Bates and O'Steen v. State Bar of Arizona: From the Court to the Bar to the Consumer

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Bates and O'Steen v. State Bar of Arizona: From the Court to the Bar to the Consumer

INTRODUCTION

On February 22, 1976, the Legal Clinic of Bates and O'Steen placed an advertisement in a local newspaper as a knowing challenge to the profession's historical ban on attorney advertising. Each side in the resulting disciplinary action urged that it had the public interest at heart. Nevertheless, the widely differing perceptions of advertising within the profession so colored the debate that it became clear that interests beyond that of the public were being protected. Proponents of the ban argued that it prevented fraud and deception of the public and preserved the dignity of the profession. Opponents focused on advertising as an informative rather than a persuasive device; they contended that the ban interfered with the flow of commercial information to the consumer and with the profession's responsibility to make legal counsel available.

In Bates and O'Steen v. State Bar of Arizona, the Supreme Court offered something to both sides. In holding that a newspaper advertisement listing prices for routine legal services was constitutionally protected speech, the Court necessitated changes in the organized bar's position. The ruling opens up the flow of information about lawyers' fees and encourages alternatives in the delivery and use of legal services. At the same time, the Court recognized the legitimate use of regulations to prevent fraud and deception of the public. The response of the American Bar Association (ABA) and state regulatory agencies to the Bates decision will determine whether the public interest is really served.

This article explores the development of the legal profession's ban on advertising and the constitutional doctrine of commercial free speech upon which the Bates decision rested. The Court's analysis that found justifications for the ban insufficient is also examined. Finally, it discusses recent amendments to the ABA's Code of Pro-

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1. As later stipulated, the advertisement was a knowing violation of disciplinary rule 2-101(B), embodied in rule 29a of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. (1976 Supp.), p. 26.
2. Advertising and solicitation of clients are seen as closely related. For purposes of definition, "advertisement" is "[i]nformation communicated to the public..." BLACK'S LAW DICTIONARY 74 (Rev. 4th ed. 1968). "Solicit" is a more individualized activity and "implies personal petition and importunity addressed to a particular person to do a particular thing." BLACK'S LAW DICTIONARY 1564 (Rev. 4th ed. 1968). This comment concerns advertising although the decision does have implications for solicitation.
professional Responsibility which were adopted in response to the Bates decision.

**The Advertising Ban**

A substantial part of the argument presented by the appellant bar in Bates was based on the historical role and discipline of the profession. The practice of law developed from a concept of professional dignity and responsibility rather than from business competitiveness. The fundamental premise often articulated in state court disciplinary actions was that the practice of law was a "profession" and not a "trade." As one court explained it, "the basic ideal of that profession is to render service and secure justice for those seeking its aid. It is not a business, using bargain counter methods to reap large profits for those who conduct it." The professional characteristic of public service was reaffirmed in the methods used by early courts to control the manner in which lawyers practiced.

Yet the advertising ban, and even codes of ethics, are recent developments in the history of the law. Although early works on professional ethics did not specifically address advertising, self-

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4. The amendments to the Code of Professional Responsibility [hereinafter cited as the Code] were adopted by the ABA House of Delegates at an annual meeting held in Chicago on August 10, 1977. Chicago Daily Law Bull., August 11, 1977, at 1, col. 3. The amendments were adopted less than two months after the decision with both consumer groups and opponents of the amendments urging deferral. Consumers wanted to see how the market and the profession would react in an atmosphere of non-regulation and opponents felt that guidelines exceeded the Supreme Court ruling. ABA, Div. of Communications, release 081677s (8/9/77).

5. The Bates decision gives the strongest arguments for the ban. See text accompanying notes 73 through 104 infra. The purpose of this section is, therefore, to give a brief history of the organized bar's approach to advertising.

6. The men who learned the law by appearing at the Inns of Court were generally well-to-do and were not concerned with earning a livelihood. See H. Drinker, Legal Ethics 210-11 (1953); M. Okin, Legal Ethics 3-8 (1957).


9. The common law controlled lawyers' conduct through the crimes of barratry (the offense of frequently exciting or stirring up litigation), champerty (supporting litigation in which one was not a party upon agreement to share the proceeds), and maintenance (maintaining, supporting, or promoting the litigation of another). See generally Restraints on Advertising, supra note 8, at 1137; E. Smith, Canon 2: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available," 48 Tex. L. Rev. 285 (1970); Note, Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available, 81 Yale L.J. 1181, 1189 (1972) [hereinafter cited as Duty to Make Legal Counsel Available].

10. The first ethics code adopted in America was that of the Alabama bar in 1887. See Duty to Make Legal Counsel Available, supra note 9, at 1182 n.5, citing H. Drinker, Legal Ethics 23 (1953).

11. George Sharswood's Essay on Professional Ethics, first published in 1854, is consid-
laudation and the active search for clients were discouraged. Canon 27 of the first Canons of Professional Ethics, adopted by the ABA in 1907, contained a partial ban on advertising that arose out of a fear that the profession was becoming increasingly commercialized. The ABA was also concerned that unscrupulous attorneys were misleading the public through inflated claims of legal skills. But it was not publicity that was seen as the evil; rather, it was the use of commercial methods which the ban addressed. While other businessmen increasingly relied on advertising to promote their products, the legal profession moved in the opposite direction.

In retrospect, others see a less altruistic motive in Canon 27. The real catalyst may have been fear of litigation of causes unpopular to the establishment—segregation, landlord-tenant, and consumer-manufacturer disputes. Without advertising, the people most likely to initiate such actions were left without the information necessary to locate attorneys willing to represent them. The ban affected the

12. ABA Canons of Professional Ethics No. 27 read in part:
   The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements or by personal communications, or interviews, not warranted by personal relations, is unprofessional. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's position, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

For example, a legitimate news story could be acceptable but encouraging such a story was not. This rule, however, was not consistently enforced. Compare *In re* Connelly, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963) with *Florida Bar v. Nichols*, 151 So.2d 257 (Fla. 1963).


15. See, e.g., J. AUERBACH, UNEQUAL JUSTICE 41 (1976), noting that in 1905, President Roosevelt rebuked attorneys who assisted corporate clients in evading new regulatory legislation. The ABA responded by developing standards reflecting the influence and position of the bar. But once the bar associations became involved in the campaign for ethical codes, corporate lawyers, who were disproportionately represented on bar councils, shifted the onus to "ambulance chasers" who were disproportionately excluded.

urban lawyer and his potential blue-collar clientele rather than the established firm representing the well-to-do or corporate clients.

