expressed little alarm. Having outlined the concern, a full analysis of the issues will, again, be delayed until the next portion of this Note.

The third, and final, major concern many express regarding blawgs is the potential for unauthorized practice of law. According to Model Rule 5.5, "[a] lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction."<sup>121</sup> In the context of blawgs, one can easily see the potential problem. The Internet is a "shotgun" approach to communication. It is impossible for a blawger to precisely target where any given person will read their entries. As such, a lawyer in Iowa may find himself unwittingly giving advice about contract terms to a reader in North Carolina, a state in which the Iowa lawyer is not licensed to practice law. A full discussion of this thorny issue also merits more careful explication below.

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117. Ribstein, *supra* note 90, at 204 ("Web-only distribution enables blogs to be interactive with their readers through the comment and trackback features. Each entry can therefore generate a surrounding body of correcting and extending commentary and references."); *see also* David Bruns, *Blogs: The Great Equalizer in Marketing Attorney Expertise*, 2005 SAN FRANCISCO ATT'Y 46, 47 (calling the interaction between bloggers and those that comment on a blog an "active dialogue.").

118. *See* Dave Winer, *Weblogs at Harvard Law—What Makes a Weblog a Weblog?* <http://blogs.law.harvard.edu/whatMakesAWeblogAWeblog> (last visited Apr. 3, 2008).

119. Bruns, *supra* note 117, at 47; *See also* Winer, *supra* note 118 (outlining the mechanics of blog comment features); Sunstein & Barnett, *supra* note 109, at 224 (demonstrating the type of scholarly dialogue that can occur via a blog).

120. *Cf.* Mitchel L. Winick et al., *Attorney Advertising on the Internet: From Arizona to Texas—Regulating Speech on the Cyber-Frontier*, 27 TEX. TECH. L. REV. 1487, 1572 (1996) (expressing concern that email exchanges may give rise to solicitation concerns and, therefore, might be open to regulation).

121. STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 314 (2000).

E. *Some Synthesis: The Intersection of Blawgs,  
Ethics Rules, and the First Amendment*

This Note suggests that blawgs serve more than a simple advertising function, and that blawging may implicate serious potential ethical concerns for attorneys. But if one cannot define the role of blawgs, then how can one say with any precision what sorts of protections blawgs have under the First Amendment or what sorts of burdens they must adhere to under ethics rules? From the perspective of the Model Code of Professional Conduct and current Supreme Court jurisprudence, should blawgs be subjected to some sort of regulation? Historically speaking, the answer to this question has been no, almost by default. As one prolific blawger notes, “[b]logs are way out ahead of where the ethics rules are.”<sup>122</sup> However, the current regulatory status of blawgs does not answer the normative question as to whether blawgs ought to be subject to regulation as a matter of legal ethics (the public policy of this decision is investigated in Part IV below). Scholars, blawgers, and even some state bar associations suggest the answer to the normative question is also a resounding no.<sup>123</sup>

Over the last roughly one hundred years, the American Bar Association and the United States Supreme Court has crafted policies which regulate the ability of attorneys to advertise based on two underlying principles: to increase the regard the general public has toward lawyers and limit the potential for overreach or deception in attorney advertising. The former principle took root in 1908, as exemplified by Canon 27, and held sway for roughly seventy years.<sup>124</sup> In 1977, the Supreme Court in *Bates* rejected the need for ethical codes which promote the general reputation of the profession and instead expressed a more limited concern about deception in attorney advertising.<sup>125</sup> The Court spent the next

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122. Kellogg, *supra* note 94, at 38.

123. See generally Barry L. Brickner, *Focus on Professional Responsibility: Scary Things (or How to Avoid Breaching Ethics on the Internet)*, 78 MICH B. J. 578, 579 (1999) (“Posted information is in the nature of general material, non-targeted, and is seen or used when a user gains access to the venue upon which the information is posted. Since the user initiates the contact with the posted information, MRPC 7.3 is not triggered.”); Bernadette Miragliotta, *First Amendment: The Special Treatment of Legal Advertising*, 1990 ANN. SURV. AM. L. 597, 627–32 (1992); Ribstein, *supra* note 90.

