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AD TECH & THE FUTURE OF LEGAL ETHICS

Seth Katsuya Endo

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AD TECH & THE FUTURE OF LEGAL ETHICS

*Seth Katsuya Endo**

Privacy scholars have extensively studied online behavioral advertising, which uses Big Data to target individuals based on their characteristics and behaviors. This literature identifies several new risks presented by online behavioral advertising and theorizes about how consumer protection law should respond. A new wave of this scholarship contemplates applying fiduciary duties to information-collecting entities like Facebook and Google.

Meanwhile, lawyers—quintessential fiduciaries—already use online behavioral advertising to find clients. For example, a medical malpractice firm directs its advertising to Facebook users who are near nursing homes with bad reviews. And, in 2020, New York became the first jurisdiction to approve lawyers’ use of retargeting, one form of online behavioral advertising. But the professional responsibility scholarship has not yet considered these developments.

The Article describes the rise of online behavioral advertising and lawyers’ nascent use. It draws on modern privacy scholarship to explain how this advertising method can lead to privacy invasions and manipulation. It then explores the specific case of lawyer advertising. And it critiques the existing regulations, which do not prohibit tactics involving privacy invasions or manipulation even though they undermine client autonomy—a key concern for the law of lawyer marketing.

In addition to this descriptive and doctrinal work, the Article makes two other contributions. First, the examination of online behavioral advertising helps explain why the legal profession struggles to integrate new technological innovations more generally. AI tools and similar products are driven by informational capitalism’s focus on exploiting knowledge advantages, its speed, and its scale. But these features all are in tension with traditional aspects of the fiduciary relationship between lawyers and their clients. Second, as privacy scholars begin to think about how the duty of loyalty might provide a principle to limit abuses of Big Data in other contexts, the Article proposes that lawyers—who already have this duty—make good subjects for a case study.

INTRODUCTION

Last year, a friend mentioned an article about factors that are predictive of divorce.¹ Intrigued, I searched for the piece and a funny thing happened—on several websites, I saw banner advertisements for divorce attorneys in my

* Assistant Professor of Law, University of Florida Levin College of Law. I am grateful to Rebecca Aviel, Benjamin Barton, Sarah Bishop, Benjamin Edwards, Nora Freeman Engstrom, Stephen Gillers, Renee Knake Jefferson, Robert Rhee, Scott Skinner-Thompson, Jeffrey Stempel, Lauren Willis, and Adam Zimmerman for their helpful feedback and comments. I also benefited from presenting this article as part of the Professional Responsibility Section New Voices Works-In-Progress Workshop at the AALS 2021 Annual Conference. And many thanks are owed to my colleagues at the University of Florida for their helpful comments and discussion on an early draft at our internal junior scholars’ workshop. Research assistance from Andre Alford, John Guerrero, Jody-Ann Knight, and Caitlin Otis was essential to this project. Finally, I acknowledge the thoughtful editorial work of the various members of the Alabama Law Review, especially: Allie Coogler, Bailey Cormier, Bryce Dean, Layne Fincher, Mason Kruse, Brad Deem, Lucie Dierikx, Marjorie Head, Praise Oh, Taylor Holt, Brenna Johnson, Govin Kaggal, Margaret Olsen, Cassidy Keith, Callie Leopard, Price McGiffert, Clay Wash, Callie Cochran, and Hunter Myers.

1. Olga Khazan, *The Divorce-Proof Marriage*, ATLANTIC (Oct. 14, 2014), <https://www.theatlantic.com/health/archive/2014/10/the-divorce-proof-marriage/381401>.

town.² Not being in the market for a divorce,³ I did not click on any of the links, and they were soon replaced with my standard fare of advertisements for consumer electronics, the two websites that I get all of my clothes from, and the furniture I would get if junior law professors were paid more. Nevertheless, it was a salient reminder of the quotidian pervasiveness of online behavioral advertising—that is, the practice of using Big Data to target individuals based on a combination of their characteristics and behaviors.⁴ And it is easy to imagine less benign uses like a divorce attorney sending daily offers to individuals who recently Googled marriage counselors.⁵ With such examples in mind, this Article draws on modern privacy scholarship to examine how lawyers' use of online behavioral advertising presents new risks of privacy invasions and manipulation that go uncaptured by the current law of lawyer marketing.

The practical upshot of online behavioral advertising is that marketers can specifically and repeatedly target individuals who have characteristics that, although derivable from public or ostensibly volunteered data, are of a private nature.⁶ One example that made the news in 2012 was when a father accused a national retailer of encouraging his teenage daughter to get pregnant after it sent her coupons for maternity clothing and baby products.⁷ A few days later, the father returned to the store and apologized.⁸ The retailer had developed an algorithm to identify potentially pregnant customers based on other purchases that, when analyzed together, permitted the retailer to correctly guess the teen's pregnancy status.⁹

Over the past decade, privacy scholars have examined online behavioral advertising and related commercial exploitation of consumer data. This literature identifies the privacy invasions and manipulation that these activities

2. Michelle Castillo, *Here's Why That Facebook Ad Is Following You and Your Family*, CNBC (Dec. 19, 2018, 12:15 PM), <https://www.cnbc.com/2017/11/30/why-facebook-ads-follow-you.html>. In contrast to Facebook's policies, Google Ads purports not to permit personalized advertising that exploits viewers' personal hardships, including divorce. *Personalized Advertising*, GOOGLE, <https://support.google.com/adspolicy/answer/143465?hl=en> (last visited Aug. 23, 2021).

3. [Knocking on wood that this happy state continues.]

4. See JOSEPH TUROW, *THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH* 75 (2011); Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95, 99 (2013).

5. Professor Rebecca Aviel suggested this hypothetical, which greatly informed the Article's development.

6. See Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 253–54 (2013); *Alexander v. Cahill*, 598 F.3d 79, 99 (2d Cir. 2010).

7. See Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES (Feb. 16, 2012), <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>.

8. *Id.*

9. *Id.*; see also Bradley A. Areheart & Jessica L. Roberts, *GINA, Big Data, and the Future of Employee Privacy*, 128 YALE L.J. 710, 759–60 (2019) (describing a healthcare analytics company that could predict when employees were pregnant or trying to conceive).

can cause.¹⁰ And it theorizes about how consumer protection law should respond. For example, a new wave of this scholarship contemplates applying fiduciary duties to information-collecting entities like Facebook and Google.¹¹

Meanwhile, lawyers—quintessential fiduciaries—already use online behavioral advertising to find clients. A medical malpractice firm targets its advertising to Facebook users when they are near nursing homes with bad reviews.¹² Retargeting—that is, the repeated showing of online advertisements to consumers based on their past browsing—is now an accepted feature of lawyer advertising.¹³ This all is unsurprising in a world in which clients and lawyers find each other through the internet.¹⁴ And it is possible that these practices might help address the access-to-justice gap by reaching members of the lay public who need legal assistance but fail to recognize their problems as legal ones or do not know how to find a lawyer.¹⁵ However, given the potential downsides, it is problematic that neither the law of lawyer marketing nor professional responsibility scholars have closely examined the downside of such practices. This Article fills that gap, importing modern privacy scholarship to understand the practical, doctrinal, and conceptual concerns raised by lawyers' use of online behavioral advertising.

The existing law of lawyer marketing does not recognize the new dangers of invasiveness and manipulation presented by online behavioral advertising. The current American Bar Association Model Rules of Professional Conduct only restrict advertising that is false or misleading.¹⁶ While the Model Rules have stricter prohibitions on in-person solicitations for pecuniary gain, they do not

10. See generally Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1003 (2014) (“Whereas sellers have always gotten a ‘feel’ for consumers, . . . this new combination of interpersonal manipulation with large-scale data presents a novel challenge to consumers and regulators alike.”); Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 744–45 (2018) (explaining how the harms that follow from data breaches include heightened privacy risks and anxiety).

11. See, e.g., Neil Richards & Woodrow Hartzog, *A Duty of Loyalty for Privacy Law*, 99 WASH. U. L. REV. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642217; Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1185 (2016); Neil Richards & Woodrow Hartzog, *Privacy’s Trust Gap: A Review*, 126 YALE L.J. 1180, 1183 (2017) (reviewing FINN BRUNTON & HELEN NISSENBAUM, *OBfuscation: A USER’S GUIDE FOR PRIVACY AND PROTEST* (2015)); Ari Ezra Waldman, *Privacy, Sharing, and Trust: The Facebook Study*, 67 CASE W. RES. L. REV. 193, 225–30 (2016); Lindsey Barrett, *Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries*, 42 SEATTLE U. L. REV. 1057 (2019).

12. Danielle Braff, *Facebook’s Woes May Have Driven Big Firms Away, but Small Firms and Solos Still See It as a Great Way to Advertise*, A.B.A. J. (Apr. 1, 2020, 1:40 AM), <https://www.abajournal.com/magazine/article/facebook-woes-may-have-driven-big-firms-away-but-small-firms-and-solo-practices-still-see-it-as-a-great-way-to-advertise>.

13. See, e.g., N.Y.C. Bar Ass’n Comm. on Pro. Ethics, Formal Op. 2020-2, at 6 (2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2020-2-whether-lawyers-may-use-retargeting-in-online-marketing>.

14. See *infra* Part II(B)(2).

15. See, e.g., Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97, 106–07 (2016).

16. MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS’N 2020) (restrictions on lawyer advertising).

guard against privacy invasions or manipulation either.¹⁷ And the definition of “solicitation” within the Model Rules excludes online behavioral advertising in the first instance.¹⁸ Put bluntly, the law of lawyer marketing has a big blind spot.

Professional responsibility scholars have not considered the privacy and manipulation risks presented by online behavioral advertising either.¹⁹ Usually, when a new communication method emerges, entrepreneurial lawyers adopt it as part of their marketing efforts.²⁰ Professional responsibility scholars then assess the ethical and legal ramifications of the new modes of advertising, typically applying the framework laid out by the Supreme Court.²¹ Here, unusually, there has been very little discussion of lawyers’ use of online behavioral advertising.²²

In looking to the future of lawyer advertising, scholars have proposed—and the ABA has considered—a simple rule that would prohibit false, misleading, deceptive, and coercive communications about legal services.²³ These efforts are motivated by concerns that technological innovations are making the existing rules obsolete.²⁴ But this widely proposed fix, again, fails to recognize privacy invasions and manipulation concerns. And this is problematic because those harms undermine client autonomy and disrupt the lawyer–client relationship just like misleading advertising or coercive solicitation.²⁵

Against this backdrop, this Article makes both prescriptive and theoretical contributions. It proposes several regulatory changes to address the previously

17. *Id.* r. 7.3 (restrictions on lawyer solicitation).

18. *See id.* cmt. 1 (implicitly defining online behavioral advertising as “advertising” and not prohibited “solicitation”).

19. *Cf.* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 501 (2015) (examining “how the commercial speech doctrine should apply to modern marketing techniques”).

20. *See, e.g.*, Steve Stecklow, *Cyberspace Clash: Computer Users Battle High-Tech Marketers Over Soul of Internet—Firms Believe There Is Room for Ads on Vast Network, But Risk Being ‘Flamed’—Gore’s Superhighway Project*, WALL ST. J., Sept. 16, 1993, at A1 (noting that a law firm was one of first advertisers on a then-new internet service).

21. *See, e.g.*, Ashley M. London, *Something Wicked This Way Thumbs: Personal Contact Concerns of Text-Based Attorney Marketing*, 58 HOUS. L. REV. 99, 139 (2020); Renee Newman Knake, *The Commercialization of Legal Ethics*, 29 GEO. J. LEGAL ETHICS 715, 719 (2016); Robertson, *supra* note 15; Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 64–65 (2015).

22. To date, one article from practitioners and one student note have tackled this specific subject. *See* Eric T. Kasper & Troy A. Kozma, *Did Five Supreme Court Justices Go “Completely Bonkers”?: Saul Goodman, Legal Advertising, and the First Amendment Since Bates v. State Bar of Arizona*, 37 CARDOZO ARTS & ENT. L.J. 337, 367 (2019); Justin Orr, Note, *Digital Marketing in an Analog World*, 29 GEO. J. LEGAL ETHICS 1203 (2016).

23. *See, e.g.*, London, *supra* note 21, at 145–48 (suggesting simple rule); Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 409–14 (1990) (same); Gregory C. Sisk, “The More Things Change, the More They Remain the Same:” *Lawyer Ethics in the 21st Century*, 9 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 342, 353 (2019) (describing trend in Model Rules).

24. London, *supra* note 21, at 139.

25. *See* Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 3 (2019) (describing risks to autonomy); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 207–10 (2001) (discussing relationship of regulations on lawyer advertising and client autonomy); Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1073 (1976) (arguing that lawyers’ primary function is to enhance clients’ autonomy).

ignored problems of privacy invasions and manipulation. These suggestions aim to offer evidence-based reforms that improve access to justice while also protecting consumers of legal services.²⁶

Additionally, this Article draws out some broader implications from its examination of lawyers' use of online behavioral advertising and privacy law scholarship. First, it suggests that the evolution in the political economy towards informational capitalism helps explain why the legal profession struggles to integrate new technological innovations more generally. AI tools and similar products are driven by informational capitalism's focus on exploiting knowledge advantages, its speed, and its scale.²⁷ But these features all are in tension with traditional aspects of the fiduciary relationship between lawyers and their clients. Second, as privacy scholars begin to think about how the duty of loyalty might provide a principle to limit abuses of Big Data in other contexts, it offers lawyer advertising regulations as a case study.

I. THE LAW OF LAWYER MARKETING & ITS CRITICS

A. *Current Legal Landscape*

The Supreme Court doctrine addressing lawyer marketing broadly follows from its general jurisprudence applying the First Amendment to commercial speech.²⁸ Over the past forty years, the case law governing how lawyers find clients has distinguished in-person solicitation for pecuniary gain from advertising to the general public.²⁹ The differential treatment turns on the Court's assessment of the risk that the respective forms of marketing are likely to lead to "overreaching, invasion of privacy, [or] the exercise of undue influence."³⁰

The Court's focus on "undue influence" and "overreach" borrows from common law concepts that speak to abuses of trust or unfair advantage to

26. See, e.g., Jim Hawkins & Renee Knake, *The Behavioral Economics of Lawyer Advertising: An Empirical Assessment*, 2019 U. ILL. L. REV. 1005, 1009 (2019); Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1038 (2020). See generally Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297, 310–15 (2019) (explaining the legal and political pressures that should push regulators to consider empirical data and regulatory objectives).

27. Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1486 (2020) (first reviewing SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019); then reviewing JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019)).

28. See Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 52 (2011).

29. Compare *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382–83 (1977) (extending the First Amendment protection of truthful and nondeceptive commercial free speech to lawyers), with *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (permitting states to ban in-person solicitation for pecuniary gain).

30. *Edenfield v. Fane*, 507 U.S. 761, 778 (1993) (O'Connor, J., dissenting) (alteration in original) (quoting *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 475 (1988)).

manipulate others into a decision that is against their interest.³¹ Building on this, scholars have noted that a concern for the listener—and, in effect, the client’s autonomy to make informed decisions without pressure—conceptually undergirds these interests and animates the doctrine.³²

The cases most directly applicable to lawyers’ use of online behavioral advertising show this strong concern for the listener. In 1977, after decades of states prohibiting virtually all lawyer advertising, the Supreme Court held that such blanket restrictions violated the First Amendment in *Bates v. State Bar of Arizona*.³³ The Court repeatedly described the public’s need for information about their legal rights and the availability of counsel.³⁴

The next year, the Court decided a pair of solicitation cases. In *In re Primus*, the Court held that the First Amendment protected an ACLU lawyer’s mailed solicitation letter to a potential client in a suit challenging South Carolina’s sterilization of welfare recipients.³⁵ The Court issued *Ohralik v. Ohio State Bar Ass’n* on the same day as *Primus*.³⁶ *Ohralik* has been described as a classic “ambulance-chaser” case.³⁷ Although the Court approved of the lawyer providing information to potential litigants, those benefits were outweighed by the risk that the in-person solicitation might “exert pressure and . . . demand[] an immediate response, without providing an opportunity for comparison or reflection.”³⁸

Two decades later, in *Shapiro v. Kentucky Bar Ass’n*, the Court held that a lawyer could send targeted letters to individuals who were facing foreclosure suits because the letters helped members of the public know about their rights and, unlike the solicitation in *Ohralik*, did not demand an immediate response.³⁹

The last direct word from the Court came just over twenty-five years ago.⁴⁰ In *Florida Bar v. Went For It*, the Court upheld Florida’s thirty-day ban on

31. See generally *Undue Influence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The improper use of power or trust in a way that deprives a person of free will and substitutes another’s objective . . .”); *Overreaching*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The act or an instance of taking unfair commercial advantage of another . . .”).

32. See Burt Neuborne, *The Status of the Hearer in Mr. Madison’s Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 914–16 (2017) (outlining a hearer-oriented theory of the First Amendment); see also Berman, *supra* note 19, at 500 (characterizing commercial speech jurisprudence as “based on the premises that advertising (1) communicates information to consumers, and (2) such information allows consumers to make autonomous and more informed choices”); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 28 (2000) (“Within commercial speech, . . . the primary constitutional value concerns the circulation of accurate and useful information.”); Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2865 (2014) (“The Court was at least as focused, if not more so, upon the public’s informational interests as it was upon the attorneys’ speech interests [in *Bates*].”).

33. *Bates*, 433 U.S. at 384.

34. *Id.* at 356, 358, 364, 378.

35. *In re Primus*, 436 U.S. 412, 431 (1978).

36. See *id.* at 422.

37. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 469 (1978) (Marshall, J., concurring).

38. *Id.* at 457; see also *id.* at 464–65, 464 n.23 (discussing FTC rules regulating face-to-face selling).