In 1970 the Canons were replaced by the Code of Professional Responsibility. The Code introduced a new concept in Canon 2: the duty to make legal services available. This marked a transition from a passive lawyer-client relationship to an active professional obligation to make legal services available. Disciplinary Rule (DR)2-101 (B), however, banned all advertising except office signs, phone number listings, and ordinary business cards. The rule sustained the traditional model of lawyer waiting for client and restricted lawyers who wanted to use new approaches that might increase consumer awareness of the availability of legal services. This inconsistency between the goal of Canon 2 and the means of implementing it was the issue faced in Bates.

The ABA again amended the Code in 1976. Under an addition
Advertising Legal Services

to the disciplinary rules, attorneys were permitted to supply information to the yellow pages and law lists, including office hours, fees for initial consultation, and the acceptance of credit cards. At the time of the Bates and O'Steen advertisement, however, only three states had adopted these provisions.

The Bates Advertisement

John Bates and Van O'Steen, attorneys licensed to practice in Arizona, operated a legal clinic providing legal services “at moderate fees to persons of moderate incomes who did not qualify for governmental legal aid.” In order to attract the clients necessary to their practice, they placed a newspaper advertisement offering routine legal services at reasonable rates. For this violation of the


21. DR 2-102(A)(6) permits "a listing in a reputable law list, legal directory, a directory published by a state, county or local bar association, or the classified section of telephone company directories giving brief biographical data." The data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates, to the extent not prohibited by the authority having jurisdiction under state law over the subject; a statement that practice is limited to one or more fields of law, to the extent not prohibited by the authority having jurisdiction under state law over the subject of limitation of practice by lawyers; a statement that the lawyer or law firm specializes in a particular field of law or law practice, to the extent permitted by the authority having jurisdiction under state law over the subject of specialization by lawyers and in accordance with rules prescribed by that authority; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical, and professional association and societies; foreign language ability; names and addresses of references, and with their consent, names of clients regularly represented; whether credit cards or other credit arrangements are accepted; office and other hours of availability; a statement of legal fees for an initial consultation or the availability upon request of a written schedule of fees to be charged for the specific services.

22. Lawscope, 63 A.B.A.J. 299 (1977). Maine, Michigan and Oklahoma had amended their regulations although only Maine went as far as the amendments allowed. Arizona, the state in which Bates and O'Steen practiced, had not adopted the 1976 amendments at the time the ad was placed.


24. Their practice was limited to routine legal matters such as simple personal bankruptcies, uncontested divorces, name changes, and the like so that through the use of paralegals and standardized forms and procedures, costs could be minimized. The ad, run in a local daily newspaper, listed the following services—uncontested divorce or separation, uncontested adoption, non-business bankruptcy, change of name—and the prices listed for each. Id. at 2694.
Arizona Supreme Court rules disciplinary action was commenced. After recommendation of a six month suspension by the State Bar, the case was brought on review to the Arizona Supreme Court. The court found the attorneys guilty but sanctioned only censure. The Supreme Court of the United States noted probable jurisdiction of two issues:

1. Does a total ban on advertising by private attorneys, originated by the ABA and incorporated into a rule of the Arizona Supreme Court, violate the Sherman Act notwithstanding the state action exemption of Parker v. Brown?
2. Does such a ban, enforced by an integrated state bar and state supreme court, violate the first amendment?

THE ANTITRUST ISSUE

Opponents of the advertising ban claimed that it was a per se violation of section 1 of the Sherman Act because it constituted

25. See note 35 infra.
27. The Arizona Supreme Court issued a plurality opinion. Although one justice styled himself a dissent, he concurred with the finding of a violation and objected only to not maintaining the six month suspension. Id. at 402, 555 P.2d at 648 (Hays, J., dissenting).
29. There were other issues before the Arizona court. In addition to the two for which review was granted, the Arizona Supreme Court addressed the ban on the grounds of state antitrust violation, equal protection, and as a statute void for vagueness. In re Bates, 113 Ariz. 394, 555 P.2d 640 (1976). The issues for which appeal was granted were in the alternative. In order to find an antitrust violation there must have been no state action; in order to find a first or fourteenth amendment violation, there must have been state action. One commentator states, however, that the definition of "state action" is not the same in first amendment and antitrust cases. See Marty, Lawyer Advertising: The Unique Relationship between First Amendment and Anti-Trust Protections, 23 WAYNE L. REV. 167, 197-98 (1976) [hereinafter cited as Marty].
31. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1955) states: "Every contract, combination...or conspiracy in restraint of trade or commerce among the several states...is hereby declared to be illegal..." Violations fall into two categories: per se violations and unreasonable restraints. Prior to United States v. Standard Oil Co. of N. J., 221 U.S. 1 (1910), all restraints of trade were per se violations of the Sherman Act. In Standard Oil, the Court applied a rule of reason, so construing the Act that all contracts or combinations which amount to an unreasonable or undue restraint of trade in interstate commerce are illegal. The rule's standard is one of commercial reasonableness rather than societal reasonableness. Accord, L. SULLIVAN, LAW OF ANTITRUST 194 (1977).


The analysis performed by the courts is limited to the facts, for once an arrangement has
illegal price fixing.\textsuperscript{32} The Supreme Court, as had the Arizona court, summarily disposed of this issue by relying on the state action exemption. In \textit{Parker v. Brown},\textsuperscript{33} the Court held that the Sherman Act was not applicable to anti-competitive activities directed by the state as sovereign.\textsuperscript{34} The Court found the conduct in \textit{Bates} within this rule since to practice law in Arizona attorneys had to be licensed members of the Arizona Supreme Court-created and -controlled State Bar.\textsuperscript{35} The advertising ban contained in the 1970

been characterized as price-fixing, the \textit{per se} doctrine relieves the court of the need to compare possible benefits or harms. \textit{See}, e.g., United States \textit{v. Nat'l Ass'n of Real Estate Bds.}, 339 U.S. 485, 489 (1949). \textit{See generally L. Sullivan, Law of Antitrust} 199 (1977).