124. ABA, *supra* note 62, at 894–98.

125. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977) (“[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained.”); *Bates*, 433 U.S. at 369 (“[T]he assertion that advertising will diminish the attorney’s reputation in the community is open to question.”); *Bates*, 433 U.S. at 375 n.31 (“Unethical lawyers and dishonest laymen are likely to meet even though restrictions on advertising exist. The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity.”); *Bates*, 433 U.S. at 383 (finding that regulation to encourage truthfulness will not discourage protected speech).

18 years defining the boundaries between permissible advertising based speech and impermissibly deceptive speech. Interestingly, in 1995, with a largely new Court in place, Justice O'Connor resurrected the "reputation of the profession" justification in her defense of a Florida ethics rule which prohibited direct-to-consumer mailings within 30 days of an event during which a potential client was injured.<sup>126</sup> Though *Went For It* is merely one opinion by a Justice no longer even on the bench, it represents a significant shift in the analytical process of the Court.<sup>127</sup> If the Court continues to use professional reputation arguments in future cases, one could rightly expect a shift toward Court support for far more stringent ethics rules.<sup>128</sup> On the other hand, if *Went For It* is merely an analytical aberration, one could expect that advertising ethics rules will continue to play a rather limited role.<sup>129</sup>

Given the Court's recent vacillation on its underlying principles for analyzing regulations on professional advertising, one must wonder what the mood of the Court is today. However, analytically, it is difficult to envision a scenario in which the ABA, the various state bars, and the Court could support the comprehensive regulation of attorney blawgs in any principled manner under either major theory advanced by the Court over the history of its advertising jurisprudence. Even if one concedes that support for *some* level of regulation may exist in the Court's holding in *Went For It* (due to its shift toward the professional reputation concerns of the early 20th century), scant evidence exists to suggest that blawgs, generally speaking, damage the reputation of the profession. In fact, as previously noted, the currency of blawgs is reputation.<sup>130</sup> Indeed, the importance of reputation within one's physical community has become less important in the "real world" than in years past,<sup>131</sup> yet one of

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126. Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618, 625 (1995) ("We have *little trouble* crediting the Bar's interest as substantial. On various occasions we have accepted the proposition that 'States have a compelling interest in the practice of professions within their boundaries . . .'" (emphasis added). Interestingly, in supporting her assertion that the Court has "little trouble" upholding a State's interest in protecting the reputation of professions within their borders, Justice O'Connor cites *Ohralik* as well as two decisions which were handed down before *Bates*. To ignore the Court's shift toward a more narrow deception-based concern in *Bates* can only be seen as a move, on the part of Justice O'Connor, to repudiate the underlying rationale of *Bates* and its progeny. Simply put, Justice O'Connor seems to want every precedent cited in Part II to go away.

127. Winick, *supra* note 120, at 1527.

128. *Id.*

129. *Id.* (observing that "[i]n view of these shifts in the Court's makeup and perspective, it would be difficult to predict the outcome of any future attorney advertising cases heard before the Supreme Court.").

130. See Ribstein, *supra* note 90; Kochan, *supra* note 90.

131. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 n.30 (1977) ("It might be argued that advertising is undesirable because it allows the potential client to substitute advertising for reputational information in selecting an appropriate attorney. . . . Although the system may

the principle goals of a blawg is to incubate a positive reputation for its author in the legal industry as a whole.<sup>132</sup> Far from imposing on passive viewers an impression of “ambulance chasing” attorneys, blawgs are specifically sought out by consumers of legal services to learn more about a particular area of the law. People have to want to read a blawg and lawyers have to make informative and interesting posts if they want readers to notice them. From this perspective, it is difficult to envision how one might argue blawgs harm the reputation of the profession, short of the minority of blawgs which are poorly written.