39. *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 475–76 (1988).

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

targeted direct-mail solicitations to personal injury victims and their families.⁴¹ The Court specifically described the “special vulnerability” of these individuals, which speaks to a risk of exploitation and ensuing diminishment of client autonomy.⁴² The Court’s characterization of the ban as a narrow one further demonstrated its concern for the listener, as it listed all of the ways that injured individuals in need of a lawyer could find one.⁴³

Another feature of the cases is the importance of record evidence, perhaps as a bulwark against self-serving, protectionist regulations by the profession.⁴⁴ However, this is not to suggest that the Court correctly interprets the data or requires statistical rigor.⁴⁵

With the Court’s creation of a two-track regime that protected advertising but permitted greater regulation of in-person solicitation, the ABA fashioned model rules that accommodated this distinction.⁴⁶ Model Rule 7.1 prohibits “false or misleading” advertising.⁴⁷ And Model Rule 7.3 prohibits lawyers from communicating through live person-to-person contact to specific people to offer legal services when the primary motive is pecuniary gain unless one of several exceptions applies.⁴⁸ The Rule also categorically prohibits any solicitation if the target has expressed a desire not to be solicited by the lawyer or the solicitation involves coercion, duress, or harassment.⁴⁹

Of particular relevance for online behavioral advertising, Comment 1 to Model Rule 7.3 exempts communications that are “in response to a request for information or [are] automatically generated in response to Internet searches.”⁵⁰ This describes how most online behavioral advertising is generated. Accordingly, Model Rule 7.1’s prohibition on false or misleading communications is the most clearly applicable guardrail.

41. *Id.* at 620.

42. *Id.* at 625; *see also* Neuborne, *supra* note 32, at 918.

43. *Went For It*, 515 U.S. at 633–34.

44. *See, e.g., id.* at 629 (“Finally, the State in *Shapiro* assembled no evidence attempting to demonstrate any actual harm caused by targeted direct mail.”). *See generally* Gregory P. Magarian, Lee Epstein & James L. Gibson, *Data-Driven Constitutional Avoidance*, 104 IOWA L. REV. 1421, 1436–37 (2019) (“At a practical level, courts routinely both grant and deny First Amendment claims based on empirical assertions”).

45. *See* Magarian et al., *supra* note 44, at 1437; Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 ARK. L. REV. 703, 728 (1997) (“*Went For It* accepted empirical and anecdotal studies that were, to put it mildly, far from rigorous.”).

46. *See* Robert F. Boden, *Five Years After Bates: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 555 (1982) (describing changes to Canon 2 of the Model Code following *Bates* and developments leading to the modern rules). *See generally* Thomas B. Metzloff & Jeffrey M. Smith, *The Future of Attorney Advertising and the Interaction Between Marketing and Liability*, 37 MERCER L. REV. 599, 605–09 (1986) (discussing how ABA and states adapted their rules governing lawyer marketing in response to Supreme Court decisions).

47. MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS’N 2020).

48. *Id.* r. 7.3(a)–(b).

49. *Id.* r. 7.3(c)(1)–(2).

50. *Id.* r. 7.3 cmt. 1.

The Model Rules have no binding force but provide a template that, along with the boundaries set by the Supreme Court's commercial speech doctrine, has led to limited state variations.⁵¹ Some states have adopted the Model Rules without modification.⁵² Other states have retained conservative, traditional approaches, which keep more substantial limitations on exactly how and what lawyers may communicate about their services.⁵³ A few jurisdictions (notably, Oregon, Virginia, and the District of Columbia) have already liberalized more than the Model Rules, effectively adopting a standards-based approach that prohibits misleading, false, deceptive, or coercive marketing.⁵⁴ Gregory Sisk identified the general trend of "streamlining restrictions on lawyer advertising down toward the core prohibition on false or misleading statements."⁵⁵

In addition to professional responsibility regulations that explicitly cover lawyer advertising, states have general consumer protection laws and other statutes that apply to lawyer marketing efforts.⁵⁶ For example, an Ohio law prohibited solicitations to represent claimants or employers in workers' compensation claims or appeals.⁵⁷ A number of states also have passed or are considering laws that address internet-related privacy concerns. For example, the California Privacy Protection Act prohibits certain internet advertising practices as a matter of privacy regulation.⁵⁸ And Vermont passed legislation that addresses practices by data brokers.⁵⁹

Several federal authorities regulate aspects of lawyer marketing too. For example, the Federal Trade Commission Act prohibits any advertising that is false or misleading.⁶⁰ The Bankruptcy Abuse and Consumer Protection Act of 2005 also imposed certain disclosure requirements on lawyers acting as debt

51. See Thomas Jon Moore, *Attorney Advertising in the Wake of Florida Bar v. Went For It, Inc.: A Groundbreaking Maintenance of the Status Quo*, 101 DICK. L. REV. 451, 473–74 (1997) (describing results of state survey about what changes, if any, they were considering in light of *Went For It*); *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 470–71 (1988) (describing a change to Kentucky's ethical code governing lawyer marketing in response to a Supreme Court decision on the constitutionality of another state's prohibitions); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 836 (2002).

52. See, e.g., DEL. LAWS¹. RULES OF PRO. CONDUCT r. 7.1–7.3 (2020).

53. See, e.g., N.J. RULES OF PRO. CONDUCT r. 7.1–7.5 (2021).

54. See, e.g., OR. RULES OF PRO. CONDUCT r. 7.3 (2020) (limiting solicitation only if the lawyer knows the target could not exercise reasonable judgment, the target has made known a desire not to be solicited, or the solicitation involves coercion, duress, or harassment).

55. See Sisk, *supra* note 23, at 353.

56. See Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 13 (1985); Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1196 (2016).

57. See *Bevan & Assocs., LPA, Inc. v. Yost*, 929 F.3d 366, 369 (6th Cir. 2019) (addressing First Amendment challenge to Ohio's statute).

58. California Privacy Protection Act of 2018, CAL. CIV. CODE §§ 1798.100–199.95 (West 2018).

59. See Max N. Helveston, *Reining in Commercial Exploitation of Consumer Data*, 123 PENN. ST. L. REV. 667, 694 (2019) (discussing Vermont efforts).

60. See Arthur Best, *Lying Lawyers and Recumbent Regulators*, 49 IND. L. REV. 1, 16 (2015).

relief agencies.⁶¹ To the extent that the lawyer advertising interacts with how telecommunications entities collect and use data on consumers, the FCC and its regulations play a role.⁶²

B. *Scholarly Critiques of the Status Quo*

When assessing the current law of lawyer marketing, professional responsibility scholars tend to criticize the prohibitions on in-person solicitation as needlessly complicated, often suggesting a blanket prohibition on misleading, deceptive, or coercive marketing communications by lawyers instead.⁶³ This position moves the effect of the communication to the forefront of the ethical inquiry, displacing the current focus on the methods of the communication.⁶⁴ Extending the logic of this line of thought, Jan Jacobowitz has explained how Model Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation sufficiently covers the legitimate concerns about lawyer marketing and guards against obsolescence.⁶⁵

In considering whether in-person solicitation warrants different treatment than advertising, Louise Hill argues that the categorical prohibition on in-person solicitation is not narrowly tailored to the objectives of preventing overreach and undue influence.⁶⁶ Instead, just as with advertising restrictions, states could use less obstructive means to safeguard the public, such as requiring specific disclosures by the lawyers during the conversations, filing notifications of proposed contacts with state regulators, or permitting rescission of contracts that result from in-person solicitation.⁶⁷ More recently, Ashley London explained how text messaging—a form of lawyer marketing that is now characterized as a type of advertising, not solicitation—might present some of

61. See 11 U.S.C. § 528(a)(4), (b); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–32 (2010); Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 427 (2012).

62. See Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1622–24 (2019).

63. See London, *supra* note 21, at 145–48; Hill, *supra* note 23, at 410; Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 524 (1986); Fred S. McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers*, 134 U. PA. L. REV. 45, 66 (1985). *But see* Harold G. Christensen, *Advertising by Lawyers*, 1978 UTAH L. REV. 619, 628 (1978) (arguing that distinguishing between advertising and solicitation is “the most workable test for determining whether conduct constitutes protected commercial speech under the first amendment”).

64. See generally Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 224 (1993); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1391 (1992); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249–50 (1991).

65. Jan L. Jacobowitz, *Ending the Pursuit: Releasing Attorney Advertising Regulations at the Intersection of Technology and the First Amendment*, 24 PRO. LAW. 1, 9–10 (2017).

66. Hill, *supra* note 23, at 369–70.

67. *Id.* at 410–12.

the same dangers as the in-person communication that concerned the Supreme Court in *Obralik*.⁶⁸

The jurisprudence permitting the banning of some types of in-person solicitation also is criticized. The main thrust of this criticism is the lack of administrability. For example, Model Rule 7.3—and most of the state rules implementing the same—draws on the distinction that the Supreme Court made between *Obralik* and *Primus* over the presence of a pecuniary motivation.⁶⁹ But the subjectivity of the term “motivation” does not lend itself to consistent results.⁷⁰ In this same vein, the court decisions in solicitation cases tend to be very fact-specific with unpredictable outcomes.⁷¹ And the rapid pace of technological change means that the rules do not always extend to new practices or the rules’ treatment fails to adequately address features of new practices.⁷² At the more theoretical end of the concerns about the jurisprudence that distinguishes solicitation and advertising, the decision in *Obralik* has been criticized as unnecessarily regulating both the content and format of the in-person speech for the risk that they were likely to be overbearing or intrusive.⁷³ Instead, the Supreme Court could have employed a two-tier system that first looked at the content for deception and then the format for overreach.⁷⁴

Several scholars have identified anticompetitive or inequitable effects of the prophylactic ban on lawyers’ in-person solicitation. As theoretically suggested by economies of scale and as empirically demonstrated in certain older studies, the ban on solicitation might place smaller, newer law firms at a competitive disadvantage with larger, entrenched practices.⁷⁵ Solo practitioners or small practices might not be able to afford mass-market advertisements, making solicitation a more viable alternative for growing their business. To this, solicitation specifically might reach clients who otherwise would be unable to find lawyers.⁷⁶ For example, Monroe Freedman tells the story of a woman who

68. See London, *supra* note 21, at 132–34.

69. See *id.* at 121.

70. See Louise L. Hill, *A Lawyer’s Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393, 412 (1991).

71. See Maute, *supra* note 63, at 501; McChesney, *supra* note 63, at 49.

72. See London, *supra* note 21, at 122; Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL’Y 63, 65 (2012).

73. Lori B. Andrews, *Lawyer Advertising and the First Amendment*, 1981 AM. BAR FOUND. RSCH. J. 967, 977–79 (1981).

74. *Id.* at 979.

75. See Hill, *supra* note 70, at 418–21; Al H. Ringleb, Alan J. Bush & William C. Moncrief, *Lawyer Direct Mail Advertisements: Regulatory Environment, Economics, and Consumer Perceptions*, 17 PAC. L.J. 1199, 1235 n.238 (1986) (citing a 1980 study). Another older study found that lawyers from small practices were less likely to accept advertising restrictions than their peers from larger practices. See Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 312 (2004) (citing JEROME E. CARLIN, LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR 52–61 (1966)).

76. See, e.g., MONROE H. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 118 (1975) (describing benefit of access to justice in a case involving solicitation); Diane J. Klein, *Knocking on Heaven’s*

speaks little English arriving at a courthouse where she is facing an eviction proceeding and being approached by a man who “asks her in her own language whether he can help her,” ultimately leading to her being represented by a lawyer who guides her through the process and represents her interests.⁷⁷ This story highlights how in-person communication can help lawyers reach potential clients who might lack the resources to find a lawyer.⁷⁸ And, it is further buttressed by the findings of Jim Hawkins and Renee Knake Jefferson’s recent study on lawyer advertising, which found that many advertisements were not written to be accessible to potential clients from all educational backgrounds.⁷⁹

Many of the criticisms of solicitation bans echo the more general concerns that restrictions on lawyer marketing are simply protectionist restraints.⁸⁰ For example, as a historical matter, the ban on advertising and solicitation was meant to prevent immigrant lawyers from entering the market, which raises questions about bias.⁸¹ Additionally, the conventional wisdom holds that lawyer marketing generally results in higher service quality and lower costs.⁸² While more recent scholarship has questioned whether the findings from older empirical studies on the relationship of marketing restrictions to the quantity, cost, and quality of the supply of legal services are generalizable across all areas, they might hold in high-volume, standardized practices.⁸³ Either way, the

Door: Closing the Racial Estate-Planning Gap by Ending the Ban on Live Person-to-Person Solicitation, 44 J. LEGAL PRO. 3, 7–8 (2019) (describing need for in-person solicitation to overcome racial gap in estate-planning legal services).

77. FREEDMAN, *supra* note 76.

78. See Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending in-Person Client Solicitation*, 34 HARV. C.R.-C.L. L. REV. 487, 505 (1999) (describing how, with in-person solicitation, “prospective clients are able to ask questions and interact with lawyers on a personal level”).

79. Hawkins & Knake, *supra* note 26, at 1035.

80. See generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1233–34 (2003) (characterizing the restraints on advertising and solicitation as “aimed at decreasing competition”); Guttenberg, *supra* note 61, at 424–25; Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 415 (2004).

81. See Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 167–68 (2003) (describing times “when advertising and solicitation restrictions were wielded aggressively to keep immigrant lawyers from developing practices”); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 40–41, 43 (1976) (describing class bias of early solicitation restrictions).

82. See Maute, *supra* note 63, at 508; Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1084 (1983) (showing that legal advertising promotes information without sacrificing quality); Terry Calvani, James Langenfeld & Gordon Shuford, *Attorney Advertising and Competition at the Bar*, 41 VAND. L. REV. 761, 776–78 (1988); Knake, *supra* note 32, at 2867. *But see* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 995 (2000) (“[T]here is little evidence that . . . the elimination of overt market restrictions has had any substantial effect.”).

83. See Hawkins & Knake, *supra* note 26, at 1020–35 (identifying several sources of market failure to explain why lawyer advertising has not led to an increase in access to legal services). Compare Michael R. McCunney & Alyssa A. DiRusso, *Marketing Wills*, 16 ELDER L.J. 33, 70 (2008) (“Restrictive rules on advertising are also thought to create a disincentive for providing ‘standardizable services,’ like will drafting, at discount prices.”), with Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65

continuing unmet legal needs of the country—often due to lay individuals not knowing their rights or where to go for legal help—remain a source of great concern.⁸⁴

There is very little scholarly disagreement about the legitimate objectives of regulating lawyer marketing. Academics highlight the goals of promoting access to justice by educating potential litigants about their rights, the availability of legal help, and the possibility that more lawyer marketing results in lower prices.⁸⁵ They also note the need to protect consumers, discussing how increased competition may promote quality while still sounding a warning note about the potential for misleading or overreaching communications.⁸⁶ And, again, there appears to be a consensus that reforms should follow from these goals, emphasizing a move towards a uniform standards approach that prevents misleading communications.⁸⁷

In the following Parts, this Article pushes forward the consensus account, offering one major refinement. The academic literature mostly discusses misleading and false advertisements. But this focus does not recognize that technological advances in marketing now permit invasive and manipulative advertisements, which similarly threaten client autonomy.⁸⁸ Taking advantage of the relevant privacy and technology scholarship, this Article details those developments and their implications for the legal profession.

II. THE RISE OF ONLINE BEHAVIORAL ADVERTISING

A. *Developments in Advertising Technology*

As virtually all aspects of life are increasingly entwined with the internet, two interrelated developments in marketing technology have transformed advertising in ways that raise legal ethics issues.⁸⁹ The first development is the

STAN. L. REV. 633, 667 (2013) (“[T]here is no evidence that advertising personal injury lawyers charge less, on a percentage basis, than their non-advertising counterparts.”).

84. See, e.g., Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955, 987 (2019); Raymond H. Brescia, *Law and Social Innovation: Lawyering in the Conceptual Age*, 80 ALB. L. REV. 235, 292–93 (2016); David L. Hudson, Jr., *Attorney Advertising in The Litigators and Modern-Day America: The Continued Importance of the Public’s Need for Legal Information*, 48 U. MEM. L. REV. 959, 985 (2018).

85. See London, *supra* note 21, at 146; Hill, *supra* note 23, at 420–21; Maute, *supra* note 63, at 532.

86. See London, *supra* note 21, at 147; Maute, *supra* note 63, at 525–26. But other scholars have focused more on the problems with lawyer advertisements and the harm they have had on consumers. See, e.g., Best, *supra* note 60, at 2–3.

87. See, e.g., London, *supra* note 21, at 145–48 (suggesting use of Justice Marshall’s approach); Maute, *supra* note 63, at 524–25.

88. See Calo, *supra* note 10, at 1003–04.

89. See generally *United States v. Perazza-Mercado*, 553 F.3d 65, 73 (1st Cir. 2009) (“The importance of the internet in modern life has steadily increased over time, and we have no reason to believe that this trend will end.”); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267 (1998).

Big Data revolution.⁹⁰ Although there are a myriad of definitions, a helpful way of understanding it is as a “problem-solving philosophy that leverages massive datasets and algorithmic analysis to extract ‘hidden information and surprising correlations.’”⁹¹ And, from internet browsing history to light bulb usage, advertisers now have an immense and unprecedented volume and variety of data on consumers.⁹² Whether alone or paired with traditional repositories of personal information such as government records, the data let advertisers create detailed profiles of consumers and what motivates them.⁹³ The second development is the change in how individuals consume media, which has given advertisers the ability to “narrowcast”—that is, to deliver tailored advertisements to specific individuals via internet-enabled devices such as computers, smart phones, and even home televisions.⁹⁴ Together, these developments mean advertisers can microtarget (and retarget) specific consumers using information that the consumers did not intend to share and appealing to unknown, subconscious drivers.⁹⁵ As described in a recent article by Danielle Keats Citron, “Online behavioral advertising generates profits by ‘turning users into products, their activity into assets,’ and ‘platforms into weapons of mass manipulation.’”⁹⁶

90. See Joseph Blass, *Algorithmic Advertising Discrimination*, 114 NW. U. L. REV. 415, 417 (2019) (“Big data and machine learning have already transformed advertising.”); Mitch Barns, *Big Data’s Big Impact on the Future of Advertising*, VOX (Jun. 22, 2015, 2:09 PM), <https://www.vox.com/2015/6/22/11563780/big-datas-big-impact-on-the-future-of-advertising>.

