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LAWYER REFERRAL SERVICES: A REGULATORY WASTELAND

by
Elwyn C. Lee*

THE most basic relationship in law is the relationship between the attorney and client. The dynamics of this relationship are always of great theoretical concern.¹ Similarly, continual interest exists concerning the practical aspects of bringing the relationship into existence.² This interest has intensified recently, particularly because of the increasing competition for financially able clients³ caused in part by the

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1. See D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* (1974); Blaustein, *What Do Laymen Think of Lawyers? Polls Show the Need for Better Public Relations*, 38 A.B.A. J. 39 (1952); Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981); Clark & Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272 (1938); Drinker, *Laymen on the Competency and Integrity of Lawyers*, 22 TENN. L. REV. 371 (1952); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

2. See, e.g., G. ROSSMAN & R. STRINGHAM, *INCREASING A LAW PRACTICE* (1965); C. ROWE, *HOW AND WHERE LAWYERS GET PRACTICE* (1955); N. STEVENSON, *HOW TO BUILD A MORE LUCRATIVE LAW PRACTICE* (1967); J. TRACY, *THE SUCCESSFUL PRACTICE OF LAW* (1947); *Bar Attitudinal Study: Use of Lawyers at All Time High but Serious Knowledge Gap Exists*, 34 TEX. B.J. 105 (1971).

3. Because of "increased competition, sophisticated firms are coming to the realization that they must market their services . . ." Reed, *Future of the Practice: Survival of the Fittest*, Nat'l L.J., Apr. 25, 1983, at 16, col. 3. The use of the word marketing "in an article prepared for lawyers reflects the astounding change over the last five years." *Id.* at 17, col. 1. Evidence that aggressive marketing has become even more acceptable in the past four years can be found in the fact that some 900 firms have either been represented at or purchased written and audio materials from Georgetown's continuing legal education seminar on marketing and selling legal services. Wilkin, *Firms Turn to Selling Themselves*, Nat'l L.J., Apr. 25, 1983, at 1, col. 4, at 30, col. 1 (includes marketing history of several medium to large firms); see also *Attorneys Spend \$6.15M for TV Advertisements*, Nat'l L.J., Apr. 26, 1982, at 2, col. 3 ("The nation's lawyers spent a total of \$6.15 million on television advertising in 1981, more than six times the total for 1978, the first full year in which advertising by lawyers was permitted."). In 1980 the American Bar Association published a 162-page manual for the marketing of services by lawyers: L. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION* (1980).

The need for more clients is spawned by a myriad of factors including profit squeeze resulting from the increase in office overhead due to automation, inflation, and the competitive restraints on what a lawyer can charge for his or her services, not to mention the persistent economic sluggishness in the United States and corresponding decline in specific categories of legal work. Reed, *supra*, at 16.

almost exponential increase in the number of lawyers⁴ and by attempted encroachments by nonlawyers who perform legal tasks.⁵ Much of the seemingly endless public debate centers on whether and in what forms lawyers may advertise.⁶

Typical lawyer advertising provides information about the attorney or the firm, with details as to the availability and terms of routine legal services provided in order to entice the potential client to contact that specific firm or attorney. The lawyer referral service is a related but much less visible mechanism for establishing contact between the potential client and a qualified attorney or firm. Lawyer referral services generally focus, however, on the need of the consumer and potential client for access to competent legal services, rather than on any specific attorney's or firm's need for

4. Since 1970 there has been a 50% increase in the number of lawyers in the United States with 535,000 attorneys reported for 1980, roughly one lawyer for every 410 persons and approximately twice the number of lawyers per capita as in 1960. The distribution of attorneys and the concomitant competition, however, is uneven; over 50% of the attorneys are concentrated in California, Florida, Illinois, New York, Ohio, Pennsylvania, Texas, and Washington, D.C. *Seminars for ABF Fellows Include Preview of Data from 1981 Lawyer Statistical Report*, AM. B. FOUND. RESEARCH J., Summer 1981, at 7 [hereinafter cited as *1981 Lawyer Statistical Report Preview*]; Coblenz, *A Glut of Lawyers*, NEWSWEEK, June 27, 1983, at 17 (too many young people going to law school rather than becoming engineers, artists, and other producers); cf. Bok, *Law and Its Discontents*, BAR LEADER, Mar.-Apr. 1983, at 21-22 ("Japan boasts a total of fewer than 15,000 lawyers, while American universities graduate 35,000 every year.")

5. See generally Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 35-36 (1981) (prevalence of unauthorized practice of law). A 1962 constitutional amendment in Arizona gave real estate brokers and salesmen the right to draft documents connected with real estate transactions. ARIZ. CONST. art. XXVI, § 1; see also *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977) (state bar ruling that only lawyers may make real estate title searches violated Sherman Act), *vacated*, 571 F.2d 205, 208 (10th Cir.) (federal court must withhold decision until state supreme court rules on disputed question in pending state action), *cert. denied*, 436 U.S. 941 (1978). *But see Chicago Bar Ass'n v. Quinland & Tyson*, 34 Ill. 2d 116, 214 N.E.2d 771, 774 (1966) (suit to enjoin real estate brokerage firm from completing certain contracts; court held drafting or completing blanks of deeds and other legal instruments constituted unauthorized practice of law). Consumers and environmentalists have brought challenges to unauthorized practice rules in at least three states. *Will Consumers Be Next to Challenge UPL Rules?*, 65 A.B.A. J. 685, 685-86 (1979). The practice of persons doing their own divorces is reportedly spreading across the country. See, e.g., *Doing It Yourself*, 69 A.B.A. J. 433, 443 (1983) (roughly half of all divorces in Maricopa County, Arizona, which includes Phoenix, are filed with self-help packets); *Up Against the Bar in Florida*, NEWSWEEK, Aug. 22, 1983, at 69 (detailing the saga of secretary Rosemary Furman who has been filling out divorce petitions since 1972); see also Sylvester, *The People vs. Lawyers*, Nat'l L.J., Jan. 9, 1984, at 1, col. 7 (describing "hatred" of attorneys and growing public acceptance of self-help legal publications).

6. See Hobbs, *Lawyer Advertising: A Good Beginning but Not Enough*, 62 A.B.A. J. 735, 735-36 (1976). The ABA's ban on broad public advertising has a long tradition. In 1908 the first ABA ethical canons banned advertising to eliminate billboards and street solicitation. The printing of business cards in newspapers, however, was tolerated until 1937. The roots of the prohibition lay in fears of loss of professional dignity, service, and enforcement problems. *Id.*; see also Sprecher, *Ethical Advertising and Solicitation: Law Lists*, 53 A.B.A. J. 121 (1967) (guidelines for determining what is a reputable law list in which attorney may publish his professional card); *Code Amendments Broaden Information Lawyers May Provide in Law Lists, Directories, and Yellow Pages*, 62 A.B.A. J. 309 (1976) (amendments adopted by ABA House of Delegates in Feb. 1976); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958) (analysis of some evils traditionally believed to be caused by lawyer solicitation).

more clients. Thus, most services are generally sponsored or operated by bar associations and refer clients only to lawyers who meet certain qualifications and standards. The American Bar Association has for many years considered bar sponsorship essential to lawyer referral services,⁷ and most state codes of professional conduct currently require it.⁸ Most state codes contain rules prohibiting attorneys from participating in private lawyer referral services and some even have rules that inhibit competition between local bar sponsored lawyer referral services.⁹ The essential requirement of bar sponsorship and the ethical rules complementing those requirements, however, are presently being challenged within the bar¹⁰ and by a veritable explosion of various forms of private referral services.¹¹

While questions concerning the deceptiveness and/or legality of a given nonbar sponsored legal referral service may be subject to debate and must be resolved on a case-by-case basis, certainly the mere participation of attorneys in such a service seems to violate the spirit of the bar sponsorship requirement. With increasing competition for paying clients, even attorneys themselves are operating nonbar sponsored services in ways that may defeat the central purpose and benefit of lawyer referral services, which is putting clients who are able to pay in touch with attorneys who are qualified to handle those potential clients' specific legal problems. Additionally, the traditional fee arrangements common to lawyer referral services are now under fire. The routine lawyer referral service practice of enforcing a low fixed ceiling of ten to twenty dollars on the initial consultation fee paid by the referred client to the attorney, though of obvious benefit to the public, is questioned as anticompetitive. Similarly, questions arise about the propriety of fees charged to the participating attorneys by the lawyer referral services to defray administrative expenses. These combined circumstances create a crisis atmosphere in which fundamental questions arise about the future feasibility of lawyer referral services.¹²

Advocates of bar sponsored lawyer referral services will find no easy cure for the alleged plague of private lawyer referral services in state bar

7. STANDING COMM. ON LAWYER REFERRAL SERVICE OF THE A.B.A., HANDBOOK ON THE LAWYER REFERRAL SERVICE 7 (5th ed. 1965) [hereinafter cited as HANDBOOK].

8. See *infra* notes 90, 167, and accompanying text.

9. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(C) (1980) (discussed *infra* note 154 and accompanying text).

10. See Podgers, *New ABA rules may end private LRS ban*, BAR LEADER, Jan.-Feb. 1980, at 3; *infra* note 162 and accompanying text.

11. Telephone interview with Constance E. Berg, Staff Liaison to the ABA Standing Committee on Lawyer Referral and Information Service (June 27, 1983) [hereinafter cited as Berg Interview]. A private lawyer referral service is one that is not sponsored by a bona fide bar association; that is, an association that has a variety of professional programs and purposes other than lawyer referral. A description of a nationwide private service is contained in Vilkin, *Lawyer Referral Service Plans Nationwide Network*, Nat'l L.J., Jan. 17, 1983, at 2, col. 1. The author notes: "Private referral services are not new. There are some in various parts of the country that are operated as franchises or are limited to specific specialized areas, like civil rights or women's rights. These are also normally limited to localities or regions." *Id.*

12. See Podgers, *Is Lawyer Advertising Killing LRS?*, BAR LEADER, Nov.-Dec. 1979, at 22, 23.

grievance committees because the committees either tackle the problems indirectly, challenging one attorney at a time, or are reluctant to tackle the problem at all so as not to be accused of anticompetitive behavior.¹³ For several years the Federal Trade Commission has questioned whether certain organized bar practices dilute competition in violation of the antitrust laws.¹⁴ Such scrutiny has contributed to the reticence of bar officials, who are reluctant to move against lawyer referral services that are not bar sponsored. These growing problems expose the heretofore unnoticed regulatory wasteland and the conflicting policies and guidelines that surround lawyer referral services.

This Article examines the plethora of problems confronting lawyer referral services. Commencing with a brief history of the genesis of the lawyer referral service movement, it probes the policy rationales for such services. The Article explores the requirement of bar sponsorship to determine if it is justified in light of current realities and today's law. Similarly, ways in which alleged illegal or unethical private lawyer referral services can be eradicated are assessed for their feasibility and impact on the goals of lawyer referral services. The Article also considers potential antitrust problems such as fee arrangements, which have received little if any attention in the context of lawyer referral services. Assuming that violations or unethical behavior do occur, the Article also assesses suggested mechanisms for cure to determine whether they do in fact solve the problem while still furthering the goals of lawyer referral services. Finally, this Article deals with the question of whether efforts to stifle communication by these private referral services are permissible under the first amendment right to freedom of speech, and if so, under what conditions. In discussing these problems particular emphasis is placed upon the situation in Texas.

I. THE GENESIS AND OPERATION OF BAR SPONSORED LAWYER REFERRAL SERVICES

State and local bar associations in this country have operated lawyer referral services for the past forty-six years.¹⁵ The first decade was one of limited growth for the concept. The Los Angeles County Bar established the first lawyer referral service in 1937; during the next ten years Chicago, St. Louis, and New York followed suit.¹⁶ In 1946 the ABA moved from a position of implicit approval of the concept to strong encouragement of the

13. See Podgers, *supra* note 10, at 3. In the opinion of a former chairman of the ABA Standing Committee on Lawyer Referral Service, "enforcement of the prohibitions [against private referral services] would raise restraint of trade issues resulting in constitutional questions for integrated bars and antitrust questions for non-integrated bars." *Id.*

14. See Winslow, *Regulating the Profession: The FTC Approach*, BAR LEADER, July-Aug. 1983, at 23-24.

15. Gallantz, *Lawyer Referral—A Brief History*, 45 J. AM. JUDICATURE SOC'Y 306, 306 (1972).

16. *Id.* at 306-07; see also *ABA Annual Report, Proceedings of the 69th Annual Meeting*, 71 A.B.A. REP. 77, 110 (1946) (Committee on Low-Cost Legal Services Bureaus report on latest developments) [hereinafter cited as *ABA 69th Annual Meeting*].

formation of bar sponsored lawyer referral services. By 1953 one hundred services were functioning in the United States.¹⁷ This number had nearly doubled by 1961.¹⁸

The ABA created a Special Committee on Legal Clinics in the same year that the Los Angeles County Bar Referral Service began operating.¹⁹ Although the committee was initially oriented toward the provision of legal services at low cost, it went through several transitions involving changes in policy as well as name, and in 1951 the present Standing Committee on Lawyer Referral Services succeeded that committee.²⁰ The 1942 report of the committee recommended endorsement by the ABA of local referral services, and specified that such services should be under the auspices of local bar associations.²¹

The legitimacy of bar sponsored lawyer referral services was assumed from the beginning. ABA Opinion 227, issued in 1941, presented the question of whether lawyer referral services may advertise their services.²² Answering in the affirmative, the ethics committee outlined a lawyer referral service similar to those of today, including a requirement of a certain maximum charge for the initial client interview.²³ The ethics committee further stated that operational and advertising costs could properly be defrayed by charging an annual registration fee.²⁴ Fifteen years later, in 1956, the ethics committee again directly addressed the question of whether a bar association may require members of the panel to assist in the financing of the service and approved this practice.²⁵

Although the ABA was aware of and condoned the operation of bar association lawyer referral services from their inception, not until 1946 did the ABA begin a formal policy of encouraging and promoting lawyer referral services. At the ABA convention in Atlantic City, New Jersey, in October of 1946, the House of Delegates of the ABA approved the estab-

17. Gallantz, *supra* note 15, at 308.

18. Cottingham, *A Survey of Legal Aid, Lawyer Referral and Public Defender Facilities in Texas*, 24 TEX. B.J. 389, 458 (1961); Madden & Christensen, *Lawyer Referral Service: A Sensible Approach to a Difficult Problem*, 49 A.B.A. J. 965, 966 (1963). Today there are over 300 services. 7 MARTINDALE-HUBBELL LAW DIRECTORY 1L-13L (112th ed. 1980) lists 299 services in the United States and is the latest edition in which lawyer referral services are listed.

19. Gallantz, *supra* note 15, at 306.

20. *Id.* at 307.

21. *Report of the Special Committee on Low-Cost Legal Service Bureaus*, 67 A.B.A. REP. 290, 292-94 (1942).

22. ABA Comm. on Professional Ethics and Grievances, Formal Op. 227 (1941), reprinted in ABA OPINIONS 520 (1967) [hereinafter cited as ABA Formal Op. 227]:

[The canons of ethics do] not prohibit the employment of advertising facilities by an organized bar association to acquaint the lay public with the desirability of securing legal services promptly when a legal problem arises and to apprise the public of the maintenance of a Lawyers' Reference Service [embracing a plan of low-cost legal service], the plan under which it operates, and the availability of the service.

23. *Id.* at 520-21.

24. *Id.* at 524.

25. ABA Comm. on Professional Ethics and Grievances Formal Op. 291 (1956), reprinted in ABA OPINIONS 644 (1967) [hereinafter cited as ABA Formal Op. 291].

lishment of lawyer referral plans by state and local bar associations.²⁶ The realization that great numbers of Americans were not taking their legal problems to lawyers because their incomes were too high to qualify for legal aid and because they feared they could not afford expensive attorneys²⁷ had spread since the 1942 report by the Special Committee on Legal Clinics. Interest in facilitating practical training for young lawyers also existed,²⁸ but World War II gave the greatest impetus to the spurt in the growth of lawyer referral services.

A. *The Fear of Socialism*

Two factors resulted from the war experience and compelled the ABA to take a firm affirmative stance concerning lawyer referral services. The Army and Navy had found their legal assistance plans to be great morale builders for the troops.²⁹ Resolution of legal problems helped the soldiers and sailors to concentrate on the job at hand.³⁰ At the end of the war the Army and Navy asked the ABA to create a national referral system for the benefit of members of the armed forces.³¹ So pressing was the problem of access to suitable attorneys by returning troops and other persons of moderate means that the ABA realized that if the organized bar did not quickly take responsibility for solving the problem, another well-organized entity would, namely, the United States Government.³² The fear engendered by the war was that socialism would sweep the legal profession. One writer of the day, considering the problems of entrusting legal services offices to government bureaus, feared the loss of independence of the profession.³³ This commentator contended that the lack of an independent bar would lead to the disappearance of habeas corpus, which in turn "leads to the totalitarian state, which necessarily denies that a human being has an immortal soul."³⁴

26. *ABA 69th Annual Meeting*, *supra* note 19, at 110.

27. Niles, *Report of the Special Committee on Legal Service Policies*, 71 A.B.A. REP. 240, 242 (1946); see Comment, *The Lawyer Referral Service—A Blueprint for Texas*, 38 TEX. L. REV. 614, 618 (1960).

28. Smith, *Legal Service Offices for Persons of Moderate Means*, 31 J. AM. JUDICATURE SOC'Y 37, 44-45 (1947).

29. *Id.* at 38.

30. *Id.*

31. *Id.* at 38-39.

32. *Here May Be "Operation Cross-Roads,"* 33 A.B.A. J. 42, 43 (1947) [hereinafter cited as *Operation Cross-Roads*]. *Legal Service Policies*, 32 A.B.A. J. 866 (1946), mentioned the report of the Special Committee on Legal Service Policies that was presented at the 1946 Atlantic City gathering of American lawyers. That report dealt inter alia with the organization of legal service for persons of moderate means and presented the profession with an early choice as to whether it would "maintain its historic prerogatives and position by itself fulfilling the new needs, or will stand by while these essential forms of legal service are taken over by institutions, by labor organizations, or by bureaus of government." *Id.*

33. Smith, *supra* note 28, at 47.

34. *Id.* The ABA Committee on Lawyer Referral Service echoed these sentiments as late as 1965 when it asserted in its handbook that:

[L]awyer referral service heads off the evil consequences likely to follow from too much government domination of the profession. Socialism would destroy the independence of the bar and create among the lawyers a loyalty above that

Thus at the time the ABA was moving formally to approve and encourage the formation of lawyer referral services, the debate over who should operate such services appeared to address the question of the benefits of organized bar sponsorship versus the likelihood of government operation of law offices in the event that the organized bar did not move quickly enough to answer the public need for lawyer referral.

B. The Unmet Needs of the Middle Class and Underutilization of Attorneys

While the general concern about government intrusion into the legal profession certainly continues,³⁵ the historic and sometimes hysteric paranoia over government-run law offices for middle income persons dissipated.³⁶ That fear coexisted with another less urgent but enduring concern, the genuine need to provide legal services to persons of moderate incomes with undetermined legal needs who had not formerly utilized attorneys. Early studies indicated that substantial numbers of persons failed to consult lawyers about legal problems.³⁷ Although some dissenters questioned the view that real demand existed,³⁸ important bar officials such as Barlow F. Christensen of the Idaho Bar expressed the view that lawyer referral offered a sensitive approach to a difficult problem.³⁹ Some persons identified the problem as the paradox inherent in the fact that because

which is owed to the individual client. Already the bar is faced with the problem of combatting the efforts of government agencies to discourage consultations with lawyers by citizens who have to deal with such agencies and are urged to accept the government's interpretation of the law. They will be less likely to accede when aware that through a referral service they may obtain individual and independent legal advice at moderate cost.

HANDBOOK, *supra* note 7, at 64.

35. *Say regulation major issue facing the bar in 1980s*, BAR LEADER, Mar.-Apr. 1980, at 11.

36. The 1982 fiscal year budget for the federally funded Legal Services Corporation was drastically reduced to \$241 million, a 25% cut from fiscal year 1981. Middlebrook, *Corporate Law Departments: A Source of Pro Bono Publico Services*, 68 A.B.A. J. 924, 924 (1982). Ten percent of the reduced budget will be spent on private bar involvement. *Id.* at 925; see 46 Fed. Reg. 61,017 (1981). Nonetheless, whether the private bar will be able to satisfy the increased demand for legal services by those who would have turned to the Legal Services Corporation is unclear. Middlebrook, *supra*, at 924.

37. A 1948 study embracing 4000 families disclosed that 40% of 843 middle-income families with legal problems did not consult a lawyer. Porter, *Answers to Objections to the Lawyer Reference Service*, 31 OR. L. REV. 15, 17 (1951) (discussing E. KOOS, *THE FAMILY AND THE LAW* 5 (1949)).

38. One lawyer was quoted as saying:

"I want some proof that there is a long-felt desire by the public and I want some proof that that desire has been frustrated in the past for competent legal advice at moderate cost. . . . There is nobody running around the streets of my city saying, 'My kingdom for a lawyer, where can I get one?' It sounds asinine to me."

Porter, *supra* note 37, at 16. In 1954 Theodore Voorhees, former chairman of the ABA Committee on Lawyer Referral Service, acknowledged that at "one time" lawyers in New York, Chicago, and Los Angeles, as well as lawyers in the smaller communities, insisted that there was no need for a referral service. Voorhees, *The Lawyer Referral Service: The Medium-Size and Smaller Communities*, 40 A.B.A. J. 663, 663 (1954).

39. Madden & Christensen, *supra* note 18, at 956.

society was becoming more and more complex even ordinary activities were subject to more and more legal consequences; thus a commensurate growth in the demand for legal services and a concomitant improvement in the economic condition of the bar and the esteem in which attorneys were held could be expected.⁴⁰ Christensen, however, wrote in 1963:

[Q]uite the opposite appears to be the case. Members of the Bar generally seem to enjoy less public esteem than they would like, and their incomes compare unfavorably with those of members of other professions. At the same time, the unauthorized practice of the law appears to be flourishing, despite the profession's vigorous efforts to stop it.⁴¹

This quote was later adopted and set forth in an early brochure of the ABA Standing Committee on Lawyer Referral and Information Service. (LRIS)⁴² The desire to aid the public coexisted with the concern for improving the economic condition of underutilized attorneys by inhibiting the unauthorized practice of law and inducing those able to pay reasonable fees to bring their problems to attorneys. The financial rewards from participating in lawyer referral were reported with pride.⁴³

Almost from the beginning, the advocates emphasized that the goal of referral services was to encourage those persons who had never used a lawyer to begin doing so.⁴⁴ Early efforts revealed that in fact uninitiated potential clients comprised the majority of persons served by the referral services,⁴⁵ thus diminishing fears that referral services would simply redistribute the existing supply of clients. The need for a more efficient way to meet the potential needs of those with moderate incomes was also aggravated by the trend away from the traditional model of the small town solo

40. The expectation that complexity will spawn more work for lawyers has been confirmed by recent observers. Law has gone beyond being primarily the concern of just those with businesses and property. With the expansion of law and the role of lawyers in ordering human conduct, the "involvement of the lawyer must increase." Breitel, *The Paradox of the Profession of Law*, BAR LEADER, Nov.-Dec. 1980, at 14, 15; see also *Why Everybody is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50-55. Some of the blame for the current explosion of litigation, however, is put on the alleged glut of lawyers. *Why Everybody is Suing Everybody*, *supra*, at 51; Ashby, *If it weren't for lawyers, we wouldn't need them*, Hous. Post, Aug. 14, 1981, at B1, col. 1; Ashby, *Lawyers' domain: Is it too eminent?*, Hous. Post, Aug. 2, 1981, at B1, col. 1 ("[T]he more lawyers we have, the more laws, the more lawsuits, the more courts.").

41. Christensen & Madden, *supra* note 21, at 965; see also Voorhees, *The Outlook for the Lawyer Referral Service: Much Remains to Be Done*, 38 A.B.A. J. 193, 194 (1952) ("All lawyers are aware of the broad increase in the complexity of mere existence in this country during the last twenty-five years; few would assert that the number of our clients or the volume of legal business has shown a comparable increase."). Compare, however, the recent assertion that "the very growth and complexity of our society has increased the role of legal institutions and . . . the stature of the lawyers." Breitel, *supra* note 40, at 16.

42. ABA STANDING COMM. ON LAWYER REFERRAL AND INFORMATION SERV., LAWYER REFERRAL SERVICE: A SENSIBLE APPROACH TO A DIFFICULT PROBLEM.

43. *A Banner Year for Lawyer Referral*, LAW REFERRAL BULL., Jan. 15, 1964, at 1 (noting that it was "not surprising, then, that more lawyers than ever before . . . are now taking part" since attorneys participating in lawyer referral during 1963 earned "better than half a million dollars in legal fees" (emphasis in original)).

44. HANDBOOK, *supra* note 7, at 17-18 (referral service not designed to help clients who already have lawyers or who have lawyers as acquaintances).

45. More than 80% of the persons making use of the lawyer referral services were meeting the lawyers for the first time. *Id.* at 17; see Voorhees, *supra* note 38, at 663.

practitioner who knew his neighbors and acquired business through a reputation for competence and integrity.⁴⁶

The ABA considered the lawyer referral service to be the ideal way to reach those needing legal service because it attempts to eliminate the reasons for the perceived reluctance to use attorneys. Those reasons include distrust of attorneys,⁴⁷ fear of excessive fees,⁴⁸ inability to recognize and/or categorize a legal problem,⁴⁹ ignorance about how to select a lawyer,⁵⁰ and the belief and fear that lawyer involvement means extended controversy and inevitable litigation.⁵¹ In addressing these problems the ideal lawyer referral service would utilize what the ABA considered essential components, including (1) local bar association sponsorship and supervision, (2) a panel of practicing attorneys who agreed to serve potential clients referred to them by the service, (3) a person, preferably a lawyer, with whom the prospective clients could discuss their problems and who could refer them to appropriate lawyers on the panel, (4) a moderate fixed fee for the client's first consultation with a panel attorney, (5) a system of collecting and preserving records, and (6) continuous and effective publicity to educate the public about the existence of the lawyer referral service, the legal significance of many seemingly unimportant problems, and the need for a lawyer's expertise in solving those problems.⁵²

This last component was especially important and presented a task for which the bar association was perhaps uniquely suited. Contemporaneous writing on the issue certainly contained no suggestion that lawyer referral services might be set up by groups other than bar associations.⁵³ Due to the ban on attorney advertising at the time,⁵⁴ individual attorneys could

46. B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 6 n.5 (1970). The percentage of sole practitioners is steadily declining. In 1948 61.2% of all lawyers were solo; in 1966 only 39.1%. *Id.* In 1980 only 33% were solo practitioners. *1981 Lawyer Statistical Report Preview*, *supra* note 4, at 7.

47. B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 229, 231-32 (1977).

48. Madden & Christensen, *supra* note 18, at 965; Searcy, *supra* note 27, at 618 (many laymen do in fact believe legal services are actually prohibitive in cost); see Cottingham, *supra* note 18, at 458.

49. L. ANDREWS, *supra* note 3, at 1; Voorhees, *supra* note 43, at 664.

50. L. ANDREWS, *supra* note 3, at 1; Cottingham, *supra* note 21, at 458. Eighty-three percent of the respondents agree with the statement that "[a] lot of people do not go to lawyers because they have no way of knowing which lawyer is competent to handle their particular problem." B. CURRAN, *supra* note 47, at 228.

51. Madden & Christensen, *supra* note 18, at 966. In the Curran study 59% felt that lawyers are not prompt about getting things done and 30% felt that lawyers needlessly complicate the client's problems. However, 87% felt that lawyers try hard to solve their clients' problems without having to go to court. B. CURRAN, *supra* note 47, at 229.

52. HANDBOOK, *supra* note 7, at 7-8; Madden & Christensen, *supra* note 18, at 966.

53. See Smith, *supra* note 28; *Operation Crossroads*, *supra* note 32; see also *Legal Service Policies*, *supra* note 32.

54. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908) provided that solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. Canon 27 was amended in 1937, 1942, 1943, and 1951 to provide for the use of law lists. These changes were incorporated into the new Code of Professional Responsibility in 1969, which continued the prohibition against advertising: "A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display

not publicize the nature or terms of their services. Lawyer referral services, however, could advertise the importance of consulting attorneys⁵⁵ as well as the low maximum fee set for the initial interview, which would encourage the public to investigate the lawyer referral services and, through services, to consult an attorney, knowing that the risk would be only a few dollars. This authority of referral services to advertise overcame their "essential problem," which was to find some "ethical means of inducing [people] to bring their legal problems to lawyers."⁵⁶ One commentator, in addressing the question of the necessity of bar sponsored lawyer referral services, rested his support of lawyer referral services in part on the prohibition against lawyer advertising.⁵⁷ Arguably, the objectives of lawyer referral services could be obtained through extensive bar association advertising stating the value of legal counselling and the willingness of most attorneys to charge only a nominal fee for initial consultations, and the authorization of specialty advertising in the classified section of telephone directories.⁵⁸ The fact that "[s]pecialty advertising to laymen [is] now absolutely prohibited" presented a practical difficulty, however.⁵⁹ Since lawyers now may advertise their specialties and fee arrangements,⁶⁰ one justification for the very existence of lawyer referral services may no longer be valid. Indeed, one writer has expressed concern that the increasingly liberal advertising rules may all but eradicate the need for lawyer referral services.⁶¹ Nevertheless, over three hundred services operate today.⁶²

C. *The Operation of Lawyer Referral Services*

The operation of a lawyer referral service is relatively uncomplicated.⁶³ The prospective client responds to publicity by calling at the service office. A staff person, who usually is but may not be an attorney, determines the nature of the legal problem and arranges an appointment between the potential client and a qualified attorney selected from the panel of attorneys, usually on a rotation basis. At the lawyer's office an initial consultation takes place for a moderate fixed fee of usually ten to twenty dollars. The traditional lawyer-client relationship is thus established, with further fee payment to be arranged between the lawyer and client. Most of the over

advertisements in city or telephone directories, or other means of commercial publicity" MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1969); *see also In re McCallum*, 64 N.E.2d 310 (Ill. 1945) (attorney disbarred for using "investigators" to solicit business).

55. *See* ABA Formal Op. 227, *supra* note 22.

56. Madden & Christensen, *supra* note 18, at 966.

57. Comment, *supra* note 27, at 614.

58. *Id.* at 623. The author admitted that such a plan "except for serious practical difficulties appears to obviate the need for Lawyer Referral." *Id.*

59. *Id.* at 624.

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1980).

61. Podgers, *supra* note 12, at 23.

62. *Id.*

63. *See generally* Carlin, *The Advancing State of the Art of Lawyer Referral Service*, 30 BAYLOR L. REV. 643 (1978).

three hundred services are local bar association sponsored, are open to all qualified attorneys in the respective local geographical area, and make referrals in all subject areas of the law.

The Texas Lawyer Referral Service (TLRS) functions similarly to the above description.⁶⁴ The State Bar of Texas, to which all Texas attorneys must belong, operates this service, created in 1951. Over one thousand⁶⁵ of the state's 36,368 attorneys⁶⁶ participate in the TLRS. The service is listed in over one hundred Yellow Pages and the public is informed of its existence through radio and television campaigns as well as through brochures.⁶⁷ Eligible attorneys who participate must carry malpractice insurance and pay annual dues of twenty dollars.⁶⁸ Clients are charged a ten dollar initial consultation fee, which the attorney returns to the service to help defray costs.⁶⁹ The TLRS receives an average of over two thousand calls monthly with about half of those resulting in referrals.⁷⁰ Over \$31,000 in consultation fees were returned to the service by participating attorneys during the first six months of 1983.⁷¹ Generally, the TLRS serves every city in Texas except the eleven with local referral services:⁷² Dallas, San Antonio, Arlington, El Paso, Fort Worth, Pasadena, Corpus Christi, Beaumont, Irving, Wichita Falls, and Houston.⁷³ These local services receive about seventy calls a month from the TLRS.⁷⁴

An example of one of the Texas local services is the Houston Lawyer Referral Service, Inc. (HLRS). It operates in the Houston metropolitan area, where nearly one third of all Texas attorneys reside; accordingly, it probably experiences most of the problems that a lawyer referral service can encounter.⁷⁵ HLRS is a committee of the Houston Bar Association,⁷⁶

64. See *State Bar of Texas Reply to Sunset Staff Report*, 41 TEX. B.J. 1031, 1044 (1978) [hereinafter cited as *State Bar Reply*].

65. *Id.*

66. As of June 14, 1983, there were 36,368 licensed attorneys in Texas. Telephone interview with Jackie Miller, Membership Department, State Bar of Texas (June 29, 1983) [hereinafter cited as *Miller Interview*].

67. See *State Bar Reply*, *supra* note 64, at 1044.

68. *Id.*

69. *Id.*

70. Telephone interview with Dorothy Guderian, TLRS, State Bar of Texas (Aug. 3, 1983). From January through June 1983 TLRS received 13,716 calls resulting in 7023 referrals.

71. *Id.*

72. *Id.*; see *Referrals Expected to Double as Service Adds WATS Line*, 40 TEX. B.J. 804 (1977).

73. See *State Bar Reply*, *supra* note 64, at 1044.

74. *Id.*; see *Lawyer Referral Report for Month of October, 1977*, 41 TEX. B.J. 32 (1978).

75. Clearly, attorneys and competitive pressures are not evenly distributed. While seven Texas counties have no lawyers at all and 13 have only one each, Harris County has roughly 11,013 licensed Texas attorneys within its borders (one of the highest concentrations of attorneys in the country), Miller Interview, *supra* note 66. In 1970 Harris County had one attorney for every 319 county residents and in 1977 it had one for every 260 residents. Munneke, *1977 Attorney Population Statistics*, 41 TEX. B.J. 31 (1978). By 1980 Harris County had approximately 2.5 million persons. HOUS. CITY PLANNING COMM'N, HOUSTON—YEAR 2000 II-16 (1980) (Population Projections, Harris County 1970-2000); Nelson, *Population study for H-GAC shows area to grow by 2 million by year 2000*, Hous. Post, June 26, 1983, at B1, col. 1. Thus, Harris County has roughly one attorney for every 227 persons. For per-

the largest bar group in the Houston area with over 6500 members;⁷⁷ the service is a nonprofit corporation⁷⁸ with a board comprised in part of representatives from smaller, local bar associations.⁷⁹ HLRS was established in 1958⁸⁰ and uses procedures similar but certainly not identical to those of other services. It advertises through various media and through the Yellow Pages,⁸¹ and restricts the fee the participating attorney may receive for the first one half hour of consultation to no more than fifteen dollars.⁸² To participate an attorney must, of course, be licensed in the state, practice law on a full-time basis, and maintain an office suitable to receive clients during normal business hours.⁸³ Additionally, the attorney must maintain professional liability insurance in a minimum amount of \$100,000.⁸⁴ The participating attorneys, who number over 450 each year,⁸⁵ must pay annual dues on a graduated basis according to their years of practice.⁸⁶ They must also contribute varying and graduated amounts to HLRS when they receive payment for performing legal services for clients referred.⁸⁷ These funds are used to defray the cost of administering the service, which averages 1700 calls a month.⁸⁸ HLRS also uses experience panels that are groups of lawyers who have experience in designated areas of law.⁸⁹

spective this can be compared to the range for 1980 among the states where West Virginia had one attorney for every 833 persons and the District of Columbia had one attorney for every 224 persons. G. MUNNEKE, OPPORTUNITIES IN LAW CAREERS 131-32 (1981). Many of these lawyers have followed the national trend toward advertising by attorneys. Moran, *Growing number of attorneys cash in on advertising bonanza*, Hous. Chron., Oct. 25, 1981, § 2, at 15, col. 4. To the extent that competition for clients exacerbates the problems confronted by lawyer referral services, Houston appears to be a good place to find such problems.

76. See *HBA Committee Reports*, HOUS. LAW., Dec. 1981, at 10, 20.

77. Telephone interview with Regina Feale, Houston Bar Association, June 18, 1983.

78. HLRS, 1982-1983 Application for Renewal of Membership 1 [hereinafter cited as HLRS Application].

79. Bylaws of Houston Lawyer Referral Service, Inc., A Nonprofit Corporation § 2.02.

80. Telephone interview with Tricia Horgan, Executive Director, HLRS (June 28, 1983) [hereinafter cited as Horgan Interview].

81. *Id.*

82. HLRS Application, *supra* note 78, at 1.

83. *Id.*

84. *Id.*

85. HLRS, WE CAN HELP (Pam. 1980).

86. HLRS Application, *supra* note 78, at 1. Houston Bar Association members participating in the HLRS must pay annual dues to HLRS according to the following schedule: \$50 with less than three years of practice; \$75 with three to eight years of practice; and \$100 with nine or more years of practice. *Id.*

87. *Id.* If the fee received by the participating attorney is between \$0 and \$249, only the initial consultation fee is forwarded by the attorney to HLRS; if the fee is between \$250 and \$499, then \$20 are sent; \$60 are sent if the fee is between \$500 and \$999; and \$110 are sent if the fee is between \$1000 and \$4999. *Id.* If \$5000 or more have been earned, then the HLRS receives 10% of the fee in addition to the initial consultation fee. *Id.*

88. Horgan Interview, *supra* note 80.

89. See HLRS Application, *supra* note 78, at 1. Experience panels are available in the areas of child custody, title and boundary disputes, international law, commercial litigation, bankruptcy-debtors, bankruptcy-creditors, securities, felony, criminal appeals, administrative law-social security, immigration, patent and trademark, copyrights, personal injury, admiralty, workers compensation, tax, will contests, and entertainment, athletics, and the arts. *Id.* at 5-6. Typical example of experience panel criteria are those for child custody:

Board Certification in Family Law by the Texas Board of Legal Specialization will qualify an attorney for membership on the Child Custody Experience

HLRS refers problems in a particular area first to attorneys who comprise the experience panel for that designated area of law. For example, a child custody problem will be referred to an attorney who is a member of the child custody experience panel. TLRS and HLRS both maintain extensive public information programs involving the use of radio, television, and brochures.

II. REGULATION OF LAWYER REFERRAL SERVICES

Few, if any, federal or state statutes expressly regulate the overall operation of a lawyer referral service.⁹⁰ Standards and rules that establish parameters within which lawyer referral services function are essentially indirect or advisory. The ABA Standing Committee on Lawyer Referral and Information Service, like its predecessors, promulgates and maintains standards for lawyer referral services. This committee has for more than thirty years zealously promoted the concept of lawyer referral services and the standards through the publication not only of the standards, but also of periodic bulletins, handbooks, surveys, directories, and reports, as well as through meetings.⁹¹ The standards, though not binding on lawyer referral services, are influential.

The other source of ABA guidance is quite indirect; it is the Model Code of Professional Responsibility adopted by the ABA on August 12, 1969, and amended on several occasions.⁹² A majority of the states have adopted the Model Code though many have modified various parts of it.⁹³ The Model Code is not binding on a state; rather, the state version, as adopted by either the respective state legislature or state supreme court,

Panel. Otherwise, an applicant must have participated, during his or her career, in: (1) three or more trials conducted under the Texas Family Code, including at least one involving child custody; and (2) two or more contested show cause hearings.

Id. at 5.

90. *Cf., e.g.,* STATE BAR OF CAL., MINIMUM STANDARDS FOR A LAWYER REFERRAL SERVICE IN CALIFORNIA (1982). Rule 2 of the minimum standards states *inter alia* that "[a]uthorization" to establish and operate a lawyer referral service shall be granted only on the basis of a written application and after certain detailed standards have been met. *Id.* Rule 2.1. Though noncomplying services are not prohibited, they may not publish that they are approved by the State Bar of California. *Id.* Loss of certification may result in the loss of tax exempt status. *See* CAL. REV. & TAX. CODE § 23734d (West Supp. 1983). Effective since May 14, 1976, this comprehensive set of minimum standards was promulgated by the unified State Bar of California and later adopted by the California Supreme Court. Telephone interview with Lyle C. Wing, Lawyer Referral Program, State Bar of California (Sept. 8, 1983) [hereinafter cited as Wing Interview].

91. *See, e.g.,* Rubin, *Lawyer Referral—The Generation Gap*, LAW. REFERRAL BULL., Apr. 1970, at 1. The Bulletin was published by the ABA Standing Committee on Lawyer Referral Service. The article describes a project entitled "Target Cities" by which the committee planned to establish lawyer referral services in certain cities of 100,000 persons or more where no such service was available. *Id.*

92. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as MODEL CODE]. The Preface provides a brief history of the Model Code.

93. The various state codes of professional responsibility are compiled in A.B.A. NAT'L CENTER FOR PROFESSIONAL RESPONSIBILITY, CODE OF PROFESSIONAL RESPONSIBILITY BY STATE (1980).

actually governs an attorney's behavior in a specific jurisdiction.⁹⁴ The Model Code is comprised of Canons, Ethical Considerations, and Disciplinary Rules (DRs).⁹⁵ None of these expressly bind lawyer referral services; the disciplinary rules, however, are most significant because should an attorney violate a DR, he or she may be subject to disciplinary action that could entail the loss of the license to practice law.⁹⁶ For example, an attorney could be disciplined for accepting referrals from a nonbar sponsored lawyer referral service.⁹⁷ Thus, Model Code disciplinary rules that define and circumscribe the activity of attorneys in regard to lawyer referral services indirectly impose definite limits on the lawyer referral services within the jurisdiction governed by those disciplinary rules.

Several questions arise concerning these ABA lawyer referral standards and the Model Code disciplinary rules. Do they impede or further the goals of lawyer referral? If they advance the goals, are any other legal policies infringed in the process? The answers to these questions bear on the question of whether bar sponsored lawyer referral services should continue to exist as we know them. These questions are stimulated primarily by the controversy over bar sponsorship and the concern over the various fee arrangements administered by lawyer referral services, two areas that this Article examines closely. While these areas are central sources of tension, however, they arise in the context of a structured set of standards. The ABA standards for lawyer referral services, the Model Code provisions, and the recent modifications that have an impact on lawyer referral services are explored. This examination reveals the inconsistencies and uncertainties in the rules used to determine how lawyer referral services should operate.

A. ABA Standards

Several versions of the ABA's standards for lawyer referral services exist. Of most relevance are the February 1978 Statement⁹⁸ and the 1982 proposed Standards,⁹⁹ which are scheduled for possible ratification by the

94. MODEL CODE n.12 ("The Model Code seeks only to specify conduct for which a lawyer should be disciplined by courts and governmental agencies which have adopted it.").

95. *Id.* Preamble.

96. Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 495 (1958) ("There is generally no prescribed discipline for any particular type of improper conduct. The disciplinary measures taken are discretionary with the courts, which may disbar, suspend, or merely censure the attorney as the nature of the offense and past indicia of character may warrant.").

97. State Bar of Tex. Comm. on Professional Ethics, Formal Op. 371 (1975), *reprinted in* 38 TEX. B.J. 461 (1975) [hereinafter cited as Tex. Formal Op. 371].

98. A.B.A. STANDING COMM. ON LAW. REFERRAL SERV., STATEMENT OF STANDARDS AND PRACTICES FOR A LAWYER REFERRAL SERVICE (1978) [hereinafter cited as 1978 STATEMENT].

99. A.B.A. STANDING COMM. ON LAW. REFERRAL AND INFORMATION SERV., STATEMENT OF STANDARDS AND PRACTICES FOR A LAWYER REFERRAL AND INFORMATION SERVICE (1982) [hereinafter cited as 1982 PROPOSED STANDARDS]. These were amended in April 1983 by adding a comment to § 5.2 and making changes in the first and last paragraphs of § 8.3 [hereinafter cited as AMENDMENTS TO 1982 STANDARDS].

ABA House of Delegates in 1984.¹⁰⁰ The 1978 Statement begins with a four-part statement of the purposes of a lawyer referral service; the first purpose is, of course, to provide a way for a person to find an able and interested attorney.¹⁰¹ The last three parts relate to the goal of informing the public about the availability of legal services, where to seek such services, and general legal information useful to the public.¹⁰² The 1982 proposed Standards expand upon these purposes. Subpart (a) of section 1.1 of those standards states as a goal referral to a qualified lawyer rather than to just an interested and able lawyer and elaborates on the basis for making that referral.¹⁰³ Another stated purpose is referral to appropriate government and consumer agencies when that is in the best interest of a client.¹⁰⁴ Finally, the 1982 version adds as a purpose the referral of attorneys to practitioners qualified to advise other lawyers in particular areas.¹⁰⁵

The Statement and Standards next enumerate broad policies. Section 1.2 of the 1978 Statement specifies that the service should be sponsored and supervised by a state or local bar association.¹⁰⁶ The disciplinary rules governing most attorneys indirectly endorse this requirement.¹⁰⁷ The 1982 proposed Standards, however, make a fundamental break with the history of lawyer referral service guidelines by striking the requirement that lawyer referral services necessarily be sponsored by state or local bar associations.¹⁰⁸

Section 1.5 of the 1978 Statement underscores the need for adequate funding and expressly describes, as effective means of financing services, attorney registration fees and the remittance of initial consultation fees.¹⁰⁹ Section 1.6 emphasizes that the service should be operated for the benefit of the public.¹¹⁰ Toward that end the Statement specifies that funds received by the service should be used to promote and develop the service, educate the public, improve justice, or support other activities in the public

100. Berg Interview, *supra* note 11.

101. 1978 STATEMENT § 1.1:

The purposes of a Lawyer Referral Service . . . are:

- (a) to provide a way in which any person may be referred to a lawyer who is able to render and interested in rendering needed legal services;
- (b) to provide information about lawyers and the availability of legal service which will aid in the selection of a lawyer;
- (c) to inform the public when and where to seek legal services; and
- (d) to provide general and legal information needed by the public.

102. *Id.* § 1.1(b)-(d).

103. 1982 PROPOSED STANDARDS § 1.1(a) ("to make legal services readily available to the general public by providing a way in which any person may be referred to a qualified lawyer on a basis which takes into consideration the person's financial circumstances, spoken language, geographical convenience, and the type and complexity of the legal problem presented").

104. *Id.* § 1.1(d).

105. *Id.* § 1.1(e).

106. 1978 STATEMENT § 1.2.

107. *See infra* notes 167, 180, and accompanying text.

108. 1982 PROPOSED STANDARDS § 1.2.

109. 1978 STATEMENT § 1.5 ("Use of attorney registration fees and remittance of initial consultation fees to the Service are effective means of financing a Service.").

110. *Id.* § 1.6.

interest.¹¹¹

Part II of the 1978 Statement specifies that a plan of organization with written rules should govern the service and recommends that a committee be set up to operate the service and that a nonlawyer be a member of that committee.¹¹² The 1982 proposed Standards add to section 2.2 a statement that a majority of the members of the supervising committee should be licensed in the jurisdiction covered by the service.¹¹³

Part III of the 1978 Statement specifies general requirements for participation by lawyers. Each service is directed to provide a panel or panels of lawyers to whom referrals can be made.¹¹⁴ Lawyers may be required to participate in pro bono panels in order to participate in the full fee generating panels.¹¹⁵ Naturally, only lawyers in good standing who are licensed to practice by the jurisdiction in which the service operates may participate.¹¹⁶ Participation should not be restricted to the sponsoring bar association members, but should be extended to all lawyers practicing in the area served by the service.¹¹⁷ The 1982 proposed Standards do not include this last requirement, which suggests that the maintenance of an office in the service area may not be a requirement for participation, though the license requirement was retained.¹¹⁸

Part IV of the 1978 Statement details specifications for a directory and/or registry with information about participating attorneys.¹¹⁹ Of special interest is section 4.5, which specifies that "[n]o rating of lawyers nor endorsements or commentary about the listing lawyer's skill shall be permitted or authorized by the Service," though client references may be included.¹²⁰ This provision is paradoxical because section 5.2 directs the service to establish panels representing different fields of law whose membership has experience, special education, or training.¹²¹ Panel membership in a designated field, which connotes specialized qualification, seems an implicitly higher rating in comparison to membership generally.¹²²

111. *Id.* § 8.3.

112. *Id.* §§ 2.1-2.

113. 1982 PROPOSED STANDARDS §§ .2.

114. 1978 STATEMENT § 3.1.

115. *Id.* § 3.3.

116. *Id.* § 3.4.

117. *Id.*; *cf.* ABA Formal Op. 291, *supra* note 25. The opinion states:

The Committee does not deem it proper to lay down any hard and fast requirements as to whether the panel shall or shall not be confined to members of the bar association. In the case of some bar associations such a provision would be reasonable; in the case of other associations it might not. This matter is within the reasonable discretion of the bar association

118. 1982 PROPOSED STANDARDS § 3.4.

119. 1978 STATEMENT part IV.

120. *Id.* § 4.5.

121. *Id.* § 5.2.

122. The trend in the profession is toward specialization. *Bates v. State Bar of Arizona*, 433 U.S. 350, 403 n.13 (1977) ("[P]erhaps the strongest trend in the profession is toward specialization.") (Powell, J., concurring in part and dissenting in part). At least 10 states (Arizona, California, Florida, Georgia, Iowa, New Jersey, New Mexico, South Carolina, Utah, and Texas) have formal specialization programs. Winter, *Say renewed interest in specialization plans*, BAR LEADER, May-June 1982, at 24. *See generally* 8 ALI-ABA CLE RE-

Perhaps the authors of the standards did not view panel membership as a rating or, alternatively, purposely excluded all ratings except for panel designation.¹²³

Part V of the 1978 Statement deals with referral panels. Section 5.2, as stated above, encourages services to establish panels representing different fields of law and expresses a preference that experience, special education, or special training be required for participation on such panels.¹²⁴ The 1982 proposed Standards substitute an entirely new paragraph for section 5.2; this new version makes mandatory the establishment of "special qualification panels."¹²⁵ This requirement accords with one of the bar's primary justifications for the exclusive right to sponsor lawyer referral services, which is its capacity and commitment to ensure the competence of the counsel to whom persons are referred.¹²⁶ The addition in April 1983 of a lengthy comment to section 5.2 detailing how competence ought to be determined underscores the importance of this task.¹²⁷ Applicants may

VIEW, Nos. 39-44 (1977). The Texas program of specialization commenced in 1975. The Texas Board of Legal Specialization certifies special competence in such fields as family law, estate planning and probate law, criminal law, labor law, civil trial, and personal injury. Recertification is required every five years. See Smith, Beck & Price, *The Legal Profession & the Competency & Availability of Legal Services in 1978*, in STATE BAR OF TEX., HOW TO AVOID THE LEGAL MALPRACTICE TRAP H-1, -20, -26 (1978); *Legal Specialization Comes to Texas*, 38 TEX. B.J. 235, 235 (1975).

123. In comparison the Texas Code of Professional Responsibility requires that an advertising attorney specify whether or not she or he is board certified in any specialty. TEX. REV. CIV. STAT. ANN. art. 320a—1 app., Rules Governing the State Bar of Texas, art. XII, § 8, Code of Professional Responsibility DR 2-101(C) (Vernon Supp. 1982-1983), as amended July 21, 1982, by Order of the Supreme Court of Texas and effective Sept. 1, 1982, reprinted in 45 TEX. B.J. (Sept. 1982).

124. 1978 STATEMENT § 5.2.

125. 1982 PROPOSED STANDARDS § 5.2. The comment following § 5.2 added in April 1983 stresses the importance of the attorney's being qualified:

The ABA Standing Committee on Lawyer Referral and Information Service believes that the public has a reasonable expectation that LRIS's will use their best efforts to match clients with attorneys competent to handle the matters referred. In order to meet this expectation, LRIS's should refer clients only to attorneys who have demonstrated to the LRIS that they have the necessary training, experience and motivation to handle the matter which is to be referred.

AMENDMENTS TO 1982 STANDARDS § 5.2 comment.

126. Barlow F. Christensen, Senior Research Attorney at the American Bar Foundation, has challenged the efficacy of using certificates of special competence to determine the suitability of an attorney for a particular client. First, he says, certification often does not go beyond the minimum level deemed necessary for recognition as a specialist. The absence of a graduated ranking system coupled with the dearth of specific information on an attorney's performance make it difficult for a consumer to select an attorney above the minimum competence level. Second, the certification omits other data equally significant to the prospective client such as fees charged by specific attorneys beyond the initial consultation fee. Christensen, *Toward Improved Legal Service Delivery: A Look at Four Mechanisms*, 1979 A.B. FOUND. RESEARCH J. 277, 280-83.

127. AMENDMENTS TO 1982 STANDARDS § 5.2 comment:

In determining whether an attorney is competent to handle a given matter, consideration should be given to the definition of legal competence employed by the American Law Institute-American Bar Association Committee on Continuing Professional Education. The ALI-ABA definition provides:

"Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she prac-

demonstrate substantial compliance with the criteria by showing equivalent qualifications.¹²⁸ Participation in such a panel under the 1982 proposal shall not be based solely upon years of practice, and applicants shall be allowed to demonstrate substantial compliance with the criteria.

The admonition in section 5.3 of the 1978 Statement implicitly indicates that one goal of the ABA standards is to increase the referral service clientele beyond the universe of middle class Americans who can make reasonable payments. That section encourages services to "establish other separate panels including, but not limited to: a no-fee-to-indigents panel; a reduced-fee panel . . . ; an in-court referral panel; an inmate assistance panel; a legal services for the aged panel; and a lawyer-to-lawyer panel."¹²⁹ This suggestion is not mandatory. In practice many, if not most, services leave the establishment of these other panels to other bar association committees.¹³⁰ The 1982 proposed Standards change the admonition in section 5.3 to a requirement that separate panels be established. The in-court referral panel and the inmate assistance panel were struck from the list, however. Both the 1978 and 1982 versions also urge services to refer potential clients to lawyers within the client's same geographical vicinity and to accommodate non-English speaking clients.

Section 6.4 of the 1978 Statement addresses the impact of experience panels on newly admitted attorneys. The ABA committee points out that "sympathetic consideration should be given to . . . recently admitted and less experienced attorneys . . ."¹³¹ The ABA does, however, want referral services to refer competent attorneys. Toward that end section 6.3 recommends that each applicant be evaluated for professional qualifications

tices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities."

In order to accomplish this end, LRIS's should maintain sufficient subject matter panels and qualification standards for panel members as are necessary to meet the needs and reasonable expectations of the community served. Naturally, the LRIS's should also maintain a staff sufficiently trained and qualified to make the determinations necessary to make the referrals only to competent attorneys.

Consideration should also be given to the panel member's experience with particular kinds of cases within each subject matter panel. For example, by virtue of a panel member's experience, he or she may be competent to handle a criminal misdemeanor case and considered incompetent to handle a criminal felony case. In order to guard against the loss of competency once obtained, consideration should be given to requiring a certain amount of recent actual experience. Consideration should also be given to requiring recent continuing legal education courses. In addition, LRIS's should maintain a viable mechanism through which panel members may be suspended or removed for failing to handle referred matters appropriately.

128. *Id.*

129. 1978 STATEMENT § 5.3.

