
INTRODUCTION

In Bates v. State Bar of Arizona1 the United States Supreme Court held that state regulations, which proscribed newspaper advertisement of the availability and terms of routine legal services, violated the first amendment.2 The Court also held that the restraint on lawyer advertising, imposed by the Supreme Court of Arizona, was not subject to challenge under the Sherman Act.3 The principle reason for extending first amendment protection to commercial advertisement by lawyers was the "individual and societal interests in assuring informed and reliable decision making."4 These interests were found to outweigh the specific justifications advanced in support of the ban on all lawyer advertising.5 Although total suppression of advertising by attorneys was prohibited, the Court expressly stated that some regulations on lawyer advertising were constitutionally permissible.6

This controversial decision7 was not unexpected in light of the Court's recent holding in Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.,8 which invalidated a statute that totally barred the advertisement of prescription drug prices by pharmacists.9 Although Virginia Pharmacy eliminated the misconception that pure commercial expression was unprotected by the first amendment,10 the decision specifically reserved judgment on the issue of advertising by other profes-

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2. Id. at 2709.
3. Id. at 2698.
4. Id. at 2699 (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-65 (1976)).
5. 97 S. Ct. at 2701-08. See text at notes 98-112 infra.
6. 97 S. Ct. at 2708-09. See text at note 121 infra.
9. Id. at 770-73. See text at notes 70-79 infra.
10. 425 U.S. at 762. See text at note 72 infra.
sions. The Bates Court partially resolved this issue by deciding that all advertising by attorneys may not be suppressed. However, in limiting the scope of its holding to the specific advertisement in issue, Bates inevitably raises a number of questions which remain unresolved.

THE FACTUAL SETTING

As licensed members of the Arizona State Bar Association, John R. Bates and Van O'Steen opened a law office, which they called a "legal clinic," in Phoenix. Their purpose was to provide legal services at modest rates for persons of moderate income. To achieve this end, the operation of their legal clinic stressed volume rather than high fees and returns. Accordingly, the clinic accepted only "routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name." The nature of these services permitted extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. The legal clinic therefore minimized its costs and was able to charge relatively modest fees.

After two years of operation, Bates and O'Steen concluded that the survival of their legal clinic depended upon generating more business by advertising the availability of legal services at moderate rates. Consequently, the appellants placed an advertisement in a local newspaper which offered, "legal services at very reasonable fees," and which listed their rates for certain services.

11. 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 the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising. 425 U.S. at 773 n.25.
12. 97 S. Ct. at 2708.
13. See text at notes 175-211 infra.
14. 97 S. Ct. at 2693-94.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id. The appellant's advertisement listed the following services and fees:
   - Divorce or legal separation—uncontested (both spouses sign papers) $175 plus $20 court filing fee.
   - Preparation of all court papers and instructions on how to do your own simple uncontested divorce $100.
SUBSEQUENTLY, A COMPLAINT WAS LODGED WITH A BAR DISCIPLINARY COMMITTEE BY THE PRESIDENT OF THE ARIZONA STATE BAR ASSOCIATION. AT A SPECIAL DISCIPLINARY COMMITTEE HEARING, THE APPELLANTS CONCEDED THAT THEIR ADVERTISEMENT CONSTITUTED A CLEAR VIOLATION OF DISCIPLINARY RULE 2-101(B), WHICH GENERALLY PROHIBITED LAWYER ADVERTISING. AFTER REFUSING TO CONSIDER BATES AND O'STEN'S ATTACK ON THE VALIDITY OF THE DISCIPLINARY RULE, THE COMMITTEE RECOMMENDED THAT EACH APPELLANT BE SUSPENDED FROM PRACTICE FOR NOT LESS THAN SIX MONTHS. ON APPEAL TO THE SUPREME COURT OF ARIZONA, THE APPELLANTS ARGUED, INTER ALIA, THAT THE DISCIPLINARY RULE: (1) VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT BY TENDING TO LIMIT COMPETITION; AND (2) INFRINGED ON THEIR RIGHTS OF FREE SPEECH UNDER THE FIRST AMENDMENT. ALTHOUGH THE ARIZONA COURT REJECTED THESE ARGUMENTS, IT REDUCED THE SANCTION TO CENSURE. ON APPEAL, THE UNITED STATES SUPREME COURT REVERSED THE ARIZONA COURT ON THE FIRST AMENDMENT ISSUE BY FINDING THAT THE ADVERTISEMENT IN QUESTION WAS PROTECTED COMMERCIAL SPEECH. IT DID, HOWEVER, AFFIRM THE STATE COURT'S FINDING THAT THE DISCIPLINARY RULE WAS NOT SUBJECT TO CHALLENGE UNDER THE SHERMAN ACT. SINCE THE FIVE TO FOUR DECISION IN BATES WAS BASED ON A FINDING THAT COMMERCIAL ADVERTISING BY ATTORNEYS WAS SANCTIONED BY THE FIRST AMENDMENT, IT IS APPROPRIATE TO BRIEFLY EXAMINE THE RECENT EXTENSION OF CONSTITUTIONAL PROTECTION TO COMMERCIAL EXPRESSION.

- Adoption—uncontested severance proceeding $225 plus approximately $10 publication cost.
- Bankruptcy—non-business, no contested proceedings. Individual—$250 plus $55 court filing fee. Wife and husband—$300 plus $110 court filing fee.
- Change of Name—$95 plus $20 court filing fee.

The advertisement also stated that information regarding other types of cases would be furnished on request. *Id.* app. at 2710.

20. 97 S. Ct. at 2695.
21. Ariz. Rev. Stat. Sup. Ct. R. 29(a), DR 2-101(B) (Supp. 1977) provided: A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.
22. 97 S. Ct. at 2695.
24. *Id.* at —, 555 P.2d at 643. The appellants also challenged the disciplinary rule on due process, equal protection, and void-for-vagueness grounds. *Id.* at —, 555 P.2d at 645-46.
25. *Id.* at —, 555 P.2d at 646.
26. 97 S. Ct. at 2708.
27. *Id.* at 2698.
THE FIRST AMENDMENT AND COMMERCIAL SPEECH

The first amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Although the language of the amendment appears unequivocal, its judicial history has proven that the freedom of speech is not absolutely immune from legislative circumscription. Traditionally, the analysis of statutory encroachments on first amendment interests requires a threshold determination of whether the proscription in question is a restriction on the content of speech, or a regulation of the time, place, and manner of its dissemination. As a general rule the Supreme Court has only permitted restrictions based on the content of speech in such forms of expression as obscenity, defamation, fighting words or speech which presents a clear and present danger of incitement to imminent unlawful action. In contrast, the Court has consistently approved narrowly drawn time, place, and manner regulations "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."
However, this dichotomous mode of analysis assumes that content restrictions are readily distinguishable from time, place, and manner regulations. The infirmity of this assumption is manifested by the enigmatic emergence and subsequent demise of the so-called "commercial speech doctrine."\(^{37}\) The initial failure of the Court to distinguish time, place, and manner regulation of commercial expression from content restriction, established the misconceived notion that all commercial speech was unprotected by the first amendment.\(^{38}\) However, later decisions of the Court eliminated this misconception by holding that the public interest in the content of even a purely commercial advertisement warranted the extension of constitutional protection.\(^{39}\)

The commercial speech doctrine originated in *Valentine v. Chrestensen*,\(^{40}\) where the Court sustained a city ordinance which had been interpreted to ban the handbill distribution of an advertisement that solicited customers for a submarine exhibition. In an attempt to circumvent the ordinance, Chrestensen printed a social protest on the reverse side of his advertising handbill and claimed first amendment protection.\(^{41}\) After finding that the social protest was attached for the sole purpose of evading the proscription of handbill advertisements, a unanimous Court enunciated the commercial speech doctrine:

This Court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the *Constitution imposes no such restraint on government as respects purely commercial advertising*.\(^{42}\)

This sweeping proposition, announced without citing any authority, precipitated the notion that all speech in the form of a

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\(^{37}\) See text at note 40 infra.