91. Woodrow Hartzog & Evan Selinger, *Big Data in Small Hands*, 66 STAN. L. REV. ONLINE 81, 81 (2013) (quoting Ira Rubinstein, *Big Data: The End of Privacy or a New Beginning?*, 3 INT’L DATA PRIV. L. 65, 74 (2013)); see also Julie E. Cohen, *What Privacy is For*, 126 HARV. L. REV. 1904, 1920 (2013).

92. See Calo, *supra* note 10, at 999 (“[T]he digitization of commerce dramatically alters the capacity of firms to influence consumers at a personal level.”); Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1850–51 (2011). One work on Big Data described volume, velocity, variety, and value as the “four ‘V’s . . . of Big Data.” MAURICE E. STUCKE & ALLEN P. GRUNES, *BIG DATA AND COMPETITION POLICY* 11 (2016).

93. See Calo, *supra* note 10, at 999; Ido Kirovsky, *Legally Cognizable Manipulation*, 34 BERKELEY TECH. L.J. 449, 455–57 (2019) (describing general ability to use Big Data in these ways); Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2023 (2013); Schwartz & Solove, *supra* note 92, at 1851.

94. See Michael S. Kang, *From Broadcasting to Narrowcasting: The Emerging Challenge for Campaign Finance Law*, 73 GEO. WASH. L. REV. 1070, 1070 (2005).

95. See Olivier Sylvain, *The Market for User Data*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1087, 1089 (2019); Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 ARIZ. L. REV. 339, 379 (2017); TUROW, *supra* note 4, at 136–58.

96. Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. 1073, 1086 (2020) (quoting Facebook, Inc., Commission File No. 1823109, at 8 (F.T.C. July 24, 2019) (Comm’r Rohit Chopra, dissenting), <https://perma.cc/5X5M-2WCN>).

1. Centrality of Behavioral Advertising

It is difficult to find how much is spent specifically on online behavioral advertising, but all estimates convey its significance.⁹⁷ Overall internet advertising in the U.S. was estimated as 107 billion in 2018.⁹⁸ Facebook and Alphabet (Google's parent company) captured about 60% of the market.⁹⁹ And this makes online advertising the main driver of Facebook and Alphabet's revenue.¹⁰⁰ In turn, the revenue of these two companies is a driver of the broader economy—the combined market cap of Facebook and Alphabet constitutes over 5% of the total U.S. market cap.¹⁰¹

2. Volume and Variety of Information

Targeted marketing is not a recent development.¹⁰² By the 1950s, businesses were using information about consumers to guide both their general advertising and their direct marketing efforts.¹⁰³ But the volume and variety of data-gathering underlying contemporary behavioral advertising efforts is a relatively new phenomenon.¹⁰⁴ To provide some perspective as to the volume

97. Compare Natasha Lomas, *Targeted Ads Offer Little Extra Value for Online Publishers, Study Suggests*, TECHCRUNCH (May 31, 2019, 11:09 AM), <https://techcrunch.com/2019/05/31/targeted-ads-offer-little-extra-value-for-online-publishers-study-suggests/?guccounter=1> (citing studies showing that behavioral advertising is now the dominant form of internet advertising and might constitute up to 90% in Europe), with Christopher Heine, *76% of Marketing Execs Say They Don't Target with Behavioral Data*, ADWEEK (Mar. 20, 2014), <https://www.adweek.com/digital/76-marketing-execs-say-they-dont-target-behavioral-data-156408/> (citing study that found only 24% of marketing executives use behavioral data). These two figures are reconcilable in several different ways. First, they are from two different times. Second, they measure related but distinct things. Regardless, it should be clear that behavioral marketing is a significant piece of the global economy.

98. Sheila Dang, *Google, Facebook Have Tight Grip on Growing U.S. Online Ad Market: Report*, REUTERS (Jun. 5, 2019, 8:08 AM), <https://www.reuters.com/article/us-alphabet-facebook-advertising/google-facebook-have-tight-grip-on-growing-u-s-online-ad-market-report-idUSKCN1T61IV>.

99. *Id.*; see also Kapczynski, *supra* note 27, at 1476.

100. See Jake Swearingen, *Can Google Be More than an Advertising Company?*, N.Y. MAG.: INTELLIGENCER (Feb. 5, 2019), <https://nymag.com/intelligencer/2019/02/google-earnings-show-it-needs-to-be-more-than-an-ad-company.html> (calculating that advertising made up 83% of Google's revenue); Rishi Iyengar, *Here's How Big Facebook's Ad Business Really Is*, CNN BUS. (Jul. 1, 2020, 9:19 AM), <https://www.cnn.com/2020/06/30/tech/facebook-ad-business-boycott/index.html> (noting that advertising made up 98.5% of Facebook's revenue in 2019). See generally *In re DoubleClick Inc. Priv. Litig.*, 154 F. Supp. 2d 497, 502 (S.D.N.Y. 2001) (explaining how DoubleClick became the dominant internet advertiser by offering targeted advertisements).

101. *Largest American Companies by Market Capitalization*, COMPANIES MKT. CAP, <https://www.companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/> (last visited Sept. 20, 2021).

102. See Caitlin E. Jokubaitis, *There and Back: Vindicating the Listener's Interests in Targeted Advertising in the Internet Information Economy*, 42 COLUM. J.L. & ARTS 85, 86 (2018); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 722 (1999).

103. See Shaun B. Spencer, *The Problem of Online Manipulation*, 2020 U. ILL. L. REV. 959, 966–67 (2020); see also Susser et al., *supra* note 25, at 5 (citing VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957)).

104. See Peter Segrist, *How the Rise of Big Data and Predictive Analytics Are Changing the Attorney's Duty of Competence*, 16 N.C. J.L. & TECH. 527, 538 (2015).

of information that is being created, it has been estimated that the world will generate 40 zettabytes over the next two years.¹⁰⁵ This roughly corresponds to about 40 quadrillion pieces of paper.¹⁰⁶ If you are trying to visualize this, imagine almost 3 billion separate stacks of paper connecting the Earth and the Moon.¹⁰⁷

The dramatic rise in the amount of information in the world is tied to the digitization of daily life and commercial forces that find value in the data produced.¹⁰⁸ Even twenty years ago, more than 90% of all the information being created was digital.¹⁰⁹ Now, a great deal of the information is about individuals and their habits.¹¹⁰ This is related to the “smartphone effect,” which has put instant internet access in millions of pockets around the world.¹¹¹ Other sorts of smart devices—from wearable fitness monitors to appliances—have proliferated too.¹¹² It has been estimated that there are anywhere from 50 to 212 billion internet-connected personal devices that are tracking individual behavior.¹¹³ For example, one popular fitness monitor device collects information on one’s daily movements, eating habits, and sleeping patterns.¹¹⁴ Smart televisions collect information on viewing habits.¹¹⁵ Kindles and other e-readers collect information on the reading habits of their users, including

105. Patrick J. McKenna, *A Lucrative Micro-Nice Practice: Digital Transformation Practice*, COUNSEL, Nov. 2019, at 13, 13.

106. See Seth Katsuya Endo, *Technological Opacity & Procedural Injustice*, 59 B.C. L. REV. 821, 840 (2018) (“[E]ach gigabyte (one trillionth of a zettabyte) could equal tens of thousands of printed pages.”).

107. The Moon is about 240,000 miles away from Earth. *How Far Away is the Moon?*, NASA SCI.: SPACE PLACE, <https://spaceplace.nasa.gov/moon-distance/en/> (last updated July 23, 2021). A thick piece of paper is about 0.018 inches thick. *Paper Weight Chart*, JAM PAPER & ENVELOPE, <https://www.jampaper.com/paper-weight-chart.asp> (last visited Sept. 15, 2021). To reach the Moon from the Earth, one would need to stack about 13,714,285 pieces of paper. And 40 quadrillion divided by that number equals about 2.9 billion.

108. See Ira S. Rubinstein, Ronald D. Lee & Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. CHI. L. REV. 261, 262–70 (2008); Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 353 (2008).

109. See John D. Evans, *Panel One: The Consequences of Regulatory Policy Lagging Behind Technological Change: How Policy Responds to and Affects Innovation*, 2001 L. REV. MICH. ST. U. DET. COLL. L. 235, 236 (2001).

110. See Margaret Hu, *Small Data Surveillance v. Big Data Cybersurveillance*, 42 PEPP. L. REV. 773, 823–25 (2015) (detailing how much information is generated by examples of common behavior, such as using Google, Twitter, and text messaging).

111. See Meredith Attwell Baker, *Advancing Consumer Interests Through Ubiquitous Broadband: The Need for a New Spectrum*, 62 FED. COMM’NS L.J. 1, 5 (2010).

112. See Anshika Jain, *Smart Home Market Witnessing Rapid Growth*, COUNTERPOINT (Mar. 31, 2021), <http://www.counterpointresearch.com/smart-home-market-witnessing-rapid-growth/>.

113. See Stephen Moccia, *Bits, Bytes, and Constitutional Rights: Navigating Digital Data and the Fourth Amendment*, 46 FORDHAM URB. L.J. 162, 163–64 (2019); INT’L DATA CORPORATION, *THE DIGITAL UNIVERSE OF OPPORTUNITIES* 5 (2014), <https://www.iotjournal.nl/wp-content/uploads/2017/01/idc-digital-universe-2014.pdf>.

114. See Graham Johnson, *Privacy and the Internet of Things: Why Changing Expectations Demand Heightened Standards*, 11 WASH. U. JURIS. REV. 345, 350 (2019).

115. See Eldar Haber, *The Internet of Children: Protecting Children’s Privacy in a Hyper-Connected World*, 2020 U. ILL. L. REV. 1209, 1214 (2020).

whether one lingered on a specific page.¹¹⁶ Even brick-and-mortar retailers are keeping detailed digital records of their customers' purchases in addition to the less obvious tracking that they might do.¹¹⁷ And more and more government records—such as court documents filed on PACER, voter registration information, property records, or professional licenses—are kept in digital form that is publicly available online.¹¹⁸

The internet is a crucial aspect of data generation and collection. Individuals knowingly and deliberately share a great deal of personal information, such as their names, ages, email, and addresses, with e-commerce and social media websites.¹¹⁹ Sites like BuzzFeed use the responses to their quizzes to build detailed profiles of individuals, which might include intimate information such as whether one has had an eating disorder.¹²⁰ To provide a sense of the ubiquity of BuzzFeed's quizzes, one example—*What State Do You Actually Belong In?*—was taken over 48 million times since it was posted in 2014.¹²¹ In this particular quiz, some of the questions ask readers to select their favorite television show or fast food restaurant.¹²² Another quiz asks which negative trait best describes the reader.¹²³ With millions of users answering these questions, companies are able to figure out what drives the individuals who visit their sites.¹²⁴

116. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1938–39 (2013).

117. See Calo, *supra* note 10; Akiva A. Miller, *What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing*, 19 J. TECH. L. & POL'Y 41, 45–47 (2014); Stephanie Clifford & Quentin Hardy, *Attention, Shoppers: Store Is Tracking Your Cell*, N.Y. TIMES (July 14, 2013), <http://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell.html> (WiFi tracking); Megan Garber, *I Know What You Did Last Errand*, ATLANTIC (July 15, 2013) <http://www.theatlantic.com/technology/archive/2013/07/i-know-what-you-did-lasterrand/277785/> (use of facial recognition software).

118. See Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1270–71 (2020) (discussing how private credit agencies scrape federal court records from PACER); see also Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 136, 141 (2009); FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 11–13 (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>; David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387–88 (2017).

119. See Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1411 (2001); FEDERAL TRADE COMMISSION, *supra* note 118, at 13; Segrist, *supra* note 104, at 539.

120. See Segrist, *supra* note 104, at 539–40 (citing Caitlin Dewey, *The Scary, Eye-Opening Truth of Internet Tracking – on BuzzFeed Quizzes, and Everywhere Else*, WASH. POST (June 26, 2014), <https://www.washingtonpost.com/news/the-intersect/wp/2014/06/26/the-scary-eye-opening-truth-of-internet-tracking-on-buzzfeed-quizzes-and-everywhere-else/>).

121. Andrew Ziegler, *100 BuzzFeed Quizzes that Went Viral This Decade*, BUZZFEED (Dec. 20, 2019), <https://www.buzzfeed.com/andrewziegler/best-buzzfeed-quizzes>.

122. Tanner Greenring & Dave Stopera, *What State Do You Actually Belong in?*, BUZZFEED (Feb. 13, 2014), <https://www.buzzfeed.com/awesomer/what-state-do-you-actually-belong-in>. (Apparently, I belong in Minnesota.)

123. *Id.*

124. Dewey, *supra* note 120.

In addition to the first-parties who are given this personal information, the data get packaged and disseminated to third-parties. When websites like Facebook or LinkedIn make information public, data brokers use programs to automatically collect it.¹²⁵ But even with sites that do not host or post individuals' information, the data are often sold to third-parties.¹²⁶

Individuals' internet browsing history and many other activities are now clandestinely tracked and collected in a variety of ways by both first-parties and third parties.¹²⁷ One method of tracking involves keeping a record of the activities associated with an internet protocol (IP) address, which is given to websites to deliver content to the device.¹²⁸ With fixed IP addresses, the activities can be associated with a specific person by analyzing the traffic.¹²⁹ Another tracking method involves the use of "cookies," small text files that identify a particular device and convey the browsing history of the user back to the cookie's source.¹³⁰ Again, some cookies can be connected with personally identifiable information.¹³¹

It is also difficult—if not outright impossible—to escape from this corporate surveillance. In response to software that permits users to block cookies, many websites use alternative methods to track users' internet activities.¹³² For example, any website that has a Facebook "like" button transmits data about its visitors back to Facebook, permitting the company to track users even when they are not logged into its home website.¹³³ Another method relies on the unique combinations of computers, operating systems, browsers, individualized settings, and so forth to create a digital fingerprint of each computer that connects to a website, permitting the tracking of users from various sites even if they have blocked cookies or use other antitracking tools.¹³⁴

In addition to browsing activity, geolocation data may also be collected.¹³⁵ When computers or smartphones connect to the internet, their location can be discerned either through a global positioning system chip or triangulation from

125. FEDERAL TRADE COMMISSION, *supra* note 118, at 13 & n.40, 17.

126. *Id.* at 13–14.

127. Solove, *supra* note 119; FEDERAL TRADE COMMISSION, *supra* note 118, at 13–14.

128. *See* Segrist, *supra* note 104, at 539–40.

129. *See id.*; Schwartz & Solove, *supra* note 92, at 1837–40.

130. *See* Segrist, *supra* note 104, at 540; Schwartz & Solove, *supra* note 92, at 1851.

131. *See* Segrist, *supra* note 104, at 541; Schwartz & Solove, *supra* note 92, at 1888.

132. *See* Segrist, *supra* note 104, at 541.

133. *See id.* at 542–43.

134. *See id.* at 543–44.

135. *See* Kevin F. King, *Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61, 66 (2011); *see also* Natasha Singer, *Google Promises Privacy with Virus App but Can Still Collect Location Data*, N.Y. TIMES (Jul. 20, 2020), <https://www.nytimes.com/2020/07/20/technology/google-covid-tracker-app.html#:~:text=tracker%2Dapp.html-,Google%20Promises%20Privacy%20With%20Virus%20App%20but%20Can%20Still%20Collect,Google%20to%20make%20a%20change> (describing geolocation tracking through Google's Android system).

wireless network towers.¹³⁶ Websites also can figure out the locations of their visitors by linking an IP address or other similar information to physical locations.¹³⁷

3. *Ability to Draw Meaning from Data*

The key development of Big Data is the ability to mine it for meaning.¹³⁸ The Big Data collection described above permits advertisers to use the aggregated data to understand broad patterns and hidden connections.¹³⁹ It also lets advertisers create detailed profiles of individuals.¹⁴⁰ And by combining insights into both the broad patterns and the individuals, advertisers may be the beneficiaries of a gestalt effect in which the whole of the data is greater than the sum of each piece.¹⁴¹ Illustrating this point, several privacy scholars explained how a data collector would be able to make different inferences based on whether internet searches for the terms “paris” and “hilton” were paired with either “louvre” or “nicky.”¹⁴²

The immense volume of data permits large-scale analysis that, in the aggregate, may uncover surprising or hidden relationships. For example, social scientists have demonstrated that personal details about an individual—such as race, gender, religion, sexual orientation, substance use, and psychological and personality traits such as intelligence and openness—can be inferred from Facebook likes.¹⁴³

Advertisers also can create detailed profiles on specific individuals. For example, Andrew Guthrie Ferguson noted that political actors claim to have “up to as many as several hundred points of data” on each of the 168 million registered voters in the U.S.¹⁴⁴ And in 2018, a marketing firm was discovered to have more than 400 points of data—such as whether a person smokes or their religion—on more than 230 million consumers.¹⁴⁵ These profiles may exist

136. See King, *supra* note 135.

137. See *id.* at 67.

138. See Joseph T. Thai, *Is Data Mining Ever a Search Under Justice Stevens's Fourth Amendment*, 74 FORDHAM L. REV. 1731, 1740 (2006).