130. This practice is followed by the Houston Lawyer Referral Service, Inc.

131. 1978 STATEMENT § 6.4.

and that mere possession of a license to practice should not necessarily be deemed sufficient to qualify an attorney for enrollment on a panel.¹³²

Part VII of the 1978 Statement deals with procedures of the service. "[E]ach client-applicant should be interviewed by a lawyer or other trained interviewer."¹³³ The 1982 proposed revisions do not alter this provision though section 2.8 of that proposal emphasizes that the service should employ a full-time attorney director.¹³⁴ Section 7.8 of the 1978 Statement provides that a panel lawyer may not refuse a referred case except for ethical or personal reasons.¹³⁵ Other sections deal with records and follow-up procedures.¹³⁶

Part VIII of the 1978 Statement discusses operating fees and the use of proceeds. Generally, the assessment of fees against participating attorneys are permitted.¹³⁷ The only restraint on this power states that "no Service may require any fee . . . which is in conflict with statutory or other legal prohibitions against the award of attorney's fees or which is unreasonable whether those fees be required of client-applicants, panel members or both."¹³⁸ Section 8.3 of the 1978 Statement specifies the uses to which the proceeds from lawyer referrals should be restricted.¹³⁹ The 1983 proposed amendment to section 8.3 adds the admonition that proceeds shall likewise be used consistent with the ABA Model Rules of Professional Conduct.¹⁴⁰ The implications of this incorporation by reference are not entirely evident; clearly, however, the contours of permissibility shift with the modifications of the ABA rules of conduct. Thus, inasmuch as the recently adopted ABA Model Rules of Professional Conduct eliminate the bar sponsorship requirement, a bar association cannot be faithful to section 8.3 and expend referral proceeds to shut down a competing lawyer referral service simply because the competitor is not bar sponsored.¹⁴¹

Part IX of the 1978 Statement addresses the issue of publicity and requires that a referral service develop active publicity programs.¹⁴² Section 9.2 specifies the form and content of any publicity.¹⁴³ Section 9.3 further

132. *Id.* § 6.3.

133. *Id.* § 7.4.

134. 1982 PROPOSED STANDARDS § 2.8.

135. 1978 STATEMENT § 7.8.

136. *Id.* § 7.9.

137. *Id.* § 8.1.

138. *Id.* The test for the reasonableness of such fee or fees is whether it "increases the client-applicant's cost for legal services beyond that which he or she would normally pay or decreases the quantity or quality of services which he or she otherwise would have received, but for the involvement of the Service." *Id.*

139. *Id.* § 8.3.

140. AMENDMENTS TO 1982 STANDARDS § 8.3.

141. *See infra* note 166 and accompanying text (new ABA rules); *see also infra* notes 402-34 (attempts by bar-related organizations to stymie development of private lawyer referral services).

142. 1978 STATEMENT § 9.1.

143. *Id.* § 9.2: "The form and content of all publicity regarding the Service must be dignified and consistent with recognized principles of legal ethics within the applicable state or jurisdiction and shall not be false, deceptive or misleading. All advertising shall identify the sponsor(s) of the Service."

states that no publicity shall identify a particular lawyer participating in the service though an attorney may act as spokesman for the service if so authorized by the supervisory committee.¹⁴⁴

B. *The Model Code of Professional Responsibility*

The fate of the various proposals for amending the ABA standards for lawyer referral will remain unknown until 1984.¹⁴⁵ In contrast, the ABA culminated six years of study and debate over standards of ethical conduct with the adoption on August 2, 1983, in Atlanta, of new ABA Model Rules of Professional Conduct.¹⁴⁶ This odyssey began in 1977 when ABA President William B. Spann, Jr., appointed the Commission on Evaluation of Professional Standards and charged it with assessing anew the problems and ethics of the profession.¹⁴⁷ The Kutak Commission, so called after its recently deceased chairman, Robert Kutak, issued a Discussion Draft of the proposed Model Rules of Professional Conduct in January 1980.¹⁴⁸ In May 1981 the Commission released its Final Draft of the Model Rules of Professional Conduct.¹⁴⁹ The ABA House of Delegates debated parts of the Final Draft in August 1982 in San Francisco and again in Atlanta in February 1983.¹⁵⁰ The House Committee on Drafting and Rules and Calendar, pursuant to direction from the ABA House of Delegates, met and proposed additional amendments prior to submitting the revised Final Draft¹⁵¹ to the House of Delegates at the August 1983 annual convention in Atlanta. The ultimate impact of the new ABA Model Rules of Professional Conduct will depend on changes in state codes based on the new model. The adoption of the ABA Model Rules by a majority of the states, though expected, is by no means automatic; indeed, representatives of the New York Bar Association, the California State Bar, and the Florida State Bar opposed adoption of the new ABA Model Rules.¹⁵² In light of the

144. *Id.* § 9.3.

145. The 1982 PROPOSED STANDARDS were withdrawn from consideration at the ABA midyear conference in February 1983. ABA SUMMARY ACTION OF THE HOUSE OF DELEGATES 4 (Feb. 1983) [hereinafter cited as ABA SUMMARY]. All proposals for modifying the lawyer referral standards will be considered in 1984. Berg Interview, *supra* note 12.

146. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter cited as ABA MODEL RULES], reprinted in 52 U.S.L.W. 1-27 (1983). For a report on the vote adopting the Rules, see Taylor, *Bar Group Adopts Model Ethics Code*, N.Y. Times, Aug. 3, 1983, at Y1, col. 1.

147. Chairman's Introduction, Model Rules of Professional Conduct (Proposed Final Draft, May 31, 1981) [hereinafter cited as PROPOSED FINAL DRAFT].

148. MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft 1980) [hereinafter cited as DISCUSSION DRAFT].

149. PROPOSED FINAL DRAFT, *supra* note 147.

150. See ABA SUMMARY, *supra* note 145, at 3; Memorandum to Members of the House of Delegates, Section and Committee Chairmen, and Other Interested Parties from L. Stanley Chauvin Jr., June 1, 1983).

151. MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Final Draft revisions, June 1, 1983) [hereinafter cited as REVISED FINAL DRAFT].

152. See Slonim, *Kutak commission ethics draft draws early fire*, BAR LEADER, Mar.-Apr. 1980, at 2, 3 (quoting Massachusetts Bar official: "The days are over when the ABA pontificates and everybody blindly accepts."); *ABA delegates approve new model ethics code*, Hous. Post, Aug. 3, 1983, at A3, col. 3 (New York Bar Association representative remarked:

prospect for diversity in the foreseeable future and the historic influence of the Model Code in effect prior to the August 2, 1983, vote, this Article explores the Model Code as well as the various proposals for its modification, including those incorporated into the new ABA Model Rules.

The Model Code addresses the issue of lawyer referral services under Ethical Consideration 2-15¹⁵³ and DR 2-103. Section (C) of DR 2-103 prohibits a lawyer from requesting an organization or person to recommend him as a private practitioner unless the service is sponsored, approved, or operated by a bar association.¹⁵⁴ Section (D) complements this section by specifying that a lawyer "may be recommended, employed or paid by, or may cooperate with" organizations promoting the use of his services including "[a] lawyer referral service operated, sponsored, or approved by a bar association."¹⁵⁵ The Model Code, after which so many

"What we've done today is destroy the national consensus that existed . . . Adoption by the states may not be easy . . . there will be no rubber stamp,' . . .").

153. MODEL CODE EC 2-15:

The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of the lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of *competent* lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of *qualified* counsel.

(Emphasis added.)

154. MODEL CODE DR 2-103(C)(1) provides: "A lawyer shall not request a person or organization to recommend or promote the use of his services . . . except that (1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto." A bar association may require participating attorneys to assist in the financing of the service either through a flat fee or by a sliding scale charge based on the fees derived by the attorneys from the cases referred. ABA Formal Op. 291, *supra* note 25.

The earlier version of DR 2-103(C) modified the term bar association: "He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association *representative of the general bar of the geographical area in which the association exists* and may pay its fees incident thereto." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(C)(1) (1974) (emphasis added). The corresponding definition of "a bar association representative of the general bar of the geographical area in which the association exists" was:

[A] bar association, the membership of which is open to any lawyer in good standing in the geographical area and which has a membership at least equal to the lesser of three hundred members or twenty percent of the lawyers licensed to practice in the geographical area. A bar association of specialists as referred to in DR 2-105(A)(1) or (4) is a "bar association representative of the general bar" even though it does not meet the test of the preceding sentence.

Id. at Definitions (7).

Notwithstanding this language there is no DR 2-105(A)(4) in the 1980 Model Code. Former DR 2-105(A)(1) authorized the patent, trademark, and admiralty specialty designations while subsection (A)(4) restricted the manner in which an attorney could hold himself out as a specialist to rules prescribed by the state jurisdictional authority certifying the specialty. *Compare id.* at Definitions (7); *with id.* at Definitions (9): "'Lawyers representative of the general bar of the geographical area in which the plan is offered' are lawyers in good standing numbering not less than the greater of three hundred or twenty percent of those licensed to practice in the geographical area." The new ABA Model Rules *supra* note 146 do not have a definition of bar association since bar sponsorship is not required.

155. MODEL CODE DR 2-103(D).

state codes are patterned, seems to endorse attorney involvement and participation in bar sponsored lawyer referral services, and thus is consistent with the 1978 version of the ABA standards of lawyer referral services and many state bar codes.¹⁵⁶ The Model Code, however, also authorizes services "operated" or "approved" by a bar association.¹⁵⁷ Theoretically, under DR 2-103(C) and (D) a lawyer could participate in a referral service operated by private persons if it were approved by a bar association. The only major impediment to this conclusion seems to be the prohibition against sharing fees with nonlawyers;¹⁵⁸ the conflict could be resolved, however, by operating the service so that no fees are paid by the client to the service. In particular, the practice of remitting to the referral service all or part of the initial consultation fee could be eliminated. The proposed modifications under the Final Draft are interesting in that so very little is said specifically about lawyer referral services. Ironically, given the acknowledgement by the Kutak Commission that the need of middle income people who are less experienced in the use of legal services is acute, the modifications under the Final Draft address lawyer referral services only briefly.¹⁵⁹

Rule 9.2 of the 1980 Discussion Draft deals with advertising. The comments specifically state that "[a] lawyer should be allowed to pay for advertising permitted by this Rule; for example, media charges or the cost of participating in a lawyer referral service."¹⁶⁰ Rule 9.3 of the Discussion Draft deals with solicitation and provides that a lawyer may initiate contact with a prospective client under the auspices of, inter alia, "a public or charitable legal services organization . . . or trade organization whose purposes include . . . recommending legal services."¹⁶¹ Thus the payment of fees to a lawyer referral service as well as a lawyer's participation in a referral service seems authorized, although the lawyer's participation in a commercial for-profit type of referral service seems indirectly proscribed. The Final Draft is even less instructive because the term lawyer referral service is not used at all. The lawyer's participation in a private or nonbar sponsored lawyer referral service is endorsed by the elimination of the prior language from the Model Code that expressly limited lawyer participation in lawyer referral services to those that are bar sponsored, operated, or approved.¹⁶² Another commentator has also reached this conclusion.¹⁶³ On the question of allowing attorneys to pay services to recommend them, the Final Draft comment no longer tracks that in the earlier Discussion Draft. Whereas the Discussion Draft comment expressly mentioned law-

156. See *infra* note 167 and accompanying text.

157. See MODEL CODE DR 2-103(D)(3).

158. *Id.* DR 3-102(A).

159. PROPOSED FINAL DRAFT rule 7.2 comment.

160. DISCUSSION DRAFT rule 9.2.

161. *Id.* rule 9.3.

162. Compare MODEL CODE DR 2-103(C)-(D); with PROPOSED FINAL DRAFT rule 7.2; and ABA MODEL RULES rule 7.2.

163. Podgers, *supra* note 10, at 3.

yer referral services, the Final Draft comment does not.¹⁶⁴ The change from the Discussion Draft is not explained. Rule 7.2(c) of the Final Draft states that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising"¹⁶⁵ To the extent that fees paid by a lawyer to a lawyer referral service represent the cost of advertising, they are of course permitted under the Final Draft. The difference in language between the Discussion Draft and the Final Draft on this point can be viewed as a simple stylistic editing change rather than a substantive modification since the change is nowhere explained. The revised Final Draft as submitted and ultimately adopted as the new ABA Model Rules by the ABA House of Delegates directly confronts the issues of fees, augmenting rule 7.2 with language stating that a lawyer may pay the usual charges of a "not-for-profit lawyer referral."¹⁶⁶ This modification obviates the need for subtle interpretations necessitated by the vagueness of the Discussion and Final Drafts. Fee payments are clearly authorized, but only to noncommercial lawyer referral services. Accordingly, private lawyer referral services that are not bar sponsored are sanctioned by the new ABA Model Rules if such services operate on a not-for-profit basis.

C. State Rules on Lawyer Referral: A Focus on Texas

The key provisions concerning lawyer referral services are generally set forth under DR 2-103 of the respective state disciplinary rules. With the exception of the codes of Maryland and California the state codes of professional responsibility require bar sponsorship of lawyer referral services.¹⁶⁷ DR 2-103(B) has long carried a prohibition against the giving of compensation by a lawyer to anyone for the procurement of clients.¹⁶⁸ An express exemption authorizing the attorney to pay fees or dues incident to the operation of a lawyer referral service exists in practically every state code.¹⁶⁹

164. See DISCUSSION DRAFT rule 9.2 comment:

A lawyer is permitted to pay for advertising by this Rule [7.2 of PROPOSED FINAL DRAFT], but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices.

165. PROPOSED FINAL DRAFT rule 7.2(c).

166. REVISED FINAL DRAFT rule 7.2 comment; ABA MODEL RULES rule 7.2 comment.

167. A typical provision is the Texas version quoted *infra* note 180. For the Maryland exception, see MD. ANN. CODE vol. 9C, app. F (Supp. 1983). In California bar sponsorship is encouraged but not required. See *supra* note 90.

168. MODEL CODE DR 2-103(B).

169. An example is the newly revised Virginia Code, which under DR 2-103(D) states that "[a] lawyer . . . may pay . . . the usual and reasonable fees or dues charged by a lawyer referral service" See Revised Virginia Code of Professional Responsibility DR 2-103(D), reprinted in 31 VA. BAR NEWS, June 1983, at 36. The effective date of the revised Code is Oct. 1, 1983; there are significant differences between it and the PROPOSED FINAL DRAFT. The Codes of Professional Responsibility of Texas, Illinois, Massachusetts, Minnesota, and Nevada do not expressly provide that a lawyer may pay fees to a lawyer referral

The Texas Code of Professional Responsibility¹⁷⁰ amply illustrates regulatory confusion and inconsistency when its rules are compared to those already explored. Following the 1977 *Bates v. State Bar of Arizona*¹⁷¹ decision, which held unconstitutional state prohibitions on certain forms of advertising,¹⁷² Texas Code disciplinary rules DR 2-101 and 2-102 on lawyer advertising were suspended,¹⁷³ and confusion reigned.¹⁷⁴ In June 1978 and April 1980 the state bar held referendums on proposed amendments to the disciplinary rules relating to advertising.¹⁷⁵ Although the majority of those bar members voting accepted the proposals, they failed to pass because less than fifty-one percent of the registered membership voted.¹⁷⁶ The Texas Supreme Court, in the exercise of its inherent and statutory power over Texas attorneys,¹⁷⁷ issued an order on July 21, 1982, to resolve

service. This does not mean that the payment of fees is prohibited in those states. For example, rule 2-103(d) of the Illinois Code prohibits a lawyer from giving anything of value to a person to solicit a prospective client. ILL. ANN. STAT. ch. 110A, rule 2-103(d) (Smith-Hurd 1983). Illinois rule 2-103(b) permits a lawyer to "initiate contact with a prospective client . . . under the auspices of . . . a *bona fide* . . . charitable . . . organization whose purposes include but are not limited to providing or recommending legal services." *Id.* rule 2-103(b). The phrase "under the auspices" could encompass the paying of usual fees of such a charitable organization to defray its expenses.

Though usually found under DR 2-103(B), the express language in some state codes is found in other sections. The Codes of the District of Columbia, Florida, Georgia, Hawaii, Kentucky, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming contain the language in DR 2-103(C). Minnesota and Alabama have installed the language in DR 2-104, and Maine has it in DR 3.9(F)(2).

170. The current nine canons and the accompanying disciplinary rules were promulgated by the Texas Supreme Court by Order dated Dec. 20, 1971, and are located at TEX. REV. CIV. STAT. ANN. art. 320a—1 app., Rules Governing the State Bar of Texas, art. XII, § 8 (Vernon 1973 & Supp. 1982-1983) [hereinafter cited as TEXAS CODE]. Prior to that time attorney conduct was measured by 43 canons. See Zunker, *Introduction to the Code of Professional Responsibility*, 46 TEX. B.J. 90 (1983); see also Jones, *The Code of Professional Responsibility: the Texanization of the ABA Code*, 23 BAYLOR L. REV. 689 (1972); Smith, *The Texas Canons of Ethics Revisited*, 18 BAYLOR L. REV. 183, 188-90 (1966).

171. 433 U.S. 350 (1977).

172. *Id.* at 357.

173. See Order of the Texas Supreme Court (Dec. 13, 1978); see also Zunker, *Lawyer Advertising, Solicitation and Trade Names Since Bates*, 43 TEX. B.J. 321, 321 (1980).

174. "Now, we have no rule in Texas. Right at the moment we have no advertising guidelines, so it's going strictly on a case by case basis." Transcript of Temporary Injunction Hearing at 150-51, *Houston Lawyer Referral Service v. Clevenger*, No. 81-52951 (133rd Judicial District Court, Harris County, Texas Dec. 9, 1981) (statement of Judge Hittner).

175. The Texas Supreme Court ordered the State Bar to study the issue and the State Bar Board of Directors recommended that a referendum be held. See, e.g., Shelton, *Lawyer Advertising, Second Chapter*, 41 TEX. B.J. 9 (1978); *Advertising Guidelines Referendum Set*, 43 TEX. B.J. 221 (1980); *The Advertising Guidelines: To Be Or Not To Be?*, 43 TEX. B.J. 318 (1980) [hereinafter cited as *To Be Or Not To Be?*]. The State Bar Act specifies the procedures for referenda. See TEX. REV. CIV. STAT. ANN. art. 320a—1, § 8(b) (Vernon Supp. 1982-1983).

176. See, e.g., *Advertising Referendum Fails*, 43 TEX. B.J. 689 (1980); *Rule Changes Are Preferred but Referendum Invalid*, 41 TEX. B.J. 760 (1978). Section 8(b) of the State Bar Act states in part that "no election shall be valid unless a minimum of 51 percent of the members registered shall have voted at the election at which the rules, regulations and amendments are adopted." TEX. REV. CIV. STAT. ANN. art. 320a—1, § 8(b) (Vernon Supp. 1982-1983).

177. The State Bar Act contains the grant by the Texas Legislature of the power to promulgate disciplinary rules governing the professional conduct of attorneys. *Id.* § 8(a). Section 2 specifies that this legislation "is in aid of the judicial department's powers under the

the confusion and uncertainty regarding advertising and solicitation.¹⁷⁸ That order repealed DR 2-101 through DR 2-105 and reorganized the substitute provisions into DR 2-101 through DR 2-104.¹⁷⁹

The former Texas Code DR 2-103(D) is almost identical to its Model Code counterpart; both authorize an attorney to cooperate with a bar sponsored lawyer referral service as long as there is no interference with the lawyer's independent professional judgment. The new Texas disciplinary rules were promulgated after the Discussion Draft and Final Draft of proposed modifications to the ABA Model Code became available, and after the ABA Standing Committee on Lawyer Referral and Information Service had voted in early 1982 to eliminate the requirement that lawyer referral services be bar sponsored. Nonetheless, the new Texas Code DR 2-103(E) specifies that a lawyer may cooperate only with a lawyer referral service that is sponsored, operated, or approved by a bar association.¹⁸⁰ Because this change occurred so recently the Texas Code will probably retain the rule for some time to come even though the new ABA Model Rules eliminate the bar sponsorship requirement.¹⁸¹

The revised Final Draft and the new ABA Model Rules limit sponsorship of lawyer referral services to not-for-profit entities.¹⁸² The Texas rules contain no such express restriction. The language of the relevant disciplinary rules are open to the interpretation that an appropriate bar association could approve a for-profit lawyer referral service. This construction is inconsistent with and logically precluded by two opinions of the Texas State Bar Ethics Committee that mandate that lawyer referral services operate in the public interest rather than to enhance the employment of a group of attorneys.¹⁸³

constitution to regulate the practice of law and not to the exclusion of those powers." *Id.* § 2. The inherent power of courts to discipline attorneys never seems to have been questioned. L. PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* § 1.03 (1982); L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 33-36 (1971).

178. Order of the Supreme Court of Texas (July 21, 1982), *reprinted in* 45 *TEX. B.J.* (Sept. 1982).

179. *Id.*

180. "A lawyer shall not knowingly assist a person . . . that recommends . . . the use of his services However, he may cooperate in a dignified manner with the legal services activities of . . . (3) a lawyer referral service *operated, sponsored, or approved by a bar association* representative of the general bar of the geographical area in which the association exists." *TEXAS CODE DR 2-103(E)(3)* (as amended 1982) (emphasis added).

181. The 1978 Statement of Standards and Practices for a lawyer referral service also requires bar sponsorship of lawyer referral services. 1978 *STATEMENT, supra* note 98, § 2.1. As stated in the resolution of the Texas Lawyer Referral Service Committee announcing compliance with the 1978 *STATEMENT*: "[On] May 2, 1981, the Board of Directors of the State Bar of Texas directed its Lawyer Referral Service Committee to implement as rapidly as possible, applicable provisions of the ABA's 1978 Statement of Standards and Practices, which are pertinent to the operation of a state-wide Lawyer Referral Service" *State Bar of Tex. Lawyer Referral Serv. Comm. Resolution on Lawyer Referral Services I* (Oct. 13, 1982); *see Huffman, Lawyer Referral Service, State Bar Committee Annual Reports*, 46 *TEX. B.J.* 865 (1983).

182. *ABA MODEL RULES* rule 7.2.

183. *Tex. Formal Op. 371, supra* note 97; *State Bar of Tex. Comm. on Interpretation of the Canons of Ethics, Formal Op. 205* (1960), *reprinted in* 18 *BAYLOR L. REV.* 292 (1966) [hereinafter cited as *Tex. Formal Op. 205*].

Considerable confusion also exists concerning the question of fees. The Model Code specifically authorizes payment of fees to lawyer referral services under DR 2-103(C);¹⁸⁴ the proposed Final Draft is much more ambiguous on that point, however, having eliminated from the Discussion Draft commentary authorizing such fees. The Final Draft's rule 7.2(c) states that "a lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule."¹⁸⁵ In contrast, the former Texas Code DR 2-103(C) clearly and expressly authorizes the paying of fees to lawyer referral services.¹⁸⁶ Moreover, the amendment to DR 2-103(C) proposed by the state bar and subjected to a referendum in April 1980 also contained language about paying fees.¹⁸⁷ The Texas Lawyer Referral Service (TLRS) operated by the State Bar of Texas traditionally charges fees to attorneys.¹⁸⁸ Nonetheless, the Texas Supreme Court, in issuing new disciplinary rules in 1982 concerning advertising and solicitation, ignored the TLRS practice as well as the State Bar's proposal and eliminated the language authorizing fee payment while retaining the prohibition against a lawyer giving anything of value to a person or organization for recommending his employment to a client.¹⁸⁹ Thus both the Final Draft rule 7.2 and the new Texas Code DR 2-103(C) omit language expressly authorizing the payment of fees to a lawyer referral service by a lawyer. Under normal rules of statutory construction¹⁹⁰ the result of the elimination of that express provision by the Texas Supreme Court is that Texas lawyers are prohibited from paying such fees, unless those fees are considered costs for advertising in the public media.

184. See *supra* note 154 and accompanying text.

185. PROPOSED FINAL DRAFT rule 7.2(c). The discussion draft provided by way of comment that: "A lawyer should be allowed to pay for advertising permitted by this rule, for example, media charges or the cost of participating in a lawyer referral service." DISCUSSION DRAFT rule 9.2 comment.

186. A lawyer shall not request a person or organization to recommend employment . . . except that he may request referrals from a lawyer referral service operated, sponsored or approved by a bar association representative of the general bar of the geographical area in which it is located and *may pay its fees incident thereto*.

TEXAS CODE DR 2-103(C) (Vernon 1973) (repealed 1982) (emphasis added).

187. The proposed Texas DR 2-103(C) tracked the language of the former Texas DR 2-103(C). See *Application of the State Bar of Texas for Referendum* (Dec. 15-16, 1978), reprinted in *To Be Or Not To Be?*, *supra* note 175, at 320.

188. See *supra* note 69 and accompanying text.

189. TEXAS CODE DR 2-103(C) (Vernon Supp. 1982-1983), which states:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client; except that a lawyer may advertise in the public media within the limits of DR 2-101, so long as the advertising communication does not take place in person or by telephone.

190. 1A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 23.13, at 238 (4th ed.); accord *Luse v. City of Dallas*, 131 S.W.2d 1079, 1084 (Tex. Civ. App.—Dallas 1939, writ *ref'd*) (portions "of the original act that are omitted from the new legislation are to be considered annulled," even though not repugnant to or inconsistent in their provisions with the new enactment).

Nowhere does the Texas Supreme Court explain its rationale for omitting the reference to fees for lawyer referral services. One explanation for the omission is simple inadvertence, since the court reworded DR 2-103(C) so extensively. It is difficult to believe, however, that after expending so much effort in amending the disciplinary rules, the Texas Supreme Court was careless about the terms of its order. The supreme court may have considered language about fees superfluous since lawyers are expressly authorized to cooperate with bar sponsored referral services, and all such services, including the State Bar's own lawyer referral service, impose a fee.¹⁹¹ Additionally, the Final Draft containing proposed modifications to the Model Code is similarly silent on the attorney's right to pay fees, and the Texas Supreme Court, in possible anticipation of its adoption by the ABA, might have purposely chosen language more compatible with the Final Draft. Ironically, subsequent to the Texas Supreme Court's order of July 1982, rule 7.2 of the Final Draft was revised to expressly authorize the payment of usual charges of a "not-for-profit lawyer referral service;" the ABA ultimately adopted the revised version in its new Model Rules.¹⁹²

A key distinction between the Texas Code's former and current provisions and the Model Code and its recent proposed modifications is that whenever the Texas Code uses the term "bar association" in reference to lawyer referral services that term is modified by the phrase "representative of the general bar of the geographical area in which the association exists." As noted, prior to 1975 the ABA Model Code of Professional Responsibility contained similar language.¹⁹³ Currently, approximately eighteen state codes of professional responsibility modify the term "bar association" with the requirement that it be representative of the general bar of the geographical area in which the association exists.¹⁹⁴ This requirement further circumscribes the kind of organization that can sponsor a lawyer referral association. Therefore the Texas Code is more restrictive than the Model Code, the Final Draft, and the new ABA Model Rules.

The definitions section of the Texas Code sheds little light on the meaning of the phrase "representative of the general bar of the geographical area in which the association exists." The Texas Standing Committee on Ethics made a weak attempt at illuminating the concept in 1975. In interpreting the phrase, the committee declined to lay down any hard and fast rules as to geographical boundaries, number of members, or percentages of

191. See *supra* note 69 and accompanying text.

192. PROPOSED FINAL DRAFT rule 7.2(c); ABA MODEL RULES rule 7.2(c).

193. See *supra* note 154.

194. These states include Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, Oklahoma, South Carolina, Texas, Utah, and Wisconsin. Missouri's Code is a little ambiguous on this point. Missouri Code DR 2-103(C) states that a lawyer may request referral from a lawyer referral service sponsored by a "bar association." Supreme Court Rule 4, Code of Professional Responsibility DR 2-103(C)(1), *reprinted in* MISSOURI RULES OF COURT (14th ed. 1983). Missouri Code DR 2-103(D) states that a lawyer may be recommended by a lawyer referral service sponsored by a "bar association representative of the general bar of the geographical area in which the association exists." *Id.* DR 2-103(D)(1)(d).

the general bar.¹⁹⁵ The committee did offer some general guidelines. The appropriate bar (1) should not operate to increase the employment of any particular group of attorneys, (2) may be based on city, county, or metropolitan boundary lines, (3) would be larger than a small, limited group of lawyers, and (4) would be open to lawyers in all fields of practice and not just to attorneys practicing a certain specialty.¹⁹⁶ The committee cites an earlier 1960 formal opinion that, in addressing the issue of the propriety of organizing a bar association without state bar approval, asserts that "if the entire purpose of organizing a local group is to operate the referral plan above referred to, in the manner stated, then such a bar group has been organized for an improper purpose."¹⁹⁷ Consequently, a proper bar association should be more than just a lawyer referral service.

