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LAWYER ADVERTISING: THE PRACTICAL EFFECTS OF BATES

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LAWYER ADVERTISING: THE PRACTICAL EFFECTS OF *BATES*

I. INTRODUCTION

In March 1974, John Bates and Van O'Steen, two members of the Arizona State Bar Association, established a "legal clinic" in Phoenix, Arizona.[1] They sought to provide low cost legal services to persons of moderate income who did not qualify for legal assistance and yet could not afford private counsel.[2] The clinic, which handled only routine cases,[3] established a "systems approach" to handle recurring problems.[4] The attorneys developed procedures for particular tasks which could then be followed by paralegal assistants. Standardized forms were used whenever possible. Attorneys and staff members specialized to increase their efficiency. These techniques, along with a low profit margin, enabled the clinic to serve a large number of clients at a lower price then the typical private law firm.

The clinic required a large number of clients to achieve its goal of providing low cost, efficient legal services to the community. To attract clients, Bates and O'Steen placed an advertisement in the Arizona Republic, a newspaper of general circulation in the Phoenix metropolitan area, on February 22, 1976.[5] The advertisement violated Disciplinary Rule 2-101(B) of the ABA CODE

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1. The appellants had previously worked for the Maricopa Legal Aid Society for two years following graduation from Arizona State University College of Law. Bates v. State Bar of Ariz., 433 U.S. 350, 353 (1977).

2. The practice was established "as a conscious effort to provide legal services of good quality to persons of low and moderate income who did not qualify for governmental legal aid and who consequently had difficulty finding lawyers at prices they could afford." Brief for the Appellants at 6, Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

3. "The types of cases which appellants accept are uncontested divorce and other domestic relations matters; adoptions; guardianship and conservatorship; . . . personal injury matters; and some consumer contract and real estate work." *Id.* at 8.

4. "While such a systems approach and use of paralegals may be common in large firms engaged in commercially-oriented practice, they are quite unusual in firms serving the moderate-income clientele of the appellants." *Id.* at 7.

5. The clinic experienced an increase in volume following the advertisement, but this may in part be attributed to news stories concerning the advertisement. *Id.* at 10.

OF PROFESSIONAL RESPONSIBILITY[6] because it listed the cost of legal services. Bates and O'Steen challenged, on first amendment grounds, the total ban on advertising imposed by the rule.

The Arizona State Bar Association initiated disciplinary actions against Bates and O'Steen for their violation of the disciplinary rule. A three-member Special Administrative Committee, after conducting a hearing, recommended to the state Board of Governors a suspension of not less than six months for both attorneys. The Board of Governors, finding a good faith challenge to the rule, reduced the punishment to a one-week suspension for each attorney, with the weeks to run consecutively. Bates and O'Steen appealed the decision of the Board of Governors to the Supreme Court of Arizona and sought a modification of the disciplinary rule in question.[7]

The Supreme Court of Arizona held that the restrictions on lawyer advertising imposed by the disciplinary rule did not violate the first amendment.[8] In upholding the ban, the court noted that "[r]estrictions on professional activity and in particular advertising, have repeatedly survived constitutional challenge . . . . The legal profession, like the medical profession, has always prohibited advertising since it is a form of solicitation deemed contrary to the best interests of society."[9] Although the United States Supreme Court had recently held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[10] that consumers had a first amendment right to receive commercial information concerning the price of prescription drugs, the Arizona Supreme Court declined to apply similar reasoning in In re *Bates*.[11] The court relied instead on Chief Justice Burger's concurring opinion in that case, which noted that "quite different factors would govern were we

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6. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B), *embodied in* ARIZ. SUP. CT. R. 29(a), ARIZ. REV. STAT. § 29(a) (Supp. 1977). In pertinent part, the rule states: "A lawyer shall not publicize himself, or his partner . . . as a lawyer through newspaper or magazine advertisements . . . nor shall he authorize or permit others to do so on his behalf."

7. *In re* Bates, 113 Ariz. 394, 396, 555 P.2d 640, 642 (1976).

8. *Id.* at 399, 555 P.2d at 645. A separate challenge based on an alleged violation of the Sherman Antitrust Act was rejected by the Supreme Court of Arizona on the basis of the state action exception cited in Parker v. Brown, 317 U.S. 341 (1943). The United States Supreme Court unanimously upheld this part of the opinion. This issue is beyond the scope of this note.

9. *In re* Bates, 113 Ariz. 394, 397, 555 P.2d 640, 643 (1976) (citations omitted).

10. 425 U.S. 748 (1976). For a discussion of this case, see text accompanying notes 40-48 *infra*.

11. 113 Ariz. 394, 555 P.2d 640 (1976).

faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law."[12] The majority, however, agreed with the Board of Governors that Bates and O'Steen had placed the advertisement in the newspaper as a good faith challenge to the validity of DR 2-101(B) and changed the suspension to censure.[13]

Justice Holohan, dissenting from the majority opinion, framed the first amendment issue in terms of "the right of the public as consumers and citizens to know about the activities of the legal profession."[14] Despite his personal distaste for advertising, he concluded that instead of the total ban on advertising imposed by the disciplinary rule, the proper remedy was to ban only deceptive or misleading advertising.[15]

In their appeal to the United States Supreme Court, Bates and O'Steen argued that the commercial speech contained in their advertisement should be protected by the first amendment against the disciplinary rule's advertising ban.[16] Relying upon the Supreme Court's decision in *Virginia State Board of Pharmacy*, they argued that the consumer's interest in the cost and availability of legal services outweighed the justifications for imposing a total ban on lawyer advertising.[17]

The Supreme Court, in *Bates v. State Bar of Arizona*,[18] followed Justice Holohan's lead and reversed the decision of the Supreme Court of Arizona on first amendment grounds. The Court's

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12. *Id.* at 398, 555 P.2d at 644 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 774). Justice Gordon, in a special concurrence, stated, "Whether a blanket ban on certain forms of advertising is unconstitutional as violative of the First Amendment is a far weightier question which I am not yet prepared to resolve in the negative." *Id.* at 402, 555 P.2d at 648.