139. See FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 153 (2015) (“[T]he real basis of commercial success in Big Data[-]driven industries is likely the quantity of relevant data collected *in the aggregate*—something not necessarily revealed or shared via person-by-person disclosure . . .”).

140. See Susser et al., *supra* note 25, at 10 (describing Cambridge Analytica example).

141. See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 506–07 (2006).

142. See Tene & Polonetsky, *supra* note 6, at 251.

143. See Susser et al., *supra* note 25, at 10 (citing Michael Kosinski et al., *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT'L ACAD. SCIENCES 5802 (2013)).

144. See Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 966 (2016) (quoting Jon Gertner, *The Very, Very Personal Is the Political*, N.Y. TIMES MAG. (Feb. 15, 2004), <http://www.nytimes.com/2004/02/15/magazine/the-very-very-personal-is-the-political.html>).

145. See Elizabeth R. Pike, *Defending Data: Toward Ethical Protections and Comprehensive Data Governance*, 69 EMORY L.J. 687, 700 (2020).

because individuals volunteer information to retailers, websites, and other entities that engage in tracking and then this is cross-referenced against other records.¹⁴⁶

By connecting internet activity or other tracked conduct with publicly available, personally identifiable information, advertisers can de-anonymize data.¹⁴⁷ One researcher, Latanya Sweeney, caused a stir when she determined that over 87% of individuals in the U.S. could be identified by the combination of their five-digit ZIP code, birth date, and sex.¹⁴⁸ Dr. Sweeney purchased state medical records that included these three categories of information and the complete voter rolls of the city of Cambridge.¹⁴⁹ From these two data sources, she was able to deduce which records belonged to then-Governor William Weld.¹⁵⁰ Another example involves a journalist, Joel Stein, who spent several months gathering information on the information gathered on him.¹⁵¹ Although the accuracy of the data varied, six companies had profiles on him that included details such as his age, gender, profession, salary, hobbies, recent purchases, location, and even his social security number.¹⁵² Today, it is clear that there is an entire industry dedicated to linking ostensibly anonymous tracked data of individuals to personally identifiable information.¹⁵³

4. *How the Data Is Used in Marketing*

So, what do advertisers do with all of this data? Having data is one thing; using it is another.¹⁵⁴ Advertisers use their insights into consumers (both writ large and writ small) to serve targeted advertising.¹⁵⁵ Advertisers might tailor the content of the messages to specific factors related to the intended recipients, such as perceived personality traits, location, or other past conduct.¹⁵⁶ One

146. See Schwartz & Solove, *supra* note 92, at 1851.

147. See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1723 (2010).

148. See *id.* at 1719 (discussing Latanya Sweeney, *Uniqueness of Simple Demographics in the U.S. Population* (Lab'y for Int'l Data Priv., Working Paper LIDAP-WP4, 2000)).

149. See *id.* (citing Henry T. Greely, *The Uneasy Ethical and Legal Underpinnings of Large-Scale Genomic Biobanks*, 8 ANN. REV. GENOMICS & HUM. GENETICS 343, 352 (2007)).

150. See *id.*

151. Joel Stein, *Data Mining: How Companies Now Know Everything About You*, TIME (Mar. 10, 2011), <http://content.time.com/time/magazine/article/0,9171,2058205,00.html>.

152. *Id.*

153. See Joseph Cox, *Inside the Industry that Unmasks People at Scale*, VICE (Jul. 14, 2021, 8:00 AM), <https://www.vice.com/en/article/epnmvz/industry-unmasks-at-scale-maid-to-pii>.

154. See Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 411 (2014) (noting the importance of “what rules are in place (legal, social, or otherwise) to govern the use of information as well as its disclosure”).

155. See Susser et al., *supra* note 25, at 11–12; see also David Auerbach, *You Are What You Click: On Microtargeting*, NATION (Feb. 13, 2013), <http://www.thenation.com/article/172887/you-are-what-you-click-microtargeting>.

156. See Susser et al., *supra* note 25, at 12; see also King, *supra* note 135, at 69.

simple example is retargeting individuals who have browsed a retailer's website without making a purchase—the unpurchased items frequently follow one to other websites.¹⁵⁷ But this is merely the tip of the iceberg—through automated systems, advertisers can make real-time assessments of whom to serve advertisements and for what.¹⁵⁸

This sort of behavioral advertisement—often referred to as “microtargeting”—differs from “run-of-network” advertisements, which are broadcast to an undifferentiated public audience.¹⁵⁹ Consider, for instance, a Coca-Cola advertisement that is served to visitors to a newspaper's landing page. Behavioral advertisements also differ from contextual advertisements in which the advertisement is related to the content of the website, such as an advertisement for diamond rings that runs on the webpage for an article on weddings.¹⁶⁰

There have been several high-profile examples of microtargeting, including the Cambridge Analytica scandal. In the lead-up to the 2016 U.S. presidential election, Cambridge Analytica had an agent distribute a personality quiz through Facebook to several hundred thousand users, which provided the company with access to almost 90 million accounts of both the quiz takers and their Facebook friends.¹⁶¹ The company then created detailed profiles on over 200 million Americans that were then used to personalize advertisements designed to impact voter turnout.¹⁶²

While the efficacy of microtargeted advertisements is hard to pinpoint, there is no denying its widespread acceptance and its perceived value.¹⁶³ As the FTC reported, advertisers are willing to pay a premium for targeted online advertising.¹⁶⁴ In part, behavioral advertising has the potential to not just exploit consumer preferences but also shape or create them.¹⁶⁵

B. *Where Lawyer Advertising Is Headed*

Since the *Bates* decision in 1977, lawyer marketing has become a staple of the profession. In 2015, lawyers were projected to spend \$892 million on

157. See, e.g., Larry Bodine, “Haven’t We Met?” *How Lawyers Use Retargeting to Attract New Business*, 91 WIS. LAW. 53, 53 (2018); Aviva Meridian Kaiser, *Will the “Pants that Stalked Me on the Web” Become the Lawyer Who Stalked Me on the Web?*, 91 WIS. LAW. 54, 54 (2018).

158. See Shaun B. Spencer, *Privacy and Predictive Analytics in E-Commerce*, 49 NEW ENG. L. REV. 629, 633–38 (2015).

159. See Strandburg, *supra* note 4.

160. *Id.*

161. See Susser et al., *supra* note 25, at 10.

162. See *id.* at 11–12.

163. See Ferguson, *supra* note 144, at 940.

164. Schwartz & Solove, *supra* note 92, at 1854.

165. See Spencer, *supra* note 103, at 983; Cohen, *supra* note 91, at 1925.

television advertising.¹⁶⁶ And according to an ABA study, at least 86% of lawyers engage in some form of internet advertising.¹⁶⁷ To provide a sense of this market, nine of Google Ads' top ten most expensive terms were related to personal injury litigation.¹⁶⁸ In light of these trends and the developments in advertising technology described above, it is reasonable to assume that lawyer marketing is—and will continue—evolving by incorporating them.¹⁶⁹ Even a quick search of law firm websites indicates that some number engage in behavioral advertising, retargeting, and data analytics to determine their marketing strategies.¹⁷⁰

1. *Microtargeting & Narrowcasting with Use of Big Data*

Recall that a medical malpractice firm openly discussed how its current practices include targeting individuals based on geolocation data.¹⁷¹ Specifically, the firm sent advertisements that featured an e-book about how to select a nursing home to individuals whose locations matched nursing homes with bad reviews.¹⁷² This sort of marketing might not seem so troubling in that it largely went to informing potential clients about an important issue. And, conceptually,

166. KEN GOLDSTEIN, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TRIAL LAWYER MARKETING: BROADCAST, SEARCH AND SOCIAL STRATEGIES 2 (2015), <https://instituteforlegalreform.com/research/trial-lawyer-marketing-broadcast-search-and-social-strategies/>.

167. See Allison Shields, 2019 *Websites & Marketing*, AM. BAR ASS'N (Oct. 23, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/websites-marketing2019/ (finding 86% of respondents had a website and 80% were on social media); see also, e.g., Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 899–900 (2012) (describing how one Maryland lawyer uses 15% of his gross revenue on internet advertising to drive his successful practice); Victor Li, *Legal Advertising Blows Past \$1 Billion and Goes Viral*, A.B.A. J. (Apr. 1, 2017, 12:05 AM), https://www.abajournal.com/magazine/article/legal_advertising_viral_video (describing major advertising law firm that spends 45% of its budget on internet advertisements). See generally Christopher Hurd, *Untangling the Wicked Web: The Marketing of Legal Services on the Internet and the Model Rules*, 17 GEO. J. LEGAL ETHICS 827, 827 (2004) (“Over the past decade, the rapid growth of the Internet has given lawyers the opportunity to market their legal services on a previously unheard of scale.”).

168. See Li, *supra* note 167; see also J. Mark Phillips, Kyle A. Huggins & Lora Mitchell Harding, *From Old Spice to the Texas Law Hawk: How Inbound Marketing, Content Leadership and Social Media Can Level the Playing Field for Solo Practitioners*, 9 J. BUS. ENTREPRENEURSHIP & L. 389, 396 (2016) (describing how small firms might benefit from shifting to an inbound marketing strategy that encourages prospective clients to reach out to the firms based on internet videos and other material); RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 105–11 (2008).

169. See, e.g., Bodine, *supra* note 157.

170. See, e.g., *PLLC Privacy Policy*, SUSSMAN L. FIRM, <https://www.sussmanlawfirmpllc.com/privacy-policy-2/> (May 14, 2020) (noting that the firm “collect[s] several types of information from and about users of our Website, including information: [] by which you may be personally identified”); *Privacy Policy*, MARKS & HARRISON, <https://www.marksandharrison.com/privacy-policy/> (lasted visited Sept. 16, 2021) (noting use of Google Ads' retargeting services); Li, *supra* note 167 (“Sokolove Law has an analytics group that determines which ads are working and how many phone calls become clients.”).

171. Braff, *supra* note 12.

172. *Id.*

it is not all that different from traditional advertising.¹⁷³ The law firm presumably could have allocated its advertising budget to billboards in such areas instead.

However, the microtargeting of internet advertisements can go well beyond this, layering in multiple data points that might speak to more private aspects of a targeted individual's identity or involve mechanisms that the individual does not consciously understand. To the former, start with the simple case of divorce lawyers targeting social media users who post about their relationship issues.¹⁷⁴ For example, Facebook tracks user life events such as changing one's relationship status, which would permit divorce lawyers to focus on these individuals.¹⁷⁵ Using geolocation data, divorce lawyers might further target users who have posted about a change in relationship status and are suddenly spending their evenings in the vicinity of local hotels or other transient housing.¹⁷⁶ To the latter, the divorce lawyers might further hone their aim by advertising particularly heavily towards the subset of those individuals who are traveling during the holiday season, as sociological studies suggest that can add stress to a relationship and lead to divorce.¹⁷⁷ And because the advertisements can be highly tailored, the content might adjust based on factors such as whether the individual had previously expressed the buying habits associated with somebody who worries about scarcity by serving a variation of the advertisement which includes a warning that the services or discounted price are available for a limited time only.¹⁷⁸

Advertisers' ability to make inferences about consumers may combine both the privacy and manipulation risks. Imagine that an individual has not announced a relationship change on social media. But the individual's purchase history indicates an abrupt shift from purchasing groceries such as large

173. See Nora Freeman Engstrom, *Legal Access and Attorney Advertising*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1083, 1093 (2011) (explaining how settlement mills target low-income clients with television advertisements).

174. See Jordan M. Sartell, *Caveat Solicitor: Considerations for Ethical Online Attorney Business Development*, DCBA BRIEF, Sept. 2018, at 12, 17.

175. See Somini Sengupta & Evelyn M. Rusli, *Personal Data's Value? Facebook Is Set to Find Out*, N.Y. TIMES (Jan. 31, 2012), <https://www.nytimes.com/2012/02/01/technology/riding-personal-data-facebook-is-going-public.html> ("Every time a person shares a link, listens to a song, clicks on one of Facebook's ubiquitous 'like' buttons, or changes a relationship status to 'engaged,' a morsel of data is added to Facebook's vast library.").

176. See generally Braff, *supra* note 12 (providing another example of using geolocation data to target consumers).

177. See Calo, *supra* note 10, at 996 (discussing a study that suggested companies should target advertisements featuring their beauty products to women on Monday mornings because that is when they feel less attractive); Stephanie M. Bucklin, *Is Divorce More Common During the Holidays?*, TODAY (Dec. 19, 2016, 10:54 AM), <https://www.today.com/health/divorce-more-common-during-holidays-t106149> (describing research on divorce filings).

178. DELOITTE, HAVE IT ALL: PROTECTING PRIVACY IN THE AGE OF ANALYTICS 3 (n.d.), <https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/Analytics/ca-en-analytics-ipc-big-data.pdf>; see also Spencer, *supra* note 103, at 977–83 (explaining how advertisers might be able to identify, exploit, and even create individuals' vulnerabilities with specificity, at scale, and in real time).

quantities of vegetables to junk food and microwavable meals instead. A divorce attorney who realizes that diet quality and eating alone are negatively correlated might be able to use these factors to target potential clients.¹⁷⁹ Even more disruptively, a divorce attorney might target individuals who search for “marriage counselors,” encouraging the use of legal services for what might not be a legal problem.¹⁸⁰

One can find less extreme, real-life examples currently being used by law firms or their agents to generate business leads.¹⁸¹ For example, one marketing firm was hired to find potential clients for a lawsuit involving a medical device used in hysterectomies that allegedly caused ovarian cancer.¹⁸² The marketing firm took demographic data from the Centers for Disease Control and applied it to Facebook’s advertising tools, searching for women over fifty-five years old who had liked an ovarian support group page.¹⁸³ Personal injury lawyers were willing to pay up to \$3,000 for each name of a woman who might have been implanted with the device.¹⁸⁴

As demonstrated by the ovarian cancer example, mass torts—especially those involving medical products—are an area in which such techniques have been used.¹⁸⁵ Third-party litigation funders, in particular, have been said to use aggressive internet marketing techniques to find potential plaintiffs for mass tort lawsuits.¹⁸⁶ Some law firms also have basically become aggregators or case handlers, focusing on marketing efforts to collect clients even while the legal services are provided by others.¹⁸⁷

179. See Wonjeong Chae et al., *Association Between Eating Behaviour and Diet Quality: Eating Alone vs. Eating with Others*, NUTRITION J., Dec. 19, 2018, at 1, 5.

180. Many thanks again to Rebecca Aviel for suggesting this hypothetical and noting the family law literature that has explored when legal services are substitute goods.

181. See Jesse King & Elizabeth Tippet, *Drug Injury Advertising*, 18 YALE J. HEALTH POL’Y L. & ETHICS 114, 123 (2019) (“The disconnect between litigation filings and advertising—as well as the presence of non-law firm advertisers—suggests that some law firms, and corporations, specialize in producing and financing advertising spots, while other law firms specialize in litigating.”); CARY SILVERMAN, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *BAD FOR YOUR HEALTH: LAWSUIT ADVERTISING IMPLICATIONS AND SOLUTIONS* 3 (2017), <http://www.instituteforlegalreform.com/research/bad-for-your-healthlawsuit-advertising-implications-and-solutions/>.

182. See Doni Bloomfield & Shannon Pettypiece, *How Law Firms Use Facebook and Other Data to Track Down Medical Victims*, BLOOMBERG (May 27, 2015, 11:17 AM), <https://www.bloomberg.com/news/articles/2015-05-27/how-law-firms-use-facebook-and-other-data-to-track-down-medical-victims>.

183. *Id.*

184. *Id.*

185. See, e.g., Memorandum of Law in Support of Motion for Disclosure of Non-Party Interested Entities or Persons at 7–8, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, No. 2:16-md-02740-KDE-MBN, 2019 WL 2995897 (E.D. La. June 20, 2017).

186. *Id.* at 1.

187. See, e.g., Engstrom, *supra* note 83, at 674–75 (describing two examples).

2. Retargeting

As suggested by the New York City Bar opinion discussed above, retargeting is already a feature of legal advertising.¹⁸⁸ If law firms are using it at the same rates as other advertisers, it could make up to 10% of their budget.¹⁸⁹ While retargeting is both a variant of the behavioral advertising described above and a well-accepted method of advertising by retailers, it raises specific concerns for lawyers and thus warrants its own discussion.¹⁹⁰

Assume an individual visits a law firm's website and begins to fill out a contact form. But the individual decides not to complete and submit the form, leaving to browse other corners of the internet. Retargeting permits the law firm to market to the individual by displaying an advertisement across the newly visited websites.¹⁹¹ Although the New York Bar opinion dismisses the possibility, the technology might even allow the law firm to send an email to the individual, exhorting the individual to return to the website to complete the form.¹⁹²

3. Current Constraints

Several factors may explain why lawyers have not yet made the most aggressive advertising techniques a significant part of their collective marketing arsenal. Some of the most unsurmountable barriers are the self-set limits of the major advertising platforms. For example, Google Ads does not permit advertisers to target consumers based on personal hardships, which includes things such as divorce.¹⁹³ The platform also has a size requirement of 1,000 active visitors to a site before its remarketing listing features can be used, which might put the technique out of reach for many legal advertisers.¹⁹⁴

The long history of the legal profession's aversion to advertising might also be holding back the widespread adoption of intrusive and manipulative internet

188. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 1 (2020); *see also* Bodine, *supra* note 157.

189. *See* Bodine, *supra* note 157, at 55.

190. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 5 (2020) (noting its ubiquity); Bodine, *supra* note 157, at 54 (same).

191. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 2 (2020); Bodine, *supra* note 157.