32. Price need not be fixed in a rigid sense; it is sufficient that the purpose and effect of an agreement among competitors is to stabilize prices. United States \textit{v. Container Corp. of America}, 393 U.S. 333 (1969); United States \textit{v. Gasoline Retailers Ass'n, Inc.}, 285 F.2d 688, 691 (7th Cir. 1961). \textit{See also Branca and Steinberg, supra note 31, at 497. The advertising ban's opponents feel the agreement not to release price information prevents the consumer of legal services from comparing prices. The ban may make it more difficult for new attorneys to attract clients. Thus, the ban reduces the competitive incentive among lawyers. Accord, R. Arnould and R. Corley, \textit{Fee Schedules Should Be Abolished}, 57 A.B.A.J. 655 (1971); Branca and Steinberg, \textit{supra} note 31, at 510-12; R. Hummel, \textit{Antitrust Problems of Industry Codes of Advertising, Standardization, and Seals of Approval}, 13 \textit{Antitrust Bull.} 607 (1968); Martyn, \textit{supra} note 29, at 174. A ban similar to the ABA's was found to be a \textit{per se} violation of the Sherman Act in United States \textit{v. Gasoline Retailers Ass'n, Inc.}, 285 F.2d 688, 691 (7th Cir. 1961), notwithstanding that the agreement was rationalized as one protecting the public.

33. 317 U.S. 341 (1943).

34. The Court in \textit{Parker} stated:

\begin{quote}
We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. \ldots The Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action or official action directed by a state.
\end{quote}

\textit{Id.} at 350-51. The exemption was limited, for the state could not authorize private violations of the Act nor could mere participation by the state in private actions be sufficient to grant immunity. \textit{Id.} at 351.

In Goldfarb \textit{v. Virginia State Bar}, 421 U.S. 773 (1975), the Supreme Court found the minimum fee schedule of a local bar association to constitute illegal price-fixing. Defendant argued that the \textit{Parker} exemption applied where the private action was "prompted" by the State; however, the Court found this relationship inadequate as "anti-competitive activities must be compelled by the state acting as sovereign." \textit{Id.} at 791 (emphasis added).

In \textit{Cantor v. Detroit Edison Co.}, 428 U.S. 579 (1976), the Court again examined state action immunity in holding that the mere fact that private conduct will be subject to state regulation is not enough to confer immunity. \textit{Id.} at 592-93. It implied a balancing of state and federal interests in the anti-competitive activity, and that the state interest must be significant to survive when inconsistent with federal antitrust regulation.

\textit{Bates} seems to give renewed vigor to state action immunity. The \textit{Bates} analysis focused on the relationship of the defendant to the state rather than on the implicit balancing of the state interest in relation to the federal interest. The \textit{Bates} Court apparently rejected the necessity of significant state interest by hinting a different outcome would have occurred in \textit{Cantor} had the state regulatory commission rather than the private instigator of the anti-competitive activity been the party defendant. 97 S.Ct. at 2779. This leads to the conclusion that where a sufficiently close relationship to the state is proved, immunity will be extended without a final balancing of federal and state interests.

35. Rule 27(a) of the Supreme Court of Arizona reads in part:
Code was part of the Rules of the Arizona Supreme Court and thus was conduct mandated by the state. By applying the Parker exemption, the Court left states free to impose restrictions on advertising even though the charges of price-fixing may remain.\footnote{36}

\textbf{COMMERCIAL FREE SPEECH}

\textit{Historical Development}

The key to the \textit{Bates} decision is its first amendment analysis. Freedom of expression is fundamental to the American system of government.\footnote{37} The constitution guarantees broad protection to the flow of ideas on political, social and economic matters.\footnote{38} Freedom

\begin{itemize}
\item[1.] In order to advance the administration of justice according to law . . . the Supreme Court of Arizona does hereby perpetuate, create, and continue under direction and control of this Court an organization known as the State Bar of Arizona, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this Court.
\item[36.] It is doubtful that the Court will ever reach the issue of the advertising ban as a \textit{per se} violation. State action immunity would not be present in a suit against the ABA, and United States v. American Bar Association, Civ. Action no. 76-1182 (D.D.C. 1976) was to be such a test. The question may be moot by virtue of the recent Code amendments. There is authority stating that such a deliberate change in an association's policy will avoid liability. United States v. Oregon Medical Soc'y, 343 U.S. 326, 334 (1952).
\item[37.] U.S. Const. amend. I, cl. 2: "Congress shall make no law abridging the freedom of speech or of the press."
\item[38.] Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940):
The freedom of speech and of the press guaranteed by the constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.
\end{itemize}
of speech is not, however, an "unlimited license to talk." False, misleading or untruthful speech has never been protected for its own sake and some regulation is permitted to protect significant government interests. Reasonable regulation as to time, place, and manner of speech is permitted; however, such regulation must leave open alternative channels for constitutionally protected communications. In addition, any regulation that operates as a prior restraint of speech is regarded by the Court as having a heavy presumption against validity.

Until recently, the constitutional protection afforded political, social, and economic ideas did not extend to speech of a purely commercial nature. In 1942, the Supreme Court stated emphatically in Valentine v. Christensen, that the constitution did not restrain governmental regulation of purely commercial advertising. Since

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97 S.Ct. at 2707.

39. Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 (1961). Speech may be limited in two ways: (1) certain forms of speech (e.g., libel, obscenity) or speech in certain contexts; and (2) where the regulation is not intended to control the content but is incidental to free exercise.


43. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1940); see, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).


45. 316 U.S. 52 (1942). The owner of a submarine had attempted to distribute a handbill advertising the boat in violation of a local sanitary code that forbade distribution on the streets of commercial and business advertising matter.
the advertisement at issue there did not have the requisite relationship to the exchange of ideas, the Valentine Court did not see it as within the scope of the first amendment.

While this view survived until 1970, it was encroached upon by an expanding interpretation of the first amendment. Three strands in this development are important to the Bates decision. First, the Supreme Court held that speech did not lose first amendment protection merely because money was spent to project it or because it was carried in a form that was sold. Thus, the form standard of Valentine was rejected in favor of a "content" standard: if commercial speech is protected, it is because the content is protected rather than because it appeared in commercial form. Second, the Court extended first amendment protection where speech benefitted the exercise of other constitutionally protected rights.