13. *Id.* at 400, 555 P.2d at 646.

14. *Id.* at 402, 555 P.2d at 648.

15. This Court should forthrightly declare the rule unconstitutional. We can then attempt to write rules which provide for public access to information about attorneys . . . . [W]hat we have now is defective. We need to create new guidelines which allow for broader dissemination of information to the public but at the same time protect them from misleading or deceptive statements.

Id. at 404, 555 P.2d at 650 (Holohan, J., dissenting).

16. Brief for the Appellants, *supra* note 2, at 23.

17. The justifications argued in favor of the disciplinary ban are discussed at text accompanying notes 70-86 *infra*.

18. 433 U.S. 350, 384 (1977). Justices Brennan, White, Marshall, and Stevens joined the majority opinion of Justice Blackmun on the first amendment issue. As previously stated, the entire Court rejected the challenge based on the Sherman Act. *See* notes 8-9 *supra*.

holding, simply stated, was that "advertising by attorneys may not be subject to blanket suppression. . . ."[19] More specifically, the Court stated that the first amendment protects the flow of truthful information from suppression by the disciplinary rule applied in the instant case.[20] Even though the Court limited its opinion to allow lawyer advertising of prices for certain routine services,[21] the likely result, as noted by Justice Powell in dissent,[22] is an expansion of advertising by lawyers beyond the confines of the majority opinion.[23]

II. BACKGROUND

In *Bates v. State Bar of Arizona*, the Court applied the vestiges of the commercial speech doctrine[24] to the traditional ban on lawyer advertising.[25] The distinction between commercial speech and other varieties of speech under the first amendment was created in the landmark case of *Valentine v. Chrestensen*.[26] In upholding a city sanitation regulation banning the distribution of a circular advertising a submarine tour, the Supreme Court casually remarked that commercial speech was not entitled to first amendment protection.[27] The commercial speech doctrine, as it devel-

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19. 433 U.S. at 383.

20. Justice Blackmun, for the majority, stated:

> The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement. . . . We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

Id. at 384.

21. *See* notes 3-6 *supra* and accompanying text.

22. "Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined 'routine legal services.'" 433 U.S. at 389 (Powell, J., dissenting).

23. Seven members of the Court agreed that the fee for an initial consultation and hourly rate could be properly advertised. Only five justices agreed to allow price advertising for routine, standardized services.

24. *See* text accompanying notes 37-45 *infra*.

25. *See* note 6 *supra*.

26. 316 U.S. 52 (1942).

27. The advertiser attempted to gain first amendment protection by printing, on the reverse side of the advertisement, a protest about the wharf facilities. The protest was ignored by the Court, which felt, according to one commentator, "that commercial advertising was merely ancillary to the proper performance of a business, and accordingly could be regulated by legislative action in the public interest. Thus, without citing precedent, historical evidence, or policy considerations, the Court effectively read commercial speech out of the first amendment." Redish, *The First Amendment*

oped, held that once speech is determined to be commercial in nature, the first amendment offers no protection from governmental regulation.[28]

The Court's dissatisfaction with the doctrine,[29] due largely to the inability to define "commercial speech," frequently led it to avoid finding pure commercial speech.[30] Instead, the Court refused to limit speech which arguably presented opinions or ideas of the speaker.[31] The content of the advertisement became the focus of review,[32] and only speech dealing with a purely commercial transaction was subjected to restrictions that could not be placed on other varieties of speech.

In *Bigelow v. Virginia*,[33] the Court narrowed the scope of the doctrine. In that case, an advertisement, printed in a Virginia newspaper in violation of a state statute, contained information about the availability of legal abortions in New York City and referred potential patients to a clinic at which abortions and counseling were available. The Court recognized that when an advertise-

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in the Marketplace: Commercial Speech and the Values of Free Expression, 39 GEO. WASH. L. REV. 429, 450 (1971).

28. *See generally* Redish, *supra* note 27; Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. L.F. 1080.

29. *See, e.g.*, Cammarano v. United States, 358 U.S. 498, 514 (1959) (the *Chrestensen* decision "was casual, almost offhand. And it has not survived reflection.") (Douglas, J., concurring).

30. Few cases have specifically relied upon the commercial speech doctrine to prohibit commercial speech. For one case which did rely on the doctrine, see Breard v. Alexandria, 341 U.S. 622 (1951) (an ordinance prohibiting door-to-door sales of magazines did not abridge freedom of speech since the element of selling a subscription brought a commercial feature into the transaction not present in the mere distribution of the materials). *See also* Note, *Commercial Speech and the First Amendment: An Emerging Doctrine*, 5 HOFSTRA L. REV. 655, 660 (1977).