The application of this definition would tend to require that only one lawyer referral service operate in a given area.¹⁹⁸ This interpretation is consistent with the factual situation in Texas, where the lawyer referral service sponsored by the State Bar of Texas does not operate where there are local lawyer referral services.¹⁹⁹ This interpretation is, however, contrary to the practice in many other states.²⁰⁰ Moreover, the prohibition against sponsorship by specialty bar associations espoused in Texas Ethics Committee Opinion 371 contributes to the seemingly ineluctable drift toward one lawyer referral service per geographical area, a result that aggravates antitrust concerns. This interpretation can be challenged inasmuch as the definitions section of the Texas Code in existence at the time that opinion was rendered, which still exists in the same form, specifies that a bar association representative of the general bar embraces a bar association of specialists.²⁰¹ Accordingly, a specialty bar arguably should be allowed to sponsor a lawyer referral service notwithstanding this opinion. This proposition does not mean, however, that the specialty bar could limit its referrals to its specialty area or that it could prohibit nonspecialists from participating in the service; these are questions separate from that of whether the specialty bar could establish a lawyer referral service that operates in a more representative fashion according to the strictures of Texas Formal Opinion 371.

D. Tax Rulings

Obviously, operation of a lawyer referral service requires money. The level of funding for such services is a concern of the ABA Standing Com-

195. Tex. Formal Op. 371, *supra* note 97.

196. *Id.*

197. Tex. Formal Op. 205, *supra* note 183.

198. Indeed, the introductory synopsis to the opinion states: "It is improper for a group of attorneys to organize a bar association and establish a referral service for its members only, particularly when an existing referral plan is already operating in the area . . ." *Id.*

199. See *State Bar Reply*, *supra* note 64, at 1044; *supra* note 79 and accompanying text.

200. See Podgers, *State LRS may expand into local area*, BAR LEADER, May-June 1981, at 4.

201. TEXAS CODE, Definitions.

mittee on Lawyer Referral Service.²⁰² Lawyer referral services use various means to finance their operations. Three prevalent sources of funds are (1) the registration fees or dues paid by participating attorneys, (2) forwarding fees paid by attorneys to the service calculated as a percentage of the fees lawyers charge clients referred to them by the lawyer referral service, and (3) the fixed initial consultation fee, which is partially or totally returned to the lawyer referral service.

The registration fee is perhaps the least controversial source and is sanctioned by the ABA Committee on Ethics²⁰³ and the ABA Standing Committee on Lawyer Referral and Information Service.²⁰⁴ Approximately forty state and local bar associations require percentage payments from participating attorneys as a condition of referral service membership.²⁰⁵ Though the ABA endorses the percentage forwarding fees,²⁰⁶ the practice is receiving increased scrutiny.²⁰⁷ In August 1979 the Internal Revenue Service ruled in a case involving forwarding fees received by the San Diego Bar Association that such income is taxable as unrelated business income.²⁰⁸ The association received ten percent of all fees after the initial consultation fee collected by the participating attorneys that exceeded \$100 but were less than \$5000. The money was used to defray the expenses incurred in operating the referral service.²⁰⁹ Nonetheless, the IRS reasoned that the forwarding fees were not directly related to the referral service's purpose of making legal services available to individuals who do not have or know a lawyer in their immediate community.²¹⁰ The impact of

202. *Report of the Standing Committee on Lawyer Referral Service, reprinted in* 102 A.B.A. ANN. REP. 653 (1977).

203. ABA Formal Op. 291, *supra* note 25; ABA Comm. on Professional Ethics and Grievances, Formal Op. 227 (1941).

204. *See* 1978 STATEMENT, *supra* note 98, § 8.1; 1982 PROPOSED STANDARDS, *supra* note 99, § 8.1; HANDBOOK, *supra* note 7, at 29.

205. Winter, *Fee sharing, client contacts raise LRS ethical concerns*, BAR LEADER, May-June 1982, at 5.

206. HANDBOOK, *supra* note 7, at 30 ("[S]ome services charge a forwarding fee, ranging from 10% to 25%, of the fee collected by the attorney."); 1978 STATEMENT, *supra* note 98, § 8.1; 1982 PROPOSED STANDARDS, *supra* note 99, § 8.1; ABA Formal Op. 291, *supra* note 25.

207. *See* Winter, *supra* note 205, at 5-6.

208. Private Ltr. Rul. 7952002; Podgers, *IRS ruling called threat to LRS programs*, BAR LEADER, July-Aug. 1980, at 2. The IRS concluded that the income of the bar association from the lawyer referral annual registration fees and the initial consultation fees is income substantially related to the association's exempt purpose of ensuring that the community receives competent legal services, regardless of the ability of the individuals to pay. Private Ltr. Rul. 7952002. That bar association was exempt under § 501(c)(6) of the Internal Revenue Code, which provides for the exemption from federal income tax of business leagues not operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. *Id.*; *see* I.R.C. § 501(c)(6) (1976). Note that under § 6110(j)(3) of the Internal Revenue Code, private rulings "may not be used or cited as precedent." I.R.C. § 6110(j)(3) (1976).

209. Private Ltr. Rul. 7952002; *cf.* Podgers, *supra* note 208, at 2 (portion of funds were used on bar association services *other* than lawyer referral).

210. *See* Private Ltr. Rul. 7952002:

[A]ny relationship that develops between the participating attorney and the client subsequent to the initial consultation is a business relationship for the private benefit of the attorney and the client. [The bar association] is not in-

this ruling, if applied to the finances of all lawyer referral programs, would be substantial. Lawyer referral services can ill-afford to lose money at a time when the almost mandatory use of computers²¹¹ and increased advertising²¹² are driving office overhead skyward.

As a partial solution to the problem, the State of California enacted a law exempting bar associations from paying state taxes on forwarding fees that lawyers pay to lawyer referral services.²¹³ The law grants the exemption only to referral services complying with the California lawyer referral service standards.²¹⁴ Additional cause for hope can be gleaned from a recent Tax Court case, *Kentucky Bar Foundation, Inc. v. Commissioner*.²¹⁵ An organization may qualify for exemption under sections 501(a) and 501(c)(3) of the Internal Revenue Code if it is operated exclusively for one or more of the exempt purposes enumerated in section 501(c)(3).²¹⁶ The Kentucky Bar Association filed an application for recognition of the exemption under section 501(c)(3). The Internal Revenue Service issued a final adverse determination and denied the petitioner's exempt status on the ground that the petitioner was not operated exclusively for exempt purposes within the meaning of section 501(c)(3). The issue before the court narrowed to whether any of several activities, one of which was the lawyer referral service, served a nonexempt purpose so as to forfeit the requested exemption. The court stated that where activities further both exempt and nonexempt purposes the exemption will not be denied if the nonexempt

involved with this continuing attorney-client relationship. And, this continuing relationship does not contribute importantly to the exempt purpose of [the bar association], as the referral and initial consultation do.

The relationship of the forwarding fee to the association's exempt referral purpose is even more attenuated when some of the money is used to finance other bar programs as was the case in San Diego. Podgers, *supra* note 208, at 2 (statements by Edward Huntington, then vice president of the San Diego bar).

211. See, e.g., Podgers, *Denver LRS computer frees up 'human time'*, BAR LEADER, Nov.-Dec. 1980, at 8.

212. Podgers, *California bar helps locals with LRS ads*, BAR LEADER, Jan.-Feb. 1980, at 10.

213. CAL. REV. & TAX. CODE § 23734d (West Supp. 1983); Podgers, *Law takes bar off LRS state tax hook*, BAR LEADER, Sept.-Oct. 1980, at 8; see also Podgers, *Law brings stricter LRS enforcement of standards*, BAR LEADER, Mar.-Apr. 1981, at 5 (law only exempts services that comply with California Bar standards).

214. CAL. REV. & TAX. CODE § 23734d (West Supp. 1983).

215. 78 T.C. 921 (1982).

216. I.R.C. § 501(c)(3) (West Supp. 1983). A corporation or foundation is exempt from taxation if it is organized and operated:

exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Id.

purposes are insubstantial.²¹⁷ In connection with the lawyer referral service the IRS argued that promoting, protecting, and enhancing the legal profession served a substantial nonexempt purpose. The court disagreed and described the objectives and operation of the referral service. They were typical of most services, except that the recitation omitted any description of payment of contingent fees or percentage forwarding fees, though attorneys did pay registration fees and initial consultation fees. In summary, said the court, the operation "serves a genuinely charitable purpose."²¹⁸ The court held "any nonexempt purpose served by the referral service and any occasional economic benefit flowing to individual attorneys through a referral incidental to the broad charitable purpose served."²¹⁹ The Tax Court relied in part on the Eighth Circuit opinion in *St. Louis Union Trust Co. v. United States*,²²⁰ which held that the incidental benefit flowing on occasion to a participating attorney did not vitiate the genuinely charitable nature of the referral service or the bar association.²²¹ The opinion in that case gave no clue, however, as to whether percentage fees were paid by participating attorneys. The Eighth Circuit Court of Appeals did acknowledge the registration fees and the initial consultation fees, but also noted that the association made no profit from the referral service and that expenses exceeded fees collected.²²²

E. Application of Lawyer Referral Rules and Standards

The somewhat bewildering array of paradoxical regulations and guidelines concerning lawyer referral services operates to limit the effectiveness of those regulations in furthering the goal of matching prospective clients with able attorneys. Weak enforcement of the existing regulations may be an even greater impediment. In Texas, bar sponsorship clearly must exist before an attorney may cooperate with a lawyer referral service, though the imprecise definition of bar association could lead even a conscientious public-service-oriented attorney to violate a disciplinary rule. State bar

217. 78 T.C. at 923 (citing *Better Business Bureau v. United States*, 326 U.S. 279 (1945); *Duffy v. Birmingham*, 190 F.2d 738 (8th Cir. 1951); *Ohio Teamsters Trust Fund v. Commissioner*, 77 T.C. 189, 196 (1981); *Professional Standards Review v. Commissioner*, 74 T.C. 240 (1980)).

218. 78 T.C. at 925.

219. *Id.* at 926.

220. 374 F.2d 427 (8th Cir. 1967).

221. *Id.* at 435. The court stated:

Here, again, there well may be incidental benefit flowing on occasion to a lawyer on the referral panel. This, however, is but a minimal consequence of broad public service performed in what is essentially an eleemosynary endeavor. By this means, persons with real or imaginary legal problems who otherwise, for one reason or another, would not seek or obtain legal help find assistance and answers. It is hardly a great untapped source of profitable legal business. We think the government overemphasizes the incidental economic benefits and unjustifiably would taint with an accusation of commercialism legal activity which is dedicated to the public good.

Id.

222. *Id.* at 434.

disciplinary machinery typically lacks adequate investigative resources.²²³ Any such alleged violation would be addressed not through charges against the lawyer referral service itself, but through grievance charges against the attorney for violating a disciplinary rule. Since grievance committees deal with one attorney at a time, their procedures are inherently inadequate to police the multi-lawyer organization. The well-publicized ineffectiveness of the Texas grievance mechanism²²⁴ adds to the fearlessness exhibited by those who would flout the disciplinary rules or proceed with reckless disregard. The deficiencies include a tradition of both huge backlogs and disorganization, though some recent efforts to aid the situation have been initiated.²²⁵ Although the State Bar of Texas Standing Committee on Lawyer Referral is aware of the unsettled world of lawyer referral services and has grappled with some of the issues, no solutions have been found.²²⁶ The Texas State Bar, like so many others, proceeds cautiously and is reluctant to enforce its bar sponsorship requirement because of antitrust concerns.²²⁷ Similarly, the president of the New Mexico Bar Association recently expressed fear that by enforcing ethical prohibitions against attorneys who participate in private referral services his bar association would be exposed to suit under an antitrust theory.²²⁸ In this atmosphere of unrestrained permissiveness a variety of lawyer referral services have sprouted, some private and some organized and functioning in ways seemingly inconsistent with existing rules and standards for lawyer referral services. A critical examination of these entities may aid in assessing the effectiveness of guidelines in fulfilling the purposes of lawyer referral.

223. ABA MODEL RULES rule 7.3 comment.

224. See Perry, *Flaws in Texas' system to punish lawyers cited*, Hous. Post, Mar. 6, 1983, at 1A, col. 2 ("The Texas Sunset Advisory Commission urged reform in 1978, and even officials of the American Bar Association now say Texas' system for policing lawyers perpetuates misconduct by its ineffectiveness."); see also Winter, *Texas bar heating up discipline kettle again*, BAR LEADER, July-Aug. 1983, at 10 (problems in Texas grievance system); *Experts urge revamping of state legal grievance system*, Hous. Post, Mar. 6, 1983, at 2A, col. 1 (recommendations for change); *Grievance office alters handling of complaints*, Hous. Post, Mar. 6, 1983, at 2A, col. 2 (changes in handling of complaints).

225. See Burleson, *Loss of Local Control: Centralization of Grievance Prosecution*, 46 TEX. B.J. 1386 (1983); Chavez & Fleming, *We Can Afford the Changes, But We Can't Afford Avoiding Change*, 46 TEX. B.J. 1388 (1983); Lochridge, *Improvement of Disciplinary Procedures*, 46 TEX. B.J. 859 (1983); *Grievance office alters handling of complaints*, *supra* note 224, at 2A, col. 2. On May 25, 1983, the State Bar of Texas Board of Directors adopted a proposed amendment to the state bar rules that would substantially alter disciplinary procedures in the state. Some of the innovations include: (1) a procedure whereby a trial court may temporarily suspend a license of an attorney pending the trial of a disciplinary lawsuit; (2) authorization for the appointment of a custodian who will function like a receiver in instances when a lawyer simply leaves unfinished client business; (3) a requirement that disbarred and/or suspended lawyers immediately notify their clients of their loss of the right to practice; and (4) the power of the courts and grievance committees to include curative as well as punitive matters in their judgments. See Lochridge, *supra*; Zunker, *Proposed Article X of the State Bar Rules: An Analysis and Commentary*, 46 TEX. B.J. 1275 (1983).

226. See *infra* note 258.

227. Conference with Jerry Zunker, General Counsel, State Bar of Texas (May 10, 1983) [hereinafter cited as Zunker Conference].

228. See Quade, *Referral Burn*, 69 A.B.A. J. 719, 720 (1983).

1. *Small Firms and the Use of Trade Names.* One may classify as a group small firms and solo practitioners who have adopted a trade name and advertised it in the Yellow Pages telephone directory and elsewhere under the heading of lawyer referral services. The use of a trade name obfuscates the fact that the referral organization is in reality an advertising device for a small firm or a solo practitioner rather than a true referral service. Many states, including Texas, follow the Model Code and prohibit the use of trade names.²²⁹ The right to prohibit trade names is supported by the United States Supreme Court decision in *Friedman v. Rogers*,²³⁰ in which the Supreme Court upheld the constitutionality of a Texas statute that prohibited the practice of optometry under a trade name. An important element in *Friedman* was factual data indicating that consumers had been misled. A trade name that remains constant, said the Court, could hide changes in staff upon whose skill the public trusted and depended.²³¹ Similarly, by using different trade names for shops under common ownership, an optometrist could convey the misleading impression that the shops compete with each other.²³² *Friedman* distinguished *Bates v. State Bar of Arizona*²³³ and did not prohibit or limit advertising the types of information, namely prices and routine services, protected in that case.²³⁴ Trade names, according to the Court, are a form of commercial speech with no intrinsic meaning and thus any restrictions have "only the most incidental effect on the content of the commercial speech."²³⁵ *Friedman* merely required that commercial information about optometrical services appear in such a form as is necessary to prevent deception.²³⁶ This holding is consistent with *Bates*, which found the use of the phrase "legal clinic" coupled with price and service data not inherently misleading.²³⁷

The Final Draft and the new ABA Model Rules permit the use of trade names by law firms so long as they are not misleading.²³⁸ The use of trade names by many small firm referral services is probably misleading because those services are designed primarily to benefit the attorneys who run them rather than the public. Opinions 205 and 371 of the Texas Committee on

229. TEXAS CODE DR 2-102(A) (Vernon Supp. 1982-1983) ("A lawyer in private practice shall not practice under a trade name . . ."); accord MODEL CODE DR 2-102(B).

230. 440 U.S. 1 (1979).

231. *Id.* at 13.

232. *Id.*

233. 433 U.S. 350 (1977).

234. 440 U.S. at 12.

235. *Id.* at 15-16.

236. *Id.* at 16. The *Bates* Court had noted that "[t]he 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 375 n.31; see also *FTC v. Royal Milling Co.*, 288 U.S. 212, 217-18 (1933) (before prohibiting use of a trade name under Federal Trade Commission Act, 15 U.S.C. § 45, which prohibits unfair methods of competition, FTC must determine that deceptive and misleading use of name cannot be remedied by any means short of proscription).

237. *Bates*, 433 U.S. at 372.

238. See REVISED FINAL DRAFT Terminology, rule 7.5 comment; ABA MODEL RULES Terminology, rule 7.5 comment.

Ethics clearly prohibit the operation of a lawyer referral service strictly for the benefit of its members.²³⁹ The new ABA Model Rules impose the same limitation by requiring lawyer referral services to be not-for-profit. Finally, it is highly unlikely that small firm members collectively masquerading under a trade name as a lawyer referral service could objectively assess the competence of the participating attorneys to whom matters are referred, since they would be screening themselves; thus, the goals of lawyer referral, if met at all under such circumstances, are met by fortuity.

2. *Specialty Bar Referral Services.* Another group of arguably taboo private referral services includes those operated by the specialty bars such as a criminal lawyers association. On the one hand, such a referral service might limit itself to criminal matters where, because of the collective special knowledge of criminal law, it could do a superior job of screening attorneys who wished to participate and classifying the criminal nature of the problems with which prospective clients need assistance. On the other hand, the narrow perspective and isolation of a specialty bar association is seen as a threat to public interest policies.²⁴⁰ For example, a greater incentive and opportunity exists for specialty bar members to respond to increased competition by using eligibility criteria and experience panel criteria to exclude new attorneys or to refer only the less lucrative cases to newcomers. The typical bar sponsored lawyer referral service is not automatically open to every licensed lawyer either;²⁴¹ however, the diversity of the general bar membership sponsoring the service makes it quite improbable that general bar members would agree on extreme exclusionary policies. The mix of competing views tends to force compromise among members.

By defining bar associations to include specialty bars, most state codes of professional responsibility seem, nonetheless, to sanction specialty referral services, at least indirectly. Arguably, however, in those states that require that the bar association sponsoring a lawyer referral service be representative of the general bar, specialty bars do not represent the general bar and therefore, though they are bar associations for other purposes, may not sponsor lawyer referral services.

Texas Ethical Opinion 371 expressly prohibits such specialty bar lawyer referral services even though under the definitions section of the Texas Code the term "bar association" includes specialty bars.²⁴² The opinion also prohibits referral services from referring cases in just one subject area of the law and requires that the lawyer referral service be open to all licensed attorneys in the geographical area.²⁴³ In contrast, the amendments

239. Tex. Formal Op. 371, *supra* note 97; Tex. Formal Op. 205, *supra* note 183.

240. Franck, *And None for All*, BAR LEADER, Sept.-Oct. 1982, at 19, 30.

241. See 1978 STATEMENT, *supra* note 98, § 5.2; 1982 PROPOSED STANDARDS, *supra* note 99, §§ 3.4, 6.3.

242. Tex. Formal Op. 371, *supra* note 97.

243. *Id.*; cf. ABA Comm. on Ethics & Professional Responsibility, Informal Op. 1139 (1970) [hereinafter cited as ABA Informal Op. 1139]. The ABA opinion directly confronts

to the 1982 ABA proposed Standards for lawyer referral services mandate experience and specialty panels under section 5.2 and point out that clients should be referred only to attorneys with the training, experience, and motivation necessary to deal with the referred matter.²⁴⁴ Distinguishing between attorneys on the basis of competence would be in the public interest if the bar association making such distinctions is bona fide and establishes the service primarily as a public service. Specialized referral services could coexist with traditional lawyer referral services because they could refer potential clients to each other. For example, given a criminal specialty bar's greater expertise, the regular lawyer referral service could refer criminal matters to that referral service. These benefits may be diminished to the extent that more than one specialty bar in a subject matter exists in the same area. Such a situation might give rise to suspicion of profit motives and certainly would tarnish claims of superior expertise.

Some states limit the associations that may sponsor or operate a lawyer referral service to those representative of the general bar of the geographical area in which the association exists. Texas has such a limitation and yet simultaneously defines a bar association as a specialty bar. For this reason the Texas Bar general counsel asserts that the ethics opinion prohibiting specialty lawyer referral services is simply wrong, and consequently, specialty bars can be representative of the general bar of the geographical area.²⁴⁵ How a specialized bar association would be representative is unclear. Would a specialty bar have to be open to non-criminal law specialists, or would it have to be open to all criminal law

the question of whether a trial lawyers group could establish a lawyer referral service. The committee asserted that a strong, general bar association, truly representative of the geographical area would better sustain and provide the best service because of the stature and reputation of that type of bar, its greater ability to secure cooperation from all segments of the bar, its sensitivity to the interest of the overall community, its capacity to publicize the service effectively due to greater financial resources, and its greater impartiality. ABA Informal Op. 1139, *supra*, at 4. The committee also felt that confusion would result in large metropolitan areas if specialty referral services were allowed since such areas could have more than one specialty service covering the same subject matter. *Id.* Nonetheless, the committee concluded:

We believe however that a specialist bar association may qualify to have a lawyer referral service if such organization has been recognized as a qualified specialist group in a particular field of law . . . by the authority having jurisdiction . . . and the membership of such group can be said to be truly representative of the general bar of the area by accepting all applications for membership from the general as well as the specialized bar of the area.

We see nothing wrong however with an organization such as the ones you have indicated establishing a lawyer referral service if it . . . does not in any way tend to aggrandize any particular members or any special group of the bar but is aimed at the basic philosophy of making a broad-based, well-run lawyers referral service more generally available to the public

Id. at 5.

244. AMENDMENTS TO 1982 STANDARDS, *supra* note 99, § 5.2 comment (*quoted supra* note 127). The comment explains how this admonition operates by noting that experience may render an attorney "competent to handle a criminal misdemeanor case and . . . incompetent to handle a criminal felony." *Id.* A specialty criminal service referral entity would be in the best position to make this kind of fine distinction.

245. Zunker Conference, *supra* note 227.

specialists in the geographical area? Even a decision on this issue would not prevent another specialty bar from meeting the same test. As a result, the specter of two or three specialty bars exists unless one takes the position regarding specialty bar lawyer referral services that the Texas State Bar Ethics Committee takes with respect to lawyer referral services in general: "It is improper for a group of attorneys to organize a bar association and establish a referral service for its members only, particularly when an existing referral plan is already operating in the area" ²⁴⁶ Such a rule is anticompetitive and tends toward monopolization, but it may well be essential to maintaining the necessary credibility so important to a referral service operating in the public interest.

3. *Charitable Groups.* The limited referrals made by nonprofit groups designed to assist persons with specific problems typify another group of private referral services. For example, a rape crisis center or center for battered wives may refer victims of abuse to volunteering attorneys. Similarly, legal aid offices operated or financed by governmental agencies may refer fee generating cases to private attorneys.²⁴⁷ Such activities are authorized even though the referral operation is not bar sponsored. Disciplinary Rule 2-103(D) of the Model Code authorizes a lawyer to cooperate with and "be recommended" by a legal aid office "[o]perated or sponsored by a bona fide nonprofit community organization."²⁴⁸ The Final Draft and the new ABA Model Rules are less clear on the subject, but do not seem to change this rule. The comment to rule 7.2 of each specifies that the restriction against a lawyer's paying others to recommend him does not preclude some other person or organization from advertising or referring a lawyer.²⁴⁹ Examples of other such groups include legal aid agencies, prepaid legal services, and not-for-profit lawyer referral programs.²⁵⁰ Lay operated lawyer referral services pose a danger to the public, however,

246. Tex. Formal Op. 205, *supra* note 183.

247. A good example is the Gulf Coast Legal Foundation, the arm of the Legal Services Corporation in Houston. That agency actively solicits private attorneys who would be willing to accept its referrals of social security disability cases which are fee generating and rate a "55% chance of winning." Letter from attorney Jeffrey J. Skarda, Gulf Coast Legal Foundation, to private attorneys (July 29, 1983).

248. MODEL CODE DR 2-103(D):

A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

- (1) A legal aid office or public defender office:
 - (a) Operated or sponsored by a duly accredited law school.
 - (b) Operated or sponsored by a bona fide nonprofit community organization.
 - (c) Operated or sponsored by a governmental agency.
 - (d) Operated, sponsored, or approved by a bar association.

249. PROPOSED FINAL DRAFT rule 7.2 comment; ABA MODEL RULES rule 7.2 comment.

250. *See* ABA MODEL RULES rule 7.2 comment; *cf.* PROPOSED FINAL DRAFT rule 7.2 comment (does not restrict lawyer participation to "not-for-profit" lawyer referral services).

because lay persons may be unable to judge the ability of an attorney to give competent legal service. The threat may be severe enough to justify state prohibitions or, at least, stringent guidelines.²⁵¹ One series of Supreme Court decisions, however, would allow referral services operated by lay organizations such as the NAACP and the ACLU that assert political rights and the freedom to associate under the first amendment as well as labor unions that provide legal services for members.²⁵²

4. *Suspect Bar Associations.* Another type of private lawyer referral service is operated by a suspect bar association.²⁵³ The sponsoring bar association typically consists of one person or just a handful of attorneys. A one-person association seems inherently misleading and fraudulent, and therefore vulnerable to challenge. Similarly, an association comprised of few members with no association program or regular meetings clearly misleads reasonable persons by deceptively implying that it is a bona fide association. Conceivably, the titles of services operated by such groups may be deemed deceptive trade names subject to prohibition by the state.²⁵⁴ The problems of classification increase as the number of members of the alleged bar association grows, from one member to eleven members, for instance, or when the small group adds a highly sporadic education program. An attorney asked to participate in a lawyer referral service operated by such a bar association faces a real quandary. The Model Code and the Texas Code prohibit the attorney from cooperating with a lawyer referral program that is not properly bar sponsored, but offers limited guidance on how to evaluate the legitimacy of a particular alleged bar association.²⁵⁵ In Texas, as well as some other states, the attorney would have to ask if the bar association is representative enough of the general bar. Would this be determined by membership, geographical distribution, racial distribution, specialty distribution, or some other feature, or a combination thereof? Would the legitimacy of the bar association hinge on the legitimacy of the educational or other programs or the number of programs?

The former ABA Model Code of Responsibility, as worded from 1969 through 1974, solved the dilemma by establishing numerical criteria. Under that Code a bar association appropriate for lawyer referral sponsorship had to be open to any lawyer in good standing in the geographical

251. See *Friedman v. Rogers*, 440 U.S. 1, 15 (1979).

252. See *In re Primus*, 436 U.S. 412 (1978); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

253. In Texas bar associations may be formed at will; no stamp of approval is needed from any group. See *Tex. Formal Op. 205*, *supra* note 183 ("Ethically, then, any group of lawyers is free to organize any bar association, and the organization of a bar association cannot be unethical per se.").

