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The Traditional Ban on Advertising by Attorneys and the Expanding Scope of the First Amendment

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The majority also demonstrates an inclination to retreat from the *Griggs* rationale of recognizing discrimination by the impact, rather than the intent, of the practice. Since the Court will now uphold a seniority system whose adoption was not racially motivated, the test of discrimination will focus on the intent in adoption rather than on the discriminatory effects of the seniority system. Good faith, although not a defense under the disparate impact theory, presumably could be a valid defense to discrimination thus defined. These consequences are inevitable in the shift from the prior jurisprudential test of "perpetuation" to the new test of "motivation."

Teamsters marks a departure from the more easily proved *Quarles* rationale by distinguishing between a discriminatory seniority system and a seniority system which is not exempt from Title VII. While *Quarles* and its progeny essentially equated discriminatory with non-exempt, the majority now holds that a seniority system may be discriminatory in operation but be immunized from Title VII prohibitions. New factors introduced by the Court demonstrate that a greater amount of evidence of motivation will be necessary to prove that a seniority system is not bona fide. However, the exact quantum of proof will only be defined in future litigation.

Wayne A. Shullaw

THE TRADITIONAL BAN ON ADVERTISING BY ATTORNEYS AND THE EXPANDING SCOPE OF THE FIRST AMENDMENT

As a part of its regulation of the State Bar, the Arizona Supreme Court imposed and enforced a disciplinary rule that restricted advertising by attorneys. In March of 1974 the defendants, members of the State Bar, opened a "legal clinic" intending to provide legal services at modest fees to people of moderate income who did not qualify for government sponsored legal aid. The attorneys relied on a high volume, low profit per client practice and handled only routine matters that could be disposed of speedily. After two years of limited success, the defendants placed an advertisement in a newspaper which stated that they offered "legal services at very reasonable fees" and which listed their fees for certain services. Both defendants admitted that the advertisement was a clear violation of the Arizona State Bar Association's Disciplinary Rules. The United States Supreme Court *held* in a 5-4 decision that the regulation

violated the defendants' first amendment right to freedom of commercial speech by preventing them from publishing a truthful advertisement concerning the availability and price of certain routine legal services in a newspaper of general circulation.¹ *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977).²

The origin of the traditional ban on the advertising of services and prices by lawyers is rooted deep in English history along with the correlative "evil" of solicitation.³ Both advertising and solicitation have historically been derided as undesirable attempts to "stir up litigation."⁴ Consequently the early English restrictions in this area were formulated to prevent barratry, champerty and maintenance,⁵ but the early restrictions placed on advertising and solicitation did not appear in their strict form in America until 1887.⁶ In 1908, the American Bar Association adopted the *Canons of Professional Ethics* at its thirty-first annual meeting in Seattle, Washington,⁷ which were replaced in 1969 with the *Code of Professional*

1. The Court also held unanimously that the State Bar Association's regulation of the activities of members of the State Bar fell within the *Parker v. Brown*, 317 U.S. 341 (1943), state action exemption to the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1970). A full treatment of the court's decision concerning the Sherman Act claim is beyond the scope of this note. Essentially, the U.S. Supreme Court affirmed the Arizona Supreme Court's decision that the state action exemption of *Parker v. Brown* barred the appellants' Sherman Act claim. The Court distinguished *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), from the instant case, noting that its finding of the state action exemption in the instant case is in full accord with its decision in those cases.

2. A rehearing was timely applied for.

3. See Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972) [hereinafter cited as *Solicitation*]. This gives an excellent account of the history of advertising and solicitation.

4. See *id.* at 1181-82.

5. "Barratry" is defined as the offense of frequently exciting and stirring up quarrels and suits [BLACK'S LAW DICTIONARY 190 (4th rev. ed. 1975)]; "champerty" as a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation (*id.* at 292); and "maintenance" as malicious or officious intermeddling with a suit that does not belong to one, by assisting either party with money or otherwise to prosecute or defend (*id.* at 1106). See also *Solicitation*, *supra* note 3, at 1182.

6. The first Code of Professional Ethics in the United States was the Code written and adopted by the Alabama State Bar Association in 1887. H. DRINKER, LEGAL ETHICS 23, n.7 (1953). For the complete text of the 1887 Alabama Code, see *id.* at 352-63.

7. The Canons of Professional Ethics up to and including Canon 32 were adopted in 1908. Canons 33 to 46 were adopted at later dates. Canon 27 dealt with the subject at issue, *Advertising, Direct or Indirect*. In pertinent part it read:

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-

Responsibility.⁸ The Code prohibits all advertising and solicitation, except certain precisely delineated advertisements in legal directories, reputable law lists and the classified sections of telephone books.⁹ There is also a narrow exception to allow certain non-profit organizations, such as legal aid societies, to advertise within limited strictures.¹⁰ The violation of one of the Code's Disciplinary Rules will subject an attorney to censure, suspension or disbarment.¹¹

merited reputation for professional capacity and fidelity to trust. This cannot be forced [S]olicitation of business by circulars or advertisements . . . is unprofessional Indirect advertisement . . . and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

ABA CANONS OF PROFESSIONAL ETHICS 12 (1936). *See also* ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 1 (1924) (canon 27 prohibits solicitation from other lawyers as well as from laymen).

8. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971). It has been concluded that Canon 2 codified the existing rules against advertising and solicitation as found in the old Canon 27 and the appropriate opinions of the ethics committee. *See* Smith, *Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available,"* 48 TEX. L. REV. 285, 290-96 (1970); *Solicitation*, *supra* note 3, at 1182.

9. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101, 2-102. It should be noted that the ABA Code was adopted by the Louisiana Bar Association and approved by the Louisiana Supreme Court with some modification and became effective on July 1, 1970. Articles of Incorporation of the Louisiana State Bar Association, Article XVI. When a provision of the ABA Code, which was adopted in Arizona, is discussed in this casenote, any difference in the corresponding provision of the Louisiana Code will be noted. *See also* note 68, *infra*.

10. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5). This was a very narrow recognition of the United States Supreme Court's pronouncements in the prepaid legal services cases. *See* note 19, *infra*.

In the Louisiana Code, this provision is reflected in DR 2-103(D)(4). Even these relaxations of the traditional ban on advertising reflect only as much as the Supreme Court mandates, to the extent that the ABA Code provides: "That a lawyer may cooperate with the organization only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires" *Id.*

11. "The Canons are statements of 'axiomatic norms' They embody the general concepts from which the Ethical Considerations and Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive

Disciplinary Rules . . . are mandatory in nature; [they] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble.

For violation of a disciplinary rule in Louisiana a lawyer may be disciplined by reprimand, either public or private, suspension or disbarment. Articles of Incorporation of the Louisiana State Bar Association, Article XV, Section 5.

It is doubtful that the reasons currently given for the continued enforcement of these restrictions are justified by the origin of the restrictions.¹² Today, the "traditional ban against advertising by lawyers . . . is rooted in public interest."¹³ The ban on advertising and solicitation has been justified as preventing "the assertion of fraudulent claims, the corruption of public officials, the stirring up of litigation, [and] attacks on marital stability."¹⁴ The ban also is designed to prevent lawyers from overreaching, overcharging, underrepresenting and misrepresenting the public, as well as to maintain the dignity of the legal profession.¹⁵ However, as people have become more conscious of the importance of access to the courts as a means of resolving disputes, the legal assaults on these restraints have become increasingly intense.

The first amendment has been the vehicle for most of these attacks.¹⁶ In *NAACP v. Button*,¹⁷ the United States Supreme Court held that the right of association for purposes of legal representation is a first amendment right which cannot be infringed by the state absent a compelling state interest.¹⁸ The Court has found the "compelling state interest" lacking which might have restricted the first amendment right of association in at least three decisions following *Button*.¹⁹

12. See H. DRINKER, LEGAL ETHICS 212 (1953). See also *Solicitation*, *supra* note 3, at 1181 n.5.

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-9. "Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore it would inevitably produce unrealistic expectations . . . and bring about distrust of the law and lawyers." *Id.*

The term "self-laudatory" is not defined, nor was it contained in the old Canon 27; thus its meaning may "vary as the chancellors foot." S. THURMAN, E. PHILLIPS & E. CHEATHAM, THE LEGAL PROFESSION 545 n.21 (1970).

14. *Solicitation*, *supra* note 3, at 1184.

15. *Id.*

16. *Id.* at 1181.

17. 371 U.S. 415 (1963).

18. *Id.* at 444.

19. *UTU v. State Bar of Mich.*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964).

In each of these cases, the relationship between the lawyer, the client and the sponsoring organization varied slightly. In *Button* the NAACP furnished a staff lawyer to aid the potential litigant. 371 U.S. at 420. In *Trainmen* the union officials provided the names of union approved private attorneys to the potential litigant who paid the attorney. 377 U.S. at 4. In *UMW* a lawyer who was on the union payroll handled the claims for the union members and their covered dependents. 389 U.S. at 219. In *UTU* the union recommended union legal counsel to its

As the barrier against legal advertising and solicitation by certain organizations was being torn down by *Button* and its progeny, another traditional barrier against legal advertising, the exclusion of "commercial speech" from first amendment protection, was being attacked by advocates who felt that these restrictions were not only unconstitutional but also against the public interest. The "commercial speech exemption" originated in *Valentine v. Chrestensen*²⁰ where the Supreme Court held that a city ordinance forbidding distribution of commercial and business advertising material did not abridge the petitioner's first amendment right to freedom of speech, even though the handbill contained a protest against certain official action. The Court stated that the handbill was "purely commercial speech," with the protest added simply to circumvent the ordinance.²¹

Although the Supreme Court has continued to recognize the "commercial speech" exception since *Chrestensen*, time and again the Court has circumvented the doctrine by finding that the speech in question was not "purely commercial." In fact, since the case of *Breard v. Alexandria*,²² in which the Supreme Court upheld the conviction of a salesman for violation of a city ordinance prohibiting door-to-door solicitation of magazine subscriptions, the Supreme Court has never *denied* protection on this ground.²³ So often has the Court eroded the *Chrestensen* doctrine, that now it is almost beyond dispute that speech does not lose its first

members and the union had an agreement with the attorneys that the fees would not exceed twenty-five per cent of the recovery. 401 U.S. at 577.

Indeed, the court noted in *UTU* that "the common thread running through our decisions in [*Button*, *Trainmen* and *UMW*] is that collective activity undertaken to obtain meaningful access to the courts is a *fundamental* right within the protection of the first amendment." *Id.* at 585 (emphasis added).

The first amendment was found applicable to the states through the fourteenth amendment in *Schneider v. State*, 308 U.S. 147, 160 (1939).

20. 316 U.S. 52 (1942).

21. *Id.* Challenges directed against the states' power under the United States Constitution to regulate professional advertising have been brought under provisions other than the first amendment. In *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), the Court held that the state regulation of advertising by optometrists was not an unconstitutional burden on interstate commerce. Similarly, appellants Bates and O'Steen urged that the disciplinary rule on advertising was violative of due process and equal protection, but the issues were not addressed by the Court in *Bates*. 97 S. Ct. at 2696 n.9.

22. 341 U.S. 622, 642-43 (1951).

23. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759 (1976). *See also* *Bigelow v. Virginia*, 421 U.S. 809, 820 n.6 (1975), citing Mr. Justice Douglas' observation in *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (concurring opinion), that the *Valentine v. Chrestensen* "ruling was casual, almost offhand. And it has not survived reflection."

amendment protection "merely because the speech in question happens to be a paid commercial advertisement" ²⁴ Speech has been accorded first amendment protection although it was in a form which was sold for profit, ²⁵ or involved a solicitation to pay or contribute money, ²⁶ or where the speaker's interest was largely economic. ²⁷ The Court's trend of restricting the application of the "purely commercial" speech exception continued until the *Chrestensen* commercial speech doctrine almost disappeared. ²⁸

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, ²⁹ the Court struck a final telling blow to the commercial speech exception by striking down a prohibition against advertising by pharmacists on the rationale that "[i]f there is a kind of commercial speech that lacks all first amendment protection . . . it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot

24. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975) ("The existence of a 'commercial activity' itself, is no justification for narrowing the protection of expression secured by the first amendment."). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) ("It is clear, for example, that speech does not lose its first amendment protection because money is spent to project it, as in a paid advertisement of one form or another."); *Buckley v. Valeo*, 424 U.S. 1, 16-17 (1975) ("Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the first amendment."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1963) ("To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement."); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943) ("The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge.").

25. *Smith v. California*, 361 U.S. 147 (1959).

26. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 266 (1963); *Cantwell v. Connecticut*, 310 U.S. 307 (1939).

27. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617-18 (1969). See also *Thornhill v. Alabama*, 310 U.S. 88, 102 (1939).

28. See *Bigelow v. Virginia*, 421 U.S. 809 (1975), where the Court stated that the *Chrestensen* holding was distinctly limited and merely a "reasonable regulation of the manner in which commercial advertising could be distributed." *Id.* at 819. See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976).

29. 425 U.S. 748 (1976).

simply be speech on a commercial subject."³⁰ Thus the *Chrestensen* commercial speech exception faded into constitutional history as the Court acknowledged not only a first amendment right to advertise, but also the reciprocal first amendment right to receive the advertising.³¹

Once the Court determines that a constitutional right is involved, then the state can regulate or prohibit the exercise of that right only by demonstrating the existence of a sufficiently compelling state interest that demands the regulation.³² In *Pharmacy Board* the Court weighed the benefits of advertising to the public against the state's interest in regulating the pharmaceutical profession, and found that the balance tipped in favor of the public's interest in a more informed and reliable economic decision-making.³³ The state asserted that advertising would undermine professionalism among licensed pharmacists, resulting in an inferior preparation, maintenance and delivery of prescription drugs, and that advertising would degrade the pharmacist from a skilled, specialized professional to the position of a shopkeeper.³⁴ Since 95% of the prescription drugs were prepackaged before reaching the pharmacy, the Supreme Court concluded that the state could not prohibit price advertising for those drugs since it was not misleading or deceptive and would not affect the professionalism of druggists.³⁵

It is noted in *Pharmacy Board* that only the regulation of advertising by pharmacists is considered and that the Court expressed no opinion on advertising of *services* by doctors and lawyers because of the increased possibility for deception and confusion in those areas.³⁶ That issue which the Court had so carefully avoided was presented to it by *Bates*.

30. *Id.* at 761.

31. *Id.* at 757 and cases cited therein.

32. *NAACP v. Button*, 371 U.S. 415 (1963).

33. 425 U.S. at 763.

34. *Id.* at 768.

35. *Id.* at 773.

36. *Id.* at 773 n.25: "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." (emphasis in original). See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975):

We recognize that the states have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to

In the instant case the Court summarized the *Pharmacy Board* case in particular detail and declared that the result here "might be said to follow *a fortiori* from it."³⁷ From this foundation the Court recognized that the first amendment freedom of speech encompasses an attorney's right to advertise and the public's reciprocal right to receive such advertising unless the state can show some compelling state interest that mandates the prohibition. In an attempt to justify the prohibitions against advertising, the State Bar presented six arguments to the Court.³⁸ It was argued that those six justifications of the ban on advertising by attorneys accomplished two legitimate state interests: protecting the public from false, deceptive

establish standards for licensing practitioners and regulating the practice of professions.

The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."

See also Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475, 506-08 (1977); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Note, *Sherman Act Scrutiny of Bar Restraints on Advertising by Attorneys*, 62 VA. L. REV. 1135 (1976) [hereinafter cited as *Sherman Act Scrutiny*].

37. 97 S. Ct. at 2700.

38. Briefly stated, the justifications and responses were as follows:

(1) Advertising will bring about commercialism which will adversely affect the attorney's sense of dignity and self-worth, and thereby "irreparably damage the delicate balance between the lawyer's need to earn and his obligation to selflessly serve." The Court found the connection "severely strained." 97 S. Ct. at 2701.

(2) Advertising of legal services will be unavoidably misleading because (a) services are so individualized as to prevent an informed comparison on the basis of the advertisement, (b) the consumer cannot tell in advance what service he needs, and (c) advertising will highlight irrelevant factors. The Court found (a) only routine services are susceptible of advertising, (b) the consumer can recognize his needs at the "level of generality" to which advertising lends itself and (c) the alternative of prohibition of all advertising is an unacceptable solution to this potential problem. 97 S. Ct. at 2703.

(3) Advertising will "stir up litigation." The Court found that utilization of the courts was not inherently evil. 97 S. Ct. at 2704.

(4) Advertising will raise fees because advertising expense will be recouped in fees charged. The Court found this argument "dubious at best and . . . irrelevant to the First Amendment." 97 S. Ct. at 2705.

(5) Advertising will encourage the "cutting of corners" to perform the "X service at the Y price." The Court found that an attorney so inclined would do so despite the rule on advertising. 97 S. Ct. at 2706.