\(^{38}\) Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); Breard v. Alexandria, 341 U.S. 622, 645 (1951). In Bigelow v. Virginia, 421 U.S. 809 (1975), the Court determined that the public interest in the content of the commercial advertisement warranted the protection of the first amendment notwithstanding its commercial form. Moreover, the Court clarified that Valentine v. Chrestensen concerned a regulation of the manner in which commercial advertising could be distributed, and thus distinctly limited that holding. 421 U.S. at 821-22 (emphasis added).

\(^{39}\) 425 U.S. at 762.

\(^{40}\) 316 U.S. 52 (1942).

\(^{41}\) Id. at 53.

\(^{42}\) Id. at 54 (emphasis added).
commercial advertisement was exempted from the protection of the first amendment.43

Additional support for the commercial speech doctrine of Valentine appeared in Breard v. Alexandria,44 where the Court sustained an ordinance which prohibited uninvited door-to-door solicitation of magazine subscriptions.45 Breard argued that the ordinance unduly restricted his constitutional rights of freedom of speech and of the press. In response to this argument it was held that the mere sale of the magazines did not, per se, eliminate all first amendment protection.46 However, the Court found that the selling aspect brought "a commercial feature" into the transaction.47 This commercial feature, in addition to the homeowner's right of privacy, displaced any first amendment interest in the free distribution of periodicals.48 Although Breard did not expressly reaffirm the commercial speech doctrine, it apparently penalized otherwise protected speech if it was disseminated for commercial purposes.49

However in New York Times Co. v. Sullivan,50 the Court narrowed its approach to the commercial speech exception by scrutinizing the content of the advertisement to determine whether it was protected by the first amendment. In that case the New York Times published a paid editorial advertisement that communicated ideological information, expressed opinion, protested claimed abuses, and solicited financial support on behalf of the black civil rights movement.51 Sullivan brought a libel action against the newspaper for publishing the advertisement which allegedly contained false statements concerning his activities as a public official. In response to the publisher's assertion that the advertisement was constitutionally protected, Sullivan argued that first amendment sanctions were inapplicable when the allegedly libelous statements were published as part of a paid commercial advertisement.52 The Court rejected

43. Id. at 54. In Cammarano v. United States, 358 U.S. 498 (1959), it was observed that this statement in Valentine was "casual, almost off hand. And it has not survived reflection." Id. at 514 (Douglas, J. concurring).
44. 341 U.S. 622 (1951).
45. Id. at 641-45.
46. Id. at 641-42.
47. Id.
48. Id. at 642.
51. Id. at 266.
52. Id. at 265.
Sullivan’s argument, based on Valentine, because the ideological content of the advertisement was “of the highest public interest and concern,” which was constitutionally protected speech notwithstanding its commercial form. The Sullivan case therefore limited the holding of Valentine to advertisements of a purely commercial nature. However, the commercial speech doctrine remained intact as the publication in Sullivan was “otherwise protected” and thus not “purely commercial advertising.”

The first hint of retreat from the commercial speech doctrine came in Pittsburgh Press v. Pittsburgh Commission on Human Relations. There a divided Court sustained an ordinance that had been construed to forbid newspapers from publishing help-wanted advertisements in sex-designated column headings. The newspaper claimed that the ordinance interfered with freedom of the press. However, the Court perceived no constitutional violation. Unlike the advertisement in Sullivan, the majority opinion found that the content of the help-wanted ad communicated no ideological information, and therefore resembled the Valentine advertisement. After characterizing the advertisement in issue as “no more than a proposal of possible employment,” the Court concluded that the ads were “classic examples of commercial speech.”

Although the Court in Pittsburgh Press sanctioned the proscription of a pure commercial advertisement, the ordinance was not sustained entirely on commercial speech grounds. The Court emphasized that the challenged ordinance prohibited arbitrary sex-discrimination in employment, which “is not only commercial activity, [but] . . . illegal commercial activity. . . .” In upholding the ordinance, however, Mr. Justice Powell intimated that a balancing of interests approach might be more appropriate than the rigid commercial speech doctrine:

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53. In rejecting the argument that the commercial form of the publication exempted it from the protection of the first amendment, the Court scrutinized substance rather than form, and found the advertisement contained constitutionally protected speech. “It [the publication] here 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.” Id. at 266.
54. Id.
57. Id. at 381-85.
58. Id. at 385.
59. Id. at 388.
“Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.”

Two years later, the Court implemented the balancing approach suggested in *Pittsburgh Press*, and made a significant withdrawal from the commercial speech doctrine in *Bigelow v. Virginia*. The case involved a first amendment challenge to a statute which made it illegal to aid in the procurement of an abortion. Bigelow was convicted of publishing, in his newspaper, the advertisement of a New York abortion referral service. In reply to the state’s argument that the conviction could be sustained under the commercial speech doctrine, the Court admonished that prior cases had clearly established that speech is not stripped of first amendment protection merely because it appeared in commercial advertisement form. Moreover, it was ruled that regardless of the label given to the speech in question, “a court may not escape the task of assessing the first amendment interest at stake and weighing it against the public interest allegedly served by the regulation.” By applying this test, the Court held that the abortion advertisement conveyed information of potential public interest and value, which outweighed any government interest in regulation. In addition, the *Bigelow* Court perspicaciously observed that the holding in *Valentine* was “distinctly limited,” since the ordinance there sustained was a reasonable regulation of the manner in which commercial advertising could be distributed.

Although *Bigelow* firmly established that a balancing of interests approach was to be applied to restrictions on commercial advertising, the decision did not overrule the notion of unprotected commercial speech. The abortion advertisement

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60. *Id.* at 389.
62. *Id.* at 811. At the time the advertisement was published, abortions were illegal in Virginia. The advertisement contained information on how a woman could obtain an abortion in New York where abortions had been legalized.
64. 421 U.S. at 826.
65. *Id.* at 822, 826-29.
66. *Id.* at 819-20 (emphasis added).
67. *Id.* at 826. *See Virginia Pharmacy* wherein it was said: “[S]ome fragment of hope for the continuing validity of a ‘commercial speech’ exception
was not "purely commercial speech" since it contained factual information of clear public interest and related to a constitutionally protected activity. Moreover, the advertisement which was held unprotected in *Pittsburgh Press* had been viewed as purely commercial speech. Consequently, it was conceivable that some fragment of hope for the continued validity of the commercial speech exception remained because of the content of the advertisement in *Bigelow*.

However, one year later, the issue of whether purely commercial speech was excepted from first amendment protections was squarely before the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* In that case, prescription drug consumers attacked the constitutionality of a statute which provided that pharmacists were guilty of unprofessional conduct for any advertisement of prescription drug prices. In a seven to one decision, the Court invalidated the Virginia statute, and stated that an advertisement which "does no more than propose a commercial transaction" is not wholly outside the protections of the first amendment. Then the Court applied a balancing test, as it had in *Bigelow*, and weighed the value of the prohibited information against the state interest in regulation. The *Virginia Pharmacy Court* found that the general interest of society in the free flow of commercial information outweighed the state interest of maintaining the professionalism of pharmacists through the suppression of prescription drug price information. Accordingly, arguably might have persisted because of the subject matter of the advertisement in *Bigelow*.

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68. 421 U.S. at 822. The *Bigelow* Court referred to the fact that information concerning abortions had constitutional ramifications in light of Roe v. Wade, 410 U.S. 113 (1973), where it was held that the right to privacy was broad enough to encompass a woman's decision of whether or not to terminate her pregnancy. *Id.* at 153.

69. *See* note 67 *supra*.

70. 425 U.S. 748 (1976).

71. *Id.* at 749-50.

Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in anyway whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription. *Va. Code Ann.* § 54-524.35 (1974).

72. 425 U.S. at 762.