192. *See* N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 2 (2020); John Turner, *Four Ways to Master Your Holiday Marketing Strategy in 2020*, FORBES (Nov. 30, 2020, 7:40 AM), <https://www.forbes.com/sites/theyec/2020/11/30/four-ways-to-master-your-holiday-marketing-strategy-in-2020/>.

193. *See* GOOGLE, *supra* note 2.

194. *How Your Data Segments Work*, GOOGLE, <https://support.google.com/google-ads/answer/2472738?hl=en> (last visited Sept. 16, 2021); Li, *supra* note 167 (describing Sokolove and a few other major legal advertisers).

advertising.¹⁹⁵ As illustrated by some of the comments received by the ABA when it proposed liberalizing the advertising restrictions in the run-up to the 2018 amendments, many lawyers still view advertising as undignified.¹⁹⁶ An older study highlighted that lawyers are more likely to disfavor lawyer advertising than lay consumers.¹⁹⁷ Even for those lawyers who do not personally hold such opinions, there are still financial and nonpecuniary incentives to uphold the cultural norms. To the former, in a study of solo and small law firm practitioners, Leslie Levin observed that some personal injury lawyers in Texas did not advertise on television because they worried that it would result in losing referrals from colleagues who did not approve of the practice.¹⁹⁸ To the latter, the legal profession can be a relatively insular community where there are social and emotional motivations to adhere to the group norms.¹⁹⁹

Another cultural aspect of the legal community, which might lend itself to restrained advertising, is captured by the adage: “Lawyers don’t do math.”²⁰⁰ While it is safe to assume that most lawyers understand that “more” is greater than “less” when it comes to revenue as a potential return on the investment in

195. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371–83 (1977) (“It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on ‘trade’ as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession.”) (footnote omitted) (citation omitted); William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 59 (2002) (“Lawyers had been taught for nearly seventy years that lawyer advertising was wrong. . . . [A]nd showing disdain for competition, they embraced a cultural bias against self-promotion.”) (footnote omitted).

196. See, e.g., Letter from Raymond M. Blackledge, Att’y at L., to the Am. Bar Ass’n, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/r_blackledge_comment.pdf; see also Ralph H. Brock, “*This Court Took a Wrong Turn with Bates: Why the Supreme Court Should Revisit Lawyer Advertising*,” 7 FIRST AMENDMENT L. REV. 145, 146 (2009) (asserting “the need for state bar regulation of quality of legal services claims, particularly in the burgeoning field of electronic and broadcast media advertisements”).

197. Ringleb et al., *supra* note 75, at 1238; see also H. Ronald Moser, David Loudon & Robert E. Stevens, *An Empirical Analysis of the Public’s Attitude Toward Legal Services Advertising*, 35 SERVS. MKTG. Q. 105, 121 (2014) (finding that most consumers viewed advertising by lawyers as appropriate).

198. Levin, *supra* note 75, at 362.

199. See generally Mauro Bussani, *Strangers in the Law: Lawyers’ Law and the Other Legal Dimensions*, 40 CARDOZO L. REV. 3125, 3168 (2019) (“This is why, on the top of different utilitarian reasons, general notions of reciprocal fairness and cooperation, mutual trust, common values, expectations, and beliefs may and actually do motivate participants in these groups.”). Leah Litman’s recent observation that “[e]lite circles of the legal profession seem deeply uncomfortable with doing anything that might hold other elite lawyers accountable for their disregard of various norms or principles” might seem to run counter to this. Leah Litman, *Lawyers’ Democratic Dysfunction*, 68 DRAKE L. REV. 303, 305 (2020). But the general notion of the “[f]amiliarity and insularity” that she identifies as contributing factors also might make it harder for individuals to break the norms. *Id.* at 307.

200. See *Jackson v. Pollion*, 733 F.3d 786, 788 (7th Cir. 2013) (“Innumerable are the lawyers who explain that they picked law over a technical field because they have a ‘math block’”); Lisa Milot, *Illuminating Innumeracy*, 63 CASE W. RESV. L. REV. 769, 769 (2013). But see William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 DICK. L. REV. 395, 406–07 (2018) (suggesting that it is a mistake to view the lack of innovation in the legal industry as stemming from “the lawyer stereotype—risk averse, conservative, too focused on precedent, bad at math, etc.”).

advertising, the folks who run law practices rarely have business training.²⁰¹ As one former managing partner put it, “In a sense, law firms worth millions of dollars are managed by amateurs.”²⁰² And restrictions in many states prevent lawyers from sharing fees with nonlawyers, which structurally limits the extent to which nonlawyer experts can be integrated.²⁰³

Law firms also police each other. As is frequently noted by opponents of advertising restrictions, most of the complaints about lawyer advertising that are filed with the bar come from other lawyers.²⁰⁴ The Association of Professional Responsibility Lawyers 2014 survey of bar regulators found that 78% of complaints came from other lawyers.²⁰⁵ An earlier example comes from Virginia where a law firm aired a television advertisement that boasted about three of its members being selected for inclusion in the *Best Lawyers in America* book.²⁰⁶ Then, five competitors of the firm filed a request with the state bar for a legal opinion on the advertisement.²⁰⁷ Similarly, LegalZoom sued one of its major competitors for false advertising.²⁰⁸

Finally, it is possible that the cost–benefit analysis simply does not favor intrusive or manipulative advertisements. As a group, lawyers seem to take conservative approaches to practices that might run afoul of regulators, viewing the downsides as substantial.²⁰⁹ And it is hard to determine whether

201. Allen M. Terrell, Jr., *Managing the Big Firm*, 19 DEL. LAW. 24, 26 (2001); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2045–46 (2008).

202. Terrell, *supra* note 201, at 24.

203. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1714 (2008).

204. See James M. McCauley & Michael L. Rigsby, *Professional Responsibility*, 31 U. RICH. L. REV. 1115, 1116 (1997); Lars Noah, *Giving Personal Injury Attorneys Who Run Misleading Drug Ads a Dose of Their Own Medicine*, 2019 U. ILL. L. REV. 701, 713 (2019) (“[I]t seems unlikely that state boards would bother paying attention to this category of attorney advertising”); Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J.L. & MED. 7, 40–41 (2015); Fred C. Zacharias, *What Lawyers Do When Nobody’s Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1003–04 (2002). This phenomenon is not limited to legal advertising. See generally D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 697 (2012) (“[A] private plaintiff may press for government action and then free ride off government victories in filing follow-on private actions.”).

205. REGUL. OF LAW. ADVERT. COMM., ASS’N OF PRO. RESP. LAWS., 2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE 28 (2015).

206. Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614, 618 (E.D. Va. 2003).

207. *Id.* at 619.

208. LegalZoom.com v. Rocket Law, Inc., No. 12-CV-00942 GAF, 2015 WL 12832823, at *1 (N.D. Cal. Mar. 23, 2015) (“LegalZoom asserts that Rocket Lawyer engaged in false advertising and unfair business practices when it used the term ‘free’ in advertising for its services.”); Barton & Rhode, *supra* note 84, at 969.

209. See Miss. Bar v. Att’y R., 649 So. 2d 820, 824 (Miss. 1995) (noting that only one out of about forty attorneys refused to bring his advertisements into compliance with the rules after receiving a notice from the state bar); Mark B. Moody, *Attorney Advertising in Alabama: Properly Navigating the Rules & Process*, 35 ALA. ASS’N JUST. J. 57, 57 (2016).

microtargeting is actually as effective as claimed, especially when promoting a service that might seem personal or intimate.²¹⁰

4. *Reasons Limiting Factors Might Not Persist*

Intrusive and manipulative lawyer advertising that more fully takes advantage of microtargeting and retargeting, nevertheless, is cause for concern because each of the constraints described in the preceding subpart is vulnerable. To start, one of the most significant barriers is Google Ads' policies, which prohibit targeting based on personal hardship.²¹¹ But, as the Second Circuit observed in *Cahill*, Google's policies are always subject to change.²¹² And, in fact, Google has changed its privacy policies over time. For example, in 2012, Google adopted a new policy that permitted it to combine user data across different platforms that had been previously kept separate for the express purpose of placing better targeted advertisements.²¹³

Further, the cultural aversion to advertising might be diminishing amongst lawyers.²¹⁴ One reason for this is that, over the past few decades, the legal profession has been shifting towards a more commercial conception where the practice of law is treated like any other sort of business.²¹⁵ And law firms increasingly provide management training to their managing partners, which might provide key actors with a better grasp of both the mechanics and the broad commercial acceptability of microtargeted internet advertising.²¹⁶ Another development that might hasten this trend is the nascent movement to

210. See Arwa Mahdawi, *Targeted Ads Are One of the World's Most Destructive Trends. Here's Why*, GUARDIAN (Nov. 5, 2019, 8:27 AM), <https://www.theguardian.com/world/2019/nov/05/targeted-ads-fake-news-clickbait-surveillance-capitalism-data-mining-democracy>; Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy and Shifting Social Norms*, 16 YALE J.L. & TECH. 59, 61 (2013) (explaining how some of the aggressive techniques are perceived as "creepy").

211. GOOGLE, *supra* note 2.

212. *Alexander v. Cahill*, 598 F.3d 79, 99 n.16 (2d Cir. 2010).

213. See Ira S. Rubinstein & Nathaniel Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECH. L.J. 1333, 1389–90 (2013) (describing Google's policy change); Cecilia Kang, *Google Tracks Consumers' Online Activities Across Products, and Users Can't Opt Out*, WASH. POST (Jan. 24, 2012), http://www.washingtonpost.com/business/economy/google-tracks-consumers-across-products-users-cant-opt-out/2012/01/24/gIQAArgJHOQ_story.html.

214. See Gregory C. Sisk & Ellen L. Yee, *Lawyer Advertising in Iowa After 2012*, 62 DRAKE L. REV. 549, 551 (2014).

215. See, e.g., Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1482 (2012) ("Little has changed since; if anything, practicing law as a business is now the prevailing norm."); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 381 (2001); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995); Hadfield, *supra* note 82, at 956 ("[T]he practice of law is not apart from the economy.")

216. See, e.g., *Are Law Firm Leadership Programs Worth the Money?*, LAW.COM (Mar. 4, 2008, 12:00 AM), <https://www.law.com/almID/900005504832/>.

open up law firm ownership to nonlawyers.²¹⁷ If the general world of investors could own law firms, one might see an infusion of capital and knowledge that presumably would drive innovations in marketing.²¹⁸

Additionally, it is possible that lawyers' individual cost–benefit analysis will ultimately favor aggressive behavioral advertising.²¹⁹ As described above, some law firms are already using retargeting and other forms of behavioral advertising. And the prospect of liberalized advertising rules seems likely to benefit smaller practices, especially those that focus on standardizable services.²²⁰ And this makes the legal market ripe for innovative disruption—that is, “a process by which a product or service takes root initially in simple applications at the bottom of a market and then relentlessly moves up market, eventually displacing established competitors.”²²¹ Additionally, there appears to be limited demand for privacy by consumers, which means there is unlikely to be a market penalty for adopting more aggressive practices.²²² Regulatory discipline also is uncommon, further highlighting the lack of downside.²²³ The rarity of bar intervention cannot be explained by a complete absence of wrongdoing, given several recent examinations of actual lawyer marketing that found a fair amount of noncompliant advertisements.²²⁴

217. While the ABA's 20/20 proposal regarding alternative business structures that would allow nonlawyer ownership did not ultimately go forward, individual states like Arizona and Utah have begun to experiment with them. See Deno G. Himonas & Tyler J. Hubbard, *Democratizing the Rule of Law*, 16 STAN. J. C.R. & C.L. 261, 273 (2020); Crispin Passmore, *Broadening Legal Services: A View from Abroad*, 56 ARIZ. ATT'Y 42, 42 (2020). And there is some evidence from the U.K. that alternative business structures are more likely to innovate in this way. See Hadfield & Rhode, *supra* note 56, at 1212.

218. See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 630 (1989).

219. See Michael P. Stone & Thomas J. Miceli, *Optimal Attorney Advertising*, 32 INT'L REV. L. & ECON. 329, 337 (2012) (providing a theoretical account of lawyer advertising that suggests profit-maximizing lawyers will advertise at a level beyond the social optimum unless otherwise constrained); see also Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1142 (2013); David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 512–19 (2006).

220. See Phillips et al., *supra* note 168, at 407–08; Engstrom, *supra* note 83, at 686; McCunney & DiRusso, *supra* note 83.

221. Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 557 (2014) (quoting *Disruptive Innovation*, CLAYTON CHRISTENSEN, <https://claytonchristensen.com/key-concepts/>); see also Henderson, *supra* note 200, at 407–08.

222. See, e.g., Julie E. Cohen, *Irrational Privacy?*, 10 J. ON TELECOMMS. & HIGH TECH. L. 241, 242–43 (2012); Paul Ohm, *Branding Privacy*, 97 MINN. L. REV. 907, 952 (2013) (“[T]here seems to be little incentive to compete for privacy.”); BJ Ard, *Confidentiality and the Problem of Third Parties: Protecting Reader Privacy in the Age of Intermediaries*, 16 YALE J.L. & TECH. 1, 58 (2013).

223. Gary Blankenship, *Lawyer Ad, Fee Sharing, Firm Ownership Rules Examined*, FLA. BAR (Dec. 10, 2020), <https://www.floridabar.org/the-florida-bar-news/lawyer-ad-fee-sharing-firm-ownership-rules-examined/> (“In the past 10 years, there have been only 10 lawyers punished for ad rule violations.”).

224. See King & Tippett, *supra* note 181, at 147; Best, *supra* note 60, at 2–3; Margaret Raymond, *Inside, Outside: Cross-Border Enforcement of Attorney Advertising Restrictions*, 43 AKRON L. REV. 801, 803 (2010) (noting the prevalence of lawyers' advertising on national cable channels that violates local advertising rules); Zacharias, *supra* note 204, at 988 (“Although this survey is not definitive, it does appear to confirm that enforcing advertising rules is not a priority anywhere in the United States.”) (footnote omitted). As to this

Generally applicable legacy legal protections are unlikely to inhibit lawyers' use of the techniques for several reasons. First, much of the legacy protections focus on personally identifiable information.²²⁵ But Big Data behavioral advertising does not depend on traditional identifying information, even if it can still be a useful source of data.²²⁶ Second, the common law tort of invasion of privacy tends to be limited to cases of identifiable, specific, material harm.²²⁷ When the privacy-encroaching conduct is advertising, courts are not well-disposed to find legally cognizable harms.²²⁸ Third, the law about consent has not yet caught up to the realities of Big Data and privacy.²²⁹ Given the number of unknowable variables and other practical constraints, privacy self-management through contract is unrealistic.²³⁰ And a consent regime does not account for social harms and the effects that the use of aggregated data might have on marginalized communities with higher privacy needs.²³¹

III. CONCERNS

Contemporary readers might share a sense that the advertising technology described above crosses a line into the creepy because it subverts social norms even if it is not illegal.²³² This intuition has been examined in the privacy literature, which has identified two distinct harms of online behavioral advertising that are highly relevant to the legal marketing jurisprudence's underlying concern of encouraging informed, deliberate decision-making by the prospective client: (1) invasions of privacy and (2) manipulation.²³³ These issues may arise even when online behavioral advertisements are not false or misleading under the traditional definitions that animate Model Rule 7.1 and its state variants. It also is unclear whether being served such advertisements would

issue of enforcement, the interstate nature of internet advertising might also present difficulties. *See, e.g.,* Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785 (2000).

225. *See* Ohm, *supra* note 147, at 1732.

226. *See id.* at 1742.

227. *See* M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1132 (2011).

228. *See* Omer Tene, *Privacy Law's Midlife Crisis: A Critical Assessment of the Second Wave of Global Privacy Laws*, 74 OHIO ST. L.J. 1217, 1259 (2013); Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 155 (2007).

229. *See* Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1880 (2013); Tal Z. Zarsky, *Privacy and Manipulation in the Digital Age*, 20 THEORETICAL INQUIRIES LAW 157, 165 (2019).

230. *See* Solove, *supra* note 229, at 1888–90 (2013); Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1463 (2019).

231. *See* Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2055 (2018) (“[P]rivacy rights are particularly important for marginalized communities.”).

232. *See* Tene & Polonetsky, *supra* note 210. *But see* Zach Schonbrun, *Consumers May Be More Trusting of Ads than Marketers Think*, N.Y. TIMES (July 30, 2017), <https://www.nytimes.com/2017/07/30/business/media/consumers-may-be-more-trusting-of-ads-than-marketers-think.html>.

233. *See* Tene & Polonetsky, *supra* note 210, at 68–69; Zarsky, *supra* note 229, at 158.

be seen as involving coercion, duress, or harassment—the presence of which categorically prohibits any solicitation under Model Rule 7.3 and state variants.²³⁴ And thus, online behavioral advertising—particularly, retargeting, microtargeting with the use of Big Data, and narrowcasting—might undermine the listener’s autonomy but not be prohibited by existing regulations.

A. *Privacy Scholarship on Invasions of Privacy & Manipulation*

While the professional responsibility literature has not previously deeply engaged with the harms of Big Data marketing, modern privacy scholars have built on a long and rich discourse to examine this issue.²³⁵ Invasions of privacy are frequently discussed, presumably because they follow from common law torts.²³⁶ Market manipulation has more recently emerged as another common theme.²³⁷

1. *Invasions of Privacy*

Since the late 1800s, scholars have wrestled with how to define the right of privacy and its harms.²³⁸ For example, William Prosser described four types of invasion of privacy torts: intrusion, public disclosure of private facts, false light, and appropriation.²³⁹ Daniel Solove extended the taxonomy of privacy beyond torts, offering four basic groups—“(1) information collection, (2) information processing, (3) information dissemination, and (4) invasion”—that were designed to better speak to the concerns of the information age.²⁴⁰

Many of the activities encompassed by Solove’s taxonomy apply to online behavioral advertising. One part of information collection is surveillance, which Solove defines as “the watching, listening to, or recording of an individual’s activities.”²⁴¹ Engaging with the work of historical and modern-day luminaries such as Jeremy Bentham and Julie Cohen, Solove discusses the discomfort that can follow from being observed, the chilling effects it might have on the

234. MODEL RULES OF PRO. CONDUCT r. 7.3(c)(2) (AM. BAR ASS’N 2020).

235. See, e.g., Kilovaty, *supra* note 93, at 488 (discussing Samuel D. Warren & Louis D. Brandeis’s seminal article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)); see also Skinner-Thompson, *supra* note 231, at 2063–65.