(6) Total restriction is necessary due to lack of machinery for policing the profession. The Court postulates that regardless of the rule on advertising, the majority of attorneys will continue to act so as to uphold the honor and integrity of the profession. 97 S. Ct. at 2706.

or misleading advertising by attorneys and preventing any adverse effects on the legal profession as a result of such advertising.³⁹

There was a substantial similarity between the justifications for upholding the ban on advertising in the instant case and those urged in *Pharmacy Board*. As in *Pharmacy Board*, the arguments in *Bates* failed to convince the Court that the state's interests were so compelling as to justify a complete intrusion upon constitutionally protected rights. In *Pharmacy Board* the issue was "I will sell you the X prescription drug at the Y price,"⁴⁰ and the decision was based on the delivery of standardized, prepackaged prescription drugs;⁴¹ in *Bates* the legal services in question were "routine legal matters."⁴² In *Pharmacy Board* the Court noted that there was a tremendous disparity in prices for the same specified prescription drug (up to 1200%);⁴³ in *Bates* the Court cited extensive ABA surveys showing the inadequate delivery of legal services to the public, especially to the middle income American who fails to seek legal aid primarily due to his fear of the cost.⁴⁴ The *Bates* Court regarded

39. See note 38, *supra*.

40. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 761.

41. *Id.* at 773-74.

42. 97 S. Ct. at 2701.

43. 425 U.S. at 754 n.11.

44. 97 S. Ct. at 2702 n.22.

If it is accepted as a premise that the Supreme Court is an instrument of social change, then the decision was to some degree foreseeable. For the last twenty years or so the Court and the ABA have become increasingly concerned about the delivery of legal services. See note 19, *supra*. The single greatest barrier noted as a reason for not seeking the services of a lawyer is the actual or feared cost of the services. ABA REVISED HANDBOOK ON PREPAID LEGAL SERVICES 2 (1972). In one survey 46.7% of the working class families involved cited cost as the reason for not using an attorney. E. KOOS, THE FAMILY AND THE LAW 7 (1948). In another survey, 514 out of 1,040 gave the expected cost as the reason for not seeking an attorney's services. P. MURPHY & S. WALKOWSKI, COMPILATION OF REFERENCE MATERIALS ON PREPAID LEGAL SERVICES 2-3 (1973).

Despite this reluctance to use the services of an attorney due to the feared, expected cost, it becomes more tragic when the fear may be unrealistic. In a 1976 study middle class consumers overestimated lawyers' fees by 91% for drawing a simple will, 34% for reading and advising on a two page installment sales contract, and 123% for 30 minutes of consultation. *Petition of the Board of Governors of the District of Columbia Bar for Amendments to Rule X of the Rules Governing the Bar of the District of Columbia* (1976), cited in 97 S. Ct. at 2702 n.22.

The *Bates* Court cites the above statistics and takes judicial notice of the fact that the appellants worked with the Maricopa Legal Aid Society for two years before opening their clinic; their intended clientele were those of moderate income who did not qualify for the government sponsored legal aid societies. Given this reason as the basic policy consideration underlying the decision, future cases may

“ ‘routine’ legal services as essentially no different for purposes of the first amendment analysis from prepackaged prescription drugs.”⁴⁵

The Court concluded that the ban’s justifications were based on a “highly paternalistic protectiveness” by the state and on the state’s preference for maintaining the public in ignorance.⁴⁶ Justice Blackmun, writing for the majority as he did in *Pharmacy Board*, announced that the public dissemination of factual information is not in itself inherently or inevitably harmful.⁴⁷ The potential for harm caused by such information is for the most part negated by the public’s increased ability to make judgments and comparisons based on the information gained through the advertisement.⁴⁸ If the state intends to protect the interests of the public, the Court felt that

the best means to that end is to open the channels of communication rather than to close them. The choice between dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice that the first amendment makes for us.⁴⁹

Despite the Court’s holding that the state had not shown the requisite compelling state interest to justify the total ban on all legal advertising or on the truthful, fair, non-misleading advertising in the instant case, the Court did recognize in dictum that the state will have some continued basis for regulation of legal advertising.⁵⁰

be distinguished on the nature of the practice. 97 S. Ct. at 2693-94. See also *Sherman Act Scrutiny*, *supra* note 40.

45. 97 S. Ct. at 2713 (Powell, J., dissenting).

46. 97 S. Ct. at 2699.

47. *Id.*

48. *Id.* “A corollary of this . . . would be that where consumers are fully capable, through common sense or simple observation, of protecting their interests against advertising exaggerations or distortions, there would be no reason for law to intervene.” Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 671-72 (1977).

The key is a “well-informed” public, for unless some means is provided to inform the public, “common sense” or “simple observation” would be entirely inadequate for a lay person to comprehend legal intricacies. See *id.* at 672-73.

49. 97 S. Ct. at 2699.

50. *Id.* at 2708.

Subsequent to the writing of this note the ABA Task Force on Lawyer Advertising submitted its report on the *Bates* decision to the Board of Governors along with the proposed Amendments to the ABA Code of Professional Responsibility. 46 U.S.L.W. No. 8, at 1 (1977).

The Task Force submitted two proposals to the Board of Governors with the recommendation that they be circulated to each state supreme court and to the state regulatory agencies. In its report, the Task Force explained that the two proposals represent distinctly different approaches to the question of lawyer advertising, due largely to the fact that “substantial difference[s] of opinion exist concerning the implication of [*Bates*] upon a lawyer’s right to advertise.” *Id.*

In rejecting the assertion that all legal advertising would have an unavoidably misleading effect, the Court noted that this is only partially true:

Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of this type. The *only* services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and *the like*.⁵¹

The Court stated that it was expressing no opinion on the acceptability of any advertisement which alludes to the *quality* of the legal services offered and left resolution of this issue for another day.⁵² However, the Court may have suggested its future treatment of such advertising when it stated: "Such claims probably are not susceptible to precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public or even false."⁵³

The Court also made it clear that it was not addressing the problem of "in-person" solicitation, although once again it perhaps colored the issue

Proposal "A" appears to be regulatory in nature, i.e. it attempts specifically to authorize certain types of lawyer advertising, following the basic approach of certain federal regulatory agencies such as the Food and Drug Administration or the Securities and Exchange Commission. *Id.* at 2. See note 67, *infra*.