73. *Id.* at 763-73.
the Court held that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." 74

Although Virginia Pharmacy effectively abandoned the commercial speech doctrine, the decision indicated that some forms of commercial speech regulation were constitutionally permissible. For instance, regulations on the time, place, and manner of advertising were considered permissible, 75 as were restrictions on advertising that is false, 76 deceptive, 77 or illegal per se. 78 In concluding its discussion, the Court recognized the obvious implication on the traditional ban against lawyer advertising, and thereby expressly reserved that issue for later determination. 79

That determination emerged in Bates v. State Bar of Arizona, 80 where a divided Court held that the total proscription of lawyer advertisements violated the first amendment.

ANALYSIS BY THE COURT

In Bates, the majority opinion addressed three levels of inquiry in reaching its decision. First, the Court considered whether the Arizona Bar's proscription of lawyer advertising violated the Sherman Act. 81 Secondly, it addressed the issue of whether the disciplinary rule suppressed constitutionally protected speech. 82 And finally, after extending first amendment protection to attorney advertisements, the Court discussed the scope of permissible regulation of lawyer advertising. 83

Initially, the Court rejected the allegation that the ban on lawyer advertising violated the Sherman Act. Bates and O'Steen had argued that the restraint on lawyer advertising, imposed by the Arizona Supreme Court, violated the Sherman

74. Id. at 773.
75. Id. at 771.
77. In relation to whether a state may constitutionally proscribe deceptive advertisements, the Court said: "We foresee no obstacle to a State's dealing effectively with this problem." 425 U.S. at 771.
79. 425 U.S. at 771 n.25. See note 11 supra.
81. Id. at 2696-98.
82. Id. at 2698-2708.
83. Id. at 2708-09.
Act by tending to limit competition among lawyers. In response, the Arizona Bar contended that the disciplinary rule was immune from Sherman Act challenge under the state action exemption doctrine of Parker v. Brown. In Parker the Court held that the Sherman Act was not intended to apply against certain state action. Subsequent to Parker, however, it was held in Goldfarb v. Virginia State Bar that bar association minimum fee schedules were illegal price fixing in violation of the Sherman Act. The Goldfarb Court refused to invoke the state action exemption by stating that 

[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. . . . Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.

More recently, Cantor v. Detroit Edison Co. suggested the present Court might be reluctant to shield anticompetitive activity from antitrust laws under the state action exemption. Notwithstanding Goldfarb and Cantor, the Bates majority held that the proscription of lawyer advertising imposed by the Arizona Supreme Court was exempted state action. The Court reasoned that, in contrast to the restraint in Goldfarb, the ban on lawyer advertising was an affirmative command, "'compelled by direction of the State acting as a sovereign.'" Further-

84. Id. at 2695.
85. Id.
86. 317 U.S. 341 (1943). In Parker, a raisin producer-packer brought suit against California officials challenging a state program designed to restrict competition among growers, and thereby maintain prices in the raisin market. The Court held that the state, "as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." Id. at 352.
87. Id.
89. Id. at 790 (emphasis added).
91. In Cantor a state-regulated electric utility used its monopoly power in the distribution of electricity to restrain competition in the sale of lightbulbs. The utility company distributed lightbulbs to residential customers without charge, but included the costs of the lightbulbs in its state-regulated and approved utility rates. The Court held that the state action exemption doctrine would not shield this anticompetitive activity from Sherman Act challenge. Id. at 581. See note 94 infra.
92. 97 S. Ct. at 2691, 2698.
93. Id. at 2697. See text at note 89 supra.
more, the Court found Cantor distinguishable by its facts. Consequently, the Court unanimously affirmed the Arizona court holding that the ban on lawyer advertising was state action exempted from the Sherman Act under the doctrine of Parker v. Brown.

Next, the majority opinion weighed the constitutional challenge to the Arizona ban on lawyer advertisements. The Court began with a detailed summary of Virginia Pharmacy and noted that the conclusion that the Arizona disciplinary rule violated the first amendment could be said to flow a fortiori from that decision. Then the Court narrowly defined the first amendment issue in Bates as "whether lawyers . . . may constitutionally advertise the prices at which certain routine services will be performed." Subsequently, the Court considered each of the six justifications offered by the Arizona State Bar in favor of the total restriction of price advertising by attorneys.

In rejecting the initial contention that lawyer advertising would have an adverse effect on professionalism, the Court said, "We find the postulated connection between advertising and the erosion of true professionalism to be severely strained." The Court reasoned that lawyer advertising would not necessarily diminish professionalism because the commercial nature of the legal profession was readily apparent. In support of this rationale, the Court noted that the Code of Professional Responsibility recommended that the lawyer's fee be discussed at the first attorney-client meeting, and then stated that

94. 97 S. Ct. at 2697. The Bates Court distinguished Cantor on three grounds. First, the claim in Cantor was against a private party (utility company), rather than a state agency as in Bates. Id. at 2697. Second, in Cantor, the state had no independent regulatory interest in the market for lightbulbs, whereas state regulation of bar activities is "at the core of the State's power to protect the public." Id. at 2697-98. Finally, in Cantor, the lightbulb program was instigated by the utility with the mere acquiescence of the state regulatory commission. In contrast, the disciplinary rule in Bates was a clear and affirmative articulation of state policy. Id.

95. Id. at 2698.

96. Id. at 2698-2700. See text at note 70 supra.

97. Id. at 2701. Before defining the narrow issue in Bates, the Court expressly stated that in resolving the constitutional challenge to the Arizona disciplinary rule, it need not address two collateral issues. First, the Court declared that the problems associated with advertising claims relating to the quality of legal services would not be considered. And second, the Court said it would not explore the issue of in-person solicitation. Id. at 2700.

98. Id. at 2701.

99. Id. CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-19 (1976) provides in part: "As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made."
"[i]f the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at the office." Additional- 

The second justification offered by the Arizona Bar in support of the restriction was that the advertisement of legal services was inherently misleading. It was argued that the lack of standardization in legal services, and the inability of the consumer to diagnose the required service, made attorney advertisements inevitably misleading. In reply, the Court found this argument inadequate to justify the suppression of all lawyer advertising and declared that "[t]he 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. . . ."

The third argument advanced by the State Bar was that advertising would stimulate additional litigation, or promote barratry. Rejecting this contention, the Court stated that "[a]lthough advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." Furthermore, the Court indicated that the disciplinary rule fostered the repression of information regarding legal rights, and therefore burdened the constitutional right of access to the courts.

Next, the Court rejected the fourth assertion that advertising would ultimately increase legal fees, and create entry barriers that would prevent new attorneys from penetrating the market. To the contrary, the Court concluded, by analogy to product price advertisements, that advertising might reduce the cost of legal services by stimulating price competition. With

100. 97 S. Ct. at 2701.
101. Id. at 2702-03. The Court stated: "But habit and tradition are not in themselves an adequate answer to a constitutional challenge." Id. at 2703.
102. Id.
103. Id.
104. Id. at 2704-05. Common barratry is the practice of inciting groundless judicial proceedings. Lucas v. Pico, 55 Cal. 126 (1880).
105. 97 S. Ct. at 2705.
106. Id. at 2705 n. 32.
107. Id. at 2705.
108. The Court reasoned that in the context of consumer product advertising, "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising." Id. at 2706.
regard to entry barriers, the majority observed that advertising
could “aid the new competitor in penetrating the market.”

The fifth argument, that pressure to maintain the advertis-
ing price might encourage “shoddy work,” was summarily re-
jected with the rejoinder that “[a]n attorney who is inclined to
cut quality will do so regardless of the rule on advertising.”

Finally, the Arizona Bar sought to justify the ban by arguing
that anything less than a total proscription of lawyer advert-
sing would result in unduly burdensome enforcement prob-
lems. In disposing of this argument the Court observed that
“for every attorney who overreaches through advertising,
there will be thousands of others who will be candid . . . and
straightforward . . . to assist in weeding out those few who
abuse their trust.”

After concluding that none of the justifications proffered by
the Arizona State Bar were sufficient to warrant the suppres-
sion of all lawyer advertising, the majority opinion considered
whether the specific advertisement in issue was protected by
the first amendment.