31. For instance, if the advertisement presented both a commercial and political message, a court would examine the primary purpose of the advertisement to determine whether constitutional protection was afforded to the speaker. *See, e.g.*, Murdock v. Pennsylvania, 319 U.S. 105 (1943) (incidental commercial quality of the communication combined with a lack of profit motive in the distribution of religious books made an ordinance barring door-to-door sales inapplicable). If an advertisement could be construed as communicating information of public interest, the doctrine was inapplicable. *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Unlike the advertisement in *Valentine*, the advertisement was entitled to protection since "it communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 316 U.S. at 266.

32. "If there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content." 425 U.S. at 761.

33. 421 U.S. 809 (1975).

ment presented a matter of public interest, some first amendment protection was afforded to the speech.[34] The Court's task was that of "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation."[35] Even though the advertisement in this instance related to the marketplace of products and services, the Court held that the advertised message was not valueless in the marketplace of ideas and deserved constitutional protection.[36]

The Court further reduced the significance of the doctrine in *Virginia State Board of Pharmacy*.[37] In that case, consumers challenged a state ban on the advertisement of prescription drugs by pharmacists. The Court focused on "the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[38] The Board of Pharmacy argued that the ban was necessary to protect consumers from misleading advertisement. The Board feared that the consumer might consider only the price of the drugs when deciding where to purchase drugs and not the professionalism of the druggist. The Court rejected this "consumer protection" argument and decided that the paternalistic attitude of the state was unnecessarily restrictive. Instead of a paternalistic approach, the state was "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."[39]

The Court in *Virginia State Board of Pharmacy* did not bar the

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34. Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter of the law of another State and its development, and to readers seeking reform in Virginia.

Id. at 822. The Court in this decision declined to decide "the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation." *Id.* at 826.

35. *Id.*

36. In reference to *Bigelow*, the United States, in its amicus brief in *Bates*, claimed that "there is no material difference between legal and medical services that would make the First Amendment applicable to advertisements concerning abortions but not to advertisements concerning uncontested divorces." Brief for United States as Amicus Curiae at 23, Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

37. 425 U.S. 748 (1977).

38. *Id.* at 763.

39. *Id.* at 770.

state from placing restrictions on commercial speech. The Court afforded a lower priority to commercial speech than to ideological or political speech because of two "commonsense differences" in the type of speech presented.[40] First, commercial speech was less fragile and unlikely to be hampered or "chilled" by regulations.[41] The profit motive guarantees that advertisers will continue to promote their products or services for the benefit of potential consumers despite regulations on the type of message permitted. Second, commercial speech is usually easily verifiable by the advertiser.[42] The state could prohibit false, deceptive, or misleading advertisements and those advertisements concerning unlawful products or services.[43] A total ban on advertising, however, inhibited the normal functioning of the competitive market economy; commercial speech, although subject to certain restrictions not imposed on other varieties of speech, was not outside the protection of the first amendment.[44]

The Court's discussion of commercial speech in *Virginia State Board of Pharmacy* centered on whether professional advertising was protected by the first amendment. The Virginia Board of Pharmacy sought to justify the advertising ban as a measure designed to uphold the standards and dignity of the profession.[45] These justifications, in the Court's opinion, were insufficient to withstand the challenge by information seeking consumers.[46] The Court, however, declined to extend the first amendment protection afforded to advertising by pharmacists to advertising by lawyers.[47]

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40. *Id.* at 771 n.24. For a further discussion of the "commonsense differences" between types of speech, see *id.* at 777-81 (Stewart, J., concurring).

41. *Id.* at 771 n.24. *See generally* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

42. 425 U.S. at 771 n.24.

43. *Id.* at 771-72.

44. Following *Virginia State Bd. of Pharmacy*, the Court ruled in Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977), that a town ordinance could not prohibit property owners from placing "for sale" or "sold" signs on their property to stem a perceived "white flight" to neighboring communities. The information which the ordinance sought to restrict was "of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families." *Id.* at 96.

45. 425 U.S. at 768.

46. *Id.* at 770.

47. 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 disperse standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for

The Court noted significant differences between the standardized drugs sold by a pharmacist and the professional services rendered by lawyers. Chief Justice Burger, in a concurring opinion, stated, "Attorneys and physicians are engaged 'primarily' in providing services in which professional judgment is a large component, a matter very different from the retail 'sale' of labeled drugs already prepared by others."[48]

Although *Bates* raised the issue of lawyer advertising under the first amendment for the first time,[49] the consumer's right to better access to the legal system had been upheld in contexts other than advertising. Several earlier cases held that lawyers employed by associations of workers or minorities did not improperly solicit clients.[50] The state bar associations generally argued that a lawyer, by accepting cases from members of the association, initiated the contact with the client in a manner one step removed from in-person solicitation.[51] In each of these cases, the Court recognized that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[52] Similarly, advertising, by indicating the cost and availability of a lawyer, initiates contact with the client in a manner resembling a situation where the lawyer is available to association members for a stated fee. Moreover, absent collective activity, the logical conclusion is that "[p]otential clients who are so dispersed, disorganized and powerless that they cannot organize their own litigation programs would seem to be in even greater need of in-

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confusion and deception if they were to undertake certain kinds of advertising.

Id. at 773 n.25.

48. *Id.* at 774 (Burger, C.J., concurring).