Ironically, though application of the Court’s principles concerning attorney overreach in *Bates* has usually meant the death knell for advertising restrictions, one could argue that there is still some analytical space in which to regulate blawgs. As noted in Part II above, the Court held in *Bates* that attorney advertisements constitute commercial speech which must be allowed under the First Amendment, though the Court found such speech deserves less protection than other types of speech (such as politically motivated statements).<sup>133</sup> Indeed, the Court in *In re R.M.J.* went on to say that even if a type of speech is potentially misleading, it cannot be prohibited unless it is actually misleading.<sup>134</sup> Furthermore, the Court hinted at First Amendment protections for attorney advertisements which inform citizens of their legal rights.<sup>135</sup> While these cases indicate a wide degree of deference to attorney advertisements under the *Bates* “misleading” or “deceptive” line of analysis, the Court has intimated that it will restrain attorney advertising if it goes too far. In dicta in *Ohralik*, a case normally cited for its language on in-person solicitation by attorneys, the Court indicated a willingness to allow the regulation of “harmful commercial activity.”<sup>136</sup> Furthermore, the Court qualified its broad holding in *In re R.M.J.* stating, “[i]f experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be ‘inherently’ misleading, the Court must take such experience into account.”<sup>137</sup> As such, the Court has crafted a

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have worked when the typical lawyer practiced in a small, homogenous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy.”) (citations omitted).

132. See Ribstein, *supra* note 90, at 192 (suggesting that, to be successful, blawgers must build up credibility which, in turn, allows them to test their skills and marketability).

133. *Bates*, 433 U.S. at 379, 383–84.

134. *In re R.M.J.*, 455 U.S. 191, 203 (1982).

135. *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 643 (1985) (holding that the State is not entitled to prejudge the merits of its citizens’ claims by choking off access to information that might be useful to its citizens in deciding whether to press those claims in court).

136. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

137. *R.M.J.*, 455 U.S. at 200 n.11 (emphasis added).

doctrine with a heavy presumption against regulation of attorney advertising practices unless those practices are found to be egregiously misleading or harmful.

The resulting question is whether the potential for abuse in the blawgosphere is substantial enough to trump the First Amendment protections applied to attorney advertisements by the Supreme Court via *Bates* and its progeny. As noted in Parts III.B-D above, potential for abuse of the blawg medium certainly exists. However, blawgs deserve substantial First Amendment protection under the *Bates* line of cases for three reasons. First, it is untenable to argue that blawgs, even in their most abhorrent, self-promoting form, serve only an advertising function. Blawgs by nature contain valuable information which set them apart from normal advertisements, and even the most profit-oriented blawgs serve some non-remunerative, socially beneficial role which ought to be protected by the First Amendment under the *Bates* line of cases. The presumption against chilling this sort of speech is simply too high. Second, the “ethic” of the blawgosphere itself creates a check on deceptive, overreaching activity such that almost no blawg could reach the level of egregiousness sufficient to overcome the First Amendment’s presumption against regulation and still remain in existence for any substantial period of time. The blawgosphere is a world powered by reputation, and blawgers read each other’s material. There is no better critic for blawgs than others who publish in the same medium. Blawgers tend to be fiercely defensive of their medium and will attack a deceptive or consistently inaccurate blawg. Though blawgs do not have editors or peer reviewers, they do have informed, active audiences who are willing to make their opinions known. This free-market driven test on blawg content is a better check on blawger ethics than any rule the ABA or the various state bars could possibly draft. Third, blawgs are evolving too fast for regulators to keep up. Even if the Court were to permit the regulation of blawgs as an inherently deceptive form of advertising, it is unclear how the ABA or the states could rein them in without heavily quashing the independent spirit that is the hallmark of blawging today.

The analysis of the interaction between blawgs and anti-solicitation rules is considerably less complicated than with standard advertising. In *Ohralik* and *In re Primus*, cases argued and handed down on the same day, the court expressed a concern for the potential of attorneys to “overreach” through direct consumer solicitation. In particular, the Court worried, “[t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decision-making; there is no opportunity for intervention or

counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual.”<sup>138</sup> These concerns are not present with blawgs for two reasons. First, blawg readers seek out the information rather than have it forced upon them.<sup>139</sup> In this respect, those that engage in a dialogue via a blawg are in precisely the opposite disposition as those the Court worried about in *Ohralik*. Far from “uninformed” decision makers, these are people who rationally seek information via Internet blawgs.<sup>140</sup> As such, one might speculate that these same people turn to several blawgs and other sources of information before making a decision about their legal representation. This is precisely the sort of “intervention or counter-education” the Court envisioned legal consumers would not take when directly solicited.