At the threshold, the Court was confronted with Bates and
O’Steen’s contention that their advertisement was protected be-
cause the challenged disciplinary rule was unconstitutionally
overbroad. This argument was based on prior decisions in
which the Court had invalidated statutes which restrained
ideological speech on the ground that the proscription might be
applied unconstitutionally in circumstances other than those
before the Court. The rationale for the “overbreadth doc-
trine” was that an overbroad statute might chill protected
speech. Consequently, the party who challenged the statute was
not required to prove that his own rights of free expression
were, in fact, violated. The Bates Court, however, refused to

109. The Court’s rationale was that, rather than diminishing entry barriers,
the ban on lawyer advertising in fact served to perpetuate the market position of
established attorneys. Id.
110. Id.
111. Id.
112. Id. at 2707.
113. Id. Through the doctrine of “overbreadth,” litigants “are permitted to
challenge a statute not because their own rights of free expression are violated,
but because of a judicial prediction or assumption that the statute’s very exist-
ence may cause others not before the court to refrain from constitutionally
protected speech or expression.” Broadrick v. Oklahoma, 413 U.S. 601, 612
(1973).
114. See, e.g., Broadrick v. Oklahoma, 413 U.S. 601 (1973); United States v.
Raines, 362 U.S. 17 (1960); Ashwander v. TVA, 297 U.S. 288 (1936) (Brandeis, J.,
concurring).
115. 97 S. Ct. at 2707.
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apply the overbreadth doctrine to the commercial speech at issue. Instead, the majority opinion reasoned that commercial advertising is not particularly susceptible to the “chilling effect” of an overbroad statute.\textsuperscript{116} Elaborating, the Court suggested that since the advertiser of a product or service could determine whether or not the advertisement was truthful and protected, it was unlikely that an overbroad regulation would deter protected speech.\textsuperscript{117}

After declining the opportunity to extend overbreadth analysis to commercial advertisements of professional services, the Court necessarily focused on whether the particular advertisement in issue was protected commercial speech. The Arizona State Bar argued that the Bates and O’Steen advertisement was unprotected since the terms “legal clinic” and “very reasonable rates” were misleading.\textsuperscript{118} The Court, however, was unpersuaded that those terms, as used in the Bates advertisement, were misleading, and thus unprotected.\textsuperscript{119} Therefore it was held that the advertisement in issue could not be suppressed.\textsuperscript{120}

\textsuperscript{116} \textit{Id.} (citing 425 U.S. at 771-72 n. 24). The Virginia Pharmacy Court explained that since advertising is the \textit{sine qua non} of commercial profits there is little likelihood of its being “chilled” by improper regulation and foregone entirely. Furthermore, overbreadth analysis is designed to remove any chill on protected speech that results from uncertainty in differentiating whether a given communication is protected. But, in the commercial context, the advertiser provides information about a product or service with which he is intimately familiar. Thus he can determine more readily than others whether his speech is truthful and protected. \textit{Id.}

\textsuperscript{117} 97 S. Ct. at 2707-08. The Court alluded to the “commonsense differences” between commercial speech and other varieties. \textit{Id.} In Virginia Pharmacy the Court outlined these differences by noting that commercial speech has greater objectivity and hardiness than other varieties of speech and thus may warrant a different degree of protection. \textit{See} 425 U.S. at 771-72 n. 24. \textit{See note 116 supra.}

\textsuperscript{118} 97 S. Ct. at 2708. Bates and O’Steen’s advertisement began with the caption: “DO YOU NEED A LAWYER? LEGAL SERVICES AT VERY REASONABLE FEES.” \textit{Id.} app. at 2710.

\textsuperscript{119} \textit{Id.} at 2708. The Court said:

We suspect that the public would readily understand the term “legal clinic”—if, indeed, it focused on the term at all—to refer to an operation like that of appellants that is geared to provide standardized and multiple services.

As to the cost of an uncontested divorce, appellee stated at oral argument that this runs from $150 to $300 in the area. Appellants advertised a fee of $175 plus a $20 court filing fee, a rate that seems “very reasonable” in light of the customary charge. \textit{Id.}

\textsuperscript{120} \textit{Id.} The Bates Court was also unpersuaded with the argument that the failure of the Bates and O’Steen advertisement to disclose that a name change could be accomplished without the aid of a lawyer was misleading. The Court responded that “most legal services may be performed legally by the citizen for himself.” \textit{Id.}
The majority opinion closed by emphasizing that some restrictions on lawyer advertising were constitutionally permissible. Advertisements that are false, deceptive, or misleading could be proscribed. In addition, it was held that time, place, and manner regulations were permissible, as well as restrictions on advertising that is illegal per se. And finally, the Court observed that the unique problems of advertising on the electronic broadcast media warranted special consideration.

**The Dissenting Opinions**

The four dissenting Justices all focused on the first amendment issue. Mr. Justice Powell's dissent initially observed that due to the Court's decision "[t]he supervisory power of the courts over members of the bar . . . [has] been weakened." He then argued, with Mr. Justice Stewart joining in the dissent, that the majority's reliance on *Virginia Pharmacy* was misplaced, as that decision carefully distinguished price advertising of standardized products from price advertising of professional services. Mr. Justice Powell contended that the *Bates* majority failed to give appropriate weight to the two fundamental ways in which the advertisement of professional services differs from that of standardized products: "the vastly increased potential for deception, and the enhanced difficulty of effective regulation in the public interest."

121. *Id.* at 2708-09.
122. *Id.* (citing 425 U.S. at 771-72 n. 24.) Because the truth of commercial advertisements was more easily verified and less susceptible to "chill," the Court indicated that little leeway would be afforded untruthful or misleading commercial speech than other expression. 97 S. Ct. at 2709. In addition, the Court intimated that advertising the quality of legal services might be inherently misleading and subject to regulation. *Id.* The Court also stated that "limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." *Id.*
123. *Id.* (citing 425 U.S. 748 (1976)).
125. 97 S. Ct. at 2709.
126. In *Bates*, Mr. Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Rehnquist dissented on the first amendment issue. However, all nine Justices concurred in finding the alleged Sherman Act violation barred by the state action exemption. *See* text at note 84 supra.
127. 97 S. Ct. at 2712.
128. Mr. Justice Powell stressed that *Virginia Pharmacy* could be distinguished because there the Court specifically noted that the advertisement in question concerned the price of a "standardized product." Moreover, the *Virginia Pharmacy* Court specifically reserved judgment on the constitutionality of state regulations with respect to the advertisement of professional services. *Id.* *See* 425 U.S. at 773 n. 25. *See* note 11 supra.
129. 97 S. Ct. at 2713.
In support of his first contention, Mr. Justice Powell maintained that advertising legal services would inevitably be misleading because legal services are individualized with respect to content and quality.\textsuperscript{130} In addition, he argued that the lay consumer is a poor diagnostician of the nature and scope of the services needed.\textsuperscript{131} Rejecting the majority's determination that advertising only "routine services" would not be inherently misleading, Mr. Justice Powell stated:

Even the briefest reflection . . . should caution against facile assumptions that legal services can be classified into the routine and unique. In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine.\textsuperscript{132}

Furthermore, he argued that the average lay person had no feeling for what services are contained in, for example, a package divorce, and therefore had no capacity to judge the nature of the advertised product.\textsuperscript{133} Consequently, he maintained that the advertisement of professional services would inescapably mislead many consumers.\textsuperscript{134}

Mr. Justice Powell's second ground of differentiation between the advertisement of professional services and standardized products concerned disciplinary enforcement. The dissent er attacked the majority's "almost casual assumption" that its authorization of price advertising of legal services could be effectively policed.\textsuperscript{135} Nothing that the Court acknowledged the difficulty in distinguishing between deceptive and nondeceptive advertisements, Mr. Justice Powell countered that the majority opinion "reflects a striking underappreciation of the nature and magnitude of the disciplinary problem."\textsuperscript{136} The regulation of professional service advertisements would require adequate protection of the public from deception, and ethical lawyers from unfair competition, which the dissenter argued, would be "a wholly intractable problem."\textsuperscript{137}