49. The prohibition on advertising by the legal profession was upheld in earlier state court decisions. *See* Mayer v. State Bar of Cal., 2 Cal. 2d 71, 39 P.2d 206 (1934); *In re* Cohen, 261 Mass. 484, 159 N.E. 495 (1928); State *ex rel.* Hunter v. Crocker, 132 Neb. 214, 271 N.W. 444 (1937).

50. *See* United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) (collective action to protect members from excessive fees charged by incompetent attorneys under the FELA); United Mine Workers v. Illinois State Bar Assoc., 389 U.S. 217 (1967) (collective action to obtain affordable and effective lawyers for personal injury suits); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) (legal aid department established to provide legal counsel to union members); NAACP v. Button, 371 U.S. 415 (1963) (counsel employed by the association to litigate civil rights claims brought by its members).

51. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-103(a) prohibits in-person solicitation.

52. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585 (1971).

formation regarding their legal rights . . . ."[53] Advertising is one method of informing consumers about how to obtain knowledge of their legal rights.

Another example of a court favoring dissemination of information about lawyers to consumers is *Consumers Union of United States v. American Bar Association*.[54] In that case, the petitioners sent questionnaires to local attorneys to obtain information about consultation fees and billing practices for publication in a local consumer directory. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B), however, prevented the lawyers from answering the questions regarding fees. Furthermore, since the factual information was to appear in an unapproved directory in violation of DR 2-102(A)(6),[55] the questions dealing with name, address, and education could not be answered without fear of disciplinary action. The district court ruled that the overly broad disciplinary rules could not prevent petitioners from obtaining and publishing consumer information.[56] The decision recognized the consumers' need for information about the cost and availability of legal services. In *Consumers Union*, the district court applied an overbreadth analysis to strike down the disciplinary rules.[57] Overbreadth analysis requires the court to consider whether the challenged regulation affects protected speech as well as unprotected speech. Since the district court found that the directory sought to be published by Consumers Union was neither misleading nor deceptive, it ruled that the ban affected speech protected by the first amendment and was, therefore, overbroad.[58] This analysis prevents

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53. Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1186 (1972).

54. 427 F. Supp. 506 (E.D. Va. 1976), *vacated and remanded for further consideration in light of* Bates, 433 U.S. 350 (1977).

55. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-102 (A)(6) prohibits the listing of a lawyer's name in an unapproved legal directory. The local bar association refused to approve the Consumers Union directory.

56. 427 F. Supp. at 523. Two judges disagreed on the extent of price advertising that should be permitted. Judge Merhige would allow fees for legal services to be advertised if the particular service is adequately specified, but the record did not contain the necessary evidence in this instance. A special concurrence by Judge Warriner expressed the view that "the advertising of a fee for any legal service other than for an initial consultation of a specified length is inherently misleading and thus, far from helpful, is harmful." *Id.* at 527. These opinions foreshadowed the dispute between Justice Blackmun and Justice Powell in the *Bates* decision. *See* note 67 *infra* and accompanying text.

57. *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

58. 427 F. Supp. at 523.

an overly broad regulation from hampering or "chilling" protected speech. By voiding the disciplinary rule, the court protected the rights of other publishers to print the same type of information[59] and forced state bar associations to reconsider the total ban imposed by the rule.[60]

III. THE *BATES* CASE

In its consideration of *Bates*, the Supreme Court faced a conflict between a growing movement by consumers to obtain information regarding the cost and availability of legal services[61] and the traditional ban on lawyer advertising supported by the commercial speech doctrine. The appellants accurately asserted that "[t]he public need for such information is immense; tens of millions of Americans do not know how to find a lawyer and are afraid they cannot afford one."[62] Consumer ignorance concerning the availability of lawyers' services conflicted with the teaching of *Virginia State Board of Pharmacy* that consumers should be informed about matters vitally important to their daily lives.[63]

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59. However, the publisher's claim for constitutional protection "must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the amendment." Note, *supra* note 57, at 860.

60. A major impetus of the overbreadth doctrine is to require statutory focus on the precise harms which are the asserted justification for interfering with expressive activity. The degree of specificity makes all the difference —both in avoiding overbreadth in the first instance, and then in inducing enforcement agents and factfinders to focus carefully on variables which are relevant to the question of first amendment privilege as well as the question of statutory violation.

Id. at 921.

61. Both the appellants and the Court discussed the need for the consumer to receive the advertisement to a greater extent than the need for the lawyer to advertise. The Court in *Virginia State Bd. of Pharmacy* concluded that the consumers had standing to challenge the restrictions, since "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these Appellees." 425 U.S. at 757 (footnote omitted).

62. Brief for the Appellants, *supra* note 2, at 23. Several studies support the conclusion reached by the appellants. *E.g.*, Petition of the Board of Governors of the District of Columbia Bar of the District of Columbia (1976), *reprinted in* Brief of the United States as Amicus Curiae, *supra* note 36, app. B, at 24a (citing affidavit of James G. Frierson, Consumers Union of United States, Inc. v. American Bar Ass'n, 427 F. Supp. 506 (E.D. Va. 1975)). The study reported that middle class consumers overestimated lawyers' fees by 91% for the drawing of a simple will, by 340% for reading and advising on a two-page installment sales contract, and by 123% for a 30-minute consultation. *See also* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1976); Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092, 1093 (1971) (fear of cost one of the chief reasons that the public does not use the services of a lawyer).

63. 425 U.S. at 770.