Proposal "B" is more directive in nature and adopts a general anti-fraud approach. This proposal would allow any advertisement which does not contain information which is "false, fraudulent, misleading or deceptive." *Id.*

51. *Id.* at 2703 (emphasis supplied).

52. *Id.* at 2700. The Court found that the appellant's advertisement did not contain claims of quality, "extravagant or otherwise." Justice Powell, in dissent, did not agree with the majority on this point, but did not elaborate on his view. *Id.* at 2717.

53. 97 S. Ct. at 2700. The Court has not expressly precluded all advertisements which allude to quality of the services rendered; rather, it has said that such advertising *may be* deceptive or misleading. A contrario, one may postulate that an advertisement which is susceptible of precise measurement and verification and which is not deceptive or misleading may be allowed. *See also* note 67, *infra*.

EC 2-9 of Proposal "A" of the ABA Amendments to Code of Professional Responsibility seems to support this view. It provides:

Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the *quality of service, which cannot be measured or verified*.

46 U.S.L.W. No. 8 (1977), at 4. (emphasis added). DR 2-101 (C)(4) of Proposal "B" is in accord. *Id.* at 11.

by stating that such an activity might well generate dangers of overreaching and misrepresentation that are lacking in newspaper advertisements.⁵⁴ The special problems which are or may be associated with advertising through the electronic media of radio and television were also reserved for future resolution.⁵⁵ The Court stated that advertisements which were for illegal services,⁵⁶ or were false, deceptive or misleading, could be regulated;⁵⁷ and that reasonable restrictions on the time, place and manner of advertising could be imposed by the state.⁵⁸ Finally, the Court did not

54. *Id.* Neither ABA proposal would allow one-to-one solicitation. DR 2-104 Proposal "A", in *id.* at 7.

55. *Id.* at 2709. See also *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585 (D.C. 1971), *aff'd sub nom.* *Capital Broadcasting Co. v. Acting Attorney Gen'l*, 405 U.S. 1000 (1972), wherein the three-judge court noted that "commercial speech" if afforded less first amendment protection than other forms of speech and then stated, "the unique characteristics of electronic communications make it especially subject to regulation in the public interest"

[E]ven assuming that loss of revenue from [product] advertisements affects petitioners with sufficient first amendment interest, petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenue from others from broadcasting their commercial messages." *Id.* at 585.

Of course this case was decided prior to *Pharmacy Board* and the Court's rejection therein of the "commercial speech" exception. It is questionable whether a total ban on advertising through the electronic media should be considered reasonable given the Court's concern for delivery of legal services to the average American.

In the Report to the Board of Governors by the ABA Task Force on Lawyer Advertising, it is stated that *both* proposals would allow certain radio advertising now and that if assured safeguards can be developed to effectively regulate television advertising, then it too should be allowed. The report notes that the general fear is that television advertising will emphasize style over substance and be thus objectionable. However, the countervailing consideration is that large segments of the population who, because of only marginal literacy, do not normally read printed advertisements are regularly exposed to the electronic media. 46 U.S.L.W. No. 8, at 2. This consideration is embodied in Proposal "A", EC 2-2 and DR 2-101. In this respect the proposed amendments to the ABA Code of Professional Responsibility clearly authorize advertising which was expressly reserved for consideration by *Bates* at a future time. 97 S. Ct. at 2709. Therefore the proposal is more liberal than is required by the Court's decision in *Bates*.

56. 97 S. Ct. at 2709, *citing* *Pittsburg Press Co. v. Human Relations Commission*, 413 U.S. 376, 388 (1973).

57. *Id.* at 2708.

58. *Id.* at 2709, *citing* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771. In *Pharmacy Board*, the Court said, "We have often approved restrictions [of time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a *significant governmental interest*, and that in so doing they leave open *ample alternative channels* for communication of the information." (emphasis added). What will amount to an "ample alternative" commensurate with *Bates*? Could the

completely foreclose the possibility of requiring an additional warning or disclaimer to be added "even [to] an advertisement of the kind ruled on today" to insure that the public will not be misled.⁵⁹

Although the majority opinion expressly designated the issue presented for resolution as a narrow one, the holding of the Court may not be susceptible of such precise limitation, especially when the obscurity of the terminology as well as the radical departure from the states' traditional regulation of the bar are considered.⁶⁰ From *Bates* it is clear that an

Bar Association designate three days a month for attorneys to advertise only in a special newspaper section?

59. 97 S. Ct. at 2709. If such a warning may be required, what would it contain?

Perhaps a sample ad might read:

Simple Uncontested Divorce \$200.00.

The fee indicated is an approximation. Individual circumstances concerning alimony, child support, property rights or child custody requirements may cause the fee to vary.

Such a warning would primarily protect the *attorney* by ensuring that he does not accept a "routine" matter only to find a Medusa lying below the simple exterior. If the Bar Associations' primary concern, however, is protecting the *consumer*, the above examples resemble too closely "bait and switch" advertisements that entice consumers into the advertiser's business to enable the advertiser to sell them a totally different, usually more expensive, item. To combat this potential problem the Bar might require the attorney to render the desired legal service at the stated price to any clients that are attracted by the advertisement, *regardless* of the difficulties which might arise. Also, the Bar might require the offer in the advertisement to remain open for a certain period of time. For example, if the advertisement is published in a daily newspaper, a requirement that the offer remain open for 30 days might not be reasonable; if it is a trade journal published quarterly, the Bar might require the offer to remain open for six months or one year.

Proposal "A" rejects the former contention and adopts the latter. DR 2-101(E) provides: "If a lawyer advertised a fee for a service, the lawyer must render that service for no more than the fee advertised." 46 U.S.L.W. No. 8, at 5 (1977).