254. See *supra* notes 229-39 and accompanying text.

255. See TEXAS CODE DR 2-103(E) (Vernon Supp. 1982-1983); MODEL CODE DR 2-103(C)-(D). The lack of precision can foster conflicts. See *Podgers, Houston LRS dispute centers on new bar*, BAR LEADER, Sept.-Oct. 1980, at 16.

area, but also had to have a membership "at least equal to the lesser of three hundred members or twenty percent of the lawyers licensed to practice in the geographical area."²⁵⁶ The Model Code after 1974, the Final Draft, and the new ABA Model Rules all eschew this approach. The Texas Code avoided numerical specificity as well; the Ethics Committee preferred to define bar associations in terms of purpose while acknowledging that a small group of lawyers is not generally acceptable.²⁵⁷ One approach proposed in Texas would have the State Bar Ethics Committee certify a list of valid lawyer referral services that function in a fashion compatible with the disciplinary rules.²⁵⁸ In so doing the committee would, of course, have to evaluate the legitimacy of any sponsoring bar association. Once established, the list would serve as an easy reference for attorneys who want to participate in lawyer referral services.

5. *Restricted Legitimate Bar Associations.* A related problem arises when bar association membership is restricted by gender or ethnic origin. Such bar associations are generally legitimate in terms of number of members and diversity of programs. Often the membership is representative of the geographical area in the sense that the association membership includes lawyers with a wide range of experience and competence in most of the major subject matter areas. Whether or not a lawyer who participates in a lawyer referral service operated by such a bar association violates a disciplinary rule depends generally on how the service functions. Thus, if the restricted bar association established a nonprofit entity that operated in conformity with the ABA standards for lawyer referrals, a lawyer could certainly participate. Attorneys who are not members of the bar associa-

256. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(C) (1974).

257. Tex. Formal Op. 371, *supra* note 97; Tex. Formal Op. 205, *supra* note 183.

258. At a meeting of the State Bar of Texas Standing Committee on Lawyer Referral a majority rejected the suggestion that the State Bar of Texas establish a certified list of approved lawyer referral services. Interview with attorney Norma Trusch, member of State Bar of Texas Standing Committee on Lawyer Referral (Aug. 20, 1983); *cf. supra* note 97 (discussion of California approach). A similar idea was articulated in House Bill 1426 approved by the Texas House of Representatives during the 1983 legislative session. Under the proposal the State Bar of Texas standing Committee on Professional Ethics was required upon "request by any interested person or group" to "render an opinion binding to all except the Supreme Court as to whether an operating or proposed lawyer referral service is legal and proper as prescribed by the Disciplinary Rules" Tex. H.B. 1426, § 1(c), 68th Leg. (1983). Additionally, the committee was required to require as essential components of any lawyer referral service bar association sponsorship, not-for-profit status, a purpose of benefiting the public, the referral of every type of legal problem, openness to attorneys in every field, and the maintenance by each participating attorney of at least \$100,000 malpractice insurance. *Id.* § 1(c)(1). Concern was expressed, however, over the fact that the Ethics Committee was composed of nine volunteer lawyers and therefore could not handle the expected number of inquiries, and money for additional committee support staff was sorely lacking. Many bar officials also felt that any bill that sought to amend the State Bar Act should be opposed because it would invite other proposals for amendment that would not be initiated by the State Bar. For these reasons the primary drafters of the bill worked out a compromise on the Senate version that restructured the bill in order to eliminate the need for amending the State Bar Act. *See* Tex. C.S.S.B. 1173, 68th Leg. (1983). The session terminated before a conference committee was convened to resolve the differences between the House and Senate versions.

tion would be eligible to participate, and referrals would not be based on race or sex. Dues charged to participating attorneys as well as criteria for experience panels could and probably would vary, but would not seriously distinguish the restricted bar's lawyer referral service from one sponsored by a bar association whose membership is not restricted.

The more problematic question is whether an ethnic or gender specific bar association could operate a lawyer referral service and restrict referrals to its members or to members of its ethnic or gender group. This issue is more than hypothetical, as demonstrated by a Chicago-based female bar association with nearly seven hundred members that started a referral service catering to persons seeking female attorneys.²⁵⁹ The standards of the ABA Standing Committee on Lawyer Referral and Information Service (LRIS) prohibit referrals based on race, sex, age, religion, or national origin.²⁶⁰ The Committee's standards do encourage the establishment of subpanels to facilitate referral based on geographical convenience and to accommodate non-English language requirements.²⁶¹ The effect of implementing these panels, particularly in cities that are segregated to a large extent, could be little different from referral services referring clients to attorneys of one race or one language. The key distinction is that an immutable characteristic is not determinative of participation under the LRIS Committee's standards; an attorney could change his geographical location or acquire a facility with a particular language. This practice differs in principle from referrals to attorneys of one race or one ethnic background or one gender.

On the other hand, some clients may prefer an attorney of a similar gender or ethnic background. A rape victim may want a female attorney to handle her case for damages against her attacker because she feels a woman attorney could sympathize more and she would be less embarrassed discussing the case. A man going through a divorce may want a woman attorney because he believes that the judge may be more sympathetic to him with a woman by his side.²⁶² A black client might distrust a white attorney in a sensitive civil rights or employment discrimination matter. A Ku Klux Klansman might prefer a white attorney to pursue his right to demonstrate. A Hispanic may believe that a Hispanic attorney could best understand the origins of his domestic dispute and therefore represent him better than someone who merely speaks Spanish. The law certainly does not prohibit individuals from following these personal views in selecting an attorney. Do the disciplinary rules prohibit the facilitation of those choices?

ABA Formal Opinion 291 allows a bar association to "use its reasonable

259. Quade, *Men show interest in women's bar's LRS*, BAR LEADER, Jan.-Feb. 1982, at 33.

260. 1978 STATEMENT, *supra* note 98, § 7.2; 1982 PROPOSED STANDARDS, *supra* note 99, § 7.2.

261. 1978 STATEMENT, *supra* note 98, § 5.3; 1982 PROPOSED STANDARDS, *supra* note 99, §§ 1.1(a), 5.3.

262. See Quade, *supra* note 259, at 33.

discretion in deciding whether to confine the referral panel to bar association members only," as long as other principles discussed in the opinion are observed.²⁶³ These principles include requirements that the members of the panel be competent and that the plan not operate for the benefit of any particular group of lawyers.²⁶⁴ Thus under certain circumstances a restricted bar association is authorized to restrict its referrals to its members. The new ABA Model Rules do not address this issue directly; rule 7.2 simply limits a lawyer's participation to not-for-profit referral services. Accordingly, a not-for-profit restricted bar association referral service is permissible. In Texas, however, membership in a referral service may not be limited to members of the bar association itself.²⁶⁵ This restriction would preclude limiting referrals to the women's bar association members. The requirement under Texas Ethics Opinion 371 that all lawyers in good standing be eligible to apply also precludes limiting referrals to one race or one gender.

Efforts to sustain the right to make restrictive referrals causes resort to constitutional arguments. Such arguments rely on cases reinforcing the freedom to associate and exchange political expression as well as the consumer's right to receive commercial information.²⁶⁶ Consistent with this theme, many private referral plans consider themselves advertising cooperatives through which groups of small firms or solo practitioners can share the high cost of advertising campaigns.²⁶⁷ Minority lawyers therefore claim that as long as they do not mislead or deceive the public as to the qualifications or source of the attorneys to whom clients are referred, they should be allowed to advertise collectively through a referral service in exercise of their constitutional right to free speech. While race, sex, age, and other immutable characteristics are irrelevant to an attorney's competence and anathema to many as criteria for selecting counsel, such factors are nevertheless often important to the quality of the interaction between client and attorney.

Restricted referrals may violate title VII of the 1964 Civil Rights Act.²⁶⁸ Under title VII an employment agency may not "refuse to refer for em-

263. ABA Formal Op. 291, *supra* note 25.

264. *Id.*

265. Tex. Formal Op. 371, *supra* note 97 ("[A lawyer referral service] must be open to lawyers generally . . ."). The 1978 Statement is clearly in accord with the Texas view: "Participation [in a lawyer referral service] should not be restricted to members of the sponsoring bar association . . ." 1978 STATEMENT, *supra* note 98, § 3.4.

266. See *In re Primus*, 436 U.S. 412 (1978); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). A number of Supreme Court decisions have accorded great weight to the interest of the intended recipient of speech. See, e.g., *Procurier v. Martinez*, 416 U.S. 396 (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *Thomas v. Collins*, 323 U.S. 516, 534 (1945). *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976), was the vehicle for the Court's most emphatic expression on the subject: "If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted . . ." *Id.* at 757.

267. Podgers, *supra* note 11, at 3.

268. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. V 1981).

ployment . . . any individual because of his race, color, religion, sex, or national origin”²⁶⁹ The law covers employment agencies regardless of size and includes “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.”²⁷⁰ Inasmuch as an employment agency is necessarily defined in terms of employers and employees, a referral service or agency that merely brokers or acts as an intermediary for independent contracts is not an employment agency under title VII. Since lawyers must exercise independent judgment and typically are independent contractors, a lawyer referral service would ordinarily not be an employment agency. Such services may become employment agencies by making restricted referrals to companies and law firms seeking female and minority applicants for attorney-employee positions.

6. *Unabashed Commercial Services.* Perhaps the most troublesome private lawyer referral services are those set up as commercial enterprises. Lawyers as well as lay persons have organized such services, which function as local concerns, statewide enterprises, and even national services. A group of private investigators allegedly formed one such entity. Reputedly, one prerequisite for becoming a participating attorney was the employment of the investigators on referred cases. This criterion is certainly irrelevant to competence as a lawyer. To the extent that the term “lawyer referral service” connotes some form of objective assessment of the participating attorneys’ skills, the service run by these investigators is misleading and therefore not in the public interest. While all commercial endeavors in lawyer referral do not necessarily lack critical assessment of legal competence, the risk is certainly greater in a profit enterprise that attorneys will be accepted who lack the necessary competence but who do have the financial capacity to pay the fee for participation, which is often as high as \$500.

In services of this kind the number of attorneys who can participate is artificially limited so that the operators can ensure that the participating attorneys receive a high number of referrals. This restriction is an important factor in attracting attorneys and justifying the high charges to the attorneys. The high fees received allow the elimination of any fee from the potential client and of the receipt by the sponsor of any forwarding fee. This of course avoids any problem concerning fee splitting with nonlawyers.²⁷¹

Perhaps the best known of such entities was the National Lawyer Refer-

269. *Id.* § 2000e-2(b).

270. *Id.* § 2000e(c).

271. See MODEL CODE DR 3-102; ABA MODEL RULES rule 5.4; *cf.* MODEL CODE DR 5-107(B) (contemplating possibility of attorney’s being an employee by providing that a “lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services”); ABA MODEL RULES rule 5.4(c) (essentially same language as DR 5-107(B)).

ral Service (NLRS). The service was limited to eleven subject matter panels with twenty lawyers per panel to assure rapid rotation. By dividing a metropolis such as Houston into six areas, the program planned to sign up no more than 1320 attorneys in that city. Each attorney would pay NLRS \$500 annually for the privilege of membership. The attorneys were to be selected on a referral basis; that is, attorneys contacted would be asked to refer other attorneys to NLRS, and NLRS would then rely upon the judgment of the referring attorney. Though the service was based in California, out-of-state clients could enter the system by calling a toll-free number. The caller would then be told that an attorney would contact him once the nature of the problem was determined. NLRS would designate an attorney in each city to answer questions about NLRS. Additionally, NLRS planned to initiate a scholarship program in each state that would award a scholarship to one law student in each area.²⁷²

The NLRS would violate any state code of professional responsibility requiring bar sponsorship as a prerequisite for lawyer participation and, of course, would violate the new ABA Model Rules that restrict a lawyer's ability to pay for recommendations to not-for-profit referral services as well. Even apart from these concerns, however, NLRS may have been misleading. First, the number of attorneys was limited not out of concern for quality but to ensure significant financial returns to those attorneys who did sign up. A caller in a particular geographical area would have a choice on any given legal problem of only twenty attorneys, whose credentials were never formally screened. The structure of the operation therefore vitiated the value of the high number of attorneys scheduled to participate. Additionally, although the advertisement in the Yellow Pages suggested that there would be "absolutely no cost,"²⁷³ the attorneys could charge whatever initial consultation fee they chose. NLRS ultimately folded, apparently without refunding money owed to many lawyers who never realized the advertised benefits.²⁷⁴ One attorney who realized some early benefits maintains that such private referral services are a "dynamite idea" if properly regulated.²⁷⁵

III. ANTITRUST PROBLEMS

The regulatory scheme creates confusion as to how lawyer referral services ought to finance themselves and whether bar sponsored lawyer referral services can or should stifle competition from nonbar sponsored

272. Letter from James Hibbeler, President of the National Legal Referral Service, to John Werner of the Houston Lawyer Referral Service, Inc. (Mar. 31, 1982).

273. National Legal Referral Service Advertisement, GREATER HOUSTON TELEPHONE DIRECTORY YELLOW PAGES 139 (June 1982) ("Let the attorney referral service help at absolutely no cost to you.").

274. See Quade, *supra* note 222, at 719.

275. *Id.* In Houston the right of NLRS to do business in Texas was challenged. The legality of that challenge and the methods available to combat services which allegedly lure attorneys into violating the disciplinary rules are addressed *infra* notes 402-35 and accompanying text.

referral services. The prospects for survival of the bar sponsored lawyer referral services hinge, therefore, on the extent to which several essential features of such services can be maintained. Those features are perhaps most gravely threatened by the antitrust laws. The federal antitrust laws are designed to prevent interference with competition in interstate and foreign commerce. The purpose of the Sherman Antitrust Act is to preserve free and unfettered competition²⁷⁶ and to protect consumer interests.²⁷⁷ Section 1 of the Act prohibits contracts and conspiracies to restrain interstate trade and commerce.²⁷⁸ Section 2 prohibits monopolies of trade or commerce including attempts to monopolize trade or commerce.²⁷⁹ Monopoly denotes the power to control prices or exclude competition²⁸⁰ and includes conspiracies to acquire or maintain the power to exclude competitors from any part of trade or commerce.²⁸¹

The concern with application of the antitrust laws to lawyer referral services²⁸² is part of a continuing struggle over whether professionals should be allowed to regulate themselves.²⁸³ A professional in the strictest

276. 15 U.S.C. §§ 1-7 (1982); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 4 (1958).

277. See Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

278. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States" 15 U.S.C. § 1 (1982).

279. Section 2 provides that "[e]very person who shall monopolize, or attempt to monopolize . . . trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." *Id.* § 2.

280. *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 389 (1956).

281. *American Tobacco Co. v. United States*, 328 U.S. 781, 786 (1946).

282. In addition to §§ 1 and 2 of the Sherman Act, other provisions may also be applicable to lawyer referral activities. Section 7 of the Clayton Act provides: "No corporation engaged in commerce shall [merge with another], where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1982). Section 5 of the Federal Trade Commission Act prohibits "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce . . ." *Id.* § 45. The Federal Trade Commission Act is technically not an antitrust statute, but it reaches conduct forbidden by the Sherman and Clayton Acts, as well as activities similar but outside of their reach. See Boomer, Chamberlain, Horn, Weart & Winston, *Advertising Restrictions on Licensed Occupations: An Antitrust Approach*, 8 ST. MARY'S L.J. 729, 744 (1977). In proscribing unfair methods of competition, such as advertising restrictions, the FTC Act does not require concerted activity, in contrast to the Sherman Act. Private parties, however, do not enjoy a private right of action under the FTC Act, and the authority of the FTC in certain areas is being vigorously challenged. See Sbaratta, *Yes, FTC, There is a Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising*, 57 B.U.L. REV. 833 (1977); Tartt, *President's Page*, 46 TEX. B.J. 1361 (1983). An in-depth analysis of the FTC Act is beyond the scope of this Article. Similarly, space limitations do not permit an exploration of state antitrust statutes used to challenge some of the restrictions on the operation of lawyer referral services. For the most part those state statutes parallel the Sherman and FTC Acts. Therefore, the analysis would be essentially the same. See generally ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST LAWS (1973-1974).

283. Since 1975 challenges to professional self-regulation programs have been made under the antitrust laws, often successfully. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1982); *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam*, 455 U.S. 676 (1982); see also *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538 (1978). See generally L. AN-

sense is someone who applies advanced training in a complex, systematic discipline to meet the needs of individual members of the general public.²⁸⁴ This narrow definition distinguishes the physician and lawyer as well as perhaps the military officer and theologian from others who also work for a living.²⁸⁵ Theoretically, lay persons who lack this intensive specialized training cannot fully comprehend the practices and judgments of the professional and lack the time to monitor those practices. Because lay persons cannot effectively evaluate professionals, each profession, so goes the theory, ought to monitor and conduct peer review of its own members to ensure that each professional is functioning in a manner beneficial to the public. The hoped-for results of self-regulation by professionals are rising quality and declining cost of services offered by professionals who are imbued with the exclusive objective of advancing the public interest.

Many believe that, by and large, professionals have failed to discharge

DREWS, *supra* note 3, at 6 (Justice Department's 1976 suit against ABA alleging conspiracy to prohibit advertising); Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570 (1975) (applicability of antitrust laws to "learned professions"); Leibenluft & Pullard, *Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints*, 34 VAND. L. REV. 927 (1981) (effect of antitrust laws on professional activities). The Federal Trade Commission (FTC) is especially active, spawning frequent discussion by commentators on the legal profession. See Bierig, *Whatever Happened to Professional Self-Regulation?*, BAR LEADER, Mar.-Apr. 1983, at 18; Comras, *Are We Heading Toward Federal Regulation of the Legal Profession*, BAR LEADER, Mar.-Apr. 1979, at 19-21; Slonim, *FTC Future Discussed as Lawyer Probe Renews*, 66 A.B.A. J. 1056 (1980); *The FTC Returns: Bar Not Rejoicing*, BAR LEADER, Jan.-Feb. 1980, at 2 (reporting on voluntary FTC questionnaire for circulation to the bar associations of 50 states and the District of Columbia as part of probe of possible constrictions of flow of affordable legal services). The FTC activity even inspired legislative proposals in Congress to curb the authority of that agency. See H.R. 918, 98th Cong., 1st Sess., 129 CONG. REC. H138 (1983) (proposing moratorium on activity of FTC with respect to certain professions and professional associations until Congress expressly authorizes such activity); S. 1984, 97th Cong., 1st Sess., 127 CONG. REC. S15672 (1981) (amending Federal Trade Commission Act to protect legislative and regulatory authority of state legislatures). The State Bar of Texas has been particularly hostile to FTC efforts to investigate and regulate lawyers. In 1982 it established a 21-person standing committee on federal laws and regulations affecting the bar. The committee's chief activity has been to appear before congressional committees to oppose FTC authority to regulate professionals. Orrin Johnson, then president of the State Bar, is reported to have observed that "the intrusion [sic] of the Federal Trade Commission violated the historic relationship between state and federal governments . . . [T]hat members of the bar were regulated by the judicial branch of the government of Texas and were therefore a part of the very fabric of the judicial system of Texas." Wilson, *Federal Laws and Regulations Affecting the Bar*, 46 TEX. B.J. 857, 858 (1983); see also Tartt, *supra* note 282, at 1361. The State Bar solicited support of the 1983 ABA convention in Atlanta for its efforts to strip the FTC legislatively of its power to patrol lawyers' actions. See *Lawyers Seek a Loophole*, NEWSWEEK, Aug. 1, 1983, at 11; *FTC Chairman Vows to Fight on Lawyer Regulation*, Hous. Post, Aug. 1, 1983, at 10A, col. 1.

284. See Bierig, *supra* note 283, at 19.

285. See M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968). Bloom's purpose is "to show how the American middle class is victimized by the American legal profession." *Id.* at 9. "[W]hile law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves than the lawyers." *Id.* at 15 (quoting former Yale law professor Fred Rodell); see also Behrman, *The Erosion of the Professional Image*, BAR LEADER, Mar.-Apr. 1983, at 29, 30; Podgers, *The Lawyer's Image—A Problem that Won't Go Away*, BAR LEADER, Nov.-Dec. 1980, at 11; *How Bars Are Trying to Polish Public Image*, BAR LEADER, Mar.-Apr. 1983, at 31.

their professional responsibility to police themselves as well as they might have, and consequently, the image of professionals has suffered, and justifiably so.²⁸⁶ Where self-regulation was once automatically accepted, it is now viewed somewhat more critically. Limits on self-regulation have been proposed by persons invoking the antitrust laws. While some debate continues as to whether the same standards ought to apply to professionals and professions as apply to traditional business ventures under antitrust laws,²⁸⁷ generally the standards are the same. If a particular practice does not violate the antitrust laws per se, the sole inquiry tends to be whether the practice, in this case self-regulatory activity, is "one that promotes competition or one that suppresses competition."²⁸⁸ Generally, if the practice impedes competition, it is illegal whether or not it serves the public interest.²⁸⁹ In antitrust analysis considerations apart from competitive significance are largely irrelevant. For example, total bans on advertising and disseminating information are anticompetitive and therefore unlawful. In contrast, restraints on misleading and false promotional practices are procompetitive because they enhance the accuracy of information used by consumers to make choices. Standards of competence or quality, then, are unlawful if they discriminate against individuals or products for anticompetitive purposes or for reasons unrelated to their ostensible objectives. In the context of lawyer referral services one would, for example, look to the objects and purposes of the experience panel criteria used by bar sponsored lawyer referral services and ask whether those criteria reflect or measure high performance, and if so, whether they help consumers make informed choices, thereby encouraging competition.

A. *The Restraint of Bar Sponsorship*

The insistence that attorneys cooperate or participate only in bar sponsored lawyer referral services necessarily limits competition because it precludes lawyer participation in those services that are not bar sponsored. Attorney participation is essential to any lawyer referral service. In those states where bar association is defined as one "representative of the general bar of the geographical area in which the association exists,"²⁹⁰ the competition is further limited as not every bar association is authorized to spon-

286. See Podgers, *supra* note 285, at 11-13.

287. Behrman, *supra* note 285, at 29.

288. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978).

289. There are of course exceptions to this rule. Communicating a viewpoint to a legislature or regulatory board is protected by the first amendment under the *Noerr-Pennington* doctrine. *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). An activity may be lawful because it is part of a federal regulatory scheme that is incompatible with antitrust laws. *National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 393 n.18 (1981). If the activity constitutes a state regulated insurance business the McCarran-Ferguson Act may extend immunity to it from antitrust laws. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). In addition, activities undertaken by the state or pursuant to state directive and under state supervision may escape antitrust sanction under *Parker v. Brown*, 317 U.S. 341 (1943). See *infra* notes 343-51 and accompanying text.

290. See *supra* note 154 and accompanying text.

sor a referral service. The Texas Ethics Committee has stated that allowing competing groups of attorneys within the same general geographical area to advertise and solicit business through the guise of lawyer referral services could convey to the public an implication that the principal purpose of such employment is the private benefit of the group being advertised rather than the benefit to the public that accrues by facilitating public access to legal services.²⁹¹ One bar tends to preclude efforts by the other bars since often only one bar is sufficiently representative.²⁹²

The anticompetitive potential of the bar sponsorship requirement shows more clearly where specialty bars such as criminal bar associations are allowed to sponsor referral services. If specialty bars operate or sponsor services, the restraint on competition may be increased because the sponsors of the service that establish the rules for attorneys applying to participate are direct competitors of the newcomers who would like to participate. As competition for new clients heightens, the incentives to toughen the standards under the guise of protecting the public increase.²⁹³ In a much broader and less specialized bar association, however, the anticompetitive incentive is diffused. The monopolistic tendencies of the bar sponsorship requirement are not inconsistent with the long tradition of professionals who decide to form associations, agree on fee schedules, agree not to solicit business or advertise, agree not to engage in competitive bidding, and in general agree that it is somehow unprofessional to engage in the kind of competitive activities typical of other businesses.

At one time the professions argued that as learned professions they were never intended to be regulated by the federal antitrust laws since they were regulated by the state, and more fundamentally, that they were not engaging in trade or commerce.²⁹⁴ The Supreme Court firmly rejected those propositions as bases for the exemption of activities of professionals from federal antitrust sanctions. In the 1975 case of *Goldfarb v. Virginia State Bar*²⁹⁵ the Court held that lawyers were involved in trade and commerce and stated that "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on com-

291. See Tex. Formal Op. 371, *supra* note 97.

292. See, e.g., Podgers, *supra* note 255, at 15 (strenuous opposition of large Houston bar association to establishment of referral service in same geographical area by alleged bar association with only 39 members).

293. But see *supra* notes 240-46 and accompanying text (discussion of specialty bar associations).

294. The often asserted learned profession exemption from the Sherman Act is derived from *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208-09 (1922), where the Supreme Court created an exemption for major league baseball. Justice Holmes declared in a dictum that "a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another State." *Id.* at 209. Similarly, doctors follow a profession and not a trade. *FTC v. Raladom Co.*, 283 U.S. 643, 653 (1931).

295. 421 U.S. 773 (1975). The statements quoted *supra* note 294 were characterized as mere "passing references." *Id.* at 786 n.15.

merce.”²⁹⁶ Thus the Court held that those activities were fully subject to scrutiny under the antitrust laws and that the Virginia State Bar’s adoption of a schedule of suggested fees for various legal services did in fact violate the antitrust laws.²⁹⁷ Nevertheless, the Court inserted a footnote to its *Goldfarb* opinion suggesting that it might still give greater latitude to restrictive rules adopted by professionals than it would to rules adopted by other commercial actors.²⁹⁸ How wide this latitude might be remains in some doubt,²⁹⁹ though the door left open is indeed a narrow one.

In *National Society of Professional Engineers v. United States*³⁰⁰ the Court held that the Society’s rule prohibiting engineers from engaging in competitive bidding violated the Sherman Act by restraining price competition among engineers.³⁰¹ The Society did not contest the contention that the ban on competitive bidding restrained price competition. The Society did argue, however, that such a rule was reasonable and necessary because price competition among engineers would be contrary to the public interest and that such competition would place pressures on engineers to design inefficient and less expensive structures, which would decrease the quality and safety of the structures. The Court responded by noting that the congressional policy favoring open competition did not allow the courts to inquire whether that competition was good for an industry.³⁰² The Sherman Act, said the Court, mandates competition and outlaws arrangements that restrain it; the Act “reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”³⁰³ The Court also clarified to some extent the footnote in *Goldfarb* by pointing out that the Court would be willing to inquire whether rules limiting competition in other markets might have a different effect in markets for professional services.³⁰⁴

296. *Id.* at 788.

297. *Id.* at 792-93.

298. *Id.* at 788 n.17. The Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id.

299. Further elaboration may accompany the Supreme Court’s pending review of *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 686 F.2d 286 (5th Cir. 1982), *cert. granted*, 103 S. Ct. 1271 (1983). In this case a board certified anesthesiologist charged that § 1 of the Sherman Act was violated by the exclusive contract for anesthesia service between a hospital and a professional medical corporation. The hospital district argued that the traditional and more stringent per se rule of liability should be rejected due to the “professional nature of the services.” *Id.* at 293. The Fifth Circuit Court of Appeals disagreed. *Id.*

300. 435 U.S. 679 (1978).

301. *Id.* at 696-97.

302. *Id.* at 695.

303. *Id.*

304. *Id.* at 696.

Bar sponsorship requirements will no doubt generate similar arguments that the public might be better served by bar sponsored referral plans. Arthur Lewis, past chairman of the ABA Standing Committee on Lawyer Referral Service, has indicated that "[b]ar sponsorship 'is like the *Good Housekeeping* seal.'"³⁰⁵ He suggested that not only does bar sponsorship lend credibility to lawyer referral services in the eyes of the public, but also that it will ensure a high caliber of service. Bar sponsorship is impliedly synonymous with high standards for participating attorneys, the existence of malpractice insurance, and precise screening of potential clients. Certainly, instances of abuse by private referral entities exist. Nevertheless, one group of lawyers, such as a lawyer referral service governing board comprised of bar association members, is not necessarily better in all instances at referring potential clients to lawyers than is another group of lawyers of the same size with similar resources simply because the latter group is not bar sponsored. Obviously, a referral in the public interest is less certain where a handful of attorneys poses as an association.³⁰⁶ Such a service might even be fraudulent and vulnerable to challenge under state laws forbidding deceptive trade practices.³⁰⁷ Nevertheless, unless protected by some exemption, there is a real danger that bar sponsorship requirements violate the antitrust laws.