\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Mr. Justice Powell expanded beyond the uncontested divorce example by stating: "[S]imilar complications surround the uncontested adoption and the simple bankruptcy." \textit{Id.} at 2714 n. 6.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 2715.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 2716.
In the next section of his dissent, Mr. Justice Powell recognized the need for expanding the availability of legal services and observed that the bar had made considerable progress in the delivery of legal services in recent years.138 As an alternative to the Court's decision, he argued that the advertisement of the initial consultation fee, or specific hourly rate, would provide an adequate means of informing the public, while decreasing the possibility that the client would be mislead.139

In closing his attack in the Bates majority, Mr. Justice Powell remarked that hard and fast constitutional rules encouraging competitive price advertising of specific legal services would substantially inhibit experimentation and limit the control heretofore exercised over lawyers.140 In conclusion, he stated that “[s]ome members of the public might benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services 'almost infinite [in] variety and nature. . . .'”141

Mr. Chief Justice Burger filed a separate dissent in which he stressed that Virginia Pharmacy was not controlling since the product-service distinction made that decision distinguishable. He recapitulated that the majority's failure to define "routine services," or to adequately consider enforcement difficulties will "create problems of unmanageable proportions."142 In echoing Mr. Justice Powell's comment that the bar has made considerable progress in providing the public with information concerning attorneys and fees,143 the Chief Justice concluded that "[r]ather than allowing these efforts to bear fruit, the Court...

138. Mr. Justice Powell observed:
At both the national and state level, the Bar has addressed the need for expanding the availability of legal services in a variety of ways, including: (i) group legal service plans, increasingly used by unions, cooperatives and trade associations; (ii) lawyer referral plans operated by local and state bars; (iii) bar sponsored legal clinics; (iv) public service law firms; and (v) group insurance or prepaid service plans. Notable progress has been made over the past two decades in providing counsel for indigents charged with crime. Not insignificant progress has also been made through bar sponsored legal aid and, more recently, the Federal Legal Services Corporation in providing counsel for indigents in civil cases.

Id.

139. Elaborating, Mr. Justice Powell said: "The advertisement of this [hourly] rate in an appropriate medium, duly designated, would not necessarily be misleading if this fee information also made clear that the total charge for the representation would depend on the number of hours devoted to the client's problem—a variable difficult to predict." Id. at 2717.

140. Id. at 2719.
141. Id. (quoting 425 U.S. at 773 n.25).
142. 97 S. Ct. at 2711.
143. See note 138 supra.
today opts for a draconian 'solution' which I believe will only
breed more problems than it can conceivably resolve."

Mr. Justice Rehnquist, who dissented in both Bigelow v.
Virginia and Virginia State Board of Pharmacy v. Virginia
Citizens Consumer Council, Inc., maintained his opposition to
the Court's abandonment of the commercial speech doctrine. In
his separate dissent, he stressed that commercial advertising
"is not the sort of expression that the [First] Amendment was
adopted to protect." In concluding his dissent, Mr. Justice
Rehnquist declared that "[t]he Valentine distinction was con-
stitutionally sound and practically workable, and I am still un-
willing to take even one step down the slippery slope away from
it."

ANALYSIS

The Court's conclusion that the first amendment forbids the
banning of all lawyer advertising was a natural consequence of

144. 97 S. Ct. at 2711.
145. Id. at 2719. Mr. Justice Rehnquist dissented in both Bigelow v. Virginia,
421 U.S. 809, 829 (1975) and Virginia State Bd. of Pharmacy v. Virginia Citizens

In Bigelow, Mr. Justice Rehnquist maintained that the Court erred in "as-
suming Virginia's interest in its statute [banning dissemination of abortion
information] because it did not focus on the impact of the practices in question
on the State." 421 U.S. at 836. He argued that by focusing on the "multistate
nature of [the] transaction," instead of "Virginia's interest... in preventing
commercial exploitation of the health needs of its citizens," the Court failed to
recognize the statute as a "reasonable regulation that serves a legitimate public
interest." Id. at 834-36.

In Virginia Pharmacy, Mr. Justice Rehnquist objected to the Court extend-
ning first amendment protection to "purely commercial endeavors which [the]
most vigorous champions on this Court had thought to be beyond its pale." 425
U.S. at 781 (1976). After conceding that "society also may have a strong interest
in the free flow of commercial information," Mr. Justice Rehnquist argued that
such interest should "presumptively be the concern of the Virginia Legislature,
which sits to balance these and other claims in the process of making laws..."
Id. at 783. In extending protection to all commercial speech that is truthful, and
not misleading, Mr. Justice Rehnquist argued, the Court overlooked the view
that the first amendment is primarily an instrument to protect "decisionmaking
as to political, social and other public issues, rather than the decision of a
particular individual as to whether to purchase one or another kind of sham-
poo." Id. at 787. In balancing the interests in individual free speech against the
public welfare determinations embodied in the statute, Mr. Justice Rehnquist
commented that "the societal interest against the promotion of drug use for
every ill, real or imaginary, seems to me extremely strong." Id. at 789-90. Con-
cluding that the statute banning the advertisement of prescription drug prices
should be sustained, Mr. Justice Rehnquist stated, "I do not believe that the First
Amendment mandates the Court's 'open door policy' toward such commercial
advertising." Id.

146. 97 S. Ct. at 2719.
147. Id. at 2720.
its recent decisions which extended constitutional protection to commercial speech. The Virginia Pharmacy decision firmly established that the general interest of society in the free flow of truthful commercial information was protected by the first amendment. Consequently, it would be anomalous to hold that the unhampered flow of information about legal services was any less important than the free flow of information concerning prescription drug prices. Indeed, the public interest in the dissemination of legal service information may be more compelling. Limitations on information about the availability of legal services, for example, may hinder a citizen's right of access to the courts—an interest of constitutional stature. In addition, it has been observed that the need for legal services has increased dramatically in recent years. The five to four decision in Bates, however, indicated that the state's interest in the regulation of lawyer advertising was significantly stronger than the regulatory interest involved in Virginia Pharmacy. An examination of the dissenting opinions in Bates indicates that the controversy within the Court centered around two of the specific justifications offered for retaining the ban on lawyer advertising.

148. In his majority opinion, Mr. Justice Blackmun stated that "the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to follow a fortiori from [Virginia Pharmacy]." Id. at 2700. Moreover, a number of recent observers support this view. See, e.g., Martyn, Lawyer Advertising: The Unique Relationship Between the First Amendment and Antitrust Protections, 23 WAYNE L. REV. 167, 167 (1976); Comment, Lawyer's Advertising: Beyond the Yellow Pages, 13 IDAHO L. REV. 247, 252 (1977); Note, Don't Be Confused—We Don't Bait and Switch! A First Amendment Analysis of Lawyer Advertising, 21 ST. LOUIS L.J. 125, 136-37 (1977); Note, Constitutional Law—First Amendment—Protection of Commercial Speech, 60 MARQ. L. REV. 138, 149 (1976).

149. See text at notes 70-79 supra.

150. See articles cited in note 148 supra.


152. See generally B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS, 131-32 (1970). Moreover, a recent bar study acknowledged that "the middle 70% of our population is not being reached or served adequately by the legal profession." ABA, Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services 2 (1972).

153. This is indicated by the fact that three Justices who voted to strike down the ban on pharmacist advertisement in Virginia Pharmacy, refused to find in favor of lawyer advertising in Bates. These three Justices were Mr. Chief Justice Burger, Mr. Justice Stewart, and Mr. Justice Powell.
These controverted justifications concerned the potential collateral problems of consumer deception and disciplinary enforcement. Three dissenting Justices maintained that the weight of these justifications, with regard to the advertisement of professional services, made Bates distinguishable from Virginia Pharmacy which dealt with standardized products. Although the Virginia Pharmacy Court specifically acknowledged the product-service distinction, it seems clear that this distinction should not be dispositive. As Mr. Justice Rehnquist remarked, dissenting in the prescription drug price case, the "difference between pharmacists' advertising and lawyers' ... advertising can be only one of degree and not of kind." Ironically, it is apparent that the Bates majority adopted this view.

