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Ethics Saved or a Penny Earned: An Exploratory Discussion of Legal Advertising Bans

Kenya Burton
Grand Valley State University

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Abstract

Advertising is a venue used to reach the masses for many products and services. Whether it's the image of a basketball icon or a familiar cartoon character, everyone is trying to make an impressionable thirty-second niche that will persuade the public to seek their product or service.

Yet, when there is a multitude of advertisers in one sector, the advertisements can suddenly change from catchy segue to annoying imagery for the consumer. Within the legal industry, many lawyers try to stand out from the brigade of attorneys by advertising their talent to the public. Unfortunately, it is the spirited few that use theatrical maneuvers that seem to test the ethical sensitivity of society. Advertisements using business cards that are reminiscent of Monopoly's "get-out-of-jail-free" cards; medical concerns; negative imagery of legal counterparts; and toll-free telephone assistance after an injury have sodden the professional image of the legal profession.

This research project provides examples of legal advertising from past to present, and relevant court decisions that both oppose and defend a lawyers' right to market their services to the public sector. Although legal advertising is a national controversy, this paper will direct its focus on how current remedies affect the legal environment in Michigan.

Part I of this review researches the landmark case *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its historical ruling that gave "constitutional protection to law firm marketing and advertisements" (*ABA Journal*, 1995).

Part II focuses on the general interest in legal advertising and marketing that is prevalent today, including ethical sensitivity and professional image concerns.

Part III examines recent court rulings that either defend or oppose cur-

rent marketing tactics. This section also provides professional commentary on a recent case that affects the current state of legal advertising.

Part IV provides a conclusion about the future of legal advertisements with the introduction of advertising bans, and the effects on the legal consumer. Lastly, Part V is a personal conclusion on the research topic.

PART 1: *Bates v. State Bar of Arizona*

Americans view legal advertisements in many ways. In the 1990s, legal advertising is an everyday occurrence that's projected to the masses in some media form. Yet, without the landmark *Bates v. State Bar of Arizona* decision, today's legal marketing tools would be nonexistent.

This section provides a brief summary of *Bates v. State Bar of Arizona*. Discussion in this section deals with certain relevant events proceeding the lawsuit, and the resulting aftermath of the lawsuit as those results provide a basis for legal proclamations that are considered customary today.

In *Bates*, attorneys that were both licensed in the state of Arizona and members of the Arizona State Bar Association were charged with violating the State Supreme Court of Arizona's disciplinary rule that prohibits attorney advertising through public media.¹

In 1976, John R. Bates and Van O'Steen advertised the services of their legal clinic² to inform the public of its services and fees.^{3*}

This information was deemed necessary by both partners in order to maintain the clinic's operations.⁴ The advertisement was placed in the *Arizona Republic*, a Phoenix newspaper. By listing certain fees, and stating "... legal services offered at very reasonable fees," the partners clearly violated Disc. Rule 2-101 (B)1: "A lawyer shall not publicize himself or his partner, or associate, or any other

Student: Kenya Burton

Mentor: James Wolter, Ph.D.

lawyer affiliated with him or his firm as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.”

The partners were then charged with a complaint filed by the Arizona State Bar’s president. Once the complaint was filed a hearing was held before the Special Local Administrative Committee.⁵ The committee recommended that the group be suspended from legal practice for no less than six months. This recommendation was based on a challenge by the opposing parties, not an attack on the legitimacy of the rule. Further review by the Board of Governors of the Arizona State Bar⁶ recommended a suspension from practice for both partners. This recommendation was made final.

The partners then sought review of the recommendation⁷ in the State Supreme Court of Arizona. The defendants argued that the disciplinary rule violated articles 1 and 2 of the Sherman Act⁸ and infringed upon their First Amendment⁹ rights.