The representatives of the bar association recognized the need to provide consumers with information about their legal rights.[64] They justified the ban on price advertising, however, on six grounds: 1) Price advertising adversely affected professionalism; 2) lawyer advertising was inherently misleading; 3) price advertising adversely affected the administration of justice; 4) expanded advertising caused undesirable economic effects; 5) price advertising had an adverse effect on the quality of service provided by a lawyer; and 6) existing enforcement procedures were inadequate to supervise anything less than a total ban upon advertising. The Court balanced these justifications against the interest of the consumer and refuted each one separately.

The appellee bar association first asserted that the historical concept of professionalism required a ban on advertising. The Court, however, found the connection between advertising and the erosion of true professionalism to be "severely strained."[65] Since the commercial nature of the relationship between the attorney and client is traditionally established when the fee is discussed during the initial interview, it would be inconsistent, in the Court's view, to ban the same information at an earlier time.[66]

The argument that all lawyer advertising was inherently misleading did not persuade the majority. The Court decided that the consumer was able to understand the nature and extent of the legal service required. The Court, however, limited price advertising to routine, standardized services. This limitation minimizes consumer misunderstanding of the nature of the services advertised. A consumer, in the Court's opinion, also has sufficient knowledge to evaluate advertising claims in relation to his particular problem. Even though the detail involved in performing the task may be unknown to the consumer, the Court stated that "he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself."[67] The concern that consumers

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64. "An important objective of a state's regulatory scheme should be to encourage the education of laymen to recognize their legal problems, to facilitate the intelligent selection of counsel, and to assist in making legal services fully available." Brief for the ABA as Amicus Curiae at 8, Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

65. 433 U.S. at 368.

66. *Id.* at 369.

67. The lack of any distinction between routine and unique services troubled Justice Powell. In dissent, he stated, "Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the

would fail to consider the lawyer's skill when selecting legal counsel was dismissed by the Court, since the alternative, prohibiting advertising and leaving the public ignorant, was of "dubious" value.[68] The Court concluded that price advertising would not adversely affect the administration of justice or the quality of legal services. Since advertising was viewed by the Court as "the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange,"[69] the lifting of the advertising ban reduced a significant restriction on access to legal services.[70] The opinion further stated that restraints on advertising were "an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising."[71]

The Court did not find that expanded advertising would cause undesirable economic effects. Even though the effect of price advertising on the cost of legal services was uncertain,[72] the Court decided that an increase in the cost of legal services was unlikely, particularly considering the appellants' goal of reducing costs in this instance.[73] Also, the Court did not consider the cost of advertising a barrier to lawyers entering the profession.[74] Rather than inhibiting the growth of an aspiring law practice, advertising, by informing potential clients of the existence of a new practice, could assist a lawyer in building a clientele.[75]

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routine and the unique." *Id.* at 392. *But cf.* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 714 (1977) (lawyers perform countless relatively standardized services which vary in complexity but each job not utterly unique). *See also* notes 21-23 *supra* and accompanying text.

68. The majority noted that, despite the problem that the consumer may not consider the skill of the practitioner,

> the alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than entrusted with correct but incomplete information.

433 U.S. at 374-75.

69. *Id.* at 376.

70. "The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and unknowledgeable." *Id.* at 377.

71. *Id.* at 378.

72. The Court, however, noted that "where consumers have the benefit of price advertising, retail prices are often dramatically lower than they would be without advertising." *Id.* at 377 (citing Benhan, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337 (1972)).

73. 433 U.S. at 377 & n.35.

74. "Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market." *Id.* at 378.

75. "Advertising will have its greatest impact in expanding the information

The enforcement problem raised by the appellees did not sway the Court. The Court believed that most lawyers would continue to conduct their legal activities in conformity with ethical and professional guidelines.[76] Despite the possibility of deceptive and misleading advertising, the existing ban, according to the Court, did not serve the best interests of the consumer.[77]

Since the Court was not persuaded that "any of the proffered justifications rises to the level of an acceptable reason for the suppression of all advertising by attorneys,"[78] the opinion next discussed whether, in the context of professional advertising, the overbreadth doctrine should be applied. The Court declined to apply the doctrine because this case was considered "a context where it is not necessary to further its intended objective."[79]

IV. THE LEGAL IMPACT OF *BATES*

As a result of *Bates*, standards of professional conduct for lawyers have been revised. A six member task force on lawyer advertising, commissioned by the ABA during the consideration of *Bates*, submitted two proposals to the Board of Governors at the August 1977 meeting.[80] The proposal that was adopted and recommended to the states retains a structure similar to that of the present disciplinary rules.[81] The new rule provides that lawyers

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available to small clients and in ending the monopoly currently enjoyed by their lawyers." Morgan, *supra* note 67, at 741.

76. The ABA explained the problem in this manner:

> The lawyer who advertises his willingness to perform a particular function for a specified amount must have a preconception of the package of services which he expects to perform. Rather than turn away a prospective client who is unaware that the offered package is inappropriate for his special needs and rather than perform the needed services, the lawyer may provide the standard package, even if it is not a direct fit.

Brief for the ABA as Amicus Curiae, *supra* note 64, at 17.

77. 433 U.S. at 375.

78. *Id.* at 379.

79. For a discussion of the overbreadth doctrine, see notes 55-58 *supra* and accompanying text. Commercial speech usually survives the chilling effect of overly broad regulations. The Court looked instead to whether "appellants' advertisement [was] outside the scope of basic First Amendment protection." 433 U.S. at 381.