DR 2-101(F) provides that if the publication in which the ad appears is published more often than once a month, the offer must remain open for at least 30 days. If the ad is in a publication published once a month or less, the offer must remain open until publication of the succeeding issue. If the publication carrying the ad has no fixed date for a succeeding publication the offer must remain open for a reasonable period of time, but for at least one year. 46 U.S.L.W. No. 8, at 5-6.

Proposal "B" sets no such strict guidelines but relies on the general antifraud approach which would prohibit any ad which is false, fraudulent, misleading or deceptive. DR 2-101(A). 46 U.S.L.W. No. 8, at 10 (1977).

60. 97 S. Ct. at 2712 (Powell, J., dissenting):

Although the Court appears to note some reservations . . . it is clear that within undefined limits today's decision will effect profound changes in the practice of law The supervisory power of the courts over members of the bar, as officers of the courts and the authority of the respective States to oversee the regulation of the profession have been weakened. . . .

I am apprehensive, despite the Court's expressed intent to proceed cau-

attorney may establish and advertise the existence of a "legal clinic."⁶¹ The Court recognized, with approval, that the creation of legal "clinics" may be a natural and appropriate consequence of the removal of the wholesale ban on advertising by attorneys.⁶² The Court found that the term "legal clinic" is not per se misleading or deceptive to the general public.⁶³ If the legal "clinic," however, is to be compatible with the Court's concern for truthful, straightforward advertising, then the services which are offered by the "clinic" might necessarily include an "emphasis on standardized procedures for routine problems,"⁶⁴ the use of automatic equipment and paralegals, and a high volume, low profit per person business⁶⁵ offering services directed toward that clientele of moderate income which is unable to obtain government sponsored legal aid.⁶⁶

Although one of the major issues in *Bates* is whether *prices* may be advertised by an attorney and if so to what extent and in what context, the only unambiguous pronouncement on the subject is that an attorney may advertise the cost of an initial consultation. Here, as throughout the opinion, the Court placed considerable emphasis on the caveat that any advertising by attorneys must be truthful, fair and not misleading.⁶⁷ The

tiously, that today's holding will be viewed by tens of thousands of lawyers as an invitation . . . to engage in competitive advertising

61. *Id.* at 2708.

62. *Id.* at 2706.

63. The medical profession has long advocated the use of medical clinics; because of this fact the court felt that the public is familiar with what the term "clinic" connotes and thus this familiarity will provide the touchstone of analogy to the "legal clinic." *Id.* at 2708.

64. *Id.* at 2706.

65. *Id.* at 2694; *but see id.* at 2714 n.7 (Powell, J., dissenting). Mr. Justice Powell finds no justification for naming a law practice a "clinic" merely because it uses paralegals and automatic equipment and other modern techniques which result in a lower cost to the client by allocating the attorney's time more efficiently.

66. *Id.* at 2694. See note 44, *supra*.

67. 97 S. Ct. at 2708-09. The Court offers little guidance to an attorney desiring to advertise his fees for the so-called "routine matters." Without the Court's guidance on the subject, guidelines will have to be developed by the Bar Association and courts on a case by case basis. This is a slow process, and in order for a portion of the guidelines to be established, an attorney would have to be accused of unethical conduct and disciplinary proceedings instituted against him.

The Court may have noted an alternative to the above; both the instant case and the *Pharmacy Board* case cite Federal Trade Commission cases as authority for advertising regulation. *Bates v. State Bar of Arizona*, 97 S. Ct. at 2699, 2709; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 765. Since this is an already highly developed area and consumer oriented, this may prove to be a valuable source of guidance to attorneys after the *Bates* decision. See Pitofsky, *supra* note 48, at 661. This is an excellent article concerning

Court declined to distinguish between placing such an advertisement in a newspaper and placing the initial consultation fee in the classified section of a telephone book, the latter having been approved by the American Bar Association's Code of Professional Responsibility.⁶⁸ Arguing in dissent,

advertising regulation and discusses the possibility of FTC regulation and jurisprudence providing a basis for policing the advertising resulting from the *Pharmacy Board* case.

The Federal Trade Commission Act declares that "deceptive" or "unfair" acts or practices are unlawful. 15 U.S.C. § 45 (a)(T)(1970). A violation of this act may give grounds for suit to either the injured consumers or competitors of the advertiser. The standard from which "deception" is measured has been the "average" person in the audience to which the ad is directed while noting that many who are unsophisticated and unwary may be misled. For example, one ad, which is directed at children, could be ruled "deceptive" while the same ad, directed toward an adult audience, might not be deceptive. Likewise, vague claims or in some cases silence can be deceptive if the ad is reasonably susceptible of being understood by a substantial portion of the target audience in a way that is false. If an ad can reasonably be interpreted in more than one way, it is deceptive. In other circumstances the commission will view the ad and if the total *impression* generated by the ad is false, literal truth will be reflected as "deceptive." When an ad is shown to be misleading, materiality and causality as to whether the ad induced the purchase are irrelevant. Only the potential to deceive is necessary, not actual deception.

The concept of "unfairness" as an independent basis for challenging advertising claims is relatively new. The U.S. Supreme Court recognized this in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972), when the court allowed the FTC to develop rules concerning "unfairness." There are three principal areas where nondeceptive advertisement might be barred as unfair: (1) claims which are promulgated without prior substantiation, (2) claims which tend to overreach or to exploit particularly vulnerable groups, and (3) instances where the seller fails to make information known to the consumer which is necessary to choose between competing products. Pitofsky, *supra* note 48.