The State Supreme Court of Arizona rejected both of the defendants’ claims.¹⁰ The State of Arizona cited that the rule was exempt from the Sherman Act by state-action exemption of *Parker v. Brown*,¹¹ 317 U.S. 314 (1943). The First Amendment rights of the defendants were not violated according to the court due to past cases.¹² It was then held that the plurality¹³ was based on passages in those opinions that may bear special circumstances to advertising the legal profession.¹⁴

The case was then appealed to the U.S. Supreme Court which affirmed the decision, in part, based on the irrelevance to the Sherman Act. The Court reversed, however, the decision of irrelevancy of constitutional rights violation,¹⁵ stating that “the flow of such information may not be restrained ...therefore holding the present application of the disciplinary

rule against the appellants to violate the First Amendment.

By issuing such an opinion, advertising of the legal profession began. Yet, the issue of legal advertising and its effects on the legal profession were considered by the supreme judicial members themselves. In his dissent, Mr. Justice Holhan, even with his “personal dislike of the concept of advertising by attorneys,” stated: “...the information of what lawyers charge is important for private economic decisions by the public, by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered...”¹⁶

Thus, the above opinion reflects a benefit to those without legal expertise or knowledge to seek out those with legal intelligence. In today’s society, even with its puns and negative views of legal advertisements, attorneys are easily accessible. According to the spokesperson for the Grand Rapids law office of Dale Sprik and Associates, Bob Sprik, “Advertising makes it easier for the client to acknowledge our services. Our trademark (buffaloes) provides a quick reference to the public of services that are offered.”¹⁷

The adverse effects of legal advertisements were focused on by the Supreme Court members while issuing their opinion. “Advertising is said to erode the client’s trust in his attorney. Once the client perceives that the attorney is motivated out of profit, his confidence that the attorney is acting out of a commitment to the clients’ welfare is jeopardized.”¹⁸

In today’s world the image of American personal injury attorneys as money-sucking leeches, and/or “snakes in the road”¹⁹ is not far from majority opinion. Recent personal injury awards have many Americans questioning the necessity of some lawsuits versus their benefits to the attorney’s earning potential.

Part II: From Necessity to Professional Destruction

Part II reviews in brief these advertising methods and their professional impact. This section also provides a prelude to the next section by familiarizing the reader with the negative reactions to one aspect of legal advertising, and its ultimate elimination.

Bates brought forth a revolution not only in the legal world, but also the world of advertising. Presenting one’s legal services began to filter to the masses through several methods of media advertising.

Since *Bates*, communication of legal services has been intensified. From the controversial advertisement that started it all to the worldwide Web, the legal profession has used every type of venue available to market itself to the public. Through television, radio, newspapers, the Internet, solicitation, and the age-old method of referral, the vast number of lawyers available to one client has created competitive marketing tactics, especially in the personal injury sector.

Negative ads that present fellow lawyers as clowns, handing out condoms to maritime clients that have a slogan stating: “This law firm saves seamen the old fashioned way,”²⁰ and snappy commercial jingles have many lawyers worried about the profession’s image. From the day the ruling was overturned, court justices were concerned about advertising’s impact on the profession.

In an effort to address these concerns, the American Bar Association (ABA) has initiated a commission to focus on methods that “ensure advertising that flows both freely and cleanly.”²¹ The foremost issue addressed was that of moral suasion, which incites members to have responsibility to the profession and themselves. Proclamations have subsequently been made that strengthen the legal image. Such tactics recommended to enact moral suasion include community councils to monitor and comment on negative imagery, ABA professionalism codes, and award programs.²²

The ABA currently staffs a commission on advertising that monitors developments in legal advertising,

updates and informs both the public and the profession, and researches leading issues that impact the legal advertising environment. Its activities include an advertising clearinghouse that houses a library containing information on legal advertising. The commission also sponsors the Dignity in Lawyer Advertising award.