80. Report to the Board of Governors of the Task Force on Lawyers Advertising, 46 U.S.L.W. 1 (Aug. 23, 1977).

81. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B) has been amended to read:

> In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast . . . the following information in print media distributed or over radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that

may advertise contingency fees, the range of fees charged for certain services, the hourly rate charged to a client, and charges for "specific legal services . . . the description of which would not be misunderstood or be deceptive. . . ."[82] Advertisements may be placed in newspapers and magazines.[83] Advertising by radio is permitted, but unless a state decides that television advertising is necessary to provide adequate information to consumers, television advertising is prohibited.[84]

If the advertisement quotes a fee, the revised rule requires a statement that the fee actually charged may depend upon the particular matter handled by the lawyer and that an estimate of the fee to be charged will be provided to the consumer without obligation.[85] Although this statement qualifying the quoted fee is not required by the Court, the language appears to be a reasonable attempt to prevent deception. If, however, the service performed by the lawyer is identical to the one defined in the advertisement, it would be improper for the lawyer to charge a fee in excess of the quoted fee.[86]

The 1977 amendment to the CODE OF PROFESSIONAL RESPONSIBILITY attempts to balance the right of the lawyer with the

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the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner. . . .

82. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101 (B)(25) (1977 amendments).

83. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B) (1977 amendments).

84. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B) (1977 amendments), Ethical Consideration 2-2. Television has been included in Tennessee due to a recent decision by the state supreme court. The court felt that television was mandatory due to the large number of illiterate and semi-illiterate people. *In re* Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (Tenn. 1978).

For an example of creative use of unconventional advertising media by an attorney, see *Lawyer Hur Rides Ad Chariot Built by U.S. Supreme Court*, Springfield Daily News, Aug. 2, 1978, at 6, col. 1. Among other techniques, Attorney Ken Hur has his daughter-in-law wear a neck brace as she rides around Madison, Wisconsin in a truck bearing the message "Sideswiped? Call Ken Hur."

85. For example, ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(B)(23) (1977 amendment) states:

> Range of fees for services [may be advertised]; provided that the statement discloses that the specified fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation an estimate of the fee within the range likely to be charged . . . .

86. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-101(E) states: "If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised."

protection of the uninformed consumer. It adequately protects the lawyer's right to present his advertising message to the consumer of legal services and the consumer's right to receive information about the cost and availability of legal services. Until the public becomes better informed about the nature of legal services, the cautionary language may be necessary to avoid misleading consumers.[87]

Following *Bates*, the type of message which may be presented in an advertisement will be determined by the consumer's need for reliable information to provide assistance in choosing legal representation. The "routine services" which may be advertised by price include the services listed in *Bates* and any other service which may be concretely defined within an advertisement. The overriding concern is the avoidance of deception.

To prevent consumer deception, certain types of advertising should be prohibited. Testimonial advertising, for instance, involves a wide variety of subjective factors as to whether an attorney has successfully served his client. A potentially biased opinion presented in this manner would have little, if any, value to the consumer. Similarly, statistical data concerning a lawyer's won-lost record or a quotation of a large tort recovery should be restricted.[88] Whether a case has actually been won or lost may be ambiguous, and a prior success may influence the consumer into a false belief that the lawyer will successfully litigate his case. This information would have little bearing upon the relative effectiveness of a lawyer.

The Court declined to consider the issue of whether statements relating to the quality of services offered by a lawyer may be advertised.[89] This area is likely to cause disagreement among members of the profession because of the difficulty in determining which statements are false, deceptive, or misleading, and therefore prohibited.

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87. The second proposal presented by the task force, "Proposal B," adopted a general anti-fraud standard instead of listing the specified items permitted to be advertised. Under "Proposal B" language, a lawyer would be prohibited from participating in the use of any form of communication containing a false, fraudulent, misleading, or deceptive statement. Each of these prohibited elements are specifically defined within the rules. This proposal may be adopted by the states if they desire. *See* 46 U.S.L.W. 10 (Aug. 23, 1977).

88. In response to a question by Justice Stevens concerning whether an attorney could advertise his won-lost record or that he won his last nine cases, lost only three, and achieved a $100,000 settlement, the appellant's counsel replied in the affirmative. 45 U.S.L.W. 3497 (Jan. 25, 1977).

89. 433 U.S. at 383-84.

Although the *Bates* decision avoids using the broader term of "professional advertising" throughout the opinion, advertising restrictions on other professionals, particularly the medical profession, will likely be rejected. The American Medical Association, in their amicus brief in favor of advertising restrictions, stated that "[t]he Court's interpretation of the relationship between the public's right to know and traditional restrictions on professional conduct will of necessity affect the ability of medical associations and state regulatory agencies to regulate certain conduct of physicians."[90]

A trend towards allowing the consumer to receive price information of medical services is indicated by the district court opinion in *Health Systems Agency of Northern Virginia v. Virginia State Board of Medicine*.[91] In that case, the agency sought information from physicians in the locality concerning their standard fees for particular services and billing practices. This information was available from the physician upon request by individual patients. The district court addressed the issue of whether the agency had a constitutional right to gather, receive, and publish this information from physicians for a local directory. The right of the agency to proceed with its directory was upheld.[92] The court noted that the alternative of having patients obtain this information individually was inadequate, and that the directory, by containing a statement that the quoted fee may vary depending upon certain factors, adequately protected the consumer from being misled.[93]

V. THE PRACTICAL EFFECTS ON *BATES*

Despite the far-reaching legal implications of *Bates*, change in the actual delivery of legal services has been minimal or nonexistent. In the years preceding *Bates*, advocates on both sides of the

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90. Brief of the American Medical Association as Amicus Curiae at 2, Bates v. State Bar of Ariz., 433 U.S. 350 (1977). The AMA further asserts that "[i]n view of the vulnerability of consumers and the potentially tragic consequences of deception in this area, it is not unreasonable for a state to conclude that the public interest is best served by a clear, enforceable test proscribing certain easily-identifiable classes of professional advertising." *Id.* at 4.