Second, comment features in blawgs allow time for self-reflection. Unlike real time telephone or in-person communications, blawgs afford users the opportunity to comment or not to comment on a blawg post. Should a user decide to comment, the resulting dialogue is more akin to an exchange of letters as in *In re Primus* as opposed to impermissible real-time communication as in *Ohralik*. This is because blawg comment features do not generate instantaneous exchanges of dialogue. Instead, substantial delay is inherent in the system as users publish comments to the website and create a “string” of dialogue rather than a real-time discourse. As such, no real power dynamic or unequal bargaining position exists between the blawger and any person posting comments. As the consumer does not engage in a one-to-one conversation, he or she is free to converse with a blawger or not. Furthermore, many, if not most, blawgs allow users to post comments anonymously, creating a truly free exchange of ideas while nullifying any sense of compulsion on the part of the consumer. Given these dynamics, it is unlikely the Supreme Court would find any impermissible solicitation present in attorney blawgs.

The final major ethical issue implicated in blawging is the potential for unauthorized practice of law violations. Here, again, there is a problem of categorization. If the Court were to interpret blawgs as commercial speech, then unauthorized practice of law issues may be implicated given the universal reach of the Internet and state bar rules

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138. *Ohralik*, 436 U.S. at 457.

139. *See* Brickner, *supra* note 123, at 579 (“Posted information is in the nature of general material, non-targeted, and is seen or used when a user gains access to the venue upon which the information is posted. Since the user initiates the contact with the posted information, MRPC 7.3 is not triggered.”).

140. *See* Amy Busa and Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 508 (1999) (“The more actively involved clients are in the litigation process, and in the selection of an attorney, the more likely they are to achieve positive results.”).



governing the practice of law in each of the 50 states.<sup>141</sup> However, if the Court were to interpret blawgs merely as political speech or commentary, then they would enjoy the full protection of the First Amendment and would not be subject to unauthorized practice of law limitations.<sup>142</sup> The Court has not made its perspective on this issue known, and it is beyond the scope of this Note to speculate further in this regard. However, this legal uncertainty can be easily solved using a tool already adopted by a significant number of popular blawgs—disclaimers.

#### F. Disclaimers—A Potential “Solution” to a Non-Existent Problem

While this Note suggests blawgers are not required to follow any advertising-based rules of ethics, blawgers could avoid some ethical issues implicated in the practice of blawging by placing a link to a standard disclaimer on the main page of their blawgs. Indeed, many popular blawgs and law firm websites already follow this practice. As one commentator asserts, “almost every lawyer blog has a disclaimer.”<sup>143</sup> Furthermore, the placement of a disclaimer on a blawg is both quick and easy for an attorney.

The purpose of a disclaimer for an attorney blawg is twofold. First, a disclaimer quashes any potential ethical issues implicated by the blawg. As noted above, ethics in the blawgosphere is somewhat of an unknown universe. Though this Note argues that the ethics issues involved are not particularly great, an attorney cannot know with certainty what the ABA and the Supreme Court will decide to do about blawgs. Second, a disclaimer insulates an attorney from potential malpractice liability. As one commentator astutely points out, “[o]ne evolving issue is whether a lawyer who offers information on the Internet is ‘giving legal advice,’ thereby subjecting himself to malpractice claims, the attorney-client privilege, and confidentiality. The Internet provides fertile ground for unwittingly creating an attorney-client relationship.”<sup>144</sup> Though this author can find no instance of any malpractice lawsuits or ethics violations filed against blawgers as a result of their posts, some evidence suggests that consumers of legal services do give credibility to blawgs.<sup>145</sup> Neither

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141. Kellogg, *supra* note 94, at 38; Nia Marie Monroe, Current Developments 2004–2005, *The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising*, 18 GEO. J. LEGAL ETHICS 1005, 1016–19 (2005).