Although the majority opinion in Bates held that only "routine services" lend themselves to advertising, that term was essentially undefined. Consequently the undefined distinction between routine and non-routine legal services exposed the Court to the criticism of three dissenting Justices. Notwithstanding these criticisms, the majority's distinction was persuasive. If only those services for which a standard fee may be charged are advertised, it is doubtful that lawyer advertisements would be so inherently misleading as to justify total suppression. In response to the contention that lawyer advertisements would mislead and deceive the public, one commentator prior to Bates wrote that "the answer is not to continue the ban against all [lawyer advertising], but rather to allow advertising under the strictest of regulations, something like a 'Truth in Legal Advertising Law.'" In retrospect, this commentary might initially seem overly conservative in light of a broad interpretation of the Bates decision. It is arguable, however, that strict restrictions on lawyer advertising might be permissible since the Court intimated that little latitude would be afforded untruthful or misleading commercial expression. Moreover,

154. See text at notes 128-37, 142 supra.
155. 425 U.S. at 773 n. 25. See note 11 supra.
156. See articles cited in note 148 supra.
157. 425 U.S. at 785 (Rehnquist, J., dissenting).
158. See text at notes 132, 142 supra.
159. Mr. Justice Rehnquist noted in his dissent that "I cannot distinguish between the public's right to know the price of drugs and its right to know the price of title searches or physical examinations or other professional services for which standardized fees are charged." 425 U.S. at 785 (emphasis added).
160. Frierson, Legal Advertising, 2 BARRISTER 6, 8-9, 70 (1975).
161. In stipulating that some restrictions on lawyer advertising are constitu-
the Court suggested that lawyer advertisements might require "limited supplementation by way of warning or disclaimer."162 Such admonitory measures would insure that the consumer was aware that the quoted price would be available only to clients whose matters fell within the services described. Consequently, it would appear that the Bates majority properly found lawyer advertising was not so inherently misleading as to justify the total ban.

In contrast, the dissenter's second criticism was more forceful. Mr. Justice Powell argued that the majority opinion vastly underweighted the nature and magnitude of the enforcement problem.163 Bar disciplinary enforcement has generally proven to be an extremely difficult problem in this country.164 Moreover, one commentator on lawyer advertising suggested that innumerable borderline cases of advertisements that are not clearly false or misleading will severely hamper the enforcement process.165 Although this argument is persuasive, it may be vulnerable to at least three criticisms. First, the scope of the problem may be mitigated by well-defined bar guidelines, which the Bates Court implied would be constitutionally permissible.166 Second, the argument assumes, without any supporting evidence, that lawyers will not follow bar guidelines and thus require discipline.167 And finally, the mere existence of administrative burdens, if any, should not justify sustaining a regulation that violates constitutional rights.168 Therefore it
would also seem that the Court legitimately found that the problems of effectively regulating lawyer advertising were not compelling justifications.

In disposing of the four remaining justifications asserted by the Arizona Bar, the Court encountered virtually no objection from the dissenting Justices. Even a cursory examination indicates that these justifications were less than compelling. Virginia Pharmacy demonstrated that the interest in maintaining professionalism could not justify suppressing the free flow of commercial information. In regard to the quality of legal services, there was no reason to believe advertising would encourage inferior work. Additionally, the contention that advertising was likely to increase the cost of legal services or create entry barriers was no more probable than the converse. And finally, the anachronistic argument that lawyer advertising would undesirably increase the use of the judicial process was oblivious to the fact that limitations on information concerning the availability of legal services would burden a citizen’s fundamental right of access to the courts.

Consequently, it would seem clear that the Bates Court properly found the proffered justifications insufficient to warrant suppression of all lawyer advertising. However, by limiting the holding in Bates to the particular facts of the case, the decision raises some practical problems and questions. A recent attempt to resolve some of these questions has been made by the American Bar Association in its Proposed Amendments to the


Moreover, in the first amendment context, the Court has said that the choice between the dangers of suppressing information and the dangers arising from its free flow (for instance—administrative enforcement burdens) is precisely the choice the first amendment makes for us. 425 U.S. at 770.

Id. at 766-70.

97 S. Ct. at 2706.

See text at note 107 supra.

172. See Martyn, Lawyer Advertising: The Unique Relationship Between the First Amendment and Antitrust Protections, 23 WAYNE L. REV. 167, 190-91 (1976); Comment, Solicitation by the Second Oldest Profession: Attorneys and Advertising, 8 HARV. C.R.-C.L.L. REV. 77, 85-91 (1973); Note, Advertising, Solicitation and the Profession’s Duty to Make Legal Counsel Available, 81 YALE L.J. 1181, 1185-91 (1972); Note, Don’t Be Confused—We Don’t Bait and Switch! A First Amendment Analysis of Lawyer Advertising, 21 ST. LOUIS L.J. 125, 127-30 (1977); Note, Lawyer’s Advertising: Beyond the Yellow Pages, 13 IDAHO L. REV. 247, 253-54 (1977). It seems anomalous that the Bates Court failed to capitalize on the vulnerability of this justification by elaborating on the constitutional right of access to the courts. The above commentators contend that the constitutional stature of this right is a formidable weapon for invalidating proscriptions on lawyer advertising.

173. 97 S. Ct. at 2707.
Code of Professional Responsibility. These Proposed Amendments will be summarized in juxtaposition with the questions and problems discussed below.

One question inevitably raised by the Bates decision is which legal services are truly routine. Although the Court dismissed the contention that lawyer advertisements were inherently misleading by holding that only “routine services” may be advertised, that term was essentially undefined. By explication the Court delimitated that the term routine services included: “the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like.” However, beyond this list, the opinion provides little guidance. In Virginia Pharmacy, Mr. Justice Rehnquist’s dissenting opinion suggested that a title search was a routine service. And prior to Bates, one lower court observed that standardized legal services also include the initial consultation fee, an ordinary real estate conveyance, standard leases, and other tasks that do not significantly vary from lawyer to lawyer and can be carefully specified so that the quoted price is both factual and meaningful. In any event, after Bates it is clear that the definition or specification of what is included in the term “routine services” has been left to the bar. This bar-definition approach has been adopted by the ABA’s Proposed Amendments. The proposed amendments would permit fixed fee advertising for “specific legal services . . . which would not be misunderstood or be deceptive.” The proposal suggests that the respective state bars issue guidelines defining such “specific [legal] services.”


175. 97 S. Ct. at 2703.

176. The Bates Court never formulated a test for determining which legal services are truly routine. 97 S. Ct. at 2713 (Powell, J. dissenting).

177. 425 U.S. at 785.

178. This definition of routine legal services was formulated in Consumers Union of United States, Inc. v. American Bar Ass’n, 427 F. Supp. 506, 522 (E.D. Va. 1976). That court also intimated that bar association minimum fee schedules, issued prior to Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), demonstrated that certain services can be identified with enough uniformity between practitioners to allow for the establishment of a fixed fee. 427 F. Supp. at 522.

179. “The bar, however, retains the power to define the services that must be included in an advertised package . . . thereby standardizing the ‘product.’” 97 S. Ct. at 2703-04 n.28. “Judgments such as these should be made by the State Bar in accordance with the guidelines herein suggested.” 427 F. Supp. at 522.