91. 424 F. Supp. 267 (E.D. Va. 1976).

92. The agency's proposal reasonably protects the public from being misled by the directory . . . . Since the advertising ban extends to the publication of truthful information, it may be justified only if the state has a valid interest in protecting the public from the danger that some people will unwittingly use the information to their detriment.

Id. at 274-75.

93. *Id.* at 276.

lawyer advertising issue debated the practical effects of lifting the ban. Those opposed to lifting the ban cited deceptive advertisements, potential dominance by large firms able to afford large quantities of advertising, and a bewildering variety of advertisements as factors favoring the ban. Proponents of lawyer advertising, on the other hand, pointed to such practical benefits as increased specialization, price competition, more informed consumers, and a proliferation of legal clinics to support lifting the ban.

None of these changes have materialized to any significant extent in the year following *Bates*. One reason for the absence of significant change within the profession is that many state bar associations are still in the process of amending their rules. Because of the lack of guidelines during the amending process, many potential advertisers are awaiting final action by their respective bar associations.

The rules, however, have been modified in enough states to permit a limited projection of the ultimate effects of lifting the advertising ban. The advertising of routine legal services will have little or no long-term effect on the profession. An examination of the practical limitations of advertising routine services demonstrates that this type of advertising is ill-suited to the traditional practice of law. For purposes of this examination, the large firm, the small practice, and the legal clinic provide three convenient subdivisions of the legal profession.[94]

Lawyer advertising affects large firms[95] least of all. In part, this is because the complex legal problems that are the mainstay of a large firm's business are nearly always unique. For that reason, it would be most unusual for billing to be on a transactional basis. While an hourly rate could be advertised, the uncertainty of the

94. These arbitrary subdivisions serve expediency more than they serve accuracy. The following comments do not attempt to pigeonhole the practice of law into three compartments. No doubt, some of the observations that follow are invalid in many specific instances. Nonetheless, this general overview allows at least limited discussion of the lawyer advertising problem on a practical level. For a cautionary note regarding the term "routine services," see Justice Powell's dissent, 433 U.S. at 389-96.

95. Although the terms "large" and "small" ostensibly refer to the size of a firm, it is the type of practice, rather than sheer size, that is the crucial factor in this context. "Large firm" includes practices that handle mostly corporate accounts on a retainer basis. In large cities, firms that typically handle corporate business may consist of 200 or more attorneys. In small to medium cities, corporate business may be handled by firms with 10 to 20 attorneys. Often, even the largest firm in a small to medium city may also perform routine services. Thus, the "large firm" generalities discussed in this comment apply to these firms to the extent that they handle corporate work.

amount of work to be done would render the advertisement all but useless for purposes of estimating the final charge. It seems unlikely, therefore, that advertising could provide meaningful price information to clients.

A second and more fundamental reason exists for large firms to forego ordinary advertising. While the typical corporate client may be influenced by an advertisement strategically placed in a business journal, that client is much more likely to base its choice of counsel on traditional considerations. The type of advertising now permitted by *Bates* may be unnecessary for the large firm that has traditionally employed an entirely legal form of "solicitation." This reference, of course, is to the exposure and good will generated by membership at social and athletic clubs, or on corporate boards of directors. Furthermore, the large number of attorneys who leave such firms "advertise" the firms and presumably refer business back to them. For these two reasons—the nature of its services and the efficacy of the traditional forms of solicitation—large firms are unlikely to take advantage of the new rules allowing advertising.[96]

At first glance, small practices would appear to be in a better position to take advantage of the new advertising rules. Unlike a large firm, a small practice often provides routine services such as divorce, adoption, wills, real estate closings, and incorporation of small businesses. These services, in their simplest form, are readily described in an ordinary advertisement. Standardized prices, or at least a meaningful minimum fee, can be determined for these services. In addition to the type of service offered, the type of client attracted by a small practice can be a factor in the decision to advertise. Small practices typically depend on either individual or small corporate clients for much of their business. These clients are more likely to be swayed by conventional advertising than the large institutional client.

Despite this greater potential for the use of advertising, small practices will be inhibited from advertising by peer pressure and uncertain client reaction. Within the legal profession, there is a subtle, yet strong, feeling that the advertising attorney has somehow broken ranks with her more conventional brothers and sisters of the bar. The fear of being perceived as a maverick by other attorneys and judges may prevent many otherwise undecided

96. Many large firms refrain from ordinary advertising for still a third reason: appearing to be in need of additional work does not comport with the "blue chip" image.

lawyers from advertising. In addition to peer pressure, unknown client reaction may dissuade many small practitioners from advertising. Some potential clients may react negatively toward lawyer advertising. The small practitioner must decide, then, whether the positive client reactions will outweigh the negative in terms of fee generation. Given the present attitudes which prevail among lawyers and the public, most small practices will choose not to advertise because it is simply too risky.