Finally, in a series of first amendment cases, the Court defined certain peripheral rights. Included under the rubric of free speech and press was not only the right to utter or to print, "but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach . . ." The Court held that without these peripheral rights the specific rights would be less secure. Thus the Court interpreted the right to speak to be complemented by a willing listener's right to receive; ultimately, the right of the listener and not the speaker could control the decision. Of the three strands, this aspect was most instrumental in the development of modern commercial speech protection.

46. The holding of Valentine was questioned during this time. See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting).
These views of commercial speech development merged in *Bigelow v. Virginia*, when the Supreme Court held that first amendment guarantees of speech and press were applicable to paid commercial advertising. Some courts and commentators view that decision as granting blanket protection to commercial speech. However, *Bigelow* confronted an advertisement which incorporated elements of the more traditional forms of protection—it conveyed information relevant to the distinct constitutional right to abortion. Arguably, the decision was within the framework of protecting political and social ideas rather than simple commercial pronouncements. If the content standard was expanded by *Bigelow*, it went only so far as to protect commercial enterprises related to some area of public and constitutional concern.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court finally addressed the issue of first amendment protection for commercial advertisement unrelated to other rights. The Court cleared up the ambiguity created by *Bigelow* by holding that pure, everyday commercial information was within the protection of the first amendment. The nexus to constitutionally protected social, economic, and political ideas was not essential; it was sufficient that the consumer have a significant interest in the communication.

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55. Id. at 818.
57. The ad promoted a service that would arrange low-cost abortions in New York; there was no residency requirement. At the time, abortions were not legal in Virginia.
58. 425 U.S. 748 (1976). Consumers of prescription drugs brought suit challenging the validity under the first and fourteenth amendments of a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs.
59. Our pharmacist does not wish to editorialize on any subject... He does not wish to report any particular newsworthy fact, or to make any generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."

*Id.* at 761.
60. The Court stated:

As to 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... Those whom the supression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do,
The kind of price advertising contained in Bates was not included in the public interest analysis used to hold drug price advertising permissible in Virginia Pharmacy. First, the goods purchased in Virginia Pharmacy were standardized whereas Bates dealt with an individualized service; moreover, access to the goods in Virginia Pharmacy was controlled by someone other than the advertiser whereas no middleman exists between attorney and client. The Court in Virginia Pharmacy indicated its awareness of these significant differences in a footnote:

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.

Although regulations of speech must generally be justified without reference to content, the Supreme Court recognizes that the content of the communication may affect the measure of protection afforded to the speech. Commercial speech is perceived as a harder version of speech. Since advertising is the sine qua non of commercial profits, the Court has found it less likely to disappear in the
face of proper regulation than other forms of speech. In weighing regulations restricting the exercise of commercial free speech, the Court has developed a balancing test. The critical question in Bates was whether the good resulting from the free flow of commercial information to the consumer of legal services outweighed the government's interest in preventing consumer fraud that was allegedly served by the advertising ban.

Application of the Commercial Speech Doctrine to Advertising of Legal Services

The Bates Court focused on the first amendment issue that it reserved in the Virginia Pharmacy footnote. The issue, however, was stated more narrowly: whether a lawyer's truthful advertisement concerning the availability and price of routine legal services can be prohibited by the state. Despite limiting the issue, the Court applied the balancing test with a broader definition of advertising in mind. It did not, for example, limit the application of Bates to the newspaper medium nor did it forbid the use of creative advertising techniques. This broader analysis may be due to the fact that, with the exception of Justice Rehnquist, the only substantial objection of the dissenters was to the price element and not to advertising per se. The issue was decided within the context of the consumer's right to the free flow of commercial information. While it is argua-

67. Justice Rehnquist, dissenting in Virginia Pharmacy, argued that the majority did not use the traditional protected/unprotected analysis but looked to see if the legislature had acted rationally by eliminating greater harms that it produced. Id. at 781. See Konigsberg v. State Bar of Cal., 366 U.S. 36, 50-51 (1961); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Comment, Commercial Speech and the First Amendment: An Emerging Doctrine, 5 HOFSTRA L. REV. 655, 665-66 (1976); Comment, Advertising and the Legal Profession: An Analysis of the Requirements of the Sherman Act and the First Amendment, 6 U.C.L.A.-ALAS. L. REV. 67, 87 (1977) [hereinafter cited as Comment, Advertising and the Legal Profession].
68. See text accompanying note 59 supra.
69. The Court stated, "[W]e note that appellee's criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising. . . We recognize, however, that an advertising diet limited to such spartan fare [as DR 2-102(A)(6) (1976)] would provide scant nourishment." 97 S.Ct. at 2700-01.
70. Instead of a 5-4 vote, there would have been an 8-1 majority. Justices Burger, Powell, and Stewart see price as the critical factor. Their arguments conclude that since price advertising has a greater potential to mislead the public, the balance tips in favor of a restrictive rule. 97 S.Ct. at 2710 (Burger, C.J., concurring in part, dissenting in part); id. at 2713 (Powell and Stewart, J.J., concurring in part, dissenting in part).
71. 97 S.Ct. at 2699. This was also expressed in the Arizona Supreme Court decision of Bates:

More fundamentally there is involved the right of the public as consumers and citizens to know about the activities of the legal profession. Obviously the informa-
ble that a distinct constitutional right was involved, the Court perceived the case as related to Virginia Pharmacy rather than Bigelow. Thus, commercial speech was affirmed in its more mundane sense.

Arrayed against the consumer interest in the free flow of commercial information were a number of justifications offered to support the ban. The Court addressed all the classical reasons given by the legal profession: the adverse effect on professionalism; the inherently misleading nature of attorney advertising; the adverse effect on the administration of justice; the undesirable economic effects of advertising; the adverse effect on the quality of service; and the difficulties of enforcement. These justifications and their factual bases are worth review for they will reappear in defining the interests that justify permissible state regulations after Bates.

Professional Dignity

The bar's strongest argument was that advertising would have an adverse impact on professional dignity. Supporters of the ban argued that the public would lose respect for lawyers if they sought financial gain rather than the achievement of justice. The Supreme Court found the "connection between advertising and the erosion of true professionalism" to be severely strained since few lawyers deceive themselves that this is not a lucrative profession. Moreover, the Code already requires disclosure of the commercial re-
relationship to the client. Since respect for the lawyer is determined chiefly by how he handles his client's legal matters, it is questionable whether a price ban has any significant influence on the profession's image.