181. Id. at 5 n. 1.
A second question raised by the *Bates* case is which media may be used for lawyer advertising. It seems clear that the decision in *Bates* cannot be confined to newspaper advertisement.\(^{182}\) Mr. Justice Powell's dissent maintained that "[n]o distinction can be drawn between newspapers and . . . magazines, signs in buses and subways, posters, handbills, and mail circulations."\(^{183}\) Apparently, the ABA Proposed Amendments follow this contention as they would permit a lawyer "to publish . . . in [the] print media" information that is presented "in a dignified manner."\(^{184}\) But it is arguable that regulations concerning signs in buses, handbills, or mail circulars are reasonable place and manner restrictions which could be constitutionally permissible.\(^{185}\) In any event, the more intriguing question is whether radio or television advertisements are sanctioned.\(^{186}\) Though the Court pointed out that "advertising on the electronic broadcast media will warrant special consideration,"\(^{187}\) this observation only begs the question. Nevertheless, it is clear that there are significant differences between the electronic and print media.\(^{188}\) It has been suggested that print and radio advertising

182. 97 S. Ct. at 2718 n. 12 (Powell, J. dissenting).
183. Id.
184. *Proposed Amendments* at 5, DR 2-101(B) (emphasis added). "Print media" is not more specifically defined and thus could include signs, poster, handbills and mail circulars if such can be presented in a dignified manner.
185. See 425 U.S. at 771. Moreover, prior decisions of the Court have indicated that place and manner restrictions on signs in buses and the distribution of handbills do not violate the first amendment. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (holding that car card space on a city bus is not a first amendment forum); and *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (sustaining a city ordinance banning the street distribution of handbill advertising). Compare *Bigelow v. Virginia*, 421 U.S. 809 (1975) where the Court clarified that *Valentine* was a "reasonable regulation of the manner in which commercial advertising could be distributed" (emphasis added). Id. at 819.
186. "But questions remain open as to time, place, and manner restrictions affecting other media, such as radio and television." 97 S. Ct. at 2718 n. 12. (Powell, J. dissenting).
187. Id. at 2709.
188. Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast are 'in the air.' [sic] In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. [Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act.] It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word. 

would supply a substantial amount of the legal service information required by the public, and that television advertising might be apt to emphasize style over substance. On the other hand, it appears that even a temporary ban on the use of all electronic media might prevent a large segment of the population, who are only marginally literate or who do not normally read the print media, from receiving legal service information. Ultimately the constitutionality of time, place, and manner restrictions on the electronic media will depend on whether the restriction is reasonable, in light of these considerations, and whether there are ample alternative channels for the communication of such information. In response to the electronic media issue, the ABA Proposed Amendments would permit radio advertisements. However, the proposal would not permit television advertising absent a determination by the state authorities that it is necessary to provide adequate information of legal services to consumers.

Two other questions avoided by the Bates Court remain somewhat unresolved. These concern the constitutionality of restrictions on advertisements relating to the quality of legal services, and in-person solicitation. Although the Court did not specifically address these issues, it was suggested in dicta that both qualitative advertising and in-person solicitation would be so inherently misleading as to justify restriction. The majority opinion noted: "[A]dvertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation."

Although the constitutionality of restraints on qualitative advertisements would not seem significantly in doubt, the

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190. Id.
191. See 425 U.S. at 771.
192. Proposed Amendments at 5, DR 2-101(B).
193. Id. at 5, DR 2-101(C).
194. The Court specified that the narrow issue in Bates eliminated any need to address the peculiar problems associated with advertising claims relating to the quality of legal services or the problems associated with in-person solicitation. 97 S. Ct. at 2700.
195. Id. at 2709.
196. Since advertising claims relating to the quality of legal services might not be susceptible to measurement or verification, such expression is likely to be
Court's remark relating to in-person solicitation is more ambiguous.\(^{197}\) Thus questions of whether solicitation itself is so inherently misleading as to warrant expansive restriction, or whether some forms of in-person solicitation may be constitutionally protected, remain unresolved.\(^{198}\) However, resolution of these issues may be forthcoming, as a case challenging the constitutionality of the existing restraints of in-person solicitation is presently on the docket of the Court.\(^{199}\) As a present response to inherently misleading. \(\text{Id.}\) Although proscription of qualitative advertisements is based on the content of such expression, it is clear that inherently misleading commercial speech may be restrained. See 425 U.S. at 771-72 and n. 24. Thus it seems clear that lawyer advertisements containing qualitative representations may be constitutionally restrained.

197. The resolution of the solicitation issue remains ambiguous as the \textit{Bates} dicta (quoted in text at note 195 supra) may be read in two ways. The Court's statement that "similar objections might justify restraints on in-person solicitation," 97 S. Ct. at 2709, could be read to indicate that solicitation itself is so inherently misleading as to justify its restriction. On the other hand, this same passage could be viewed as an indication that only those solicitations containing qualitative claims or other unverifiable and misleading information may be proscribed. Either reading would warrant some restriction of in-person solicitation, based on its content, where the communication would tend to mislead the listener. Apart from content restriction of in-person solicitation based on its inherently misleading nature, it could be strongly argued that solicitation proscriptions are mere time, place, and manner regulations. If the present restraints on in-person solicitation may be viewed as regulation of the manner of communication, rather than as content restriction, it is arguable that such proscriptions are constitutionally permissible. See 425 U.S. at 771. Perhaps the \textit{Bates} Court could have more clearly dealt with the solicitation issue by separately analyzing it in the context of an incidental time, place, and manner regulation, rather than in juxtaposition with qualitative advertising claims, which relate to the content of such speech.

198. It is arguable that all in-person solicitation would not be so inherently misleading as to be totally outside the protection of the first amendment. Unlike advertising claims relating to the quality of legal services, factual statements made during an in-person solicitation would seem no less susceptible to measurement or verification than similar statements in newspaper advertisements. Moreover, after rejecting the argument that all lawyer advertising was so inherently misleading as to warrant total suppression, the \textit{Bates} Court held that truthful advertisement of the availability and terms of routine legal services could not be constitutionally restrained. 97 S. Ct. at 2709. Consequently, it would seem anomalous that truthful statements concerning the availability and terms of routine legal services would be deprived of constitutional protection merely if spoken as part of an in-person solicitation. Conversely, it is arguable that the present restraints on in-person solicitation could be sustained as reasonable time, place, and manner restrictions. See note 197 supra. In any event, it is clear that false or misleading solicitations, like false or misleading advertisements, may be constitutionally proscribed. See 425 U.S. at 771.

199. On October 3, 1977, the Court noted probable jurisdiction for \textit{Ohralik v. Ohio State Bar Ass'n}, 48 Ohio St.2d 217, — N.E.2d — (1977), appeal docketed, No. 76-1650 (United States Supreme Court Oct. 3, 1977). The question presented for consideration in \textit{Ohralik} is whether the expansive Ohio proscription of lawyer solicitation violates the first amendment when applied to suspend a lawyer indefinitely from practice for having orally solicited clients for his legal
the Bates decision, the ABA Proposed Amendments would prohibit advertisements containing qualitative representations, and restrict in-person solicitation.

Notwithstanding the Court's conclusion that the difficulties of effectively regulating lawyer advertising could not justify the total ban, it is apparent that disciplinary enforcement may be a considerable problem. An ABA report observed that many state disciplinary agencies were undermanned and underfinanced and have no staff whatsoever for the investigation or prosecution of complaints. Additionally, it has not been the case that members of the local bar are ready and willing to assist in policing the profession, notwithstanding the Bates majority's optimistic intimation to the contrary. Consequently, it is certain that the implementation of the Bates decision will augment the present disciplinary enforcement problem to some extent. Estimation of the breadth of the problem, after Bates, would be pure speculation. It might be noted, however, that the problem derives not from Bates, but from the existing inadequacies and the failure of the bar to provide necessary reform in the disciplinary enforcement process. In recognition of the enforcement responsibilities of the bar, the ABA proposes that a Commission on Professional Advertising be established to monitor developments, evaluate the various systems, and make recommendations to improve the regulation of advertising by lawyers and other professionals.

Finally, Bates inevitably raises the question of whether the existing bans on other professional advertising are constitutional, vel non. Advertising by physicians, for instance, is totally

services on two occasions. The Ohio Bar, in the proceedings before the state supreme court, made no claim of misrepresentation, overreaching, fraud, or other activity impinging on any public interest or on any client interest, as regards Ohralik's solicitation. 46 U.S.L.W. 3179 (Oct. 4, 1977).