Unlike the large firm or small practice, the nature of legal clinics not only favors, but requires advertising.[97] Again, the type of service and type of client dictate the result. By definition, legal clinics concentrate on routine services for consumers.[98] Because these services are easily described to consumers, advertising minimum fees for routine services is effective for legal clinics. Moreover, legal clinics need high volume to realize the economies of scale upon which lower fees are predicated.[99] Thus, advertising is not only an effective means of solicitation for clinics; it is indispensable. For the clinical practitioner, peer pressure is not a significant consideration; anyone who opens a legal clinic has accepted the consequences of being perceived as a maverick by the rest of the profession.

Advertising routine services is realistically feasible only for the clinic. Because of the type of services offered and the type of clients served, as well as other pressures, the large firm and small practice will refrain from advertising routine legal services. With advertising thus restricted, and the growth of legal clinics currently confined to urban areas, many of the predicted benefits of lawyer advertising may not flow to the consumer as a result of *Bates*. To be sure, if a consumer lives in a city served by a clinic, and has a routine problem, he now has the advantage of learning the fee schedules of various lawyers.

This advantage, however, is currently of little consequence. The bold consumer could shop around before *Bates*. Mere knowledge of a fee schedule for routine services does not appreciably inform the consumer about the nature of legal services, nor does it significantly improve access to legal services. The routine nature of advertised services dictates that the consumer is already aware of

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97. *See* notes 2-6 *supra* and accompanying text.

98. *See* Meyers, *Legal Clinics: Their Theory And How They Work*, 52 L.A. B.J. 106 (1976).

99. *Id.*

their existence. Furthermore, the demand for these services, divorce for example, is relatively inelastic. The advertising of routine services does not inform the consumer as to when she might have a legal problem, how it could have been prevented, or what legal remedies are available. In the wake of *Bates*, consumers still need information about what kinds of legal services are available and how they can have access to those services.

Publishing the cost of an initial consultation would serve these educational and accessibility functions. By advertising the cost of an initial consultation, lawyers would encourage consumers to seek legal advice earlier. Often, consumers are unsure if they actually have a legal problem. Even if a legal difficulty is apparent, consumers often postpone seeking a lawyer's advice until their legal situation badly deteriorates. This critical delay results largely from anxiety over possible attorney's fees. "Fee fear" could be allayed by the initial consultation, where the individual's problem could be explored, and fees could be estimated. By helping consumers identify legal problems and seek help in solving them in their early stages, advertising the initial consultation fee would clearly improve the delivery of legal services.[100]

VI. CONCLUSION

The conclusions to be drawn from *Bates* apply to legal advertising in particular and advertising by professionals in general. It is evident that a total ban upon truthful advertising will not withstand

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100. Even though knowledge of initial consultation fees would greatly aid the consumer, this advertising is unnecessary for large firms. Sophisticated clients of large firms need no prodding to seek the advice of counsel. Consequently, the initial consultation is not critical for attracting clients to a large firm.

The small practice, on the other hand, has much to gain by advertising its initial consultation fee. The small practice often caters to small, but growing businesses with a variety of problems, moderate estates, clients with moderate real estate transactions, and people with family law problems. Potential clients in these categories often verge on recognizing a present or future legal problem. Sometimes they seek legal help, sometimes not. Persons teetering on a decision to seek help are natural targets for advertising. Information regarding the initial consultation will very likely push the consumer toward the attorney's office because such advertising will erase the two largest mental blocks currently keeping her away. First, she can find out if she actually has a legal problem for a relatively small fee. Second, if there is a need for legal services, the consumer can get at least a rough estimate of the fees that will be involved. This soothes the client's anxieties regarding legal fees in general. Thus, advertising initial consultation fees can benefit both the consumer and the small practice. The benefits to the small practice may well outweigh advertising's negative aspects. Specifically, the potential fee generation may make the risks and pressures worth enduring for the small practice.

a first amendment challenge. The recognition of the consumer's right to receive information in the form of a commercial advertisement will prevail against justifications asserted by proponents of a total ban.

The Court will not employ overbreadth analysis to reject a challenged restriction without first considering the particular speech in question. The Court will scrutinize each professional advertisement sought to be restricted and decide if it is deserving of constitutional protection. Commercial speech will be protected provided that it is not false, deceptive, or misleading.

The consumer has become the focal point in cases involving professional advertising and advertising in general. The consumer's right to receive commercial information is considered to be as great as, if not greater than, the right of a professional to advertise. Professional associations have an obligation to educate the consumer and increase their understanding of the nature of the advertised service in order to prevent the consumer from being unintentionally misled.

Within the legal profession, the ability to present information about the cost and availability of legal services will foster the growth of alternative forms of practice. In addition to the legal clinic, other forms of law practice, such as the prepaid legal plans promoted by bar associations, will also be able to inform the public about the existence and availability of the program in the local newspaper. An informed public will presumably indicate its desire for innovative forms of legal practice by positively responding to advertisements.

While *Bates* expanded lawyers' first amendment rights by lifting the total ban on advertising, the limited experience since the decision indicates that obstacles in addition to disciplinary rules are stifling lawyer advertising. The complex and unique nature of most legal services, combined with deeply rooted traditional attitudes within the profession, remain as barriers to large scale lawyer advertising.

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