The ABA Dignity in Lawyer Advertising award is one method of publicly and professionally recognizing "dignified and effective" legal advertisements. The ABA also has adopted "aspirational goals" to assist lawyers in producing dignified and high-quality advertisements. These goals include issues such as conveying a positive message to the public relative to the profession, avoiding inappropriate marketing schemes that stain the legal profession, and making services affordable to the public.²³

Yet, despite the efforts of the ABA, many still consider legal advertisements a negative solicitation of the public. Beyond the impersonal world of mass advertisement as solicitation is the complex area of personal solicitation.

There are many ways that personal solicitation can occur: chance meeting in a public place, professional functions, phone calls or mail. To many this scope of legal advertising is most annoying.

A television or radio ad can be easily avoided by changing the channel or turning off the appliance completely. Newspaper ads can be shunned by not reading them. An Internet site is chosen by choice and a referral or solicitation can be ignored. Yet, a personal petition through the mail can happen uninvited.

It is in the time of personal anguish that a lawyer can either be extremely helpful or harassing. For those who are oblivious to the legalities, or lack of same, pertaining to an accident (when one is victimized), hope can be found in the lawyer who has sought them. However, for those who are cultured in the legal world, a soliciting lawyer is, for the most part, unacceptable in times of despair.²⁴

To pacify the public's exasperation with the legal advertising world, the government has asserted itself to help

the grieving, while transposing a tower of legal immunity from the past (*Bates*).

Part III: Exoneration

Florida v. McHenry is a recent decision with immense impact on advertising relating to the legal profession. This section will review the background of McHenry and its effects on the public and lawyers. It will also explain the effect of the decision on the profession and the nation.

The 90s thus far have been a decade of renewal, from reaffirmation of constitutional rights to environmental awareness. In this decade the Supreme Court has decided many cases that reduce the liberties of the individual.

One such liberty is that of the private citizen and its distaste of lawyers. Whether the spotted image of lawyers is due to media images or that of monetary jealousy, the public is tired of all the lawyers.

The most afflicted sector of the legal environment is the personal injury sector. To the public this particular segment seems to reek of greed and selfish interest that disregards both the victim and the taxpayers who fund the court system.

After a two-year study on the effects of lawyer advertising on public opinion, the Florida Bar Association resolved that several changes were needed in its advertising rules. The State Supreme Court of Florida adopted these amendments with the following two modifications:²⁵

1. "A lawyer shall not send, or knowingly permit to be sent...written communication to a prospective client for the purpose of obtaining professional employment (see footnote 26) if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication."²⁷

2. "A lawyer shall not accept referrals from a lawyer referral service unless the service: (1) engages in no

communication with the public and in no direct contact with prospective clients in a manner that violates the Rules of Professional Conduct if the communication or contact were made by the lawyer."²⁸

Stewart McHenry and his lawyer referral service, Went For It, Inc., filed an action for declaratory and injunctive relief in March of 1992 with the U.S. District Court for the Middle District of Florida.²⁹ McHenry challenged that Rules 4.7-4(b) (1) and 4.7-8 violated First and Fourteenth amendments. McHenry's motive for suing was that his business sent information targeted to victims or their survivors during the 30-day time period and he wished to proceed with this manner of business.³⁰

The District Court referred the matter to the magistrate judge who resolved that the Florida Bar would "protect the personal privacy and tranquillity of recent accident victims and their relatives...ensuring that these individuals do not fall prey to undue influence or overreaching."³¹ The District Court rejected the magistrate report and entered a summary judgment for the plaintiffs.³² Its basis was progeny *Bates v. State Bar of Arizona*, 433 U.S. 350, and subsequent cases (see Part I). The matter was then appealed to the eleventh court where it was reaffirmed in the same manner as the lower court.