201. Id. at 7, DR 2-104.

202. ABA Special Committee on Evaluation of Disciplinary Enforcement Problems and Recommendations in Disciplinary Enforcement 2 (1970) [hereinafter cited as ABA Special Committee].

203. Id. at 5-6.

204. 97 S. Ct. at 2707. See text at note 112 supra.

205. Mr. Justice Powell's dissent predicted that disciplinary enforcement would present a "wholly intractable problem." 97 S. Ct. at 2716.

206. See ABA Special Committee, supra note 202 at 1, 4.

207. Proposed Amendments at 3.

208. It is interesting to note that in Virginia Pharmacy (advertisement of prescription drug prices), the Court specifically reserved the question of lawyer and physician advertising for future consideration. 425 U.S. at 773 n. 25. However, in Bates (lawyer advertising), the Court omitted any such reservation concerning advertising by physicians or other professionals.
proscribed at present. Yet *Bates* indicated that truthful advertisements concerning the availability and terms of routine professional services were constitutionally protected. Therefore, it is clear that the current wholesale bans on physician advertisements constitute suppression of protected commercial communication. In two recent cases such proscriptions were held unconstitutional as applied to the specific advertisements in question. Apparently, the real question lies in determining which specific types of physician advertising may be constitutionally prohibited. The ultimate determination of whether an advertisement may be proscribed requires that the court weigh the public interest in the content of the particular advertisement against the specific justifications for suppressing the flow of otherwise protected commercial expression.

209. 97 S. Ct. at 2709; 425 U.S. at 773.
211. In Health Systems Agency of Northern Virginia v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E. D. Va. 1976) the court held that a statutory ban on physician advertising, which prohibited doctors from providing factual information to a health planning agency that was compiling a directory to help persons select physicians, violated the agency's first amendment rights. The agency sought to publish information relating to the several physicians' educational credentials, standard fees, billing procedures, and office practices. In balancing the competing interests, the court considered three justifications for the ban: (1) the directory was unnecessary because the public could alternatively acquire such information from individual physicians; (2) that such information, although truthful, would confuse the public and result in people selecting physicians purely on the basis of cost; and (3) that such information might be deceptive. Relying on *Virginia Pharmacy*, the district court found that the general interest of society in the free flow of such truthful commercial information outweighed the three justifications offered for the total ban on physician advertisements. Consequently, the court held that the information could not be suppressed.

In Louisiana Consumer's League, Inc. v. Louisiana State Bd. of Optometry Examiners, 46 U.S.L.W. 2117 (August 30, 1977) a preliminary injunction against the enforcement of a statute prohibiting price advertising of prescription eyeglasses was issued by the Fifth Circuit based on *Bates*. The court found that the consumers' unrebutted evidence, which demonstrated that filling prescriptions for eyeglasses was no less routine than the processing of an uncontested divorce or a simple personal bankruptcy, entitled them to an injunction.

*Louisiana Consumer's League* indicates that it might reasonably be argued that *Bates* and *Virginia Pharmacy* stand for the proposition that proscriptions on commercial speech are presumptively unconstitutional (emphasis added) where the state interest in suppressing such information rests on the advantages of keeping the public in ignorance of concededly truthful information about an entirely lawful activity. However, it should be observed that the Court's failure to explicitly articulate such a standard may infer that such a presumption of unconstitutionality is overly strong medicine; or that in the wake of the recent extension of constitutional protection to commercial speech, the Court is not yet willing to articulate the amorphous distinction between first amendment protections of commercial and ideological speech.
PROPOSED AMENDMENTS TO THE CODE OF PROFESSIONAL RESPONSIBILITY

A brief summary of the proposed ABA Code of Professional Responsibility Amendments is appropriate at this juncture.\textsuperscript{212} On July 25, 1977, the ABA Task Force on Lawyer Advertising circulated a report containing two distinct proposals. Both proposals, "A" and "B", are presently being circulated for consideration among the highest courts of all the states, and the respective state regulatory agencies. "Proposal A," which was accepted by the House of Delegates, is the recommended draft. As a response to Bates, the goal of both proposals is to provide consumers with needed information about the availability and terms of legal services.\textsuperscript{213}

"Proposal A" is regulatory in nature, employing an approach similar to that of several federal agencies such as the FDA and SEC. It would specifically authorize only certain forms of lawyer advertising.\textsuperscript{214} In contrast, "Proposal B" is more "directive." It would permit publication of all information that is not "false, fraudulent, misleading or deceptive," and provides guidelines for the determination of improper advertisements.\textsuperscript{215} Both proposals would utilize "after the fact" disciplinary enforcement.\textsuperscript{216}

"Proposal A," the recommended draft, retains many of the present disciplinary rules that specify the categories of information which may be published such as name, field of law practice concentration, education, client reference, and so forth. In addition, this proposal would permit publication of certain fee information such as contingency fee rates, a range of fees for some services, hourly rates, and fixed fees for "specific legal services, the description of which would not be misunderstood or be deceptive."\textsuperscript{217} As heretofore mentioned, the definition of such "specific legal services" has been left to the agency having jurisdiction under state law.\textsuperscript{218} Moreover, advertisements containing such fee information must include a disclosure statement in large print to insure that the advertisement is not misleading.\textsuperscript{219}

All such fee information that is not "false, fraudulent, misleading-
ing, deceptive, self-laudatory [or containing an] unfair statement or claim,"220 may be published or broadcast over radio, provided it is presented in a "dignified manner."221 This proposal would also provide for a procedure whereby a lawyer may seek to expand the information that may be disclosed through application to the appropriate state authorities.222

In contrast, "Proposal B" does not list specific items that may be advertised. Instead, it adopts a general antifraud standard223 and specifies with great particularity the elements of "false, fraudulent, misleading or deceptive" statements.224 As for fees, this proposal would authorize disclosure of the same kind of information permitted under "Proposal A," subject to the general anti-fraud provision.225 However, unlike "Proposal A," the communication of certain information is specifically forbidden. Such information would include: past performance; prediction of future success; testimonials about or endorsement of a lawyer; information regarding the quality of legal services; or other unfair or self-laudatory statements.226

Neither proposal would permit unrestricted one-to-one solicitation, qualitative advertising, nor allow the use of television in the absence of a determination by the appropriate state authorities that it is necessary to provide adequate information to consumers of legal services.227 However, radio advertising is authorized under both proposals.228 Such radio communication must be prerecorded and approved for broadcast by the lawyer. Moreover, a recording of the actual transmission must be retained by the advertising attorney.229

The Task Force on Lawyer Advertising also recommended that a Commission on Professional Advertising be established to monitor developments at the state bar level and within other professions. The commission would evaluate the various systems adopted by the states, and other professions, and make recommendations with respect to improving the ABA guidelines.230 It was also recommended that a special committee
be established to study the feasibility of a national advertising program to educate consumers as to the utility, costs, and availability of legal services.231

CONCLUSION

In BATES v. STATE BAR OF ARIZONA the Supreme Court countenanced the most controversial issue of the decade for the legal profession. However, the conclusion that all lawyer advertising may not be constitutionally suppressed was a natural consequence of recent decisions extending first amendment protection to commercial speech.232 In balancing the competing interests, the Court sufficiently demonstrated that the arguments explicitly directed toward retaining the total ban on lawyer advertising could not displace the individual and societal interests in the free flow of truthful information about the availability and price of legal services.

However, by holding that only the advertisement at issue could not be suppressed, the decision raises a number of issues that remain unresolved. These include: the scope of constitutionally permissible restrictions on lawyer advertising; a definition of which services are sufficiently "routine" as to be advertised; what media may be used for lawyer advertising; whether in-person solicitation or qualitative advertising are constitutionally protected; how advertising regulations will be effectively enforced; and whether the existing bans on other professional advertisements are constitutional.

The Proposed ABA Amendments to the Code of Professional Responsibility are an expeditious attempt to provide some guidance in confronting these unresolved issues. However, it remains to be seen whether these amendments provide a constitutionally feasible approach to the many issues and unanticipated problems that will be encountered as the profession embarks upon an uncharted path.

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231. Id.