In *Bates*, the majority states that the Bar retains the power to "correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure rather than less." 97 S. Ct. at 2704. Corrective advertising also has a well developed counterpart in the arena of FTC regulation. Generally to justify correcting an ad, the FTC Commissioner must prove:

- (1) the existence of a *material* fraud or deception with respect to a *major* advertising theme; and (2) that the fraud created a misconception in the minds of a substantial number of consumers which is *consistent with the fraud*; and
- (3) the misconception significantly influenced the purchase of the product at the time *suit was brought*.

The usual corrective advertising order has required the violator to discontinue advertising for one year or to disseminate a corrective message that accounts for 25% of the advertiser's advertising budget for a one year period. *See also Solicitation*, *supra* note 3, at 1196-99.

68. The ABA Code was apparently adopted *in toto* in Arizona. This explains why the Court makes reference to the ABA Code throughout the opinion. 97 S. Ct. at 2698 n.15. It should be noted that the Louisiana Code of Professional Responsibility is substantially different. The ABA Code provision relative to allowable advertising follows with that part which was omitted in Louisiana italicized.

Justice Powell stated that he would allow a disclosure of the attorney's hourly charge;⁶⁹ whereas Chief Justice Burger would have allowed the attorney to designate only a "range" of fees.⁷⁰ This they felt would lessen the chances of misleading the public.⁷¹ It may be of considerable importance that all of the Justices (except Justice Rehnquist) would allow the disclosure of the initial consultation fee.⁷² In seeking to justify the advertisement in question which stated that the prices were "reasonable" the Court deviated from the manner in which the Code of Professional Responsibility determines the reasonableness of a fee. The Court justified the fee as reasonable solely upon an examination of prices customarily charged in the locality for similar services.⁷³

6) A listing in a reputable law list, legal directory, or the classified section of a telephone company directory

The published data may include only the following: . . . a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific services ABA CANONS OF PROFESSIONAL ETHICS, DR 2-102 (A); LOUISIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102 (A).

69. 97 S. Ct. at 2717.

70. *Id.* at 2711.

71. *Id.* Both proposals would allow advertisement of "fixed or contingent fees for specific legal service, the description of which would not be misunderstood or be deceptive." Proposal "B", 46 U.S.L.W. No. 8, at 11 (1977), DR 2-101(B)(6)(b); Proposal "A", 46 U.S.L.W. No. 8, at 4 (1977), DR 2-101(B)(25).

In keeping with the general scheme of the proposals, proposal "A" sets out guidelines for contingent fees [DR 2-101(B)(22)], range of fees [DR 2-101(B)(23)], hourly rate [DR 2-101(B)(24)] and fixed fee for specific legal services [DR 2-101(B)(25)] in particular detail. 46 U.S.L.W. No. 8, at 5 (1977). See note 50, *supra*.

72. *Id.* at 2703, 2711, 2717. That raises an interesting question: may an attorney advertise that there is no charge for the initial consultation? All discussion in *Bates* implies that the fee will consist of a sum of money. The proposed ABA Amendments might prohibit this as "hucksterism." ABA *Code of Professional Responsibility Amendments, Proposal "A"*, 46 U.S.L.W. No. 8, at 4 (1977), DR 2-101(C)(6).

73. *Id.* at 2708. The majority compared the costs of an uncontested divorce in the vicinity of appellant's practice with the appellant's advertised cost of \$175 plus \$20 court filing fee. Since the rates ranged from \$150 to \$300, the Court concluded that the price was indeed "reasonable" as advertised by the appellant. But the fee customarily charged in an area has not been the sole factor used to determine the reasonableness of fees. The factors that are to be considered in determining the reasonableness of a fee are:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) *The fee customarily charged in the locality for similar legal services.*
- (4) The amount involved and the results obtained.
- (5) The time limitation imposed by the client or by the circumstances.
- (6) The nature and length of the professional

If the Court did indeed feel that the result in the instant case flows *a fortiori* from the *Virginia Pharmacy Board* case, then the inescapable conclusion is that the "routine legal matters" and "the like" in question are analogous to standardized, prepackaged name brand drugs.⁷⁴ The key words, "routine" and "the like," were not defined expressly by the Court, either in the majority opinion or in the dissent. Regrettably, the Court gave little guidance on the precise character of "routine matters" other than the analogy to prepackaged drugs and the fact that the Court approved the four categories of services offered by the defendants, *i.e.* the uncontested divorce, the simple adoption, simple personal bankruptcies and changes of name and *the like*. The Court by adding the phrase "and the like" to the above list recognized that there are some other services which would be considered "routine." Justice Powell pointed out that a potential client could be seriously misled or deceived if he read the advertised service as embracing all of his possible needs. A host of problems can accompany divorce.⁷⁵ Several other difficulties arise in an attempt to define which services are "routine." Does a service become "routine" if it is rendered by the average attorney in practice in the locality or is a "routine" service based on the competence and experience of each attorney?⁷⁶ It may also depend on the location⁷⁷ and the clientele to which the advertisement is directed.⁷⁸

The Court only addressed the issue of publication of an advertisement in a newspaper and expressly excluded from consideration "in-person" solicitations and the use of radio and television, but failed to discuss the different forms of media which lie between these extremes, *e.g.*, magazines of general circulation, trade magazines and billboards.⁷⁹

There is reason to believe that even the narrowest reading of the

relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the service. (8) Whether the fee is fixed or contingent.

ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-106(B) (emphasis added).

74. *Id.* at 2713. See text at note 45, *supra*.

75. *Id.* at 2713. Such problems include alimony, support and maintenance for children; child custody; visitation rights; interest in life insurance, community property, tax refunds and tax liabilities; and the disposition of other property rights.

76. "A particular service may be quite routine to a lawyer who has specialized in that area for many years. The marital trust provisions of a will, for example, are routine to the experienced tax and estate lawyer," yet this might be anything but routine to a fresh law school graduate. *Id.* at 2713-14.

77. *Id.* at 2709, *citing* Feil v. FTC, 285 F.2d 879, 897 (9th Cir. 1960).

78. *Id.* at 2709 n.37.