142. See generally Ohralik, 436 U.S. at 458.

143. Kellogg, *supra* note 94, at 38.

144. Jeffrey E. Kirkey, *Legal Ethics in Cyberspace: Keeping Lawyers and Their Computers Out of Trouble*, 18 T.M. COOLEY L. REV. 37, 47 (2001).

145. See generally *Gross v. U.S.*, No. 05-1818, 2006 U.S. Dist. LEXIS 68965 (D.D.C. 2006) (in which the court speculates that this *pro se* litigation was possibly inspired by a blog posting); Kellogg, *supra* note 94, at 31–32 (stating that consumers tend to give greater weight to the words of lawyers).

the courts nor the ABA have given any explicit guidance as to whether a disclaimer would be an effective way to resolve the potential ethical and malpractice issues which arise in the blawgosphere.<sup>146</sup> However, in *Bates* the Court averred that a disclaimer may be an effective way to alleviate ethics-based concerns about attorney advertising in general.<sup>147</sup> On the whole, it seems likely that the conscientious act of placing a disclaimer on a blawg would militate against any underlying ethics issues the Model Code attempts to address.<sup>148</sup> Furthermore, disclaimers have long been utilized on law firm web sites,<sup>149</sup> which lends credence to the argument that such disclaimers are both effective and familiar to the consumer.

Several general models for a blawg disclaimer exist which may help attorneys avoid malpractice and ethics-based issues. Though the specific language may differ, the disclaimers various law firm websites and attorney blawgs utilize all have certain elements in common. First, they indicate that the blawg is not intended to offer “legal advice” and that the information provided on the blawg may not necessarily be accurate.<sup>150</sup> Second, they indicate that the blawg does not in any way create an attorney-client relationship.<sup>151</sup> Third, they indicate that the author is only licensed to practice in a specific state or jurisdiction and that the blawg is not intended to attract or advise clients outside that jurisdiction.<sup>152</sup> Fourth, they indicate that any link provided to another website does not constitute a referral or endorsement.<sup>153</sup>

As noted earlier, there is no way of knowing whether a disclaimer will help shield a blawger from malpractice liability or ethics violations. However the use of such a device is highly encouraged not only by this author, but by other scholars and commentators as well.<sup>154</sup> Including a disclaimer on one’s blawg is cheap, easy, and smart. Until such a dis-

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146. Kirkey, *supra* note 144, at 48; Kellogg, *supra* note 97, at 38.

147. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977) (“We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.”).

148. See Hill, *supra* note 78, at 25–26 (“Additionally, the comments [to the Model Rules amended in 2001] indicate that using disclaimers may make it less likely that a statement about a lawyer or the lawyer’s services will be construed as misleading.”).

149. David Hricik, *The Speed of Normal: Conflicts, Competency, and Confidentiality in the Digital Age*, 10 COMP. L. REV. & TECH. J. 73, 76 (2005).

150. Meyerowitz, *supra* note 94, at 29.

151. Bruns, *supra* note 117, at 47.

152. See Kellogg, *supra* note 94, at 38; Kirkey, *supra* note 144, at 48–49.

153. Jeffrey R. Kruester, *Attorney Sites Can Avoid Violations of Ethics Rules*, NAT’L L.J., Aug. 12, 1996, at B11.

154. Hill, *supra* note 78, at 25–26; Meyerowitz, *supra* note 94, at 29; Kellogg, *supra* note 94, at 38.

claimer is tested in court, a blawger would be unwise to tread into the murky waters of the blawgosphere without one.