236. See Tene, *supra* note 228. See generally Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1378 (2015) (noting that the FTC focuses on individualistic harms like these).

237. See, e.g., Calo, *supra* note 10, at 995; Spencer, *supra* note 103, at 959; Susser et al., *supra* note 25, at 2.

238. See, e.g., Warren & Brandeis, *supra* note 235, at 214; Calo, *supra* note 227 (“What is a privacy harm? What makes it distinct from a burn or some other harm? We are often at a loss to say.”); Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 738–40 (1999) (exploring conceptions of privacy).

239. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

240. Solove, *supra* note 141, at 489.

241. *Id.* at 490.

observed individual's behavior, and the architectural problem of capturing sensitive information that might incidentally arise in anybody's life.²⁴²

Information processing includes aggregation (the combining of data about a person), identification (linking information to a particular individual), secondary use (use of information beyond that for which it was collected), and exclusion (the use of data without the subject's knowledge and participation in its handling).²⁴³ Aggregation may create dignitary harms when it reveals new facts about an individual that were not expected when the original pieces of data were collected.²⁴⁴ It also can give the aggregator power to make decisions over individuals using the body of data, even if the combined records are still incomplete or lead to a distorted picture.²⁴⁵ Identification seems to be a variant of aggregation in which it links collected information to a specific person and in effect, compels individuals to reveal information about themselves, which may put them at risk for having engaged in disfavored speech or conduct.²⁴⁶ Secondary use may thwart the expectations of the data subjects, violate their control over the information, and create anxiety that the information will be further misused.²⁴⁷ Exclusion reduces the accountability of the data holder and might leave errors uncorrected and create anxiety in the data subject.²⁴⁸

Information dissemination includes breach of confidentiality, which is the breaking of a promise to keep a person's information private.²⁴⁹ This is a special variant of disclosure because it involves a betrayal within the context of a special relationship.²⁵⁰

Invasion includes intrusion, which refers to those "invasive acts that disturb one's tranquility or solitude."²⁵¹ The harms include the disruption to an individual's activities and the psychic discomfort that the invasions might engender.²⁵² Solove recognizes that various forms of advertising, such as junk mail, can be forms of intrusion.²⁵³

2. *Manipulation*

A little more than two decades ago, Jon Hanson and Douglas Kysar brought to light the risk of "market manipulation"—that is, a source of market

242. *Id.* at 491–99.

243. *Id.* at 490.

244. *Id.* at 507–08.

245. *Id.* at 508–09.

246. *Id.* at 512, 514–16.

247. *Id.* at 521–22.

248. *Id.* at 522–24.

249. *Id.* at 491.

250. *Id.* at 526–27.

251. *Id.* at 491.

252. *Id.* at 553.

253. *Id.* at 554.

failure is consumers' irrational "systematic and persistent cognitive processes," which leave them vulnerable to exploitation by actors positioned to influence their decisions.²⁵⁴ Hanson and Kysar further asserted that competitive pressures would incentivize this sort of exploitation.²⁵⁵ And they empirically demonstrated that this plays out in practice, detailing all of the tricks that everyday retailers use to influence predictably irrational consumers.²⁵⁶

Since then, manipulation has been widely discussed in the privacy, contracts, and tort literatures as scholars wrestle with its philosophical and legal definitions, normative implications, and implementation questions.²⁵⁷ Where does and where should the law draw a line? Exploring these sorts of issues, Richard Thaler and Cass Sunstein's book, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, became a *New York Times* best seller.²⁵⁸

The rise of Big Data (and its offspring, online behavioral marketing) has further fanned the scholarly flames, especially within the privacy field. David Hoffman has observed that offline sorting of consumers along fine-tuned demographic lines might be too difficult to practically implement.²⁵⁹ But in his article *Digital Market Manipulation*, Ryan Calo explains how online marketing provides tools to overcome those exact difficulties.²⁶⁰ Calo also explains that digital market manipulation differs from older forms of selling because it is simultaneously uniquely personalized and heavily systematized.²⁶¹ And, as discussed above, online marketers' data-collection and analysis tools have only grown more sophisticated, and there are a plethora of examples of how they are being used to exploit consumers.²⁶²

254. See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1424–25 (1999).

255. *Id.*

256. *Id.* at 1444–45 (describing how supermarket layouts are designed to create particular moods in consumers and prime them for buying).

257. See, e.g., David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1637 (2016) (discussing issues in context of contracts); Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 153 (2017) (highlighting difference between information that enhances or decreases autonomy of listener); Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. CAL. L. REV. 549, 552–55 (1991) (considering trade-offs involving deceptive advertising).

258. *Nudge*, PENGUIN RANDOM HOUSE, <https://www.penguinrandomhouse.com/books/304634/nudge-by-richard-h-thaler-and-cass-r-sunstein/> (last visited Sept. 16, 2021).

259. Hoffman, *supra* note 257, at 1636 (relying, in part, on Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 753–55 (2009)).

260. Calo, *supra* note 10, at 1015–18.

261. *Id.* at 1020–22; see also Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM. L. REV. 2011, 2048 (2018) ("The problem of digital curators, which makes them different in kind from twentieth-century mass-media companies, is the far greater danger that they will engage in acts of manipulation and breach of trust through the use of personal data."); Zarsky, *supra* note 229, at 169 (noting four ways in which online dangers are enhanced).

262. See Spencer, *supra* note 103, at 972–77.

A consensus definition of “manipulation”—especially with an eye towards legislation or regulation—proves surprisingly elusive.²⁶³ In an early example, Sunstein defines manipulation as a failure to “sufficiently engage or appeal to people’s capacity for reflective and deliberative choice.”²⁶⁴ Daniel Susser, Beate Roessler, and Helen Nissenbaum identify problematic manipulation by its hidden influence, which subverts an individual’s autonomy by exploiting the decision-maker’s vulnerabilities.²⁶⁵ They contrast this with “persuasion,” defined as a candid attempt to offer an attractive option.²⁶⁶ They also differentiate manipulation from “coercion,” defined as restricting alternative acceptable options.²⁶⁷ Jack Balkin defines manipulation as turning on the exploitation of another’s “emotional vulnerabilities and lack of knowledge” for one’s own benefit.²⁶⁸ As Shaun Spencer points out, all of these definitions include the disruption of a rational decision-making process.²⁶⁹

Calo captures the problems associated with market manipulation that are consistent with the themes in the varied definitions. At a conceptual level, he highlights how consumers’ individual and collective vulnerability might lead to encroachments upon their autonomy when advertisers use their newfound ability to specifically target consumers’ vulnerabilities.²⁷⁰ He also describes privacy harms, such as anxiety from being surveilled.²⁷¹ Calo further identifies more concrete harms such as the risks of excessive consumption (including of harmful products), regressive price discrimination indicative of a market failure, and economic exploitation based on the use of the unwitting consumer’s data.²⁷²

B. *Specific Concerns About Online Behavioral Marketing & Lawyer Advertisements*

The privacy literature’s explanations of the harms of online behavioral marketing conceptually ground the problems with the model of lawyer advertising. In addition to these harms, Katherine Strandburg has suggested

263. See *id.* at 989–90 (canvassing definitions and providing his own synthesis).

264. See Cass R. Sunstein, *Fifty Shades of Manipulation*, 1 J. MKTG. BEHAV. 213, 239 (2015).

265. Susser et al., *supra* note 25.

266. *Id.*

267. *Id.*

268. Jack M. Balkin, *Fixing Social Media’s Grand Bargain* 4 (Hoover Working Grp. on Nat’l Sec., Tech. & Law, Aegis Series Paper No. 1814, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webreadypdf.pdf.

269. See Spencer, *supra* note 103, at 989.

270. Calo, *supra* note 10, at 1031–34; see also Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 451 (2016) (“When trusters intentionally or unintentionally disclose entrusted information to others, entrustees can be manipulated, user profiles can be impersonated, reputations can be destroyed, and bank accounts can be cleaned out.”); Kilovaty, *supra* note 93, at 465 (identifying harms that flow from online psychographic profiling).

271. Calo, *supra* note 10, at 1027–31; see also Solove & Citron, *supra* note 10, at 745–46.

272. Calo, *supra* note 10, at 1025–27.

that the very ecosystem of behavioral advertising “turns online products and services into credence goods.”²⁷³ Credence goods are those goods that consumers “cannot easily judge the quality of [which] they have purchased, even *ex post*.”²⁷⁴ Legal services, even before online behavioral advertising, were considered classic credence goods because of clients’ lack of expertise.²⁷⁵ Given this, lawyers’ use of online behavioral advertisements presents an especially worrisome combination, particularly given lawyers’ fiduciary duties that require them to not use information about their clients to the lawyers’ own advantage.²⁷⁶

One potential rejoinder is that lawyers’ use of online behavioral advertising is simply a means of communicating with a subset of the general public, which raises no special concerns. This, however, misunderstands the nature of online behavioral advertising, which often starts with members of the public interacting with law firms’ websites or other internet content.²⁷⁷ Depending on the nature of the communications, some fiduciary duties arise even before there is a contractual relationship.²⁷⁸ With online behavioral advertising, potential clients are invited to trust lawyers with their information when they visit a law firm’s website.²⁷⁹ Even if the information is entrusted to a third-party intermediary, lawyers cannot avoid these duties.²⁸⁰ Additionally, a prohibition on manipulating clients into hiring lawyers is akin to the duty not to charge unreasonable fees and other such constraints.²⁸¹

273. Strandburg, *supra* note 4, at 97.

274. Engstrom, *supra* note 83, at 673 (emphasis added).

275. *Id.*; see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977) (“After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards.”). This also explains why the lack of consumer complaints is not particularly probative of an absence of issues.

276. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 498 (2019) (critiquing Balkin’s proposal because of this disconnect); Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C. L. REV. 1697, 1702 (2015) (noting “common-law fiduciary duty that prohibits lawyers . . . from profiting from the use of confidential client information”); Shapero v. Ky. Bar Ass’n, 486 U.S. 466, 487 (1988) (O’Connor, J., dissenting) (“The roots of the error in our attorney advertising cases are a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States’ justifications for their regulations.”). See generally Balkin, *supra* note 261, at 2049 (acknowledging that digital companies and traditional fiduciaries differ).

277. See Phillips, *supra* note 168, at 398 (discussing “inbound” internet marketing strategies for firms).

278. See *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (“The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result.”); Perlman, *supra* note 21, at 64.

279. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 10-457 (2010) (analyzing when a potential client relationship begins via interactions with a law firm website). See generally Woodrow Hartzog & Neil Richards, *Privacy’s Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687, 1745–47 (2020).

280. See MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS’N 2020).

281. See *id.* r. 1.5.

Lawyers owe duties to the legal system and the public too, which raises other conflicts with certain uses of online behavioral advertising.²⁸² And the stakes concerning legal decisions are likely going to be much more significant than those involving consumer goods.²⁸³

In sum, while the privacy literature provides a starting point, lawyer advertising has specific concerns that must be worked through.

1. *Invasive Online Behavioral Advertising by Lawyers*

The subset of Solove's invasion-of-privacy harms described above all apply to online behavioral advertising by lawyers.²⁸⁴ It is a form of surveillance that might lead to discomfort on the part of the subject or even discourage potential clients from reaching out to lawyers in the first instance.²⁸⁵ Although both the record and decision in *Went For It* are subject to fair critique, the Court took note of the Florida Bar's public survey, which suggested that invasive advertising lowered the regard held for the legal profession.²⁸⁶

The record in *Went For It* also highlights how invasive the advertising might be. It cited the feelings of anger and emotional distress that were reported by individuals who were solicited immediately after tragedies like the death of a spouse or other close relatives.²⁸⁷ And it is easy to see how online behavioral advertising could lead to similar issues. Imagine, for example, the embarrassment or other strife that might befall an individual who begins to fill out a form on a divorce attorney's website whose spouse spots a retargeting email from the website. This risk of disclosure to a third party differs from the privacy interest rejected in *Shapero*, which focused on the lawyer's discovery of the potentially embarrassing underlying facts.²⁸⁸

Further, the use of Big Data might lead to the use of unshared private details as part of targeting or implicitly revealing information, such as the individual's identity, that the potential client was not yet ready to share with the

282. See *id.* pmb. ¶ 6. See generally Mortazavi, *supra* note 215, at 1488 (“Beyond formal rules of ethics, lawyers also play a broader role in safeguarding the rule of law. These distinctions are part of what makes lawyers critical actors in civil society.”) (footnote omitted).

283. See Hadfield, *supra* note 82, at 974–75.

284. See Solove, *supra* note 108, at 355–59.

285. *Id.*

286. Fla. Bar v. *Went For It, Inc.*, 515 U.S. 618, 626–27 (1995).

287. *Id.* at 627–28.

288. Compare *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988) (“Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery.”), with *Marsh v. Curran*, No. 1:18-CV-787, 2019 WL 8886436, at *1 (E.D. Va. Nov. 18, 2019) (recounting how spouses inadvertently discovered each other's emails on a shared computer), and *Wesley Coll. v. Pitts*, 974 F. Supp. 375, 384 (D. Del. 1997), *aff'd*, 172 F.3d 861 (3d Cir. 1998) (noting that a work colleague “inadvertently glimpsed an e-mail on a computer screen while helping someone”).

attorney.²⁸⁹ Again, this is unlike the public information used to generate the targeted letters in *Shapiro*.²⁹⁰ Moreover, the extent of customization in *Shapiro* was unlikely to reach the degrees that online behavioral advertising could.²⁹¹

Another issue is that the revealed information might not be accurate or may otherwise distort the lawyer's understanding of the prospective client and the issue.²⁹² Last but by no means least, the tracking might also constitute a breach of confidentiality—a heightened sense of betrayal stemming from the popular understanding that contact with lawyers is presumptively held secret.²⁹³

2. *Manipulative Online Behavioral Advertising by Lawyers*

If online behavioral advertising is (or, at least, can be) manipulative when used by companies that have no special duties towards their consumers, it is particularly problematic when used by lawyers because it might invert the principal–agent relationship that is core to the profession.²⁹⁴ And one way of reconciling the Supreme Court's jurisprudence on lawyer advertising is by focusing on which activities are seen as having the potential to either enhance or subvert the distribution of power between the lawyer and the prospective client—who is meant to have largely unfettered control over the lawful objectives of a matter.²⁹⁵ The risk of the subversion may turn on privacy invasions that find, create, or exploit vulnerabilities, which was implicit in both *Ohralik* and *Went For It*.²⁹⁶ An older case from New Jersey describes an analogous pre-internet circumstance in which lawyers parked a recreational vehicle with advertisements on it outside of an emergency shelter where victims of an explosion were being held.²⁹⁷ The court determined this “high-pressured pushing of legal services as a commodity onto susceptible and vulnerable consumers, ill-equipped to protect their own interests” was prohibited

289. See Solove, *supra* note 108, at 355–56.

290. See sources cited *supra* note 288.

291. See *Shapiro*, 486 U.S. at 469.

292. See *id.* at 476 (“Admittedly, a letter that is personalized (not merely targeted) to the recipient presents an increased risk of deception, intentional or inadvertent.”).

293. See *id.*; see also Anne Klinefelter, *When to Research is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 36 (2011).

294. See MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS'N 2020) (defining the client–lawyer relationship); see also Berman, *supra* note 19, at 537 (“Manipulative marketing is characterized not only by a lack of informational communication, but also by the attempt to undermine consumer autonomy by taking advantage of their cognitive limitations and biases.”).

295. See *supra* Subpart I(A).

296. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978) (noting with disapproval how lawyer used information gained from another client, an in-person visit to a hospital, and other methods to gain a client); see also *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 630 (1995) (noting that the harm stemmed “from the lawyer's confrontation of victims or relatives with such information, while wounds are still open, in order to solicit their business”).

297. See *In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein*, 715 A.2d 216, 220 (N.J. 1998).

solicitation.²⁹⁸ If online behavioral advertisements for legal services were to target individuals based on data relating to personal hardship, it should similarly be susceptible to regulation.

Effective manipulation—and the economic exploitation it represents—also is a potential breach of lawyers’ duties to not use confidential information (defined as any material arising out of the representation) against the client.²⁹⁹ While an online advertisement does not demand an immediate answer, it may create a conflict between the interests of the lawyer and prospective clients if it is deliberately served to vulnerable individuals at a time when they are likely to act against their best judgment.³⁰⁰ One example of this is the divorce attorney who targets individuals searching for marriage counselors. While legal scholarship rarely considers legal services to be substitutes for counseling or other similar services, online behavioral advertising might introduce that dynamic to the detriment of the potential clients.³⁰¹

The risks of manipulation might be driven by the market and the lawyers’ agents without any malevolent intention. As Cohen has observed, “[i]n a consumption-driven economy, the innovations that emerge and find favor will be those that fulfill consumption-driven needs.”³⁰² But it also is possible that the conduct will be especially incentivized in the world of multidistrict litigation, which has created a new form of settlement mills where lawyers focus on collecting clients instead of litigating their cases.³⁰³ In either case, these potential

298. *Id.*

299. See Calo, *supra* note 10, at 1027–31; Cohen, *supra* note 222, at 246 (“The first is what we might call the economic justice objection—i.e., that sorting and signaling work to operationalize a system characterized by preferential treatment for the wealthy and the maximum extraction of consumer surplus from everyone else.”).