79. *Id.* at 2718 n.12 (Powell, J., dissenting). One factor tending to limit this view might be the relative degree of in-person solicitation involved in the above media as opposed to newspapers.

decision concerning direct advertising and solicitation will substantially benefit the practicing attorney, even if he chooses not to advertise, by removing the constant fear of discipline heretofore leveled against attorneys for *indirect* advertising and solicitation. Such a narrow reading of the instant case should allow an attorney to place a one-quarter page complimentary advertisement in a high school football program⁸⁰ or to use a metered stamp with the scales of justice represented thereon.⁸¹ Under the current Codes of Professional Responsibility,⁸² both the ABA Code and Louisiana Code, strict prohibitions are stated against attorneys holding themselves out as specialists in areas other than those listed. It may well be that the Bar will relax the restraints currently imposed on attorneys who hold another professional certification, such as licensed mechanical engineers,⁸³ Certified Public Accountants,⁸⁴ or attorneys who hold a military rank.⁸⁵ A caveat, however, is in order, for until the State Bar Association takes steps to provide for some type of certification, the designation of a specialty in a particular field of law may be deemed "misleading" and as such would be subject to restraint. Alternatively, the designation of a special title or area of practice may not be protected under *Bates* if the designation represents a claim as to the "quality" of the proposed legal service. Finally, the Court approved the advertising of a legal clinic which bore the name of the partner-owners; the Court's attitude toward truthful, fair, nonmisleading advertising may well prevent an attorney from practicing law under an assumed name.⁸⁶

80. LA. COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 190.

81. *Id.*, No. 251.

82. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A).

83. LA. COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 150.

84. *Id.*, Nos. 113, 114.

85. *Id.*, No. 154.

86. See generally *Solicitation*, *supra* note 3. See also text and note 51, *supra*. Indeed, it seems that any assumed name would be misleading or deceptive to some degree. The assumed name would likely be disallowed due to the difficulties in testing the truthfulness empirically, or that the name asserts a quality. An assumed name is invariably intended to promote or conceal something. Consider, for example, "The A-1 Law Firm." Under the proposed amendments to the ABA Code of Professional Responsibility an attorney in private practice would not be allowed to practice under a trade name or a name that is misleading as to the identity, responsibility, or status of the attorneys practicing thereunder. The stated reason in both proposals is that the firm name may be a factor in the selection of an attorney and such a trade name might be misleading to the lay person. 46 U.S.L.W. No. 8, at 6, 10, (1977).

DR 2-102(B) of Proposal "A" would not allow practice under an assumed name at all. DR 2-102(B) of Proposal "B" would not allow the practice of law under an assumed name provided that it is false, fraudulent, misleading, or deceptive. *Id.*

"In holding that advertising by attorneys may not be subjected to blanket suppression . . . we do not hold that advertising by attorneys may not be regulated in any way."⁸⁷ The duty of the bar will require it to police the profession and to "correct omissions" that tend to mislead and also to engage in educating and informing the public so that advertising is viewed in its proper perspective. The Court expressed the belief that the State Bar Associations should be a leading force in defining the precise perimeters of acceptable advertising by attorneys.⁸⁸ This will cause some problems for the State Bar Associations. There are more than 400,000 licensed attorneys in the United States; the sheer size of the profession will make regulation difficult and the enforcement of those regulations by the Bar even more difficult.⁸⁹ The Bar Associations may also have to wrestle with each advertisement individually as there is no way to test the claims of an advertisement "empirically."⁹⁰

If this appears to be a formidable task for any bar association, then the task which faces the Louisiana bar association may be even more difficult. Not only will the Louisiana Bar Association have to interpret *Bates*, but it must also bear in mind that some of the specific advertisements which the Court in *Bates* approved dealt with family law, which is a complex, specialized area under our codal regime with many attendant

87. 97 S. Ct. at 2708. The Court reflects its concern again for the public welfare by declaring that the regulation of advertising to assure truthfulness will not discourage or "chill" protected speech. Also the reasons for allowing leeway for untruthful or misleading statements in other contexts have "little force" as to commercial advertising. Similarly, those statements which might be overlooked or forgiven as unimportant in other advertising, may be wholly inappropriate in the context of legal advertising due to the unsophistication of the public concerning legal services.

88. *Id.* at 2709. This duty to allow and police "restrained" advertising flows from the ABA CANONS OF PROFESSIONAL ETHICS, EC 2-1: "[T]o facilitate the process of intelligent selection of lawyers; and to assist in making legal services fully available." It will be the bar's duty to assist in "[weeding] out those few who abuse their trust." The bar is expected to play a "special role" in assuring that advertising flows both "freely and cleanly." *Id.*

The report to the Board of Governors by the ABA Task Force on Lawyer Advertising recommended that a Commission on Professional Advertising be established to monitor the systems adopted by state bar associations and the progress of professional advertising in other professions and to suggest improvements to the ABA's guidelines on lawyer advertising. 46 U.S.L.W. No. 8, at 3 (1977).

In addition a special committee was suggested to study the funding and feasibility of national advertising campaigns "to educate consumers as to the utility, costs and availability of legal services." *Id.*

89. 97 S. Ct. at 2715 (Powell, J., dissenting).

90. *Id.* at 2716.

problems. The bar will have to weigh this as a possible effect on the *Bates* decision, which is based on common law. Louisiana attorneys may be well-advised to refrain from advertising on the basis of *Bates* until the Committee on Professional Responsibility has had a chance to formulate formal guidelines.⁹¹

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91. It is possible that the Louisiana Bar Association will decline to adopt the ABA proposals, since they are more liberal than is necessary to comply with the Court's pronouncement in *Bates*. This is suggested by the Louisiana Bar Association's conservatism in not adopting the last ABA proposal relating to advertising in the classified section of a telephone book. See note 68, *supra*.