#### IV. PUBLIC POLICY ON A SHOESTRING

Even if the Supreme Court granted the states and the ABA the ability to regulate attorney blawgs, some basic public policy analysis suggests regulators should continue to leave blawgs to their own devices. The blogosphere itself, and the Internet more generally, are characterized by a certain freedom. One of the greatest attributes of the medium is its low entry and maintenance costs. Any lawyer may publish a blawg on any topic that strikes their fancy. Regulation of blawgs would militate against this ethos, possibly driving potential blawgers from the market or preventing others from entering. One commentator succinctly opines that, “[i]f [blogs] are placed, voluntarily or involuntarily, under norms of ‘professional’ conduct, ethics, law or credentialing, then they may cease to be what they have been, and perhaps what they ought to remain.”<sup>155</sup> Yet another scholar makes a direct appeal to the ethos of blawgers arguing,

The impulses that cause someone to value freedom of expression enough to publish to a small audience without direct compensation are also likely to make these writers resist external constraints. Bloggers’ diversity and unruliness could make them especially resistant to efforts to impose norms through law that they have not otherwise internalized.<sup>156</sup>

Indeed, if the reactions of political bloggers to the Federal Election Commission’s attempts to regulate them are any indication,<sup>157</sup> erstwhile regulators of legal blawgs will face severe opposition to any comprehensive attempt at regulation. To the extent that regulations on blawgs did shrink the “industry” and prevent entry of new blawgers, the free market based reputational checks on the quality of legal blawgs that assume such prominence in this Note will be hampered.<sup>158</sup> Further, consumers will lose out on the legitimate information, news, and entertainment that these blawgs offer.<sup>159</sup>

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155. Denniston, *supra* note 98, at 18.

156. Ribstein, *supra* note 90, at 213.

157. Jeffrey H. Birnbaum, *Loophole a Spigot for E-mail; Critics Fear Voters Will be Deluged as Fall Elections Near*, WASH. POST, June 11, 2006, at A06; John Reinan, *Bloggers Push Politics Aside in Fight Against FEC*, MINNEAPOLIS STAR TRIBUNE, Mar. 20, 2006, at 1A.

158. See Ribstein, *supra* note 90, at 212–13, 236–37.

159. See Ribstein, *supra* note 90, at 188 (“Moreover, any benefits of regulation must be balanced against the cost of over deterring speech by bloggers, who usually have weaker incentives to speak than career journalists. Regulation may sharply reduce amateur journalism’s

Even if a state or the ABA were to decide to regulate attorney blawgs, it is far from obvious exactly how the potential regulator might go about doing so. The Internet is, by nature, a rapidly evolving technology that does not lend itself to hard and fast rules.<sup>160</sup> Furthermore, the Internet is not a medium that easily submits to the will of individual jurisdictions. “Individual states cannot easily impose their will on this international medium . . . . [T]he legal system may be unable to devise a coherent set of rules that would have the effect of establishing Internet norms.”<sup>161</sup> A potential regulator would be forced to answer certain unanswerable questions in order to effectively enforce any potential regulation: where is a blawg located? What constitutes “legal advice”, an “advertisement”, or mere “speech”? Should lawyers be regulated more than law professors? What constitutes a “misleading” statement in the context of a blawg? The questions are virtually endless and the answers difficult, if not impossible, to provide. As scholars across the spectrum of Internet law are beginning to discover, this is not an easily regulated medium.

#### V. BLAWGS AS AN ARGUMENT AGAINST ALL ATTORNEY ADVERTISING RESTRICTIONS

Given the Supreme Court’s jurisprudence on attorney advertising over the last thirty years, the proverbial “elephant in the room” is the threshold consideration of whether *any* ethics-based restrictions on attorney advertising are justified. Indeed, the Court itself questioned the historical roots of advertising restrictions when, in rejecting the need to defend the “professionalism” of lawyers, the Court noted that “[i]t appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. . . . Since the belief that lawyers are somehow ‘above’ trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.”<sup>162</sup> Taking a cue from the Supreme Court, many scholars have questioned the need for advertising restrictions on attorneys.<sup>163</sup> The literature advances essentially two primary

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comparative advantage over professional journalism in allowing the expression of diverse views and the dissemination of specialized information.”).

160. Winick, *supra* note 127, at 1579 (“[T]he Internet, and particularly attorney use of the Internet, may be changing too rapidly to regulate.”).