B. *The Per Se Illegality of Fees*

Antitrust issues also arise concerning fees received by lawyer referral services. The fixed initial consultation fee is perhaps the most important fee because it serves two functions. To the extent that all or part of the initial consultation fee is refunded, it is a financing device; however, it is even more important as an essential method of inducing prospective clients to contact attorneys. The importance of the low initial fee as an inducement to prospective clients is often reiterated.³⁰⁸

305. Podgers, *supra* note 12, at 21; accord Carlin *supra* note 70, at 677 ("The institutional advertising of LRS under bar association sponsorship can register a more trusted image . . .").

306. See *supra* notes 253-58 and accompanying text.

307. See, e.g., Texas Deceptive Trade Practices—Consumer Protection Act (DTPA), TEX. BUS. & COMM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1982-1983); Debakey v. Staggs, 605 S.W.2d 631, 633 (Tex. Civ. App.—Houston [1st Dist.] 1980), writ *ref'd n.r.e. per curiam*, 612 S.W.2d 924 (Tex. 1981); see also Elia, *The DTPA—The All Encompassing Buyer Remedy in Texas*, 43 TEX. B.J. 745 (1980). Misleading representations may also lead to disciplinary actions against the attorney. See TEXAS CODE DR 2-101(A) (Vernon Supp. 1982-1983); MODEL CODE DR 2-101(A); ABA MODEL RULES rule 7.1. In short, the possibility still exists that a nonbar sponsored service could be interested in public service. For example, a group that calls itself the Lawyers' Registry Corporation proposes that its nationwide lawyer referral service would charge nothing to potential clients and that attorneys wanting to participate would have to meet stringent guidelines for competence. See Vilkin, *supra* note 11, at 2, col. 1, at 36, col. 1.

308. See Carlin, *supra* note 70, at 670. HANDBOOK, *supra* note 7 states:

Since fear of being overcharged is one of the principal things which deter laymen from seeking legal advice, the fixed fee has always been considered one of the most important elements in the referral plan. One carefully conducted study for the Survey of the Legal Profession showed that a large percentage of laymen who were interviewed were firmly of the opinion that a

Notwithstanding its utility, the initial consultation fee operates as an overt mechanism for fixing the price of the services rendered during the initial visit between a referred client and the participating attorney, and, therefore, is similar to the fee schedules in *Goldfarb* held to be a "classic illustration of price fixing."³⁰⁹ A key distinction is that *Goldfarb* dealt with minimum fee limits while the initial consultation fee is a maximum fee ceiling. In June 1982 the Supreme Court addressed the issue of maximum fee agreements in *Arizona v. Maricopa County Medical Society*³¹⁰ and held that such agreements are per se unlawful as antitrust violations under section 1 of the Sherman Act. This decision marked the first time that the Court expressly extended the per se rules to horizontal maximum price fixing; it also broke away from prior rules that suggested that certain activities should be subject to the rule of reason when engaged in by learned professions.³¹¹ The *Maricopa* case involved two nonprofit corporate foundations³¹² composed of licensed medical doctors. To provide a competitive alternative to existing insurance plans, each foundation established through majority vote a schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed for patients insured under plans approved by the foundation. Though the schedules were revised periodically, member doctors were always free to charge higher fees to uninsured patients and to charge any patient less than the maximum.

In assessing the contention of the foundations that the per se rule³¹³ did not govern their case, the Court recounted several cases as evidence of its unwavering enforcement of the per se rule against price fixing.³¹⁴ The

consultation with a lawyer in connection with even the simplest legal matter would cost \$50; a substantial percentage said that the fee would amount to more than \$100.

Id. at 13 (emphasis added).

309. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 (1975).

310. 457 U.S. 332 (1982).

311. See generally Harrison, *Price Fixing, the Professions and Ancillary Restraints: Coping With Maricopa County*, 1982 U. ILL. L. REV. 925 (1982) (discussion of *Maricopa* and previous case history).

312. The Maricopa Foundation for Medical Care, a nonprofit Arizona corporation was composed of approximately 1750 doctors, representing about 70% of the practitioners in Maricopa County. The Pima Foundation for Medical Care had roughly 400 members.

313. Most claims of unlawful restraints under § 1 of the Sherman Act are analyzed under the "rule of reason" test for liability, which requires the court to decide whether under all the circumstances of the case the restrictive practice imposed an unreasonable restraint on competition. The rule allows restraints when the anticompetitive effects are surpassed by their beneficial commercial results, such as increased availability of goods to consumers through greater efficiency and production. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing & Market Division*, 74 YALE L.J. 775, 781-82 (1966). The high cost of judging the business practices led to the recognition of per se rules, a conclusive presumption that certain categories of restraints, such as a price fixing agreement, are unreasonable and prohibited by the Sherman Act. *Maricopa*, 457 U.S. at 343-44; see also F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 438-43 (1970).

314. *Maricopa*, 457 U.S. at 345-47. The Supreme Court first cited *United States v. Trenton Potteries*, 273 U.S. 392 (1927), where the Court held that "[t]he aim of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix

Court was unpersuaded by the argument that the lack of judicial antitrust experience in the health care industry foreclosed the application of the *per se* rule. The Court specifically noted that the claim that price restraints will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods and services.³¹⁵ Relying on its decision in *United States v. Socony-Vacuum Oil Co.*,³¹⁶ the Court emphasized that with respect to price-fixing agreements the Sherman Act "establishes one uniform rule applicable to all industries alike."³¹⁷ Similarly, the Court rejected the assertion that the *per se* rule be rejustified for every industry that has not been subject to significant antitrust litigation.³¹⁸

The foundations in *Maricopa* also argued that the procompetitive aspects of the fee schedules should insulate them from prosecution because the fee schedules reduced medical fees and concomitant insurance premiums, thereby enhancing competition in the health insurance industry.³¹⁹ The Supreme Court rejected the argument as a misunderstanding of the *per se* concept since the "anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."³²⁰ Thus, even the possibility that a price ceiling "saved patients and insurers millions of dollars"³²¹ was not enough to convince the Court to allow a rule of reason approach.³²²

prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices." *Id.* at 397. Also cited was the Court's statement in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940):

[F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

Id. at 218. Further, the Court in *Socony-Vacuum* held:

Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.

Id. at 221-22. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), was cited for the proposition that "such [maximum price fixing] agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Id.* at 213. Finally, the Court cited *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968): "Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market."

315. *Maricopa*, 457 U.S. at 349, 350 n.22, 352 n.25.

316. 310 U.S. 150 (1940).

317. 457 U.S. at 346 (quoting *Socony-Vacuum*, 310 U.S. at 222).

318. 457 U.S. at 346.

319. To the extent that fixed initial consultation fees ensure the operation of lawyer referral services that are an alternative source of legal services, then the fee indirectly enhances competition.

320. 457 U.S. at 351.

321. *Id.* at 342.

322. See *supra* note 313 (discussion of rule of reason).

Despite the Supreme Court's emphatic adherence to the per se rule, *Maricopa* does contain indications that not all maximum fee restrictions will be disallowed automatically. The *Maricopa* Court seems to give great consideration to the argument in support of the fee schedule as a means of lowering insurance and medical costs. This approach reveals a willingness on the part of the Court to take a hard look at the facts before applying the per se label. Such an examination, almost by definition, represents a dilution, however minor, of the rigid approach implied by the per se standard.³²³ Accordingly, when confronted with a challenge to the fixed consultation fee employed by lawyer referral services courts might expose themselves to the underlying justifications for the arrangement, including the argument that the fixed fee is a necessary inducement to reluctant potential clients and an important factor in expanding the legal services market. Surprisingly, the *Maricopa* Court even offered an alternative and less restrictive method of obtaining many of the same economies as the Maricopa County plan.³²⁴ In the Court's view the function of the foundations in collecting information and determining what maximum prices would be appropriate should be performed by an insurer. While the resulting process might take more time, the economic effect should be the same.³²⁵ The Court's conclusion that the maximum fee setting by the doctors extended beyond that which was reasonably necessary³²⁶ was asserted without any concrete comparative evidence on whether that method was more or less efficient than having an insurer perform the same function by contacting each doctor separately. The Court conceded that the prior agreement might in fact be more efficient than its suggested alternative.³²⁷ The concern of the Court seems to center less on comparative efficiency and more on the greater bargaining power the combined physicians would have over the insurers,³²⁸ and inferentially, the potential of such a group to use the leverage to raise prices. If the foundations were left out of this picture, the doctors would not have a single horizontal entity bargaining for them, and their former leverage and monopolistic potential would be diminished.

The alternative suggested by the Court leaves open the possibility that maximum price fixing could be afforded rule of reason treatment if the alternatives were less obvious. The facts surrounding the typical initial consultation fees for legal services are not closely analogous to the Court's suggested alternative. Typically, no third party insurer is available. A third entity, namely, the sponsoring bar association, is involved with the individual attorney competitors, however. That association is more closely

323. Variations of the per se standard have been discerned. See Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 333 (1979-1980). The authors describe approaches that they identify as "self-executing per se" and "analytically enhanced per se." *Id.*

324. 457 U.S. at 353 n.28.

325. *Id.*

326. *Id.* at 351-55.

327. *Id.* at 353.

328. *Id.* at 354 & n.29.

analogous to the *Maricopa* foundations because the association is operated by competitor attorneys who are in some sense agents for the attorney members of the association. Typically, each participating attorney in the referral service, as a condition for receiving referrals, must agree to the fee limit set by the bar association's referral service. This situation is similar to that condemned in *Maricopa*, where the Court noted that "[u]nder the foundation plan, each doctor must look at the maximum-fee schedule fixed by his competitors and vote for or against approval of the plan (and, if the plan is approved by a majority vote, he must continue or revoke his foundation membership.)"³²⁹ Thus, though evidence of flexibility in *Maricopa* exists, the circumstances inherent in the utilization of fixed initial consultation fees may not allow lawyer referral services to take advantage of that flexibility.

The Court's suggestion of an alternative and its reiteration that the foundation's practices were not necessary implies that the ancillary restraints doctrine is still viable. The doctrine, established as early as 1893 in *United States v. Addyston Pipe & Steel Co.*,³³⁰ stands for the proposition that restraints that are ancillary to a legitimate primary purpose, necessary, and no more restrictive than required, would escape the sweeping prohibition of the Sherman Act.³³¹ The advent of the rule of reason seemed to render the ancillary restraint doctrine superfluous. The Supreme Court, however, recently acknowledged the doctrine in *Broadcast Music, Inc. v. Columbia Broadcasting System*,³³² where the doctrine was applied to buttress a rule of reason analysis of price fixing. In that case *Broadcast Music, Inc. (BMI)* and the American Society of Composers, Authors and Publishers (ASCAP) defended against charges that their practice of issuing blanket licenses for musical compositions was improper. These licenses granted licensees the right to use the compositions of all those artists affiliated with the respective agency. The impetus for such licenses derives from the high transaction costs necessary for licensing individual compositions and the prevalent unauthorized use of these compositions. Though the Second Circuit held that these license arrangements were per se unlawful price fixing,³³³ the Supreme Court reversed, stating that the rule of reason standard should be used.³³⁴ The Court noted that the particular form of enterprise, including the joint endeavor and the concomitant price fixing, was not per se unlawful if necessary to "market the product at all."³³⁵ *Broadcast Music* does not set forth guidelines on when otherwise per se violations would survive challenges if ancillary in nature. Certainly, in *Maricopa* all the discussion of ancillary restraints did not insulate the phy-

329. *Id.* at 354 n.28.

330. 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899).

331. 85 F. at 282-83. *See generally* Bork, *supra* note 313, at 796-801; Harrison, *supra* note 311, at 932.

332. 441 U.S. 1 (1979).

333. *Columbia Broadcasting Sys. v. American Soc'y of Composers, Artists & Publishers*, 562 F.2d 130, 136 (2d Cir. 1977).

334. 441 U.S. at 24.

335. *Id.* at 23.

sician's price fixing from the per se rule. Nonetheless, to the extent *Maricopa* can be read as preserving the ancillary restraints doctrine, arguably the existence of a standard initial consultation fee is necessary to market the product of lawyer referrals, which is the lawyer referrals themselves. Without the initial incentive in the form of a financial discount, potential clients who are referred may not actually follow through on contacting the attorney.

The rationale in *Maricopa* provides yet another potential basis for distinguishing the standard initial consultation fee. In refusing to embrace the contention that professionals are to be treated differently from non-professionals, the Court nevertheless indicated that where price fixing agreements are premised on public service or ethical norms, a different outcome may be required.³³⁶ The medical foundations in *Maricopa* could not avoid the per se rule because they could not distinguish themselves from any other provider of goods and services. They had simply set a price restraint that made it easier for customers to pay the doctors' fees. The fact that the initial legal consultation fee ceilings make it easier for users of lawyer referral services to afford legal services is therefore clearly an insufficient public benefit to remove the fixed fee from the holding of *Maricopa*.

On the other hand, if the overall lawyer referral service is considered, its raison d'être is to serve that portion of the public that is unsure of its legal rights and wary of what it presumes are high-priced attorneys. As discussed above, the Eighth Circuit held a typical lawyer referral service to be operated exclusively for charitable purposes for purposes of federal estate tax deductions.³³⁷ In that decision the court realized that "there well may be incidental benefit flowing on occasion to a lawyer on the referral panel."³³⁸ The court ruled, however, that this benefit "is but a minimal consequence of broad public service performed in what is essentially an eleemosynary endeavor."³³⁹ Therefore, the public service exception to the per se rule against price-fixing agreements formulated by the Court in *Maricopa* may be applicable to the ancillary but essential initial consultation fee feature of the public-service-oriented lawyer referral service. The interpretation is weakened, however, by the *Maricopa* Court's apparent insistence that the alleged restraint not only serve the public, but enhance service as well.³⁴⁰

336. *Maricopa*, 457 U.S. at 348. The Court reaffirmed its position:

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 n.17 (1975), we stated that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in any other context, be treated differently."

Id.; see *supra* notes 297-98 and accompanying text.

337. *St. Louis Union Trust Co. v. United States*, 374 F.2d 427, 435 (8th Cir. 1967).

338. *Id.*; see *supra* note 220-21 and accompanying text.

339. 374 F.2d at 435; accord *Kentucky Bar Found. v. Commissioner*, 78 T.C. 921, 925 (1982).

340. *Maricopa*, 457 U.S. at 349. The Court noted: "The price-fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not

The Court's slight deference to the distinctness of professions permits an argument that lawyer referral services do not violate the Sherman Act if fixed initial consultation fees somehow improve and enhance the professional services provided to the public. Successfully demonstrating quality improvement looms as a difficult task. The quality of service is enhanced indirectly by fees that keep the lawyer referral service functioning and by the typical bar sponsored lawyer referral service's use of only those lawyers who meet certain minimum standards of professional competence. This screening of counsel function is certainly a public service, but it is enhanced by fixed initial consultation fees only to the extent that such fees assist in defraying the cost of necessary background investigations. This quality enhancement exception is, at best, a slender reed. Sturdier prophylactics stem not from *Maricopa* itself, but from larger antitrust themes. The most important of these is the state action immunity doctrine.

C. State Action Immunity Standards

The Supreme Court first considered antitrust immunity for state action in 1904 in *Olsen v. Smith*.³⁴¹ In that case the Supreme Court decided the validity of Texas pilotage laws that created a monopoly in favor of pilots licensed by the state. In upholding the regulations, the Supreme Court emphasized that it would be improper to deny "the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises."³⁴² This decision marked the beginning of antitrust immunity premised upon principles of federalism.

1. *The Case Law.* Not until forty years after *Olsen* did the Supreme Court have another occasion to consider the immunity issue. In *Parker v. Brown*³⁴³ a California raisin producer sought to enjoin the California Department of Agriculture from enforcing the California Agriculture Prorate Act, the express purpose of which was the restriction of competition among

argue, as did the defendants in *Goldfarb* and *Professional Engineers* that the quality of the professional service that their members provide is enhanced by the price restraint." *Id.*

341. 195 U.S. 332 (1904).

342. *Id.* at 345.

343. 317 U.S. 341 (1943). The *Parker* state action immunity doctrine has been exhaustively analyzed with almost all commentators urging narrow construction. See Martyn, *Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections*, 23 WAYNE L. REV. 167, 184 n.93 (1976) (list of articles); Note, *The Organized Bar and Prepaid Legal Service—An Antitrust Analysis*, 1975 WASH. U.L.Q. 1011, 1053 n.238 (list of articles); see also P. AREEDA & D. TURNER, ANTITRUST LAW ch. 2B (Supp. 1982); Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Kennedy, *Of Lawyers, Light Bulbs, and Raisins: An Analysis of the State Action Doctrine Under the Antitrust Laws*, 74 NW. U.L. REV. 31 (1979); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974); Smith, *Antitrust Immunity For State Action: A Functional Approach*, 31 BAYLOR L. REV. 263 (1979); Comment, *The State Action Doctrine and State Antitrust Laws—Thirty Five Years of Struggle*, 30 MERCER L. REV. 1039 (1979); Note, *Parker v. Brown Revisited: The State Action Doctrine After Goldfarb, Cantor and Bates*, 77 COLUM. L. REV. 898 (1977). Similarly, many cases have addressed the issue. See Martyn, *supra*, at 184 n.93.

growers and the maintenance of prices. A raisin marketing program was instituted under the authority of the California Agriculture Prorate Act. The program committee's duty was to control the marketing of the California raisin crop primarily by restraints upon competition by producers in the sale of their crops to buyers. The buyers eventually sold and shipped ninety-five percent of the crop in interstate commerce. Over fifty percent of worldwide raisin production and almost all of the raisins consumed in the United States were grown in California. One producer brought suit against the California Director of Agriculture to enjoin enforcement of the prorate program. The Court assumed that the California program would violate the Sherman Act if it were organized and conducted by private persons. Based on legislative history, the Court found no intention on the part of Congress in 1890 to pass an antitrust statute that would apply to state regulations.³⁴⁴ The Court went on to hold that the prorate program constituted state action and thus did not violate the Sherman Act.³⁴⁵

Parker, which is considered the seminal case on this issue, represents a broad antitrust immunity position on state action.³⁴⁶ In *Parker* the Court did not consider the proximate relationship of the program officials to the state or the degree of state control and monitoring of the program. The Court expressly discounted the effect of the program on interstate commerce.³⁴⁷ Subsequent Supreme Court decisions, however, have evolved a strict standard of review for antitrust immunity claims and a presumption against immunity.³⁴⁸

Thirty years after *Parker* the Supreme Court had occasion to reexamine the scope of the state action immunity doctrine in *Goldfarb v. Virginia State*

344. 317 U.S. at 350-52.

345. *Id.* at 352.

346. The state action immunity doctrine has also been described as the "state action exemption" and "the state action defense." "The term exemption is commonly used as an abbreviated expression for *Parker*'s holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 393 n.8 (1978). Professor Handler prefers the term "preemption," which can occur when there is conflict between inconsistent state and federal legislation. With his preemption analysis the presumption is that pursuant to the tenth amendment state law effectively governs and is not displaced by federal enactment. See Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1, 17-20 (1976). Other commentators offer various other approaches. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 238, at 731-37 (1977) (balancing test that includes consideration of fairness); Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950, 967 (1970) (limit *Parker* to situations where state has legitimate local reason for limiting competition, where policy is mandated by statute, and where limitation of competition is narrowly drawn); Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693, 703, 709-10, 714-26 (1974) (limit state action exemption to public utility type regulations and require state supervision); Slater, *supra* note 357 (balancing test).

347. 317 U.S. at 368.

348. See *supra* notes 295-99 and accompanying text (discussing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)); *infra* notes 357-417 and accompanying text (discussing *Community Communications Corp. v. City of Boulder*, 455 U.S. 40 (1982); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976)).

Bar.³⁴⁹ There a unanimous Supreme Court held that minimum fee schedules published by the Fairfax County Bar Association and enforced by the Virginia State Bar³⁵⁰ violated the Sherman Act and did not qualify as state action deserving of antitrust immunity.³⁵¹ The district court and the Fourth Circuit Court of Appeals had exempted the state bar from the antitrust laws on the ground that the state bar was an agency of the state and thus its action constituted state action.

Simply because the conduct in question was that of a state agency did not by itself give rise to antitrust immunity, according to the *Goldfarb* Court.³⁵² While *Parker* had focused on the reasons for the state action doctrine, *Goldfarb* focused on the nature of the state action. The *Parker* Court found that the prorate program constituted state action simply because it derived its authority from the command of the state acting as sovereign. The *Goldfarb* Court disagreed that such a tenuous connection between the activity and the sovereign was enough for immunity purposes. The Court asserted that “[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign.”³⁵³ In *Goldfarb* the bar associations could not show that their actions were compelled by direction of the state acting as a sovereign, so the actions carried no immunity.³⁵⁴ The Court emphasized that while the state supreme court promulgated the ethical codes, “they do not direct either respondent to supply [the fee schedules], or require the type of price floor which arose from the respondents’ activities.”³⁵⁵ Thus while the state bar association was a “state agency for some limited purposes,” according to the Court, this status did not automatically confer antitrust immunity.³⁵⁶ In summary, the Court held that mere authorization, prompting, or tacit approval by the state of the activity in question was not sufficient to invoke the immunity doctrine, and the fact that the defendant is a state agency or a member of a learned profession did not control the immunity issue. The conduct challenged must be compelled by the state acting as a sovereign.

The next Supreme Court decision on this issue, *Cantor v. Detroit Edison Co.*,³⁵⁷ concerned the immunity claim of a private electric utility company.

349. 421 U.S. 773 (1975).

350. *Id.* at 789-90. The county bar was a voluntary private organization without the power to enforce the minimum fee schedules it published. The state bar, however, was a state agency because it was an administrative agency of the Virginia Supreme Court. The state bar published opinions indicating that attorneys who charged less than the recommended fees could be found guilty of misconduct and disciplined were challenged as price fixing in violation of the Sherman Act; both the state and county bar claimed immunity under *Parker*.

351. *Id.* at 790.

352. *Id.* at 791.

353. *Id.* at 790.

354. The Court noted that “[r]espondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to [the setting of] fees” *Id.*

355. *Id.*

356. *Id.* at 791.

357. 428 U.S. 579 (1976).

The company maintained a program of giving free light bulbs to its customers. The cost of the program was included in its tariff request to the Michigan Public Service Commission, and the program could not be terminated until the Commission approved a new tariff. The Court denied state action immunity to the company despite pervasive state agency regulation of its operations, focusing on the degree to which the state participated in the decision that produced the anticompetitive program.

While acknowledging that imposing antitrust liability on a private party who merely obeyed a state law would be unacceptable,³⁵⁸ the Court hastened to note that it had “already decided that state authorization, approval, encouragement, or participation in restrictive conduct confers no antitrust immunity.”³⁵⁹ A plurality of the Court embraced a per se rule that conferred no immunity unless the action was taken by state officials.³⁶⁰ The majority, however, recognized a balancing test in which the degree of state involvement in the decision that produced the offensive activities is compared to the degree of private involvement in that decision. For the majority, the question presented was whether “the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision.”³⁶¹ Applying this analysis, the Court observed that the light bulb program was the product of a decision in which both the utility and state agency participated, and that while the utility could neither institute nor terminate the program without approval by a state agency, the decision whether to use such a program was primarily that of the utility.³⁶² The Court concluded that the utility’s participation in the decision to maintain the program was so significant as to require conformity with the federal antitrust laws.³⁶³

The *Cantor* Court also discussed the immunity doctrine in terms of the necessity of the requested exemption. A plurality of the Court felt that if an exemption is unnecessary to make a state regulatory system work then there should be no antitrust exemption. Applying this standard to the light bulb distribution program, these Justices found that an exemption was unnecessary for Michigan to effectively regulate the public utility’s distribution of electricity.³⁶⁴ The Court reasoned that the Sherman Act should not be undermined by granting “a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated . . . to any necessary significant state interest.”³⁶⁵

The *Cantor* opinion is problematic in several respects. First, the Court provides no criteria for determining under the balancing test the point at which liability attaches because of the doctrine of private involvement in

358. *Id.* at 592.

359. *Id.* at 592-93 (footnotes omitted).

360. *Id.*

361. *Id.* at 593.

362. *Id.* at 593-94.

363. *Id.* at 594.

364. *Id.* at 598.

365. *Id.* at 603.

the decisionmaking process. Second, the requirement that an antitrust exemption must be deemed necessary to make a state regulatory scheme work seems to suggest that even if the conduct in question were directed by the state itself, the activity could still violate the Sherman Act upon a finding by a federal court that the state action was unnecessary. The plurality opinion, however, contains so many differing viewpoints that its precedential value is debatable.

In *Bates v. State Bar of Arizona*³⁶⁶ two lawyers sued the State Bar of Arizona, claiming that a disciplinary rule promulgated by the Arizona Supreme Court forbidding lawyer advertising violated the Sherman Act and the first amendment. The appellants had advertised their services in a local newspaper in direct contravention of the disciplinary rule. The president of the state bar filed a complaint with the local disciplinary board, which found against the attorneys. The Supreme Court held that the advertising restrictions did not violate the Sherman Act.³⁶⁷

The Court dealt with the antitrust issue primarily by distinguishing the situations in *Goldfarb* and *Cantor*. In *Goldfarb* the Court reasoned that the Virginia Supreme Court did not require the anticompetitive minimum fee schedules, whereas in *Bates* the rule against advertising was an affirmative command of the Arizona Supreme Court.³⁶⁸ In distinguishing *Cantor*, the *Bates* Court possibly added two new standards by which the presence of state action should be determined. First, the Court found that the state's policy of regulating attorneys was clearly and affirmatively expressed in its code of professional responsibility.³⁶⁹ Second, the Court emphasized that the activity in question was subject to periodic reexamination and close supervision by the state itself.³⁷⁰ Both of these elements in *Bates*, active supervision and periodic reexamination by the state, were lacking in *Cantor*.

The *Bates* Court also alluded briefly to a real party in interest test. The Court reasoned that the real party in interest was the Arizona Supreme Court, which had adopted the rules and which bore the ultimate responsibility for enforcing those rules.³⁷¹ The Court used this approach as an alternative ground for finding *Cantor* and *Goldfarb* inapplicable. The *Bates* holding provides strong precedent for holding bar sponsorship requirements immune from antitrust laws where the bar is a unified bar. First, at issue in *Bates* was a disciplinary rule with the force of a statute. Second, the defendant was related to the state in the first degree as an agency of the state supreme court just as, for example, the State Bar of Texas is an agency of the Texas Supreme Court. Third, the state policy was not only affirmatively expressed, but was also part of an extensive and pervasive regulatory scheme in which the state had an obviously important

366. 433 U.S. 350 (1977).

367. *Id.* at 359-63.

368. *Id.* at 361-62.

369. *Id.* at 359-60.

370. *Id.* at 362.

371. *Id.*

interest. The same can be said of a bar sponsorship requirement set forth expressly in the disciplinary rules adopted by a state supreme court.

In *City of Lafayette v. Louisiana Power & Light Co.*³⁷² the plaintiffs, cities authorized by the state to own and operate electric utilities, sued Louisiana Power & Light Co. (LP&L), a privately owned utility, alleging various antitrust violations. LP&L, which competed with the plaintiffs outside the boundaries of the cities, counterclaimed with its own antitrust allegations.³⁷³ The cities sought the dismissal of the counterclaim on the ground that the antitrust laws were inapplicable to cities and municipalities as subdivisions of the state.³⁷⁴

The *Lafayette* Court summarily rejected the plaintiffs' main contention that all governmental agencies were exempt from the antitrust laws. The Court noted that *Goldfarb* required an agency's act to be an act of government directed by the state as sovereign, while *Bates* required the activity to be part of an affirmatively articulated regulatory scheme, actively supervised by the state itself.³⁷⁵ The Court next turned to the nature of the relationship between the state and its city subdivisions. The Court emphasized the fact that each state has numerous incorporated municipalities, each with less than statewide jurisdiction, and suggested that cities could be expected to advance parochial interests. Under such circumstances cities could adopt policies at variance with that of the state.³⁷⁶ The Court concluded that "the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service."³⁷⁷ A determination of immunity requires that it appear "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."³⁷⁸ *Lafayette* thus adds an element of legislative intent to the immunity inquiry.³⁷⁹ Unless this inquiry is narrowly construed, *Lafayette* may potentially authorize broad grants of immunity. Furthermore, analyses based on legislative intent are typically speculative at

372. 435 U.S. 389 (1978).