Yet, in the appeal to the U.S. Supreme Court the judgment was reversed, the plaintiff asserting that the First and Fourteenth Amendments were not violated. Its grounds were based on two areas:

1) *Bates* and its progeny provide only a "limited measure of First Amendment protect." The "immediate scrutiny" framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm. of N.Y.*, 447 U.S. 557, a restriction on commercial speech that, like the advertising at issue, does not concern unlawful activity and is not misleading is permissible if the government: (1) asserts a substantial interest in support of its legislation; (2) establishes that the restriction directly and materially advances that interest; and (3) demon-

strates that the regulation is narrowly drawn (*id.*, at 564-555. Pp.3-5.³³)

2) Thereby, the ban discussed withstands the *Central Hudson* scrutiny in three elements. First, the Florida Bar has substantial interest in both the victims and their loved ones, as well as the image of the profession to protect against invasive, unsolicited contact by lawyers. Second, results of the Florida Bar study show statistically and anecdotally that direct-mail solicitations immediately after accidents reflect poorly on the profession.³⁴ Third, the limit of the ban is parallel to the stated objectives. Within the timeframe given, Floridians have other methods to learn about legal services if deemed necessary.³⁵

The effects of *McHenry* has been questioned by many legal professionals. With the reversal of the lower courts' verdicts the *McHenry* case will have the following implications:

1) The *McHenry* case will not legitimize all types of restrictions on legal advertising. This case can provide precedent for other states to initiate their own restrictions.

2) *McHenry* allows anecdotes to be relevant to First Amendment jurisprudence.

3) The direct-mail ban applies only to personal injury lawyers wishing to represent the victim. Insurance companies, media, and defendant attorneys may still contact the victim through the mail.

4) All other means of legal service marketing is still applicable.

Consequently, the verdict has made quite an impact on the legal community. To some the decision will bring an element of public admiration back to the profession. As noted by Wilbur Warren, Kenosha, Wisconsin lawyer and chairman of the board which handles disciplinary actions against lawyers, "My sense of it, from talking to lawyers in the courthouse, is that the vast majority find direct-mail solicitations to be distasteful and unprofessional."³⁶ In agreement is William M. Cannon of Cannon & Duphy (a personal injury law firm) who finds lawyers that use direct-mail solicitation "out of line and disreputable."

Even after the Oklahoma City bombing many attorneys flocked to the area seeking clients who might need legal advice after the national disaster. To counteract greedy actions from "parachute lawyers," as described by the Oklahoma Bar Association (OBA) executive director, a team of 200 lawyers was organized to represent the families and/or the victims, free of charge.

While maintaining that direct-mail solicitation is a necessity, not a nuisance, Wisconsin State Bar president-elect David A. Soicheck states that "sending letters are a far cry from ambulance chasing or passing out business cards at a disaster site. Most people appreciate a letter because it informs them of their rights as potential plaintiffs."

Others argue that the *McHenry* case is biased in favor of the larger, wealthy firms. "The lawyers who most rely on advertising and solicitation are solo practitioners and small firms, because the larger firms already have access to business," says P. Cameron DeVore, First Amendment expert who filed an amicus brief in the case.³⁷ As argued by Beverly Pohl, member of the Florida Bar, "Not all attorneys can afford TV ads. Direct mail is very cost effective for a lawyer with a small practice. But it isn't effective if it's delayed after an accident."

Is the consumer really at benefit or is this an internal professional war as David Vladeck, attorney with the Public Citizen Litigation Group in Washington, D.C., implies? According to Vladeck, the Supreme Court's decision "will only entrench the established bar...the plaintiffs' lawyers want to squelch the competition." One must ask whether the professional arguments are adequate, in relation to the basis for the Supreme Court decision, in not only protecting the profession, but most importantly, the consumer.

Part IV: The Impending Prospects

This section will discuss some of the benefits that the consumer faces without the Florida ban. It will also provide insight on some possible

losses to the unspoken individuals who were helped, and not infuriated, by direct-mail solicitation in Florida.