161. Ribstein, *supra* note 90, at 213.

162. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371–72 (1977); *See also* DRINKER, *supra* note 6, at 40–41.

163. *See, e.g.*, Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 SETON HALL L. REV. 1405, 1430–39 (1999); Marc David Lawlor, Note, *Ivory Tower Paternalism and Lawyer Advertising: The Case of Florida Bar v. Went for It, Inc.*, 40 ST. LOUIS L.J. 895 (1996).

arguments against advertising restrictions: first, the Supreme Court should, as a public policy matter, extend First Amendment protections to all attorney advertising that is not “false or misleading” as further restrictions decrease consumer access to legitimate information and increase the cost of legal services, thereby harming both poorer consumers and newer or “small-time” lawyers.<sup>164</sup> Second, restrictions on attorney advertising discriminate against attorneys in a way that is impermissible in almost any other context.<sup>165</sup> From this perspective, it makes little logical or constitutional sense to allow someone the full breadth of First Amendment speech protections only until they pass a state bar exam.<sup>166</sup> While it is beyond the scope of this Note to give this topic full treatment, it is important to consider how this debate interacts with the blawg phenomenon.

The blawg medium has exposed restrictions on attorney advertising for what they really are; not an attempt to uphold the fundamental ethics of the profession, but rather a naked power grab by wealthy, entrenched interests. This power grab was, in the past, disguised by the fact that it was expensive for attorneys to advertise. Therefore, when attorneys had the budget to advertise, such moves tended to take the form of heavy-handed “ambulance chaser” advertisements, rather than informative “rights based” advertising that could be characterized as political

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164. See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1107–09 (1983) (arguing that lifting restrictions on attorney advertising will decrease the cost of certain standard legal services); Leading Cases, 109 HARV. L. REV. 111, 198–99 (1995) (arguing that advertising restrictions harm consumers and lawyers with smaller practices); Dorothy Virginia Kibler, Note, *Commercial Speech and Disciplinary Rules Preventing Attorney Advertising and Solicitation: Consumer Loses with the Zauderer Decision*, 65 N.C. L. REV. 170, 192 (1986) (“The simple solution to these problems, and by far the best solution, is to allow attorneys to use any type or method of advertisement that contains information which is not false, fraudulent, deceptive, or misleading.”); Daniel L. Zelenko, Note, *Do You Need a Lawyer? You May Have to Wait 30 Days: The Supreme Court Went Too Far in Florida Bar v. Went For It, Inc.*, 45 AM. U. L. REV. 1215, 1238–42 (1996) (arguing that decisions such as *Went For It* will reintroduce the negative effects of advertising bans that existed before *Bates* into the legal market).

165. See Rodney A. Smolla, *The Puffery of Lawyers*, 36 U. RICH. L. REV. 1 (2002) (outlining ways in which restrictions on attorney advertising differ from restrictions, or lack thereof, on other forms of advertising by non-attorneys and arguing that such differences make little sense).

166. See Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for the Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777, 780 (1993) (questioning the need for any type of restriction on commercial speech the author notes that “[t]he theoretical question should not be what qualifies commercial speech for First Amendment coverage, but what, if anything, *disqualifies* it. In my view, there are no convincing arguments for disqualifying most modern advertising from constitutional protection.”) (emphasis in original).

speech.<sup>167</sup> However, the blawg-world demonstrates that the combination of political and commercial speech in advertisements is both functionally possible and beneficial to consumers.<sup>168</sup> An open discussion of the rights of legal consumers around the country, such as the one facilitated by blawgs, strikes at the core of the Supreme Court's First Amendment jurisprudence.<sup>169</sup> As such, attempts to regulate blawgs evince deeper problems than trying to fit the square peg of blawgs into the round hole of advertising restrictions. The core motivation of erstwhile regulators is revealed to be a desire to close out "small-time" lawyers while promoting the profit motive of large law firms.<sup>170</sup>

## VI. CONCLUSION

This Note suggests that, under current ethics rules and Supreme Court jurisprudence, blawgs are likely not subject to regulation and, even if they were, it would not be in the best interest of states or the ABA to force the blawgosphere to submit to regulation. On one level, the unique nature of the Internet and blogs themselves makes it difficult to contort the Supreme Court's logic into a form that can be seen to sensibly allow for the regulation of blawgs. This Note demonstrates an awareness of the very real ethical issues which blawgs may create as the medium contin-

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167. Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 741 (1994) (describing some of the more egregious advertising practices of some attorneys).