373. For example, LP&L alleged that the cities required prospective LP&L customers to purchase electricity from the cities as a condition for continued water and gas service.

374. 435 U.S. at 392.

375. *Id.* at 410.

376. *Id.* at 414.

377. *Id.* at 413.

378. *Id.* at 415.

379. *Accord* *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 52 n.15 (1982) ("*Parker* affords an exemption from *federal* antitrust laws, based upon *Congress'* intentions respecting the scope of those laws." (emphasis in original)). Although the *Boulder* case received much notoriety, see Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163 (1983), it logically extends the broad language in *Lafayette* that state subdivisions are not generally treated as "state" equivalents. In holding that the city of Boulder's cable regulation ordinance was not immune, the Court asserted that the state's home rule amendment guaranteeing local autonomy is not a clear articulation of state policy contemplating anticompetition. "The requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is 'one of mere neutrality respecting the municipal actions challenged as anticompetitive.'" 455 U.S. at 55.

best.³⁸⁰

The fact situation in *Princeton Community Phone Book Inc. v. Bate*³⁸¹ closely resembled that in *Bates*. The Third Circuit Court of Appeals found that state action immunity should apply, and the Supreme Court denied certiorari. In *Princeton* the challenged activity was the issuance by the defendant, the Advisory Committee on Professional Ethics, of an opinion stating that members of the New Jersey Bar were prohibited from paying a phone book company to list their names, addresses, and telephone numbers in classified sections of the book. The publisher argued that under *Goldfarb* the Advisory Committee's conduct was not exempt because it was enforcing its own interpretation of the ethics rule that prohibited paid advertising by lawyers in New Jersey. The *Princeton* court acknowledged that the committee was interpreting an unclear command and enforcing its own interpretation. The court, however, found that although "the relationship between the Committee's activity and the command of the state [was] not as close as [the] relationship in *Bates*, the relationship between the Committee as an entity and the State Supreme Court [was] closer . . . than in *Bates*."³⁸² The Third Circuit found an inverse relationship between the defendant's relationship with the state and the clarity that the authorization to engage in the challenged activity must possess.³⁸³

In *Princeton* the court found that the defendant shared a close relationship with the state and concluded that the necessary element of compulsion by the state acting as sovereign did exist.³⁸⁴ While *Princeton* is notable for its inverse relationship language, the court also found that the New Jersey rules contemplated an anticompetitive effect,³⁸⁵ one of the *Lafayette* factors, and that the state had an important regulatory interest in the subject matter of the antitrust controversy,³⁸⁶ a factor in both *Cantor* and *Bates*.

*California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*³⁸⁷ portends to be one of the leading cases in this area. In *Midcal* the Supreme Court seems to have settled upon some standards against which state ac-

380. See Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982). Professor Tribe observes that "it seems axiomatic that the words of a statute—and not the legislators' intent as such—must be crucial elements both in the statute's legal force and in its proper interpretation." *Id.* at 517 (emphasis in original). He further asserted that "[i]f legislative intent is of problematic relevance, legislative inaction—whatever intent it might signal—is a *fortiori* a forbidden source of law." *Id.*

381. 582 F.2d 706 (3d Cir.), cert. denied, 439 U.S. 966 (1978).

382. 582 F.2d at 718-19.

383. *Id.* at 719. As the court stated: "The weaker the relationship between the state and the defendant, the more clearly the state must command the precise action taken by the defendant for the defendant to enjoy the state action exemption . . . [where the relationship is close, however,] the state need only authorize action in a particular area." *Id.*

384. *Id.*

385. *Id.* at 717.

386. *Id.* at 719.

387. 445 U.S. 97 (1980).

tion immunity claims can be measured. If true, this result is a welcome change from past court decisions in which slightly modified language appeared each time a different set of facts presented itself. In *Midcal* a California statute required wine producers to file fair trade contracts with the state. In these contracts the producer established prices for those brands that the producer sold and required dealers to sell at those prices. Selling to retailers below the established prices subjected the dealer to fines, license suspension, or license revocation. The Department of Alcoholic Beverage Control charged Midcal Aluminum, Inc., a wholesale dealer, with selling wine below prices set by the Ernest and Julio Gallo Winery and with selling wine for which no fair trade contract was filed. Midcal sought an injunction against the enforcement of the price-fixing program on the grounds that it violated the Sherman Act.

Parker v. Brown and *Midcal* both involved state-created price maintenance programs for the benefit of the state producers of raisins and wine, respectively. A critical difference between the two programs recognized by the *Midcal* Court, however, was the degree of state control, participation, and supervision at the grass roots level of the program's implementation. Given the customary illegality of resale price maintenance, the program in *Midcal* failed because it sought to create private pricesetting power not directly supervised by the state. In *Parker*, on the other hand, the program was administered by California state officials and output was restricted to no more than the officials themselves approved.³⁸⁸

The *Midcal* Court read *Goldfarb* and *Cantor* as requiring that the state, acting as sovereign, compel the anticompetitive conduct for the effectuation of its policy goals, and that the state provide oversight of the regulated activity.³⁸⁹ *Bates* further supported the conclusion in *Midcal* because that decision stated that immunity would be granted when the state clearly articulates a policy of restraining competition and subjects the operation of the anticompetitive policy to careful reexamination.³⁹⁰ The Supreme Court in *Midcal* then adopted three criteria for determining the presence of state action: (1) the state must have acted in its sovereign capacity; (2) the anticompetitive conduct must be a clearly articulated and affirmatively expressed policy of the state; and (3) the actual conduct must be subject to pointed reexamination or active supervision by the state.³⁹¹ The Court held that the California wine pricing system failed to meet this last requirement. The Court concluded:

The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the

388. *Parker v. Brown*, 317 U.S. 341, 346-47 (1943).

389. *Midcal*, 445 U.S. at 104; *Bates*, 433 U.S. at 362.

390. *Midcal*, 445 U.S. at 104-05.

391. *Id.* at 105.

program.³⁹²

The Court believed that the national interest in competition should not be "thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."³⁹³

The *Midcal* decision is important in at least two respects. First, it articulates more clearly than had previous opinions one simple question with which all the prior cases seem to have been concerned, that is, just how involved was the state in the conduct of which complaint is made? Second, whether by design or by accident, the *Midcal* Court appears to have weeded out from among the many prior opinions those criteria deserving of critical importance in the state action immunity doctrine.

2. *The Exemption of Fixed Fees.* The administration of initial consultation fees by a state bar authorized lawyer referral service would not seem to justify state action immunity under the standards adumbrated thus far. *Midcal*, *Bates*, and other cases established as prerequisites for exemption the existence of a clearly articulated policy. This policy, in the words of the *Goldfarb* Court, must be promulgated by an action of the sovereign.³⁹⁴ The most unambiguous statement of policy would be a state statute setting forth the actual dollar amount of the initial consultation fees. No such statutes have been found.³⁹⁵ References to fees can be found in the disciplinary rules adopted by various states. Those references do not specifically mention initial consultation fees. A clearly articulated policy on initial consultation fees is therefore lacking, rendering vulnerable a key feature of lawyer referral services. Future adoption of guidelines concerning initial consultation fees by the legislature or a state supreme court would suffice to grant antitrust immunity. Such guidelines should be precise to the point of actually setting out the dollar amount and should mandate periodic state review of such fees.³⁹⁶

A state bar association is not the sovereign and therefore may not confer immunity on itself by establishing an initial consultation fee policy. Many state bars are, however, accorded agency status by statute or by delegation from a state's supreme court. The state bar involved in *Goldfarb* was specifically authorized to "act as an administrative agency of the [Virginia Supreme Court of Appeals] for the purpose of investigating and reporting the violations of such rules and regulations adopted by the Court. . . ." ³⁹⁷ Nonetheless, despite the clear agency status, the Court in *Goldfarb* stressed that anticompetitive actions must be compelled by the

392. *Id.* at 105-06.

393. *Id.* at 106.

394. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

395. Proposed H.B. 1426, which passed the Texas House of Representatives in 1983, contained a specific dollar figure. Tex. H.B. 1426, § 1(c)(2)(ii), 68th Leg. (1983); see *supra* note 258.

396. See *Midcal*, 445 U.S. at 105-06.

397. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 776 n.2 (1975) (quoting VA. CODE ANN. § 54-49 (1972)).

direction of the state acting as sovereign.³⁹⁸ Thus, even though it is an agency, a state bar could provide only a shield for fixed initial consultation fees if a directive by the supreme court or legislature compelled it to establish such fees. Such a directive would probably have to order the bar to establish a fixed ceiling on initial consultation fees.

Under *Princeton* the directive need not be quite as specific. The *Princeton* court established an inverse relationship between the precision of state directives and sovereign status. The further away from sovereign status is the alleged antitrust violator, the more precise the state guidelines should be.³⁹⁹ If the state bar is the sole agent of a state supreme court and has that court's authorization to act in the particular area of lawyer referral service fees, then the criteria set forth by the *Princeton* court are apparently satisfied.⁴⁰⁰ Currently, lawyer referral services operated by state bar associations establish their own initial consultation fees. While the typical disciplinary code permits an attorney to pay fees incident to participation⁴⁰¹ and therefore implicitly authorizes the setting of those fees by the service sponsor, neither the Model Code nor the new ABA Model Rules mention the fees paid by the client to the attorney.

Voluntary local bar associations are often the entities that establish the initial consultation fees. The Houston Lawyer Referral Service, Inc. is sponsored by the Houston Bar Association, which is the largest voluntary bar association in that city. Such local bar groups are not state agencies, and hence lack authorization from the sovereign to establish initial consultation fees and are not under state supervision. Accordingly, initial consultation fee ceilings established by a local bar association, absent compelling state legislation requiring that such fees be established, are outside state action immunity protection.

3. *The Exemption of the Bar Sponsorship Requirement.* Since the sanctioning of lawyer advertising by *Bates*, many veterans of the lawyer referral movement share a sense of foreboding. According to one lawyer referral service official, lawyer referral services fear the possible impact on them of lawyer advertising.⁴⁰² The liberalization of advertising, along with new competition from clinics and prepaid legal services, makes expansion of lawyer referral services more difficult. Diehard lawyer referral service officials certainly believe that the services, particularly those that

398. 421 U.S. at 790-91. The Court noted:

[I]t cannot fairly be said that the State of Virginia through its Supreme Court rules required the anticompetitive activities of either respondent. . . .

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.

Id. (emphasis added).

399. *Princeton*, 582 F.2d at 719.

400. See *Midcal*, 445 U.S. at 105-06.

401. See, e.g., TEXAS CODE DR 2-103(E) (Vernon Supp. 1982-1983).

402. See Podgers, *supra* note 12; see also Recent Cases, *Constitutional Law—Freedom of Speech—Advertising*, 46 CIN. L. REV. 1029, 1035 (1977) (*Bates* . . . may portend the demise of lawyer referral services . . .").

are bar sponsored, are essential to making available to the public a high caliber and safe source of legal service. One director of a lawyer referral service said, "[P]eople assume in calling a bar association that it implies control (over lawyer conduct), honesty and integrity."⁴⁰³ While not universal, the feeling that pervades many of the comments is that lawyer referral services ought to exist whether or not other entities provide the same benefits.⁴⁰⁴

Unfortunately, at least one study shows that when compared to prepaid legal service plans and legal clinics, lawyer referral services are the least effective in expanding the market.⁴⁰⁵ Spurred by paranoia, some services have vigorously searched for ways to enhance their competitive position by increasing advertising⁴⁰⁶ and also by seeking enforcement of the bar sponsorship requirement to stem what is deemed illicit competition. As noted above, many bar associations are reluctant to enforce that rule.⁴⁰⁷ Accordingly, the disciplinary rule requiring bar sponsorship of lawyer referral services⁴⁰⁸ is a small impediment to sham services. The question arises, therefore, whether the bar sponsorship requirement is exempt from anti-trust laws and whether antitrust constraints should prevent state or local bar associations from enforcing the bar sponsorship restrictions.

Like the initial consultation fee, the bar sponsorship requirement is not immune from antitrust challenges unless it meets the standards for state action immunity. Under *Midcal* an articulated state policy must require that lawyer referral services be bar sponsored.⁴⁰⁹ Operationally, this policy should be set by statute or by judicial pronouncement from a state's supreme court. In *Bates* the adoption of the challenged rule by the Arizona Supreme Court was critical to a finding of immunity. Most state supreme courts have adopted disciplinary rules requiring that attorneys cooperate only with referral services sponsored by bar associations.⁴¹⁰ These mandatory requirements prohibit attorneys in those jurisdictions from cooperating with nonbar sponsored services. Thus, one of the fundamental conditions for state action immunity is satisfied in many states because an express, clear policy articulates that lawyer referral services be bar sponsored.

403. Podgers, *supra* note 12, at 24.

404. *But see id.* at 27 (remarks of one lawyer referral service director that "[i]t may be that we've served our purpose and it's time for us to die' . . .").

405. Note, *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122, 153 (1980).

406. Podgers, *supra* note 12, at 25. A survey of 23 local and state bar associations revealed that all advertise, while some attempt new advertising strategies. "We're going to have to be more competitive' . . . says . . . the Dallas Bar Association's LRS director." *Id.* A 1974 study comparing two cities of similar size showed that the service that advertised referred over 1000% more individuals than the other. Hobbs, *Lawyer Advertising a Good Beginning but Not Enough*, 62 A.B.A. J. 735, 736 (1976).

407. *See supra* notes 227-28 and accompanying text.

408. *See, e.g., supra* note 180.

409. *Midcal*, 445 U.S. at 105.

410. *See supra* note 167 and accompanying text.

a. *Unified Bars*. A rule against private lawyer referral services promulgated by a state bar association would have very little chance of protection unless the association were integrated or unified by statute as an agency of a state supreme court. A unified bar is one to which all lawyers are required to belong. Often such bars are agencies of the states, as is the case with the State Bar of Texas.⁴¹¹

The State Bar of Texas was created by statute in 1939, and is an administrative agency of the judicial department of the state.⁴¹² The Texas Supreme Court is recognized by statute as the arm of government empowered to prescribe the rules regulating the practice of law in Texas.⁴¹³ The only legislative restriction regarding the rulemaking authority of the Texas Supreme Court requires the approval of the regulated group before the rule changes or dues increases can become effective.⁴¹⁴ The supreme court is, therefore, the branch of government with the ultimate power to prescribe rules for the practice of law in Texas, and the Texas State Bar is by statute an administrative agency of that body. Nevertheless, even though the State Bar of Texas is a state agency, under *Goldfarb* no automatic immunity would be implied;⁴¹⁵ a compelling sovereign directive is still required. While no such directive exists for maximum initial consultation fees, the clear bar sponsorship requirement embodied in Texas Code DR 2-103(E) suffices.⁴¹⁶

A related and more difficult question involves those policies resulting from interpretations of the bar sponsorship requirement. Opinions 205 and 371 of the Texas Bar Committee on Ethics augment Texas Code DR 2-103 with additional restrictive provisions related to lawyer referral services.⁴¹⁷ State Bar enforcement of the disciplinary rules enacted by the Texas Supreme Court is certainly action compelled by the state acting as sovereign as required by *Parker* and *Goldfarb* in that section 12 of the State Bar Act places every Texas attorney under the disciplinary jurisdiction of the Texas Supreme Court and its administrative agent, the State Bar of Texas.⁴¹⁸ The grievance committee members are selected by the State Bar;⁴¹⁹ a Grievance Oversight Committee appointed by the supreme court reviews and supervises the grievance process periodically.⁴²⁰ Addi-

411. "Every person who after the effective date of this Act becomes licensed to practice law in this state shall enroll in the State Bar by registering his or her name with the clerk of the Supreme Court within 10 days of his or her admission to practice." TEX. REV. CIV. STAT. ANN. art. 320a—1, § 10 (Vernon Supp. 1982-1983).

412. "The State Bar of Texas established under the laws of this state is continued as a public corporation and an administrative agency of the judicial department of government." *Id.* § 2. See generally Daniel, *Creating the State Bar of Texas 1923-1940*, 45 TEX. B.J. 454 (1982).

413. See TEX. REV. CIV. STAT. ANN. art. 320a—1, §§ 2, 8(a) (Vernon Supp. 1982-1983).

414. See *supra* note 176.

415. See *Goldfarb*, 421 U.S. at 791.

416. See *supra* note 180 and accompanying text.

417. See Tex. Formal Op. 371, *supra* note 97; Tex. Formal Op. 205, *supra* note 183; *supra* note 183 and accompanying text.

418. See TEX. REV. CIV. STAT. ANN. art. 320a—1, § 12 (Vernon Supp. 1982-1983).

419. *Id.*

420. *Id.* § 14.

tionally, the Texas Supreme Court appoints the members of the Professional Ethics Committee, which is directed to express its opinion on the propriety of professional conduct.⁴²¹ That committee is also charged with recommending "amendments or clarifications of the Code of Professional Responsibility, if it considers them advisable."⁴²²

The decision in *Bates* appears especially relevant here. In *Bates* a state bar association and a disciplinary rule were the sources of the anticompetitive activity. As was the case in *Bates*, the Texas policy of regulating attorneys who participate in lawyer referral services is clearly and affirmatively expressed in a code of professional responsibility. The activity of the State Bar of Texas in the disciplinary area is also subject to periodic reexamination and close supervision by the Texas Supreme Court. The presence of these elements in *Bates* was found to be controlling on the immunity issue.⁴²³ In addition, the anticompetitive effect of new Texas Code DR 2-103(E) must have been contemplated at the time it was adopted in 1982, given the general bar sensitivity to antitrust issues during that period, and thus the conduct of the State Bar in enforcing it is clearly pursuant to state policy to displace competition with regulation or monopoly public service, both considered important in *Lafayette*.⁴²⁴

A bar association ethical opinion may be deemed a compelled product of a sovereign enactment of a disciplinary code. The validity of an ethical opinion depends on how closely it follows the disciplinary rules adopted by the respective state supreme court. In *Goldfarb* the ethical opinion quoted lacked support in the Virginia Code because the disciplinary rules did not mention minimum fees, though Virginia DR 2-103(B) did indicate that "the fee customarily charged in the locality for similar legal service" was one factor in determining whether a fee was clearly excessive.⁴²⁵ Where the ethical opinion clarifies ambiguities, the antitrust effect may be different. An opinion could by interpretation lessen the anticompetitive effect of a disciplinary rule. Such an opinion should be sustained. In contrast, an opinion defining an ambiguous but not inherently anticompetitive rule in an anticompetitive fashion should be treated like a restriction unsupported by a disciplinary code since the restraint flows from the opinion and not the code. Using this approach, one could argue that the prohibition against specialty bar associations sponsoring lawyer referral services in Texas Opinion 371⁴²⁶ should not be sustained since the Texas Code is

421. *Id.* § 18.

422. *Id.* Interestingly, prior to April 1, 1979, any amendments to the State Bar of California's Minimum Standards for a Lawyer Referral Service in California had to be approved by the California Supreme Court. Wing Interview, *supra* note 90. This change undoubtedly facilitates modifications in the standards. It will also make it more difficult for California to take advantage of the state action immunity doctrine if any amendments that have not been adopted by the California Supreme Court are challenged on antitrust grounds. The likelihood of such a challenge is lessened by the fact that California does not prohibit attorneys from participating with private referral services.

423. *Bates*, 433 U.S. at 362.

424. *Lafayette*, 435 U.S. at 413.

425. *Goldfarb*, 421 U.S. at 790 n.19.

426. See Tex. Formal Op. 371, *supra* note 97.

ambiguous on this point. That portion of the opinion could be viewed as an unauthorized expansion of the disciplinary rule.

Under *Princeton* the degree to which an interpretation by an ethics committee operates as a shield for anticompetitive behavior depends on the extent to which the committee was directed to act in an area and the proximity of its relationship to the supreme court of the state in which the committee functions. *Princeton* holds that the state directive must become more precise as the relationship between the state and the defendant weakens. The Texas Supreme Court did not select the committees that authored Texas Opinions 205 and 371 since that court's power to appoint the members of the Ethics Committee only took effect as of June 11, 1979.⁴²⁷ This fact weakens the validity of the additional restrictions on lawyer referral services set forth in Texas Ethics Committee Opinion 371.

b. Local Voluntary Bar Associations. Local bars, which are not the sovereign or even an agency of the sovereign, would not receive antitrust immunity by establishing a policy allegedly prohibiting private lawyer referral services. A state statute adopting the ABA Model Code and all future amendments or policies of a local volunteer bar association by reference would not be sufficient since this would delegate the power to create anticompetitive regulations to a private organization. The *Midcal* decision criticized such delegation, indicating that the state may not retain antitrust immunity for activities delegated to private parties.⁴²⁸ Local bar associations do not control state disciplinary machinery and are not directed to take action against private lawyer referral services. Nonetheless, the desire to see that rules requiring bar sponsorship are enforced may prompt action by a local bar association. The range of action that might be taken includes but is not limited to (1) reporting attorneys who participate in private lawyer referral services to state bar disciplinary committees, (2) seeking court injunctions against sham or private lawyer referral services, (3) admonishing the state bar to compile a list of proper lawyer referral services or to take other action, (4) lobbying both the state bar and the state legislature to support a bill drafted by the local bar association that would make unlawful private lawyer referral services, and (5) attempting to discourage publishers from accepting and printing advertisements from private or sham lawyer referral services. In assessing the validity of each option, it is assumed that a clear disciplinary rule promulgated by the state supreme court prohibits lawyers from cooperating with nonbar sponsored referral services.

The key inquiries seem to be whether the local bar effort is a required part of the sovereign's effort to enforce the disciplinary rule. The reporting of attorneys who have openly violated a disciplinary rule is an obligation of an attorney under Model Code DR 1-103(A) and the new ABA Model

427. Order of the Texas Supreme Court (June 19, 1979), reprinted in TEX. YOUNG LAWYERS ASS'N, TEXAS LAWYER PROFESSIONAL ETHICS § 1-11 (1979).

428. *Midcal*, 445 U.S. at 105-06.

rule 8.3. Though individual lawyers are obligated to report misconduct, associations are not so mandated. Certainly, reporting by associations complements the effort by the state; however, complementing the state policy is not synonymous with being a necessary part of the enforcement scheme.⁴²⁹ Thus unless some exemption or defense other than the state action immunity doctrine applies, such reporting would constitute private anticompetitive action prohibited by the antitrust laws. Similarly, efforts to enjoin alleged improper lawyer referral services through the courts may be authorized under acts such as the Texas Deceptive Trade Practices Act⁴³⁰ or pursuant to judicial interpretation.⁴³¹ Nonetheless, these efforts are still simply complementary efforts rather than absolutely necessary components of a state mandated scheme.

If, therefore, the first four optional courses of action are to find shelter from antitrust challenges, they must find it under the *Noerr-Pennington* doctrine.⁴³² That doctrine, set forth in a pair of United States Supreme

429. See *Goldfarb*, 421 U.S. at 791 ("Respondents' [bar associations] arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. [R]ather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.").

430. See Swanson, *The Texas Deceptive Trade Practices—Consumer Protection Act: Application to Professional Malpractice*, 8 ST. MARY'S L.J. 763 (1977); see *supra* note 319 (discussion of Texas Deceptive Trade Practices—Consumer Protection Act (DTPA)). A suit under this act would not be without problems. First, only consumers can maintain a DTPA case. See *Delaney Realty Inc. v. Ozuna*, 593 S.W.2d 797, 800 (Tex. Civ. App.—El Paso), writ *ref'd n.r.e. per curiam*, 600 S.W.2d 780 (Tex. 1980). A local bar association would not be a consumer of a lawyer referral service under the DTPA, TEX. BUS. & COMM. CODE ANN. § 17.45(4) (Vernon Supp. 1982-1983), unless it attempted to secure a lawyer through such a service. The issue of damages might be a problem as well. Under the DTPA, *id.* § 15.50, a consumer may not maintain an action or receive an injunction unless the prohibited acts result in actual damages. Actual damages are those recoverable at common law. See *Jim Walter Homes v. Mora*, 622 S.W.2d 878, 883 (Tex. Civ. App.—Corpus Christi 1981, no writ). If a referral is made to an attorney who performs work for the client in a manner up to standards of the profession, the client has not been damaged. Even where damage is shown the incentive for the consumer has been diluted by a 1979 amendment which eliminated the award of treble damages for deceptive practices committed "unknowingly," and placed limits on the award of treble damages for "knowing" violations of the Act. See DTPA, TEX. BUS. & COM. CODE ANN. § 17.50(b) (Vernon Supp. 1982-1983).

431. See, e.g., *Touchy v. Houston Legal Found.*, 432 S.W.2d 690 (Tex. 1968). In *Touchy* practicing attorneys and an organization composed entirely of attorneys brought suit to enjoin a nonprofit corporation from continuing certain practices, including the maintenance of a lawyer referral service. The court acknowledged that the Canons of Ethics, the predecessor to the current Texas Code, did not apply to nonlawyers. *Id.* at 694. It also asserted, however, that the interest of the public would be better served by recognition of the "right of private attorneys to institute an action, upon proper and sufficient allegations, to enjoin the unauthorized practice of law or conduct of non-lawyers which is demeaning to the legal profession and harmful to the plaintiffs." *Id.*

432. See ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS ch. XI(E) (1975 & 3d Supp. 1981); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 86 (1977); see also *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (collective activity by union and mine operators to influence Secretary of Labor to take certain action that would effectively eliminate competition from small mines held lawful irrespective of anticompetitive purpose); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (collective activity by railroads to secure veto of legislation favorable to competing truckers held lawful even if it created trade restraint monopoly); *Federal Prescription Serv. v. American Pharmaceutical Ass'n*, 663 F.2d 253 (D.C. Cir. 1981) (professional society of pharma-

Court cases, immunizes and protects private efforts to obtain anticompetitive state legislative, judicial, and administrative action. The *Noerr-Pennington* shield is only valid where the act of a public officer is necessary to complete the anticompetitive action. The doctrine therefore protects the bringing of court suits. The reporting of disciplinary violations to the state agency authorized to adjudicate such breaches is also protected from the sanctions of the antitrust laws; efforts to lobby the state bar and the legislature for restrictions on private lawyer referral services are similarly protected. Protected actions, however, may lose the shield if those actions are mere shams.⁴³³

The fifth course of action seems patently anticompetitive and unprotected by the *Noerr-Pennington* doctrine. An effort to discourage a publisher from accepting and printing paid advertisements for private referral services is anticompetitive and requires no state action. Accordingly, the effort is simply an unprotected private action no matter how well intentioned it is or how well it complements an action that the state might take. Some commentators argue that a defense of fundamental fairness ought to be permissible where the defendant in good faith reasonably assumed its conduct immune from antitrust attack.⁴³⁴ The limits of this doctrine are not clear,⁴³⁵ though the unfairness notion diminishes as the state command obeyed or followed by the defendant becomes less precise. Attempting to stop advertisements would not fall within the proposed fairness exception. In short, continued implementation of a bar sponsorship requirement may still be threatened by the antitrust laws. Challenges to the requirement as

cists' activity in attempting to persuade government agencies that dispensing of prescription drugs through mails was harmful to public health held not subject to antitrust laws). *But cf.* *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226 (5th Cir. 1983) (several cable companies, with help of mayor and apparent approval of city council, collectively divided up cable television market in Houston as part of process for applying for cable television franchises, which had to be approved by city council; *Noerr-Pennington* doctrine not applied to shield any of defendants); Crawford & Tschoepe, *The Erosion of the Noerr-Pennington Immunity*, 13 ST. MARY'S L.J. 291 (1981).