300. See *Ohralik*, 436 U.S. at 461 n.19 (“[W]e cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.”).

301. See Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 51 (1994) (“[L]awyers cannot substitute for trained therapists . . .”); cf. Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 *HARV. L. REV.* 702, 716 n.51 (1977) (discussing inelasticity of demand for legal services). See generally Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 *ARIZ. ST. L.J.* 429, 441–42 (2001) (describing legal services and substitute goods).

302. Cohen, *supra* note 91, at 1926; see also Hanson & Kysar, *supra* note 254, at 1427 (“Thus, we argued that the relative indeterminacy of the behavioral research is irrelevant to products liability theory because manufacturers operating under the evolutionary influence of the market will untangle the various cognitive forces at play in the consumer’s mind even if behavioral researchers and legal scholars cannot.”) (emphasis omitted).

303. See Engstrom, *supra* note 83, at 674–75; see also Daniel Fisher, *Hedge Funds Pump Up Mass Torts with Loans, Advertising*, *FORBES* (Oct. 23, 2015, 9:19AM), <https://www.forbes.com/sites/danielfisher/2015/10/23/hedge-funds-finance-firms-pump-money-into-advertising-driven-litigation/?sh=2b5100d91fb5> (“One firm active in the pelvic implant litigation market, Houston-based AkinMears, spent more than \$25 million on television advertising last year, the most of any U.S. law firm, according to a forthcoming study by the ILR. The figure is especially remarkable since AkinMears has only four partners listed on its website.”).

harms show how manipulation is a source of market failure that should be accounted for and addressed.³⁰⁴

3. *Other Issues with Online Behavioral Advertising by Lawyers*

Several issues stem from online behavioral advertising's delivery method. One issue that is specific to lawyers is retargeting.³⁰⁵ Little has been written about this, perhaps because it appears to fit within the existing strictures. Recall that Comment 1 to Model Rule 7.3 approves of communications that are "automatically generated in response to electronic searches."³⁰⁶ And retargeting advertisements likely comport with a broad reading of the comment in that they are generated based on users' behaviors, which typically include electronic searches.³⁰⁷

Additionally, at the start of 2020, the New York City Bar issued an opinion approving the use of retargeting by lawyers.³⁰⁸ The opinion goes thoughtfully beyond Comment 1 to Model Rule 7.3's ostensible laissez-faire approach to retargeting, holding that lawyers must follow the solicitation rules if the solicitation goes to specific groups of individuals such as "members of a specific organization or individuals who may have a common claim against the same defendant."³⁰⁹

Even this explicit approval of retargeting leaves open several questions. It is unclear whether an electronic search is a deliberate invitation to being contacted at all, let alone followed around the web or even emailed. In an analogous non-internet case from Minnesota, a lawyer noticed that an applicant for a job with the lawyer was injured and employed, making him potentially eligible for workers' compensation.³¹⁰ But the applicant already had another lawyer working on that issue.³¹¹ After the applicant's lawyer was appointed to the bench, the first lawyer called the applicant back several times after the applicant said it was not "a good time to talk" and hung up on the lawyer twice.³¹² The lawyer was sanctioned for the repeated calls.³¹³ Online retargeting might be even more concerning if one imagines a prospective client who

304. See generally Hawkins & Knake, *supra* note 26 (describing the issues with market failure and lawyer advertising).

305. See Calon Russell, *The Ethics of Retargeting for Online Lawyer Ads*, LEGAL INNOVATION & ETHICS, Dec. 2020, at 1, 1.

306. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR ASS'N 2020).

307. See ROY D. SIMON JR., SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 7.3:42 (2020).

308. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 1 (2020).

309. *Id.* at 4.

310. See *In re Charges of Unprofessional Conduct Against* 97–29, 581 N.W.2d 347, 349 (Minn. 1998).

311. *Id.*

312. *Id.*

313. *Id.*

deliberately did not finish completing and submitting a web form. Additionally, a retargeting email to recipients with limited experience with the justice system might lead to confusion about whether representation had started or the lawyer had been appointed.³¹⁴

The ability to narrowcast raises several concerns too. Online behavioral advertising is fragmenting the world, which has the potential to lead to discrimination.³¹⁵ The discrimination might take the form of only showing advertisements to individuals with immutable demographic characteristics.³¹⁶ Online behavioral advertising can also be used to price-discriminate among customers along these or other dimensions.³¹⁷ Model Rule 8.4(g) prohibits lawyers from engaging in many types of demographic discrimination.³¹⁸ Although the Model Rule includes a carve-out for decisions to accept, decline, or withdraw from representation and has not yet been adopted in full by many states, California's version does not.³¹⁹ Also, screening potential clients might run afoul of other antidiscrimination provisions as seen in *Stropnick v. Nathanson*, a well-known professional responsibility case in which a lawyer was sanctioned for refusing to represent men.³²⁰

The solicitation of lawyer advertisements might also lead to a public education loss. In its preamble, the Model Rules exhorts lawyers to “further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”³²¹ Addressing this concern, Deborah Rhode highlighted the need for all of the institutional players in the justice system to raise awareness about legal issues and the unmet

314. See *Ficker v. Curran*, 950 F. Supp. 123, 127 n.6 (D. Md. 1996), *aff’d*, 119 F.3d 1150 (4th Cir. 1997) (describing testimony at hearing on bill in which “witnesses recounted stories of individuals who, upon receipt of a letter from an attorney, believed that this attorney had been ‘assigned’ to represent them”).

315. See Till Speicher et al., *Potential for Discrimination in Online Targeted Advertising*, 81 PROC. MACH. LEARNING RSCH. 1, 2 (2018) (finding that three targeting methods offered by Facebook “enable advertisers to run highly discriminatory ads”); see also Louise Matsakis, *Facebook’s Ad System Might Be Hard-Coded for Discrimination*, WIRED (Apr. 6, 2019, 7:00AM), <https://www.wired.com/story/facebook-ad-system-discrimination/>.

316. See Tene & Polonetsky, *supra* note 6, at 253 (“Predictive analysis is particularly problematic when based on sensitive categories of data, such as health, race, or sexuality.”). See generally Strahilevitz, *supra* note 93, at 2022–33.

317. See generally Oren Bar-Gill, *Algorithmic Price Discrimination When Demand Is a Function of Both Preferences and (Mis)perceptions*, 86 U. CHI. L. REV. 217, 217 (2019) (“Sellers are increasingly utilizing big data and sophisticated algorithms to price discriminate among customers.”).

318. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR. ASS’N 2020).

319. See Michele N. Struffolino, *For Men Only: A Gap in the Rules Allows Sex Discrimination to Avoid Ethical Challenge*, 23 AM. U. J. GENDER SOC. POL’Y & L. 487, 508 (2015) (discussing California’s rule).

320. *Id.* at 513 (discussing *Stropnick v. Nathanson*, No. 91-BPA-0061, 1999 WL 33453078, at *1 (Mass. Comm’n Against Discrimination July 26, 1999), *aff’d sub nom.* *Nathanson v. MCAD*, 16 Mass. L. Rptr. 761, 2003 WL 22480688, at *1 (Mass. Super. Ct. Sept. 16, 2003)).

321. MODEL RULES OF PRO. CONDUCT pmb. ¶ 6 (AM. BAR. ASS’N 2020); see also *Panel Discussion*, 35 U. MIA. L. REV. 639, 652 n.34 (1981) (noting provision of the Code that spoke to the same idea).

need for legal services.³²² Another recent article found that many Americans fail to recognize when they have legal issues and struggle to find competent lawyers even when they do.³²³ And an ABA survey found that most consumers of legal services find their lawyers through personal networks.³²⁴ When lawyer advertisements are narrowcast, the network effects of broadcast-style advertising presumably will be greatly reduced too.³²⁵

A closely related problem is the loss of monitoring. In the world of campaign communications, scholars have identified the risks that are raised when speech “has refracted into millions of variegated, individualized appeals.”³²⁶ Remember that most complaints about lawyer advertising are filed by other lawyers.³²⁷ When lawyers no longer see each other’s advertisements, this check on unscrupulous methods is lost.³²⁸ This risk was part of what led Justice O’Connor to dissent in *Shapero*.³²⁹ Additionally, the audience does not receive a physical copy that is easy to retain if they wish to bring an offending advertisement to the attention of the regulatory authorities. This harkens back to the concern in *Ohralik* about in-person solicitation being “not visible or otherwise open to public scrutiny.”³³⁰ It also distinguishes online behavioral advertising from the physical letter in *Shapero*, which can be retained.³³¹

IV. IMPLICATIONS

Online behavioral advertising—with its ability to harness Big Data to microtarget, retarget, and narrowcast to consumers—has become a ubiquitous feature of the internet and shows few signs of becoming less pervasive.³³² And with new technology comes new harms that existing regulatory regimes struggle to capture. Still, for the legal profession, this remains an emergent technology. But the conditions holding it back are unlikely to last. Accordingly, professional responsibility scholars should consider how online behavioral advertising by lawyers ought to be treated and any broader lessons this examination might offer. This Part provides some initial thoughts.

322. See generally Rhode, *supra* note 80, at 391.

323. See Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL ETHICS 63, 88–89 (2016).

324. *Id.*

325. See Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating “Fake News” and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1236 (2018) (describing similar harms in political discourse).

326. Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data, and the Representation of (Mis)perceived Electorates*, 52 U.C. DAVIS L. REV. 571, 607 (2018).

327. REGULATION OF LAWYER ADVERTISING COMMITTEE, *supra* note 205, at 6.

328. *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 481–82 (O’Connor, J., dissenting).

329. *Id.*

330. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 466 (1978).

331. *Shapero*, 486 U.S. at 466.

332. See generally Tene & Polonetsky, *supra* note 6, at 240–50.

*A. Regulating Online Behavioral Advertising by Lawyers**1. Need to Future-Proof Regulations*

As discussed above, the New York Bar has already approved lawyers' use of retargeting, which is one aspect of online behavioral advertising.³³³ The New York Bar's treatment implicitly acknowledged that online behavioral advertising has qualities of both traditional advertising and solicitation.³³⁴ And the New York Bar leveraged the existing categories and their regulations in its suggestions for how to treat online behavioral advertising.³³⁵

One could similarly characterize all online behavioral advertising as either advertising or solicitation on a case-by-case basis, assessing the salient qualities presented by the specific facts and analogizing to earlier cases. For example, if online behavioral advertising exploits vulnerable individuals, it could be treated as a form of coercion, duress, or harassment.³³⁶ Courts have stretched the categories before to reach unsolicited phone calls to individuals facing foreclosure and targeted letters offering estate planning services to elderly individuals on an insurance company's mailing list.³³⁷

The problems with failing to future-proof the regulations and doctrine governing lawyer marketing has been raised by Jan Jacobowitz and other scholars.³³⁸ These debates over future-proofing tend to track the age-old tension between rules and standards. Formal equality, certainty and predictability, and ease of administration all are served by clear, bright-line rules.³³⁹ On the other hand, standards encourage greater deliberation and allow for adaptability to the circumstances, whether it is to adjust for changes in the broader milieu over time or to account for unfairness in a specific case.³⁴⁰

When applied to technological innovation, the argument for standards is straightforward. Technology now moves fast.³⁴¹ And the current rate and degree of technological change might be upsetting the traditional balances struck between rules-based and standards-based approaches in the regulation of lawyers. Scholars have noted the modern movement towards more statutory-

333. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2020-2, at 1 (2020).

334. *Id.*

335. *Id.* at 2.

336. See MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR. ASS'N 2020).

337. See *In re Komar*, 532 N.E.2d 801, 811 (Ill. 1988); *In re Flack*, 33 P.3d 1281, 1287 (Kan. 2001).

338. See, e.g., London, *supra* note 21, at 139–47; Jacobowitz, *supra* note 65, at 6–9.

339. See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–64 (1992).

340. *Id.* at 66–69.

341. See Jacobowitz, *supra* note 65, at 9; Anupam Chander, *Future-Proofing Law*, 51 U.C. DAVIS L. REV. 1, 1 (2017).

style drafting.³⁴² This approach is especially problematic because it is likely to result in outmoded calcification when there is no legislative body that (at least, theoretically) is devoted to ensuring that the law is kept up-to-date and, instead, the regulations are largely left in the hands of the members of the bar who might not be interested in change.³⁴³ Additionally, emergent technologies frequently are misunderstood and thus caution against adopting inflexible process-specific rules at the outset.³⁴⁴

While a forward-looking, standards-based approach should insulate a new regulation from immediate obsolescence, predictions about the future (whether focused on lawyer marketing or not) remain a notoriously difficult business.³⁴⁵ And thus, it might be advisable to follow the work of David Freeman Engstrom and Jonah Gelbach who focused on the near- and medium-term in their recent article on legal technology and the profession.³⁴⁶

The durability of the regulation would be less of an issue if it focused on objectives rather than methods.³⁴⁷ This is especially true where the underlying concerns animating the regulation of lawyer marketing have not seemed to change much at all over the years, providing an underlying conceptual consistency that could anchor a standards approach. And, a focus on objectives dovetails nicely with the movement towards evidence-based regulations because, as Elizabeth Chambliss has observed, “[r]egulatory objectives, by their very nature, create a framework for measurement and assessment.”³⁴⁸

342. See, e.g., Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 493–94 (2011); Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 421 (2005).

343. See Chambliss, *supra* note 26, at 300, 310–11 (describing delegation to bar authorities, which are frequently comprised of market participants, and how they can issue ethical advisory opinions regulating the marketing of legal services); John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 65 (2013) (describing how states can take a long time to implement changes adopted by the ABA). But see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1171 (2009) (“A variety of regulators external to the ABA—including the courts—interpret, adjust, and enforce the rules and provide their own regulations when the prevailing professional code seems inadequate.”).

344. See Chander, *supra* note 341, at 23; Gary E. Marchant, *Governance of Emerging Technologies as a Wicked Problem*, 73 VAND. L. REV. 1861, 1862–63 (2020) (explaining that emergent technologies frequently exhibit complexity, diversity, and uncertainty such that there is no single perfect solution).

345. See Jane R. Bambauer, *Dr. Robot*, 51 U.C. DAVIS L. REV. 383, 383 (2017) (“Predicting the future is a surefire way to embarrass oneself.”).

346. See David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1001 (2021).

347. See Knake, *supra* note 32, at 2866 (“Instead, regulation should address, in a targeted way, the underlying concern at issue in *Ohralik*, which was not in-person contact from an attorney but rather undue influence upon a vulnerable prospective client.”); see also Dzienkowski, *supra* note 343, at 85.

348. Chambliss, *supra* note 26, at 317. See generally Susan Saab Fortney, *Taking Empirical Research Seriously*, 22 GEO. J. LEGAL ETHICS 1473, 1475 (2009).

2. *Relevant Objectives & Evidence for Reforms*

Looking to the near- and medium-term future of lawyer marketing, the widespread adoption of online behavioral advertising by lawyers is likely.³⁴⁹ Proposals should consider the objectives of regulation and any evidence that either supports or refutes particular policy suggestions.

The Supreme Court's commercial speech jurisprudence—particularly, as applied to lawyer marketing—is highly protective of the listener's autonomy.³⁵⁰ And this is consistent with a core precept of the lawyer–client relationship: the fundamental duty to enhance the autonomy of clients.³⁵¹ This concern, however, can cut both for and against prophylactic regulations on lawyers' marketing efforts.³⁵² On one hand, autonomy is undermined when decision-makers are deceived or misled as seen in the existing doctrine and regulations.³⁵³ That holds true with manipulative advertisements too. With online behavioral advertising, lawyers might be co-opting the potential clients' autonomy for the lawyers' benefit.³⁵⁴ Alternatively, lawyers' communications about their services provide vital information to prospective clients and help promote meaningful access to justice.³⁵⁵ Protecting the public and ensuring access to justice are two competing interests that appear in the ABA Model Regulatory Objectives.³⁵⁶ Accordingly, the trick will be how to balance them.

The movement towards evidence-based reform should help with this. Although it is difficult to collect information on any given interaction, the FTC, privacy scholars, and other interested parties are researching the effects that online behavioral advertising has on its audience, highlighting the risks of privacy invasions and market manipulations.³⁵⁷ For example, exposure to

349. See Bodine, *supra* note 157. See generally Kaiser, *supra* note 157, at 54–55.

350. See *supra* Subpart I(A); see also Berman, *supra* note 19, at 500; Neuborne, *supra* note 32.

351. See Fried, *supra* note 25; Sylvia A. Law, *The Messages of Legal Education, in LOOKING AT LAW SCHOOL: A STUDENT GUIDE FROM THE SOCIETY OF AMERICAN LAW TEACHERS* 155, 170 (Stephen Gillers ed., 1977).

352. See generally Alberto Bernabe, *Justice Gap vs. Core Values: The Common Themes in the Innovation Debate*, 41 J. LEGAL PRO. 1, 17 (2016).

353. See MODEL RULES OF PRO. CONDUCT r. 7.1 (AM. BAR ASS'N 2020). See generally Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 877–78 (1994); Zacharias, *supra* note 25.

354. See generally Berman, *supra* note 19, at 544.

355. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 358 (1977) (citing *In re Bates*, 555 P.2d 640, 648 (Ariz. 1976) (in banc) (J. Holohan, dissenting)).

356. COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 9 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FINAL_WEB.pdf, (adopting the ABA Model Regulatory Objectives for the Provision of Legal Services). As to the Regulatory Objectives, these interests are consistent with the protection of the public and transparency regarding the nature and scope of legal services to be provided; delivery of affordable and accessible legal services; and meaningful access to justice and information about the law, legal issues, and the civil and criminal justice systems.