168. See *supra* Part III; see also Christopher R. Lavoie, Note, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413, 436 (1997) (arguing that all truthful information is beneficial to the public and, as a result, commercial speech should not be regulated); Brian J. Waters, Comment, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626, 1645-46 (1997) (arguing that even purely commercial speech provides consumers with essential information).

169. See *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 643 (1985) ("the State is not entitled to prejudice the merits of its citizens' claims by choking off access to information that might be useful to its citizens in deciding whether to press those claims in court"); Susan Alice Moore, *Florida Bar v. Went For It, Inc.: Refining the Constitutional Standard For Evaluating State Restrictions on Legal Advertising*, 45 CATH. U. L. REV. 1351, 1397 (1996) (arguing that consumer access to the free flow of commercial information is a "fundamental principle" of the First Amendment); *But see* Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 702 (1997) (arguing that the question of whether or not to subject attorney advertising to First Amendment analysis "should not be distorted by the fact that attorney advertising involves speech, or communication, or the conveying of information. These characterizations apply equally well to a vast array of human activity to which the First Amendment has (properly) never been thought to apply.").

170. See *Leading Cases*, *supra* note 164, at 199 ("Restrictions on advertising thus enable large, established law firms to maintain disproportionate power in the legal community.").

ues to grow.<sup>171</sup> However, this Note ultimately rejects as unsound and unconstitutional the suggestion by some commentators that ethics rules for blawgers are only a matter of time.<sup>172</sup> On another level, it is unclear why states might choose to develop such rules in the first place. Examples abound of bad law created on the cutting edges of technology.<sup>173</sup> For states to create regulations which limit the development of one of the Internet's most rapidly evolving innovations seems a dramatic overreaction to a problem of limited scope.

Though this Note espouses an anti-regulatory thesis, it supports the use of disclaimers, more to protect blawgers themselves than to protect the public at large. Disclaims should not be considered as a regulatory framework but rather a means for blawgers to *avoid* the impact of some regulations. Indeed, disclaimers may be an effective way for blawgers to avoid potential lawsuits and ethics complaints. This defensive posture recognizes the stark reality of American jurisprudence: despite the merits of the claim, people are going to sue. Disclaimers are a rather innocuous solution, implicating none of the chilling effects outlined in this Note and promoting the medium by insulating authors from liability.

It is difficult to predict where and when, if at all, the blawgosphere and traditional attorney rules of ethics will clash. Is the blawgosphere truly a "radical" new medium that confounds traditional rules, or is it simply a new iteration of communications technology? The answer remains unclear. However, this uncertainty is not cause for alarm. To the contrary, regulators and courts will best serve the public by allowing this innovative new medium to evolve independent of outside intervention so that the blawgosphere may realize its full potential.

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171. See *supra* Part III.C-D.

172. Ribstein, *supra* note 90, at 215 ("Given blogs' diversity, multiple codes likely will develop for particular categories, such as for academics and lawyers. Some specific rules might develop to suit blogs generally."). Calls for a code of ethics have in fact subsequently emerged from within the blogosphere. Brad Stone, *A Call for Manners in the World of Nasty Blogs*, N.Y. TIMES, Apr. 9, 2007, at A1.

173. See Winick, *supra* note 120, at 1495, ("Whenever new technology becomes prevalent, the law enters a period of struggle to find adequate means for resolving disputes involving that technology, and for protecting the rights of people effected by it. We are now in such a period." (quoting Andrew Grosso, *Implications of the Information Super-highway for Commerce Security, and Law Enforcement*, 41 FED. B. NEWS & J. 481, 482 (1994)).