The Inherently Misleading Nature of Attorney Advertising

Another argument in support of the ban was that the advertising of legal services would be inherently misleading. It was argued that it was impossible to establish a meaningful product-to-price relationship where the product was a service and not a standardized good. Because the public could not determine the exact nature of the services needed, they could be misled by a price quotation. The Court rejected these arguments as unpersuasive. Advertising does not provide a complete guide to the selection of an attorney nor does it reflect the varied detail of legal services. But while recognizing this, the Court found that the alternative left the client with even less information with which to select an attorney. The bar's paternalistic approach, according to the Court, presupposed a public too unsophisticated to realize the limits of advertising and unable to deal with correct but incomplete information.

Rather than continue the ban, the Court placed the burden on the organized bar to educate the consumer about the nature of legal services. This education should include defining "routine" legal services such as were at issue in Bates. This obligation to define routine services in a non-misleading manner bothered some mem-

76. EC 2-19 states 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."
77. Indeed, the ban may have an adverse effect on the profession's image since disenchantment with lawyers lies in part with their failure to reach out into the community. 97 S.Ct. 2702; Branca & Steinberg, supra note 31, at 516 n.223; Recent Developments in Attorneys Fees, 29 Vand. L. Rev. 685, 707 (1976); Duty to Make Legal Counsel Available, supra note 9, at 1190.
78. This argument was advanced on the distinction made in the Virginia Pharmacy footnote. See text accompanying note 63 supra.
79. 97 S.Ct. 2704. See Martyn, supra note 29, at 172 n.28; A. Morrison, Institute on Advertising within the Legal Profession, 29 Okla. L. Rev. 609, 617 (1976); Restraints on Advertising, supra note 8, at 1158; Duty to Make Legal Counsel Available, supra note 9, at 1190; cf. J. Wilson, Madison Avenue, Meet the Bar, 61 A.B.A.J. 586 (1975) (rationale for advertising).
bers of the Court\textsuperscript{82} and conceivably poses the greatest problem for the bar. The Court believed the potential harm of inexplicit definition, however, was outweighed by other factors. First, defining the product-to-price relationship would not be too difficult a task for a profession that had already established a minimum fee schedule.\textsuperscript{83} Second, people generally do not use lawyers unless confronted with a particular legal problem. While they may not know the detail of the task, they are usually aware of the generalized nature of the service to be performed.\textsuperscript{84} Less onerous methods than a total ban can avoid possible misleading effects. If a range of prices were to appear in an advertisement or if it described situations that would not be covered, consumers would at least be able to make the initial decision to use a lawyer.\textsuperscript{85} A binding agreement as to price could be reached at the initial consultation. The Court also noted that advertisement is not misleading where the attorney does the necessary work at the advertised price.\textsuperscript{86} This is in effect a self imposed definition of routine services since lawyers would only advertise fees for those services which they consider so ordinary that the work could be done at a set fee. Finally, the advertising lawyer may elect not to include prices at all.\textsuperscript{87} Although this type of advertisement is narrower than the Bates holding, it appears to be an alternative that the individual lawyer could choose. The Court did not go beyond holding that the particular contents of the Bates advertisement were not misleading; however, it left the evaluation of these options to the discretion of the bar.\textsuperscript{88}

\textsuperscript{82} 97 S.Ct. at 2710 (Burger, C.J., dissenting). Chief Justice Burger stated that since the service was never standardized, price advertising could never give an accurate picture. Thus, price advertising for “routine services” could become “a trap for the unwary.”


\textsuperscript{84} Price information may also encourage the preventative use of lawyers since people now do not use their services because of an exaggerated idea of the fee. A. Morrison, Institute on Advertising Within the Legal Profession, 29 Okla. L. Rev. 609, 610 (1976); Recent Developments in Attorney’s Fees, 29 Vand. L. Rev. 685, 709 (1976).

\textsuperscript{85} Most people do not use lawyers because they have no way of finding the best attorney for their particular problem or they over-estimate the cost of legal services. See M. Freedman, Lawyers Ethics in an Adversary System 117 (1975); W. Smith, Making the Availability of Legal Services Better Known, 62 A.B.A.J. 855, 858 (1976); E. Cheatham, A Lawyer When Needed: Legal Services for the Middle Class, 63 Colum. L. Rev. 973, 975 (1963); A. Morrison, Institute on Advertising Within the Legal Profession, 29 Okla. L. Rev. 609, 610-11 (1976). Both of these difficulties would be overcome by the type of public information exemplified by the Bates ad.

\textsuperscript{86} 97 S.Ct. at 2703. This was adopted as part of the recent amendments. See note 123 infra.

\textsuperscript{87} In the July 3, 1977 edition of the Los Angeles Times, 88 attorneys advertised. Only eight listed price but almost all listed the general field of law in which they practiced. See 63 A.B.A.J. 1065 (1977).

\textsuperscript{88} 97 S.Ct. at 2709.
Adverse Effect on the Administration of Justice

By arguing that advertising has an adverse effect on the administration of justice the inconsistency of Canon 28 becomes apparent. The historical justification is that advertising has the undesirable effect of stirring up litigation and encouraging the assertion of fraudulent claims. The Bates Court rejected the notion of litigation as an evil, recognizing instead that it is the purpose of the judicial system to vindicate individual rights. The Court deemed the ban a likely burden on access to the courts and thus contrary to the legal profession's obligation to make counsel available. Advertising is the "traditional mechanism" for suppliers to inform purchasers of availability. The Court found no basis for the argument that advertising would increase fraudulent claims. Even assuming such a relationship the Court felt disciplinary methods other than the advertising ban were more appropriate remedies.