357. See Hanson & Kysar, *supra* note 102; Spencer, *supra* note 103, at 973–83. *But see* Van Loo, *supra* note 236, at 1379 (“Probably the biggest obstacle preventing the FTC from regulating supracompetitive

targeted advertisements has also been shown to increase brand searches and reduce searches for competing products, suggesting that it might diminish comparison shopping and thoughtful deliberation.³⁵⁸ Consumers also are becoming increasingly concerned about the data privacy implications of highly targeted advertising.³⁵⁹ A major turning point in consumer attitudes occurred following the Facebook and Cambridge Analytica scandal of 2018.³⁶⁰ The data breach revelation was met with widespread outrage, both by consumers and lawmakers over the practices and lack of security Facebook held over users' private data.³⁶¹ These findings may be extrapolated to legal advertising.

On the other hand, lawyer advertising may promote client autonomy and access to justice by informing potential clients of their rights and creating a competitive market for legal services such that costs are lowered while quality is raised.³⁶² Online behavioral advertising might be a particularly effective tool for addressing one source of the access-to-justice gap: the inability of the public to recognize when its problems are legal issues.³⁶³ And systems that have adopted more innovations in the legal profession have not shown a decrease in professionalism norms.³⁶⁴ Moreover, in a system that has treated private litigation as a substitute for regulation, these access-to-justice concerns have effects that go beyond the individual litigants.³⁶⁵

pricing has been a lack of information in two areas: firms' internal operations and consumers' decisionmaking process.”).

358. See Ayman Farahat & Michael Bailey, *How Effective Is Targeted Advertising?*, SSRN (Apr. 3, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242311; Nathan M. Fong, *How Targeting Affects Customer Search: A Field Experiment*, 63 MGMT. SCI. 2353, 2353 (2017).

359. Sarah Cathryn Brandon, *What's Mine is Yours: Targeting Privacy Issues and Determining the Best Solutions for Behavioral Advertising*, 29 J. COMPUT. & INFO. L. 637, 637 (2012).

360. See Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

361. See *id.*; Leslie K. John, Tami Kim & Kate Barasz, *Ads That Don't Overstep*, 2018 HARV. BUS. REV. 62, 62–69.

362. See Hazard, Jr. et al., *supra* note 82, at 1108–09; Fred Einbinder, *Mass Torts: Dispute Resolution in France and the United States—the Vioxx and Mediator Cases Compared*, 29 WASH. INT'L L.J. 575, 647 (2020) (comparing French and American systems). *But see* Engstrom, *supra* note 83, at 667–68.

363. See Tyler Hubbard, Justice Deno Himonas, Rebecca L. Sandefur & Jim Sandman, *Getting to the Bottom of the Access-to-Justice Gap*, 33 UTAH BAR J. 15, 16 (2020) (“The NORC survey and other studies show that a major reason people do not seek legal assistance is because they do not self-identify their problem as a legal problem.”).

364. See, e.g., David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246, 260 (2020) (discussing UK's experiences).

365. See generally Mortazavi, *supra* note 215, at 1492–97; Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 75 (2020) (noting that private enforcement is a substitute for government regulation); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 7–8 (2017); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (2003).

Directly to this point, Elizabeth Tippet and other scholars have analyzed lawyers' drug injury advertising.³⁶⁶ Tippet's study found that the advertising was associated with additional awareness-raising behaviors, like Google search volume, without showing any significant relationship with adverse events.³⁶⁷ It is possible that the personal injury lawyers who were paying up to \$3,000 for the names of women who might have been implanted with a medical device that allegedly caused ovarian cancer even saved lives.³⁶⁸ And, as was problematic in *Went For It*, there can be real-world problems with hampering plaintiffs' attorneys from educating the public and reaching out to prospective clients when such constraints do not necessarily apply to defendants.³⁶⁹ Still, there also are anecdotal reports of advertising prompting patients to stop taking medications with predictably bad effects.³⁷⁰

On balance, the move towards a standards-based approach should both help future-proof regulations on lawyer marketing and ensure that the important client-protective objectives are centered. More concretely, given the existing research, prophylactic prohibitions or conditions on online behavioral advertising by lawyers might be warranted. For example, Shaun Spencer has suggested possible consent or disclosure requirements for any online behavioral advertising.³⁷¹ Mandatory disclosures may help solve some of the inequitable aspects of the buying process for legal services by providing potential clients with otherwise difficult-to-obtain information.³⁷²

In formulating its recommendations, this Article parts ways with the seeming consensus in the professional responsibility literature on one significant point. The problems associated with online behavioral advertising disprove the notion that a standards-based approach to regulating lawyers' marketing efforts will only result in ratcheting down the limitations on in-person solicitation.³⁷³ The existing jurisprudence and regulations are not capturing the new threats of invasion of privacy and market manipulation that are posed by online behavioral advertising. And a sharper focus on the "core" prohibitions on communications that are "false, deceptive, or misleading" or involve "coercion, duress or harassment" would not solve that problem.³⁷⁴

366. See Elizabeth C. Tippet & Brian K. Chen, *Does Attorney Advertising Stimulate Adverse Event Reporting?*, 74 FOOD & DRUG L.J. 501, 501 (2020); see also Tippet, *supra* note 204, at 8–9; Noah, *supra* note 204, at 704.

367. Tippet & Chen, *supra* note 366.

368. See Bloomfield & Pettypiece, *supra* note 182.

369. See Rotunda, *supra* note 45, at 722.

370. Tippet & Chen, *supra* note 366, at 503.

371. Spencer, *supra* note 103, at 993–94.

372. See, e.g., Benjamin P. Edwards, *The Professional Prospectus: A Call for Effective Professional Disclosure*, 74 WASH. & LEE L. REV. 1457, 1463 (2017); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 866–68 (2011).

373. See Spencer, *supra* note 103, at 960–62.

374. Sisk, *supra* note 23, at 354 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977)); MODEL RULES OF PRO. CONDUCT r. 7.3(c)(1)–(2) (AM. BAR ASS'N 2020).

Given these considerations, the ABA should consider following Ashley London's suggestion of using the more expansive rule proposed by Justice Marshall in *Ohralik*, which focuses on protecting the public "from fraud, deceit, misrepresentation, overreaching, undue influence, and invasions of privacy."³⁷⁵ And the comments could make clear that any use of online behavioral advertising should, if practicable, be accompanied by a disclosure statement about the information being used so that the targeted consumer can make a truly informed decision.³⁷⁶

3. Countering the First Amendment Objections

The First Amendment looms large in the background. And First Amendment concerns might caution against categorical bans on online behavioral advertising. Categorical bans have been met with skepticism by the Supreme Court before.³⁷⁷ Additionally, the Court's general movement towards a "First Amendment *Lochnerism*" would cut against regulations on speech that are designed to have an egalitarian, redistributive effect as London's proposal might have.³⁷⁸

On the other hand, commercial speech generally—and lawyers' commercial speech especially—have long been an exception to this trend.³⁷⁹ On the speaker side, the Court has described how lawyers are officers of the courts who owe some duty to promoting faith in the judicial system³⁸⁰ and trained advocates who might be able to unduly influence lay clients.³⁸¹ On the listener side, the Court has been more receptive to assigning weight to privacy concerns as a government interest in cases involving lawyer advertising.³⁸² Additionally, the Court seems less concerned about self-dealing protectionist motives when there

375. London, *supra* note 21, at 145 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 476 (1978) (Marshall, J., concurring)).

376. See FRANK PASQUALE, *NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI* 113 (2020) ("The less we think about how we are being influenced, the more powerful influencers can become."). This, however, is not to suggest that disclosure—any more than consent—is a perfect cure given the risks of information overload and similar issues. See generally Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 789–90 (2006) (explaining how disclosure requirements do not protect borrowers seeking home loans).

377. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988).

378. See Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1962 (2018) (reviewing contemporary debates).

379. See Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 188 (2018). See generally Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 701–02 (1997); Renee Newman Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293, 1313–14 (2018).

380. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

381. See *Ohralik v. Ohio State Bar Ass'n* 436 U.S. 447 (1978); *Edenfield v. Fane*, 507 U.S. 761, 774 (1993) (distinguishing CPAs and lawyers in solicitation case); *Maracich v. Spears*, 570 U.S. 48, 61–62 (2013).

382. Compare *Ashutosh Bhagwat, Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 870 n.98 (2012) (collecting cases), with *Florida. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) ("Our precedents also leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest.'").

is data—as can be found in the privacy literature—about the harms that the regulations are designed to protect against.³⁸³ Accordingly, while an exhaustive discussion of the First Amendment is beyond the scope of this Article, this brief sketch suggests that it should not be a significant barrier to restrictions on online behavioral advertising.

B. *Legal Ethics, Technological Innovation, and Informational Capitalism*

Bringing the professional responsibility and privacy literature into dialogue sheds light on harms that the law of lawyer marketing has neglected. But privacy scholars offer insights that also might make a more significant conceptual contribution to professional responsibility and its future.

“Legal tech” developments have spawned a cottage industry of professional responsibility scholarship. This literature thoughtfully considers how technology disrupts traditional notions of the authority of lawyers and their business practices.³⁸⁴ But it has been critiqued for not looking beyond its borders.³⁸⁵ And, there has been little discussion about what, if anything, connects the legal ethics challenges that accompany different types of innovation in legal technology.³⁸⁶ This Article’s study of lawyers’ use of online behavioral advertising suggests that the rise of informational capitalism might provide a start for more encompassing theorization.

Julie Cohen has described the shift away from industrialism and towards informational capitalism—that is, a political economy in which “market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus.”³⁸⁷ This theory of political economy provides a framework for understanding the tensions in lawyers’ use of new technologies and might guide the future-proofing of the authorities governing lawyers’ conduct.

Informational capitalism’s core characteristic is the exploitation of knowledge advantages.³⁸⁸ That, by its nature, seems at odds with fiduciaries’ responsibility to not use their superior knowledge to the detriment of their

383. See generally Neuborne, *supra* note 32; Berman, *supra* note 19, at 505 (discussing *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)).

384. See, e.g., John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 *FORDHAM L. REV.* 3041 (2014); Daniel Martin Katz, *Quantitative Legal Prediction—or—How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry*, 62 *EMORY L.J.* 909 (2013); Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 *GEO. J. LEGAL ETHICS* 501, 504 (2017); Cheryl B. Preston, *Lawyers’ Abuse of Technology*, 103 *CORNELL L. REV.* 879 (2018); Engstrom & Gelbach, *supra* note 346.

385. See Engstrom & Gelbach, *supra* note 346.

386. See Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 *HASTINGS L.J.* 173, 195–205 (2018); cf. Preston, *supra* note 384 (describing characteristics of new technological tools that raise legal ethics issues).

387. See COHEN, *supra* note 27, at 6.

388. *Id.*

prospective clients.³⁸⁹ Additionally, informational capitalism disrupts the personal scale and speed that is at the heart of the fiduciary relationship.³⁹⁰ Together, informational capitalism might be disrupting the traditional value proposition of lawyers, which had turned on their expertise about the substantive law and their ability to apply it to the specific facts—including the client’s individual desires—at hand.³⁹¹

At a more tactical level, the products that drive, and are driven by, informational capitalism are inescapable. Illustrating the ubiquity of advanced technology in legal practice, Chief Justice Roberts was recently asked whether “smart machines, driven with artificial intelligences, will assist with courtroom fact finding or, more controversially even, judicial decision making.” Chief Justice Roberts replied, “It’s a day that’s here”³⁹²

These tools place both indirect and direct structural pressures on the legal profession.³⁹³ From email, to cloud storage, to Internet search tools, many of the everyday office products used by lawyers have some link to entities whose lifeblood is information.³⁹⁴ And, even more directly, the movement towards informational capitalism has created new information-based products, such as the legal forms on LegalZoom that might be substitutes for lawyer services.³⁹⁵ And, there are legal tech tools designed to augment lawyers’ traditional services such as predictive coding software to manage voluminous e-discovery.³⁹⁶ Some of these tools now promise to assist with more sophisticated work such as drafting answers.³⁹⁷ There also have been changes to how lawyers market their services with a number of scholars considering referral sites, blogs, and other participation in online forums.³⁹⁸ And, of course, lawyers use online behavioral advertising to leverage Big Data and the Internet to reach potential clients.³⁹⁹

389. See RESTATEMENT (SECOND) OF AGENCY § 390 cmt. e (AM. L. INST. 1958).

390. See Julie E. Cohen, *Scaling Trust and Other Fictions*, LAW & POL. ECON. PROJECT (May 29, 2019), <https://lpeblog.org/2019/05/29/scaling-trust-and-other-fictions>; see also Khan & Pozen, *supra* note 276; Bruce H. Kobayashi & Larry E. Ribstein, *Law’s Information Revolution*, 53 ARIZ. L. REV. 1169, 1188 (2011).

391. See Kobayashi & Ribstein, *supra* note 390, at 1171.

392. Christopher Markou, *Are We Ready for Robot Judges?*, DISCOVER MAG. (May 15, 2017, 7:00 PM), <https://www.discovermagazine.com/technology/are-we-ready-for-robot-judges#.XdMTfVdKiUk>.

393. See COHEN, *supra* note 387.

394. See generally Rebecca Bolin, *Risky Mail: Concerns in Confidential Attorney-Client Email*, 81 U. CIN. L. REV. 601, 647 (2012) (“Attorneys should look for clear explanations of when the ISP can access information itself, and when it can disclose it to others.”).

395. See Kobayashi & Ribstein, *supra* note 390, at 1194; Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3074 (2014).

396. See Remus & Levy, *supra* note 384, at 515; Endo, *supra* note 106.

397. *The Law Firm Disrupted: Walmart Won’t Pay You to Cut and Paste*, LAW.COM (Apr. 5, 2018, 7:00 AM), <https://www.law.com/2018/04/05/the-law-firm-disrupted-walmart-wont-pay-you-to-cut-and-paste/?sreturn=20210715211344>; Wendy Everett & Catherine Gellis, *The Year in Law & Technology*, 9 J. LAW 188, 194 (2019). See generally Remus & Levy, *supra* note 384, at 541 (describing pattern of disruption).

398. See J. T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267, 294 (2004); Raymond H. Brescia, *Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*, 64 BUFF. L. REV. 745, 763–64 (2016).

399. Brescia, *supra* note 398, at 807.

This Article hopes to be just the start of this exploration into what is driving and linking the technological innovations that are disrupting the legal profession. And it suggests that recognizing the underlying political-economy issues will allow scholars to better understand the challenges and promises of new legal tech tools.

C. *What Privacy Law Might Take*

The privacy literature has much to offer the world of professional responsibility as online behavioral advertising begins to take a more prominent place in lawyers' marketing efforts. But, the exchange does not need to be entirely one-sided.

Both privacy scholars and policymakers have wrestled with how to effectively address the problematic issues that follow from online behavioral advertising's use of Big Data.⁴⁰⁰ One prominent suggestion from Jack Balkin would treat "online service providers and cloud companies who collect, analyze, use, sell, and distribute personal information" as information fiduciaries.⁴⁰¹ Fiduciaries are agents who have power over their principals and, thus, must act with loyalty and good faith towards the principals—that is, the fiduciaries may not put their own interests ahead of those to whom the duty is owed.⁴⁰² Under Balkin's proposal, entities that collect private information would not be permitted to use it to "con" the users who provided the information by "inducing trust in their end-users to obtain personal information and then betraying end-users or working against their interests."⁴⁰³

While lawyers differ from the information behemoths in many ways, there is no question that lawyers are fiduciaries.⁴⁰⁴ And the Supreme Court cases on lawyers' marketing efforts are much more permissive of state prohibitions than the Court's general First Amendment jurisprudence.⁴⁰⁵ Additionally, like the FTC, states may regulate lawyers without waiting for a demonstrated, specific harm to an individual as with private liability schemes.⁴⁰⁶ And yet comment one to MPRC 7.3 and the general lack of attention paid to online behavioral advertising suggests that the legal community is not overly worried about how it might be used to manipulate prospective clients and invade their privacy.⁴⁰⁷ But, it is possible that the issue simply had not been spotted. And now that it

400. See Khan & Pozen, *supra* note 276, at 498–99.

401. See Balkin, *supra* note 11, at 1186.

402. Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1160–61 (2018).

403. *Id.* at 1163; see also Richards & Hartzog, *supra* note 11.

404. Balkin, *supra* note 402, at 1161.

405. Haupt, *supra* note 379, at 196.

406. See *id.* See generally Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2282 (2015).

407. MODEL RULES OF PRO. CONDUCT r. 7.3 cmt. 1 (AM. BAR ASS'N 2020).

has, the legal community might be a good test case for the various safeguards proposed by Balkin and others.

CONCLUSION

Lawyers are well-placed to be early movers in addressing the risks of privacy invasions and manipulation that can accompany online behavioral advertising. As fiduciaries, they must act with loyalty and good faith towards prospective clients. And the Supreme Court has granted states wide latitude to regulate the commercial speech of lawyers, perhaps in recognition of the centrality of the prospective client's autonomy. So, as lawyers begin to use online behavioral advertising, policymakers and scholars should be keeping an eye on these experiments. These early test cases should provide helpful data to inform lawyer regulations and, perhaps, even new rules for information-collecting entities like Facebook and Google.

Lawyers' use of online behavioral advertising also brings to light the stress placed on the legal profession by informational capitalism and the technological innovation that fuels it. These pressures will require scholars of all stripes to ask new questions about the role of lawyers and to identify new practices. And the use of online behavioral advertising highlights the need to examine new literatures, which already are studying these issues, and then adapt it to the special case of lawyers. This Article begins that task and invites others to join the effort.