When an accident occurs that involves injury or death, relevance is given to the available facts regarding the accident's cause in order to ensure the victim(s) of their possible rightful restitution. However, sometimes the restitution becomes a priority for the attorney instead of the victims' needs. The *McHenry* case is one aspect of government trying to set guidelines for proper, arbitrary tactics with the goal being to end the negative image of greedy lawyers.

Yet, is a thirty-day ban effective in protecting the individual or the profession? As previously noted, lawyers see direct mail as damning to the profession. However, the devil is in the details, and the possible damage to a victims' case could result in the loss of the case within the thirty-day suspension period. It could be beneficial to the case as a waiting period to establish injury.

Now that the *McHenry* case has been reversed many experts are discussing its effects on consumers seeking legal help. As noted in his dissent after the opinion was delivered, J. Kennedy warned "that the majority had undercut constitutional protection in an important class of cases and unsettled leading First Amendment precedents, at the expense of those victims most in need of legal assistance. When an accident results in death or injury it is often urgent to investigate the occurrence, identify witnesses, and preserve evidence... all tasks that can be performed only if the plaintiffs' lawyer seeks out prospective clients."³⁸ Kennedy's opinion reflects the concern of many lawyers.

As established in his commentary for the *Connecticut Law Tribune*, Ralph Gregory Elliot stresses concern for the uninformed victim. "For these people, all too often poor, unlettered, non-English-speaking, the alternative channels of media, billboard, and Yellow Page ads are totally inadequate means of attention...when releases are being shoved under their noses and morticians plying their

wares.”³⁹ How are these people to differentiate the type of lawyer they may need in their time of grief. Some may assume that the insurance company will cover all damages only to discover later this was not the case. Or an individual may leave an accident scene unharmed without an injury stated on the police report. It is then too late to seek counsel, after the fact, when no cause is noted for the record. As David Singer, a Hollywood lawyer says, “Insurance companies will have a thirty-day lead time to get claimants to sign away their rights.”⁴⁰

Unfortunately for some, the *McHenry* decision will not be seen as vindication in Florida. It will instead be interpreted as complete darkness in a unknown world.

Part V: Conclusion

As a future lawyer, I find legal advertising and bans, as discussed in the *McHenry* case, interesting. Beginning with the *Bates* case, the legal advertising that is being either discouraged or praised is all that I have ever known. As a consumer I find that it's not mainstream advertising that hurts the image of lawyers as much as sensationalism.

In the ignorant age of entertainment, many only know what they see and hear. Through available venues, such as movies and books, we read and establish perceptions of how the world functions. The perception is that lawyers are greedy because they charge outrageous prices and live outlandish lifestyles. In the world of reality few live the life of greed. The prices charged are due to economic circumstances such as financial responsibilities, i.e., school loans, time, and manpower. To be a lawyer is a tremendous cycle of expenses from things as minute as copy fees to major expenses such as private investigator fees. On average, if a case goes to trial, a lawyer could spend a minimum of 100 hours in preparation for the case. And when averaged out, \$100.00 an hour is cheap if it means avoiding a financial loss, custody of a child or even imprisonment, which is why even though people complain, they still pay.

Therefore, the legal profession will

always be needed even by those who are appalled by it. It is not the profession overall that is to blame, it's the individual. In researching this project I encountered many persons in the legal profession who were too money grubbing to give me five minutes of their time, but I also encountered those who were very helpful and free of charge.

I support legal advertisements, including mail solicitations. I feel definitely that if an accident victim had encountered those selfish individuals that I encountered on my research ventures, their judicial rights might be lost and they could possibly continue to remain a victim.

Currently, the State of Michigan is considering the same solicitation rule. The Michigan Bar Association has established through its professional committee a recommendation against a solicitation rule. Although more research will be performed to evaluate all the possibilities, it will be interesting to compare the results of the legal integrity in Florida vs. the public image here in Michigan. I seriously doubt that a letter of solicitation will influence this issue in a positive way.