Economic Effects of Advertising

Much of the advertising debate focused on its projected effect on the price of legal services. Proponents of the ban argued that the increased overhead of advertising would be passed on to the client in the form of higher fees. Opponents of the ban argued that it increased the difficulty of discovering the lowest cost attorney of acceptable ability; thus, the normal incentive to lower prices was not present. Because the ban had existed for so long, there was little evidence to support either hypothesis. With the justification

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88. See text accompanying notes 17 through 19 supra.
91. 97 S.Ct. at 2705.
92. "Instead attorneys have a professional duty to stir up litigation when they are acting to advise people, who may be ignorant of their rights, to seek justice in the courts." M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 118 (1975).
93. 97 S. Ct. at 2704-05 n.31. See Branca & Steinberg, supra note 31, at 515; Duty to Make Legal Counsel Available, supra note 9, at 1187.
94. This may be the strongest refutation of the argument that the current ban serves a compelling state interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 768 (1976). See Branca & Steinberg, supra note 31, at 511 n.200; Duty to Make Legal Counsel Available, supra note 9, at 1188.
95. 97 S.Ct. at 2705. The ban may increase price, "If so, it may deprive consumers of an alternative product that they might rationally want: low-priced, low-quality legal services." Restraints on Advertising, supra note 8, at 1166.
97. 97 S.Ct. at 2706. One study suggests that advertising lowers prices by 25%. See L.
so speculative, the Court found itself unwilling to uphold the ban on this basis, preferring to rely on the demonstrated price-depressing effect of advertising in other businesses.

**Adverse Effect on Quality of Service**

It has been a longstanding concern that lawyers, if allowed to advertise, would use improper means to keep their prices low. Although permitting states to regulate claims as to quality of individual service, the Bates Court found advertising was not a substantial factor in the quality of legal service delivery. As the Court had previously stated in *Virginia Pharmacy*, "[t]here is no claim that the advertising ban in any way prevents the cutting of corners." The ban may have nothing to do with the quality of services except to enable the low-quality lawyer to make unreasonable profits in relation to his skill. At any rate, it could not be assumed that low cost services were identical to low quality services; therefore the Court decided that the informed consumer, looking out for his own self interest, should be be able to make this distinction.

**Difficulties of Enforcement**

The same bar that extolled the dignity of the profession anticipated that misrepresentation would be so prevalent that any regulation short of the ban would be impossible to enforce. The Supreme Court found this to be an incongruous argument. Even if the bar could not enforce advertising regulations, and it appears that the threat of discipline is not that persuasive, the consumer still has other remedies. Because the Court was looking for the least intrusive means to protect the consumer interest, the advertising ban could
not stand on this ground.

The Court found that the state’s interest based on these arguments was not sufficiently compelling to warrant suppression of all advertising by attorneys.\textsuperscript{105} The real concern of the Court was not whether advertisement by attorneys was within the scope of the first amendment, but rather what was the nature of permissible state regulation.\textsuperscript{106}

The Supreme Court has long recognized the power of the states to regulate the professions.\textsuperscript{107} Although finding Arizona’s ban on advertising excessive, the Court did not rule out all regulation. Speech that is false, deceptive or misleading is of course subject to restraint.\textsuperscript{108} Since the public lacks sophistication concerning legal services and because advertising is a calculated form of speech, the Court applied a stricter standard when analyzing this type of speech. To prevent deception of consumers, even certain truthful claims warrant restraint because of their potential to mislead.\textsuperscript{109} As an example, the Court used claims as to quality of service because they are not susceptible of measurement or verification. Nevertheless, it stopped short of stating that such claims were outside constitutional protection.\textsuperscript{110} The Court declared that many of the problems in defining the boundary of non-deceptive advertising remained to be worked out, issuing an invitation to the bar to play a

\textsuperscript{105} 97 S.Ct. at 2707.

\textsuperscript{106} Justice Powell noted during oral argument of Bates that

[T]he delivery of legal services in our country is obviously defective. . . I hope you have time to address, not just the bare bones issue of whether or not there can be advertising—I don’t perceive that as the basic issue in the case. The question is what limits, rationally, fairly, constitutionally may be imposed. . .

\textit{To Advertise or Not to Advertise}, 63 A.B.A.J. 341, 344 (1977). While Bates was the first case to reach the Supreme Court, similar cases were being heard throughout the country. These courts found first amendment violations, while the Arizona court found none. \textit{See} Health Systems Agency of N. Va. v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976); Consumers Union of United States, Inc. v. American Bar Ass’n, 427 F. Supp. 506 (E.D. Va. 1976); Jacoby v. California State Bar, 45 U.S.L.W. 2529.

\textsuperscript{107} This power was reaffirmed by Bates:

[T]he regulation of the activities of the bar is at the core of the State’s power to protect the public. Indeed, this Court in Goldfarb acknowledged that the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’

\textit{Id.} at 2698.

\textsuperscript{108} 97 S.Ct. at 2708. \textit{See} note 40 \textit{supra}.

\textsuperscript{109} \textit{Id.} at 2709. This reasoning cuts a fine line between the consumer’s ability to put a legal advertisement in proper perspective (as was used to invalidate the justification of the inherently misleading nature of advertising) and the public’s lack of sophistication about legal services (that was used to rationalize stricter regulations).

\textsuperscript{110} \textit{Id.}
special role in defining that boundary.\textsuperscript{111} The Court also stated that, as with other forms of speech, reasonable restrictions as to time, place, and manner could be imposed.\textsuperscript{112} Of particular concern were problems of advertising on the electronic media.\textsuperscript{113} As with claims of quality, such advertisement was not precluded but left for special consideration by the bar.\textsuperscript{111}

**ABA Response**

Prior to the announcement of the *Bates* decision, the ABA, sensing the mood of the Court, organized the Task Force on Lawyer Advertising.\textsuperscript{115} Alternative draft regulations were prepared, reflecting the differing approaches of the bar's members. Proposal A, the more conservative approach adopted by the House of Delegates, is described as "regulatory"\textsuperscript{116} and specifically describes the permitted forms of advertising. Most significantly, Proposal A retains the Code's categories of information that can be published.\textsuperscript{117} However, to comply with the narrow *Bates* holding as to price information\textsuperscript{118} it includes contingency fee information, range for certain services, hourly rates, and charges for "specific legal services the description of which would not be misunderstood or be deceptive."\textsuperscript{119} Proposal

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\textsuperscript{111} This recognizes the special relationship between the organized bar and the state agencies. While the regulation balances state interests, it is the private bar association that responds to the case. The ABA is an advisory body, but by responding with a set of guidelines, it hoped to avoid a lack of conformity that would work to the detriment of the consumer. ABA Annual Meeting, 46 U.S.L.W. 2089.

\textsuperscript{112} 97 S.Ct. at 2709. See note 42 supra.