433. *See, e.g.*, *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981) (bringing numerous meritless appeals and deliberate delay in prosecuting those appeals states antitrust cause of action); *Ernest W. Harhn, Inc. v. Coddling*, 615 F.2d 830 (9th Cir. 1980) (series of baseless and frivolous lawsuits designed to prevent competitor from constructing proposed shopping mall could constitute sham rendering action subject to antitrust sanction); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530, 542 (5th Cir. 1978) (hospital staff communications to community physicians and state regulatory board, intended to restrict operations of nearby clinic, were not protected by *Noerr-Pennington* exemption where staff's statutory authority limited to internal disciplinary action), *cert. denied*, 444 U.S. 924 (1979); *California Motor Transp. Co. v. Trucking Unlimited*, 432 F.2d 755 (9th Cir. 1970) (institution of state and federal proceedings to deter plaintiffs from access to courts and agencies held unlawful), *aff'd*, 404 U.S. 508 (1972); *Technicon Medical Info. Sys. v. Green Bay Packaging*, 480 F. Supp. 124 (E.D. Wis. 1979) (filing of a single lawsuit can fall within sham exception to *Noerr-Pennington* doctrine); *see also* Crawford & Tschoepe, *supra* note 32, at 292-93 (introducing "mere sham" exception to *Noerr-Pennington* doctrine); Higginbotham, *The Noerr-Pennington Problem: A View From the Bench*, 46 ANTITRUST L.J. 730, 732-36 (1978) (discussing sham exceptions).

434. *See* Smith, *supra* note 343, at 288.

435. *Id.* at 290.

infringing upon the first amendment rights of consumers and lawyers also seem inevitable and are discussed in the following section.

IV. CONSTITUTIONAL PROBLEMS

State disciplinary rules that forbid the participation of attorneys in private or commercial lawyer referral services arguably violate the first amendment guarantee of free speech.⁴³⁶ A threshold question of critical significance is whether a prohibition against private referrals implicates or infringes the first amendment at all, and if so what standard ought to be applied. An argument can be made that lawyer referral services inherently involve communication and expression. All such services function first by communicating to prospective clients the availability of attorneys, then by receiving inquiries from those clients who are attracted by the advertisements, and finally by introducing the prospective client to the attorney through communication. Any restriction, therefore, on an attorney's involvement in or limitation on the public's access to lawyer referral services raises the question of whether the restriction is a valid infringement of first amendment rights.

An opposing argument contends that prohibitions against private lawyer referral services are no more than business regulations permissible under the rationality test of the fourteenth amendment.⁴³⁷ The state does not "lose its power to regulate commercial activity deemed harmful to the public where speech is a component of that activity."⁴³⁸ Indeed, the Supreme Court has held that freedom of speech is not abridged simply because the prohibited conduct is "in part initiated, evidenced, or carried out by means of language, either spoken, written or printed."⁴³⁹ The bald assertion,

436. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. The guarantees of the first amendment have long been incorporated into the due process clause of the fourteenth amendment and are therefore applicable to state action. *See Bigelow v. Virginia*, 421 U.S. 809, 811 (1975); *Schneider v. State*, 308 U.S. 147, 160 (1939); *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Whereas the action of a bar association must be compelled by the sovereign to qualify for state action antitrust immunity, *see supra* notes 350-56 and accompanying text, the test for whether a voluntary bar association activity invokes the constitutional protections of the fourteenth amendment is less severe though no less difficult to apply. The "[c]ases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972). Mere receipt of service or benefit or being subject to state regulation is insufficient; rather, all the facts and circumstances must be weighed in each case to assess whether there has been significant state involvement, and therefore state action existed. *Id.* at 172-73; *accord* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961). In the typical situation rules promulgated by voluntary bar associations and not ratified by a state supreme court or state legislature are not state action.

437. *See Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

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

439. *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Examples include: the exchange of information about securities, *see SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 964 (1969); corporate proxy statements, *see Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and the exchange of price and production information among competitors, *see American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

however, that prohibitions against private lawyer referral services are simply business regulations merely begs the question; it invites a consideration of the extent to which first amendment rights are impinged by the prohibition. This consideration forms the basis of the original question, which asks whether a prohibition on an attorney's use of a private or commercial referral service violates the first amendment.

Another argument supporting the prohibition of attorney involvement in private or commercial referral services relies on those cases involving public demonstration, labor picketing, and nonverbal expression, where the Supreme Court distinguished pure speech from speech plus conduct, holding that the latter is entitled to a lesser degree of constitutional protection.⁴⁴⁰ The distinction is not entirely clear in the Court's decisions nor has the Supreme Court yet addressed a referral case. The Supreme Court decision in *Ohralik v. Ohio State Bar Association*,⁴⁴¹ however, seems to support a conduct approach. "In-person solicitation," held the Court, "by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."⁴⁴² Accordingly, such a transaction merits a reduced level of judicial scrutiny because of the existence of state regulation.⁴⁴³

The application of this lower standard to the private lawyer referral service is ill advised, however, for several reasons. First, the typical operation of a lawyer referral service involves much less conduct and much more expression than in-person solicitation. Second, none of the speech-conduct cases have satisfactorily set forth a credible conceptual theory for drawing the line between speech and conduct. Since almost every communication contains conduct, and since much nonverbal conduct can be expressive,⁴⁴⁴ a distinction between speech and conduct may not generally promote any consistent interpretation. Nonetheless, to the extent that law referral activity is classified as speech plus conduct rather than pure speech, significant constitutional protections remain. The Supreme Court requires that state regulation further an "important or substantial governmental interest . . . unrelated to the suppression of free expression . . . and . . . the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of that interest."⁴⁴⁵ The justifications for prohibiting private lawyer referral services do not satisfy this standard.

A third argument for finding the first amendment implicated in private

440. *United States v. O'Brien*, 391 U.S. 367, 381-82 (1968) (draft card burning); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (demonstrating at jail); *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (demonstrating at courthouse); *International Bhd. of Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284, 289 (1957) (labor picketing).

441. 436 U.S. 447 (1978).

442. *Id.* at 457.

443. *Id.* at 459.

444. Kalven, *The Concept of the Public Forum*: *Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 23 ("[A]ll speech is necessarily 'speech plus.'"); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 599 n.11 (1978) (citing cases).

445. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

lawyer referral situations is the possible negative impact that restrictions on such services have on the guarantee of freedom of association. In *Bell v. Maryland*⁴⁴⁶ Justice Goldberg stated in a concurring opinion that "it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race."⁴⁴⁷ Several cases have established the parameters of this right in the context of persons seeking legal services. In *NAACP v. Button*⁴⁴⁸ the Supreme Court applied the traditional compelling state interest test in upholding the NAACP's right to refer individuals to attorneys.⁴⁴⁹ The court construed such referrals as a form of political expression protected by the first amendment.⁴⁵⁰ The Court held that the state's valid interest in regulating barratry and solicitation was not compelling enough to justify the broad prohibition against the NAACP referrals.⁴⁵¹ Subsequent cases expanded the *Button* holding to cover litigation implicating political or constitutional interests. In *Brotherhood of Railroad Trainmen v. Virginia Bar*⁴⁵² a union set up a referral system in which a union legal aid department contacted injured workers and recommended lawyers from a preselected panel. The Court upheld this system as an activity designed to assist members in asserting workers' compensation claims.⁴⁵³ Similarly, the Court in *United Transportation Union v. State Bar of Michigan*⁴⁵⁴ asserted that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."⁴⁵⁵ The activities in *Button* and *Railroad Trainmen* are today sanctioned by most disciplinary codes.⁴⁵⁶ These cases can, of course, be distinguished on their facts from a situation involving a private commercial lawyer referral service. The typical private lawyer referral service does not involve political speech, does not involve collective

446. 378 U.S. 226 (1964).

447. *Id.* at 313. *Bell* involved a challenge to the convictions of several Negro sit-in demonstrators for criminal trespass when they refused to move after being asked to leave because of their race. In concurring in the Supreme Court's reversal of the convictions, Justice Goldberg distinguished equal access to public accommodations from the protection accorded private association. *Id.* The limits of one's freedom to associate may be tested in the case of *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), *cert. granted*, 103 S. Ct. 813, 74 L. Ed. 2d 1012 (1983), which is soon to be heard by the Supreme Court. Thus far the King & Spaulding law firm, which refused to make Ms. Hishon a partner, has argued successfully that title VII of the 1964 Civil Rights Act does not apply to its partnership decisions because it is a voluntary association that is free to select for whatever reason the persons with whom it will associate. See generally Tybor, *What "Up or Out" Means to Women Lawyers*, 69 A.B.A. J. 756 (1983) (role of women lawyers and their acceptance in law firms).

448. 371 U.S. 415 (1963).

449. See L. TRIBE, *supra* note 444, § 12-23.

450. 371 U.S. at 429-30.

451. *Id.* at 439. Whether the Court was endorsing the right to litigate, advocate litigation, or associate for the purpose of litigation is unclear. Equally unclear is whether the right is limited to situations in which persons are trying to protect constitutional rights.

452. 377 U.S. 1 (1964).

453. *Id.* at 6.

454. 401 U.S. 576 (1971).

455. *Id.* at 585.

456. See MODEL CODE DR 2-103(D).

action by lay persons to seek legal services for themselves, and facilitates the lawyer's commercial employment. Nonetheless, the cases all involve the referral of persons to attorneys, which is the primary activity of the private lawyer referral service. Whether the high standard applied in *Buttton* will be required in cases where private persons, either lay or lawyers, associate to provide referrals is unclear. The *Ohralik* Court emphasized that the union legal service cases involved mutual assistance absent in the solicitation context.⁴⁵⁷ The Court further held that a "lawyer's procurement of remunerative employment" is within the "State's proper sphere of economic and professional regulation" because such procurement is "only marginally affected with First Amendment concerns."⁴⁵⁸ The Court surely did not, however, intend that statement to apply to factual situations far removed from the *Ohralik* situation. Private lawyer referral services, no less than bar sponsored lawyer referral services, facilitate "meaningful access to the courts."⁴⁵⁹ Given the critical importance of the opportunity to litigate,⁴⁶⁰ limitations on services designed to facilitate that access should be subject to at least a substantial interest standard. As emphasized in *United Mine Workers v. Illinois Bar Association*,⁴⁶¹ statutes that impede first amendment rights "cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."⁴⁶² On the contrary, the courts are obligated to scrutinize the record for some concrete evidence "of abuse, of harm to clients, of actual disadvantage to the public."⁴⁶³ Whether the practices of private lawyer referral services would provide substantial evidence of evils that would justify total prohibition is unknown.

The third argument that prohibitions against private referral services implicate the first amendment is perhaps the most persuasive. A private referral service is a method of collective advertising by the attorneys who participate in it. Advertising has traditionally raised first amendment questions.⁴⁶⁴ In many ways a private referral service is analogous to advertising by a law firm comprised of attorneys practicing in many different subject areas.⁴⁶⁵ Both the law firm and the referral service permit the cli-

457. *Ohralik*, 436 U.S. at 458-59.

458. *Id.* at 459.

459. *United Transp.*, 401 U.S. at 585.

460. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 DUKE L.J. 1153, 1172-73 (right to litigate promotes dignity, self-respect, and sense of participation).

461. 389 U.S. 217 (1967).

462. *Id.* at 222.

463. *Id.* at 225.

464. See generally Annot., 5 A.L.R. 4TH 866 (1981) (current status of attorney solicitation); Annot., 39 A.L.R. 2D 1055 (1955) (attorney discipline for advertising).

465. The financial and competitive advantages of the collective approach have been recognized even by bar sponsored referral services. See Podgers, *Houston area bars studying joint LRS*, BAR LEADER, Mar.-Apr. 1981, at 9. The article details the plans by three Houston bar associations to merge their referral activities. One bar leader reportedly cited as a factor for the plan "that a combined LRS would stand out amid the extensive private lawyer

ent, who does not know an attorney competent in the client's area of need, to initiate a referral process by calling a central telephone number. In both instances someone, who may or may not be a lawyer, will classify the problem and refer the problem to a specific attorney. In the case of the private lawyer referral service the referral most probably occurs by strict rotation within a subject matter panel. In the private law firm the referral is to a specialty department if the firm is large, or to an attorney specializing in a particular area if it is not. Additional considerations such as current workload of particular attorneys and relative skill levels will probably play a greater role in the law firm setting than in the private lawyer referral program. Moreover, while on the one hand the entrance standards for attorney participation in the referral service could be as low as the simple payment of a fee, on the other hand, the standards for participation in a referral service could be as high as those applied to new associates by the law firm, because both the law firm and the referral service desire repeat business, which to some extent depends upon the quality of the work performed by the various attorneys.

When participation in a lawyer referral service is viewed as a form of commercial advertising, the legitimacy of regulations must be reviewed according to the standards of Supreme Court cases in commercial speech. At one time purely commercial speech was deemed to fall outside the protection of the first amendment.⁴⁶⁶ The soundness of the dichotomy inherent in such a rule was repeatedly attacked⁴⁶⁷ until the Supreme Court finally abandoned the rule in *Virginia Pharmacy Board v. Virginia Consumer Council*.⁴⁶⁸ In that case the Court held that the first amendment forbids a state from suppressing truthful commercial information in the form of prices on lawfully sold prescription drugs.⁴⁶⁹ Speech "which does no more than propose a commercial transaction"⁴⁷⁰ is entitled to first amendment protections, in part because of the public's right to receive information.⁴⁷¹ The Court was careful to warn that states could regulate commercial speech as to time, place, and manner, and prohibit false or misleading commercial expressions.⁴⁷² The holding, stressed the Court, was limited to pharmacists and expressed no opinion on other professions such as medicine and law where historical and functional differences might re-

advertising in the Houston area, especially by 'those groups that are really not lawyer referral services but private groups looking for more business.'" *Id.*

466. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("The Constitution imposes no such restraint on government as respects purely commercial advertising."); *accord* *Bread v. Alexandria*, 341 U.S. 622, 644-45 (1951).

467. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 819-21 (1975); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 401 & n.6 (1973) (Stewart, J., dissenting).

468. 425 U.S. 748 (1976).

469. *Id.* at 770.

470. *Id.* at 762.

471. *Id.* at 756-57.

472. *Id.* at 771 ("Obviously, much commercial speech is not probably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with the problem.").

quire consideration of other factors.⁴⁷³ The Supreme Court confronted the regulation of lawyer advertising in the landmark *Bates v. State Bar of Arizona*⁴⁷⁴ decision. The Court there held that an Arizona Supreme Court disciplinary rule that prohibited Arizona attorneys from advertising the prices of routine services in print media infringed the first amendment rights of lawyers.⁴⁷⁵ The right of attorneys to advertise was thus established.

Disciplinary rules prohibiting the cooperation of lawyers with private or commercial referral services do not directly prohibit speech or advertising.⁴⁷⁶ Arguably they only regulate the business of referring lawyers. The scope of such rules, however, is not broad. Most bar disciplinary rules are promulgated by state supreme courts having inherent authority over the behavior of lawyers but no authority to promulgate rules prohibiting nonlawyers from establishing any lawful business. Moreover, *Virginia Pharmacy* and *Bates* imply that neither the right to regulate business nor the interest in regulating attorneys⁴⁷⁷ is imbued with a concomitant unchecked right to infringe the first amendment.

Even if a private lawyer referral service is a method of collective advertising, false, deceptive, or misleading advertising is clearly subject to restraint.⁴⁷⁸ Inherently misleading material or advertisements proven to be misleading may be restricted or prohibited entirely.⁴⁷⁹ Perhaps evidence could be accumulated to justify a conclusion that private commercial lawyer referral services, especially those with few participating attorneys, are so deceptive that the use of the designation "referral service" by such entities could be prohibited.⁴⁸⁰ This approach was evident in *Friedman v. Rog-*

473. *Id.* at 773 n.25.

474. 433 U.S. 350 (1977).

475. *Id.* at 384.

476. A more direct restraint on speech by referral services was contained in a bill approved by the Texas Senate Jurisprudence Committee. The bill conditioned the use of the term lawyer referral service on complying with several conditions. *See infra* note 480 (text of bill).

477. "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the court.'" *Goldfarb*, 421 U.S. at 792.

478. *Bates*, 433 U.S. at 383.

479. *Id.* at 375; *see also In re R. M. J.*, 455 U.S. 191, 203 (1982) ("But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the States may impose appropriate restrictions.").

480. Compare C.S.S.B. 1173, which was introduced in the Texas Senate during the 1983 Texas legislative session. The bill that overwhelmingly passed the Senate Jurisprudence Committee states:

LAWYER REFERRAL SERVICES. (a) An individual, firm, or professional corporation may not use the term "referral service" or words with a similar meaning in advertising in connection with referring potential clients to attorneys unless:

- (1) the referral service is offered primarily for the benefit of the public;
- (2) the referral service is provided by a governmental entity or by an organization that is exempt from federal taxation under Section 501, Internal Revenue Code or any organization authorized to sponsor a lawyer referral

ers,⁴⁸¹ where the Supreme Court held that Texas could prohibit the use of trade names by optometrists. The statute upheld in *Friedman* more directly limited expression than do rules prohibiting private lawyer referral services. *Friedman* could be interpreted as indicating that a lesser restriction on commercial speech such as a prohibition of lawyer referral services ought to be allowed. Such a conclusion should be resisted in light of the fact that the *Friedman* Court placed much significance on the actual experience in Texas with deceptive and misleading uses of trade names.⁴⁸² Additionally, the lack of any intrinsic meaning or content in a trade name⁴⁸³ made the prohibition less of a speech infringement. The advertisement of lawyer referral services, however, may inherently imply quality and thus contain content. The whole idea of a referral service may be imbued with the notion of quality regardless of whether the term is used in the advertisement. While bar sponsorship of a lawyer referral service may be a prestigious seal of warranted quality to some,⁴⁸⁴ the term "referral service" in and of itself may suggest guarantees of quality, though to a lesser extent. Unless explained, the term may connote referral to attorneys who are not only licensed to perform legal services, but who are capable of doing so in an especially skilled and efficient manner. Such implicit quality assertions may be the subject of regulations designed to avoid deception.⁴⁸⁵

If such services are only potentially misleading, the restrictions on advertisement may be no broader than necessary to prevent the deception.⁴⁸⁶ Accordingly, "the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimer or explanation."⁴⁸⁷ Thus, any allegedly misleading feature of

service permitted by the disciplinary rules promulgated by the Supreme Court of Texas;

(3) each attorney licensed in this state is eligible to participate in the referral service and to receive the referral of clients if the attorney complies with reasonable participation requirements, which may include but are not limited to:

(A) a requirement that the participating attorney charge no more than twenty dollars for the initial consultation with a referred client, and

(B) a requirement that participating attorneys pay reasonable fees to the service to defray administrative expenses; and

(4) the participation in the referral service by an attorney licensed in this state would not violate disciplinary rules promulgated by the Supreme Court of Texas.

(b) A person may sue to enjoin a violation of this article. The plaintiff is entitled to an injunction on a showing that a violation has occurred.

Tex. C.S.S.B. 1173, § 1, 68th Tex. Leg. (1983).

481. 440 U.S. 1 (1979); see also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (ban on in-person solicitation due to possibility of fraud).

482. 440 U.S. at 13.

483. *Id.*

484. See *supra* note 403 and accompanying text.

485. *Bates*, 433 U.S. at 360.

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

487. *Id.* (citing *Bates*, 433 U.S. at 375). The *Bates* Court limited its opinion in several ways. Problems associated with in-person solicitation, *Bates*, 433 U.S. at 366, and electronic media, *id.* at 384, were distinguished. The validity of reasonable state restrictions on time, place, and manner were reaffirmed, and the state's right to suppress advertisements concern-

an advertisement for a private lawyer referral service should be remedied by the required inclusion of additional information such as a statement that the service is not sponsored by any bar association.⁴⁸⁸ Such an approach stops short of the absolute prohibition of private lawyer referral services.

Where the communication is not misleading, as would be the case where a private lawyer referral service accurately detailed in advertisements how it was operated and financed and the number of participating attorneys, the state still retains the authority to regulate if certain conditions are met.⁴⁸⁹ The government interest in regulating the advertisement must be substantial, the regulation must advance the governmental interest, and the regulation must not be more extensive than necessary.⁴⁹⁰ In the lawyer referral context the state has an interest in (1) facilitating the public's access to the judicial process, (2) eliminating deception, and (3) ensuring that prospective clients are referred to attorneys on the basis of the attorney's competence to handle the particular legal issue. Given the central role of attorneys in the administration of justice and the maintenance of a democracy,⁴⁹¹ this interest is substantial, perhaps compelling.⁴⁹² Requiring that

ing illegal transactions was acknowledged. *Id.* Time, place, and manner restrictions must be content neutral. See *Virginia Pharmacy*, 425 U.S. at 771. The *Bates* Court also acknowledged that it was not addressing problems related to quality. 433 U.S. at 366. Justice Powell questioned the alleged absence of "quality implications" from the advertisements at issue in *Bates* since "[t]here are inherent questions of quality in almost any type of price advertising by lawyers." *Id.* at 400 (Powell, J., concurring).

488. The State Bar of California has taken a similar approach. See *supra* note 90.

489. *In re R. M. J.*, 455 U.S. at 203.

490. The conditions are part of a four-part analysis the Supreme Court has developed for commercial speech cases. See *Central Hudson v. Public Serv. Comm'n*, 447 U.S. 557, 563-66 (1980).

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566; accord *In re R. M. J.*, 455 U.S. at 203 n.15; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981); cf. *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.").

491. See *supra* note 477; cf. *Semler v. Dental Examiners*, 294 U.S. 608 (1935) (Court upheld statute prohibiting entirely certain types of advertising by dentists). Writing for the *Semler* Court, Chief Justice Hughes stated:

The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

294 U.S. at 612.

492. See *Goldfarb*, 421 U.S. at 792 ("We recognize that the States have a compelling

lawyer referral services be bar sponsored advances this goal because lawyer referral services operated by bona fide bar associations are operated expressly for the public benefit rather than for the benefit of any small group of persons. The new ABA Model Rules make the service goal paramount by requiring lawyer referral services to be not-for-profit.⁴⁹³ Such limitations advance the government interest indirectly by eliminating a financial temptation that might motivate competing referral operators to base operational decisions on their profit potential rather than on the extent to which the decision facilitates the public's access to competent legal service.

Finally, one must ask whether this interference is more extensive than necessary. The two primary evils associated with private referrals are that prospective clients may be misled about the nature of the service and that they may be referred to attorneys who have not been adequately screened for competence.⁴⁹⁴ The first evil can be dealt with without banning private or commercial referrals. A regulation requiring that more information about the service be provided would satisfy this requirement. Presumably, information about the number of participating attorneys, how they are selected, the process for referring to a particular attorney, and the fee charged attorneys who do participate would eliminate most of the deceptive aspects of private and commercial referral services. The problem of incompetence could be handled by two methods. First, the public could be informed as to how attorneys are selected to participate in the service. Services could compete on the basis of which service did the best job of ensuring that the attorneys on its panels were competent. Other businesses such as those in the automobile industry have certainly demonstrated that better quality is compatible with increased sales. Second, direct legislation could impose standards for the operation of lawyer referrals, whether private or bar sponsored.⁴⁹⁵

This analysis suggests that blanket state prohibitions against private and commercial lawyer referral services infringe attorneys' rights to advertise collectively and the public's right to receive information about such serv-

interest in the practice of professions within their boundaries, and that . . . they have broad power to establish standards for . . . regulating the practice of professions . . .").

493. See ABA MODEL RULES rule 7.2.

494. Another criticism of private and commercial lawyer referral services is that they would be less adept at classifying the nature of the legal problems of prospective clients. The criticism is not warranted since (1) there is no reason commercial services run by a group of lawyers would be less able to classify legal problems than a bar sponsored service, (2) services operated by lay persons could employ attorneys or law students to do the screening, and (3) many service oriented bar sponsored services have nonlawyers screening incoming calls, and even nonlawyer directors of such services. An example of a service using this latter method is the Houston Lawyer Referral Service, Inc.. The ABA Standards for lawyer referral services, however, admonish services to have client-applicants interviewed by a lawyer "if possible." 1978 STATEMENT, *supra* note 98, § 7.4; 1982 PROPOSED STANDARDS, *supra* note 99, § 7.4.

495. Increased frustration over the negative impact of private lawyer referral services has, however, led to a decision by that Bar to draft a proposed amendment to California's Business and Commerce Code that will require all lawyer referral services to comply with the State Bar minimum standards for lawyer referral discussed *supra* note 90.

ices. Absent a finding that such services are inherently misleading this conclusion seems sound. Nonetheless, the very generalized nature of the guidelines used by the Supreme Court in dealing with similar issues tends to weaken confidence in any such conclusion before the courts address a specific case in point. Justice Rehnquist's dissenting opinion in *Bates* recognized this danger.⁴⁹⁶ The divided nature of the Supreme Court's recent decisions in the area increases the difficulty of predicting how the Court might treat a case containing allegations that a ban on commercial and private lawyer referral services violates first amendment rights.⁴⁹⁷ These unsettled circumstances reinforce the general confusion over guidelines for lawyer referral services and support the observation that lawyer referral services truly exist in a regulatory wasteland.

V. CONCLUSION

Facilitating the prospective client's search for a competent attorney is a valuable function. The need for such facilitators will continue to exist because many consumers simply lack the ability to evaluate the information thrust upon them as a result of the relaxation of restraints on lawyer advertising. Bar associations have long spearheaded efforts to provide reliable lawyer referral services to consumers of moderate means. Competition from private and commercial lawyer referral services as well as an array of conflicting legal policies, guidelines, and rules cast a shadow over the future of bar sponsored lawyer referral services. In many ways the relatively low profile of bar sponsored lawyer referral services works to their detriment because, with the exception of special committee activity, the bar associations, state supreme courts, and legislatures rarely focus on these services. Such avoidance cannot be tolerated much longer for tax, anti-trust, and constitutional problems threaten important sources of income and key operational methods of many services. The bar associations, state supreme courts, and legislatures need a heightened awareness of the importance of lawyer referral services to the public. This awareness should lead to a commitment to confront the issues in a coherent and comprehensive manner. Some issues, as in the case of the initial consultation fee, seem to lack only legislative commitment for resolution. Other issues will

496. *Bates*, 433 U.S. at 405 (Rehnquist, J., dissenting in part). The Court again acknowledged the danger in *In re R. M. J.*:

We recognize, of course, that the generalizations summarized above [*i.e.*, the principles in *Bates*] do not afford precise guidance to the Bar and the courts. They do represent the general principles that may be distilled from our decisions in this developing area of the law. As they are applied on a case-by-case basis . . . more specific guidance will be available.

455 U.S. at 204 n.16.

497. The Supreme Court has been divided to varying degrees on how the first amendment ought to be applied to commercial speech cases in *Bates* (Burger, Powell, and Rehnquist, JJ., dissenting in part); *Central Hudson* (five separate opinions and Rehnquist, J., dissenting); *Virginia Pharmacy* (two concurring opinions and Rehnquist, J., dissenting); *Consolidated Edison* (two concurring opinions with Blackmun and Rehnquist, JJ., dissenting); *Metromedia* (two concurring opinions with Burger, Stevens, and Rehnquist, JJ., dissenting).

require more complex analysis to delineate the parameters of permissible behavior.

In confronting these problems the public interest should guide efforts to strengthen traditional bar sponsored lawyer referral services without unnecessarily stifling the attempts by those who, in good faith, want to expand the private avenues for public access to attorneys. Naturally, safeguards against fraud and deception and guidelines for competence are needed. The public's right to information, however, along with the other issues discussed in this Article, should caution the bar against taking action based on premature assumptions that bar associations are the only entities that can or care to assess the quality of lawyer referral services.