Acknowledgements

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Footnotes

- 1 Disciplinary Rule 2-101(B), incorp. in Rule 29(a) of the Supreme Court of Arizona, 17A Ariz. Rev. Stat., p.26 (Supp. 1976).
- 2 The partners used this term for their law office which specialized in providing inexpensive legal services to lower-income individuals.
- 3 To provide such economical prices, services were limited to uncontested divorces, uncontested adoptions, common personal bankruptcies, and name changes.
- * Information cited from *Bates v. State Bar of Arizona* 433 U.S. 350 p354.
- 4 *id.*, at Trial of Oral Arg. 4.
- 5 As prescribed by Arizona Supreme Court Rule 33.
- 6 State Supreme Court Rule 36.
- 7 Permitted by State Supreme Court Rule 37.
- 8 Federal Act that prohibits competition limits.
- 9 Amendment of the Constitution that provides freedom of speech to citizens of America.
- 10 113 Ariz. 394, 555 P.2d 640 (1976).
- 11 Framework case that stated California officials were not prohibited to have state programs that limited growers or raisins, thus, maintaining prices. The Supreme Court held that "as sovereign, it imposed the restraint as an act of government which the Sherman Act did not prohibit." (317 U.S. at 352.)
- 12 *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), and *Virginia Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976).
- 13 Meaning is similar to common connection.
- 14 It should be noted that in some cases, such as *Williamson v. Lee Optical*, the courts did not resolve a First Amendment issue.
- 15 According to the ruling the "constitutional issue of the case was whether the Supreme Court may prevent the publication in a newspaper of truthful advertising concerning the availability and terms of routine legal services." (*Bates v. State Bar of Arizona*, 433 U.S. 350 pp. 384.)
- 16 *Id.*, at 402-403, 555 P. 2d, at 648-649.
- 17 See acknowledgements after this article.
- 18 *Bates v. State of Arizona* 433 U.S. 368
- 19 Response written of a minute survey that was issued as part of the research for this project. See Acknowledgements.
- 20 Excerpt from "The organized bar's role," *Bar Leader*, (Jan./Feb. 1995).
- 21 *Bar Leader*, (Jan./Feb. 1995), p. 9 par. 13
- 22 "Recommendations from lawyer advertising at the crossroads," *Bar Leader*, (Jan./Feb. 1995).
- 23 ABA Dignity in Lawyer Advertising website, www.abanet.org/legalserv/dignityaward.html.
- 24 Peltz, "Legal advertising-opening pandora's box" 19 *Steson L. Rev.* 43, 116 (1989).
- 25 "Florida Bar: Petition to amend the rules regulating the Florida Bar"-*Advertising Issues*, 571, So. 2d 451 (Fla. 1990).
- 26 1995 WL 365648 (U.S.)p.2 par.
- 27 Rule 4-7(b) (1)
- 28 Rule 4-7.8 (a)
- 29 1995 WL 365648 (U.S.) p.2 para.2
- 30 Note: McHenry was disbarred for unrelated actions; John T. Blakely, licensed in Florida, substituted in his place.
- 31 1995 WL 365648(U.S.)p.2 para.3
- 32 808F.Supp.1543(MD Fla.1992)
- 33 1995 WL 365648 (U.S.) pp.1 par.3 Opinion of J. O'Connor.
- 34 Respondents mentioned as a basis by J. O'Connor are *Edenfield v. Fane* 507 U.S.; *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 475-476; and *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72.
- 35 This section was taken in part from West Law documentation of the Supreme Court decision decided June 21,1995, for the *McHenry* case 1995 WL 365648 (U.S.).
- 36 Taken from *Milwaukee Journal Sentinel*, December 24, 1995.
- 37 *Lawyers Weekly USA*, July 3, 1995.
- 38 63 U.S.L.W. 4644, *Wall Street Journal*, June 22, 1995.
- 39 *Connecticut Law Tribune*, 21, (50) December 18, 1995.
- 40 Quote is an excerpt from *The Miami Herald*, June 22, 1995.