\textsuperscript{113} Id. See note 135 infra.

\textsuperscript{114} Id.

\textsuperscript{115} The Task Force was established by the ABA Board of Governors on June 7, 1977. The *Bates* decision was announced on June 27, 1977. The Task Force met promptly thereafter and from time to time until the annual meeting of the ABA in Chicago. 46 U.S.L.W.1.

\textsuperscript{116} ABA Rep. of the Bd. of Governors to the House of Delegates, 5.

\textsuperscript{117} See note 21 supra.

\textsuperscript{118} 97 S.Ct. at 2709. Because the Court did not apply the overbreadth doctrine, only this particular factual situation is affected. See note 38 supra.

\textsuperscript{119} DR 2-101(B) as revised, provides in part:

(22) Contingent fee rates . . . provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific 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 to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rates, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged . . . ;

(25) Fixed fees for specific legal services, the description of which would not be
A ethical considerations and disciplinary rules reflect concern that advertisements convey the maximum amount of relevant price information without being misleading.\textsuperscript{120} Self-laudation and advertisements as to quality of service are still forbidden.\textsuperscript{121} The disciplinary rules require that where any price information is given, a disclosure statement in the advertisement must warn that a client is entitled without obligation to an estimate of the fee to be charged.\textsuperscript{122} To prevent escalating prices between advertisement and billing, the lawyer is bound to render the service for no more than the advertised fee.\textsuperscript{123}

Proposal B, labelled “directive,” does not restrict the content of advertising, and its antifraud approach prevents the attorney only from using any form of public communication containing a false, fraudulent, misleading or deceptive statement or claim.\textsuperscript{124} In a back door fashion, however, Proposal B imposes the same fee information limits as Proposal A since all fee information other than that per-
mitted in DR 2-101(A)(6)\textsuperscript{125} is classified as deceptive.\textsuperscript{126} Proposal B defines the standards of conduct more clearly than does "A," and by listing them in the disciplinary rules rather than in the ethical considerations, renders them binding.\textsuperscript{127} Although the disciplinary procedure is not changed in either proposal, Proposal B contains more commentary\textsuperscript{128} on ethical behavior since its effectiveness depends solely on disciplinary proceedings. The House of Delegates adopted Proposal A as its official position;\textsuperscript{129} however, it decided to circulate both proposals to the state courts and state regulatory agencies upon recommendation from the Board of Governors.\textsuperscript{130}

Both proposals deal with time, place, and manner regulations beyond the narrow scope of the Bates holding.\textsuperscript{131} While Bates could be limited to newspaper advertising, even Justice Powell in dissent noted that there was no valid distinction among print media.\textsuperscript{132} The

\begin{itemize}
\item \textsuperscript{125} See notes 21 and 119 supra.
\item \textsuperscript{126} DR 2-101(B) states in part:
Without limitation a false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:
\begin{enumerate}
\item (6) Relates to legal fees other than:
\begin{enumerate}
\item A statement of the fee for an initial consultation;
\item A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood;
\item A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
\item A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter.
\end{enumerate}
\end{enumerate}
\item \textsuperscript{127} See note 17 supra.
\item \textsuperscript{128} EC 2-8A states in part:
The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel . . . Advertising marked by excesses of content, volume, scope or frequency or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit . . . . The use of media whose scope or nature clearly suggests that the use is intended for self-laudation of the lawyer without concomitant benefit to the public such as the use of billboards, electrical signs, sound trucks, or television commercials distorts the legitimate use of informing the public and is clearly improper.
\item EC 2-8B states in part:
Advertisements or public claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly improper. Statistical data or other information based on past performance or prediction of future success is deceptive because it ignores important variables. Only factual assertions, and not opinions, should be made in public communications.
\item \textsuperscript{129} See note 4 supra.
\item \textsuperscript{130} ABA Rep. of the Bd. of Governors to the House of Delegates, 1.
\item \textsuperscript{131} The statement of the issue did not mention newspaper advertising specifically; however, by refusing application of the overbreadth doctrine, that result would follow.
\item \textsuperscript{132} 97 S. Ct. at 2718 n.12 (Powell, J., concurring in part, dissenting in part). 
\end{itemize}
ABA precluded this potential issue by not limiting advertising only to newspapers.\textsuperscript{133} Although not mandated by the decision, and not included in the Task Force's preliminary drafts, radio advertising is permitted. This is in apparent reaction to ABA public hearings which disclosed that to significant numbers of the population the electronic media was more accessible than the print media.\textsuperscript{134} The bar did not recommend use of television, recognizing that visual media may present separate problems of image and monitoring.\textsuperscript{135} However, a special section of both proposals allows television advertising upon the approval of the state agency responsible for lawyer regulation or consumer affairs.\textsuperscript{136}

Other recommendations were made to assure consumer protection. The ABA recommended the creation of a commission on advertising, including members of consumer organizations, to monitor advertising developments in other professions and state regulatory responses to Bates. The commission would also be charged with making recommendations as needs develop for amendments to the advertising guidelines.\textsuperscript{137} It also recommended forming a special committee to study the feasibility of a nationwide institutional advertising program to educate consumers about the utility, cost, and availability of legal services.\textsuperscript{138}

\begin{itemize}
  \item[133.] See notes 119 and 121 supra. Both proposals are framed in terms of public communication.
  \item[135.] Id. at 6; Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 586, aff'd without opinion 405 U.S. 100 (1971).
  \item[136.] DR 2-101(C) of Proposal A states:
  
  Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to [the agency having jurisdiction under state law]. Any such application shall be served upon [the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters] . . .
  
  DR 2-101(C) of Proposal B states in part:
  
  A lawyer shall not use or participate in the use of any form of public communication which:
  
  (7) Utilizes television or until [the agency having jurisdiction under state law] shall have determined that the use of such media is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability, and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

  In one pre-Bates action, it was decided to proscribe the use of electronic media even while permitting advertising in general. See Lawscope, 63 A.B.A.J. 299 (1977).
  \item[137.] ABA Rep. of the Bd. of Governors to the House of Delegates, 6.
  \item[138.] Id. at 10. But see J. Hoffman, Industry Wide Codes of Advertising, Seals of Approval, and Standards as Participated in by Trade Associations, 13 Antitrust Bull. 595 (1968) (problems with such activities).\end{itemize}
RESPONSES AFTER BATES & O'STEEN V. STATE BAR OF ARIZONA

The Bates case and the guidelines adopted in response to it raise numerous questions. Foremost is whether the regulations pose first amendment problems of prior restraint and content control. Of more concern to the public, however, is whether the regulations define "routine services" sufficiently to prevent deception and whether advertising will lead to further changes in the delivery of legal services.

Continuing First Amendment Problems

Since Proposal A limits permissible kinds of information, this proscription more than any other raises first amendment concerns of prior restraint and content control. Proposal B, which follows the traditionally approved formula of evaluating the speech after its communication, does not share this problem. It is questionable, however, whether Proposal A could be successfully challenged on this basis. Regulations of speech are generally invalidated in circumstances where prior permission is required. The Court has found post-speech sanctions violative of the first amendment where they have a "chilling effect" on the speech. Arguably the regulatory limitations of Proposal A could constitute either type of restraint. However, as the Court noted, "[a]ny concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated." One can conclude that the "before the fact" limits of Proposal A's categories will not have the effect of preventing the speech because of the economic benefit that is derived from advertising and the protection of the public interest that outweighs any restraining effects. Furthermore, the regulations in question are of a civil rather than criminal nature and may be viewed as having a less restrictive effect. Actual discipline occurs "after the fact" in both proposals. Finally, although a prior restraint regulation comes before the court with a "heavy presumption against its constitutional validity," it

139. See notes 37 through 44 supra.
140. The difference between "A" and "B" is the difference between "No one says I can" and "No one says I can't." The Court leans toward the latter because of the breadth given the first amendment rights.
141. See note 44 supra.
143. 97 S. Ct. at 2709.
Advertising Legal Services

is not unconstitutional per se. States have withstood prior restraint challenges upon proving scrupulous use of the regulatory power and careful administration of such regulations. Given the hearing procedures included in the Code, Proposal A, as well as Proposal B, should survive constitutional scrutiny.

Closely related to prior restraint is government control over content through regulation. Regulation effecting speech may be approved where the restraint on content is incidental to the purpose of the regulation. If the purpose of the ABA guidelines is to meet the narrow holding of Bates by providing price information, the new amendments do not constitute content control. Publication of relevant fee information is clearly permitted. On the other hand, if the purpose is to allow as much advertising as possible without misleading the public, the quality of service limitation may constitute content control. The Supreme Court did not preclude this type of advertising since it was not at issue in the Bates case. Where this issue had arisen in the past, the Court had found that the legitimate state interest in protecting consumers was sufficient to justify such a ban. However, in light of changing attitudes toward consumer information and commercial speech, it is probable that this issue will be addressed in the future. The quality of the lawyer's services is an important factor in evaluating an attorney. Just as individuals prior to Bates had to rely on word of mouth for price information, they are now forced to rely on it for indications of quality. If the issue arises, the key will be whether the measure-

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148. See text accompanying note 3 supra.
149. See note 119 supra.
150. The Bates and O'Steen ad made no claims as to quality of service. See note 24 supra.
152. If not directly, then it may be challenged indirectly, for as Justice Powell noted, reasonableness of fees depends on both quantity and quality of services. 97 S. Ct. at 2714-15.
153. Restraints on Advertising, supra note 8, at 1149. Even with advertising, there is no guarantee that such an evaluation will occur.

There is no easy answer to the fear that the public might choose attorneys on the basis of their advertising programs rather than their reputations for professional ability. It would of course be better if clients chose their lawyers on the basis of competence. But to compare that happy situation with the one which would result if advertising were allowed is misleading, because it is not at all clear that clients currently select lawyers on the basis of competence, or that they could do so in the absence of information which is blocked by the prevailing restrictions on advertising and solicitation. Non-deceptive advertising would at least increase the flow of information.

Duty to Make Legal Counsel Available, supra note 9, at 1190-91.
ment or verification of skills is sufficiently precise to outweigh the state interest in preventing fraud and deception of the public.

**Definition of Routine Services**

While the Supreme Court concluded that all advertising of legal services is not inherently misleading, it focused on the nature of "routine services" as the likely topic of advertisement. One of the significant tasks of the bar will be to define routine services in such a manner as to give leadership to its members and to prevent deception of the public.

Because the Court did not apply the overbreadth doctrine, arguably the only services permitted to be advertised are those in the *Bates* case: uncontested divorce or separation; uncontested adoption; non-business, uncontested bankruptcy; and change of name. Even price advertisements for these services were thought to be potentially misleading by the dissenting members of the Court. The majority of the Court, however, did not see this as a problem nor did they view these services as an exhaustive list of advertising subjects even though they recognized that only services similar to these would lend themselves to fixed fees. The Court was unconcerned that the precise service in each task may be likely to vary.

The ABA adopted an approach similar to that of the majority in *Bates*. Not only is there no specific list of routine services in their proposals but, like the Court, they also bumped ultimate responsibility down to the next level—the state regulatory agency or the individual practitioner. This does not mean, however, that the

154. *See note 38 supra.*

155. In pointing out the problems with a price advertisement for the routine service of "uncontested divorce," Justice Powell stated, at 97 S.Ct. 2713-14:

A potential client can be grievously mislead if he reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance; community property, tax refunds, and tax liabilities; and the disposition of other property rights . . . . The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inexcapably will mislead many who respond to it. In the end it will promote distrust of lawyers . . . .

156. *97 S.Ct. at 2703.* Factors in establishing price are: time involved, difficulty of the problem, amount of interests involved, benefits sought by the client, attorney's professional standing, attorney's opportunity cost, attitude of the profession toward the type of litigation, responsibility assumed by the attorney, probability of success, necessity of counsel's service, and client's ability to pay. Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971). This type of price setting, however, assumes more complicated fact situations than those addressed in the routine services of *Bates*.

157. *97 S.Ct at 2703.*

158. ABA, Rep. of the Bd. of Governors to the House of Delegates, 6.
Code amendments are without limits. Both proposals permit fixed fee advertising of specified legal services where the "description . . . would not be misunderstood or be deceptive . . ."\(^{159}\) The reasonable man standard is adopted in both "A" and "B" to judge the potential for deception in any given situation.\(^{160}\) Provisions permitting hourly rate and fixed fee advertisement in Proposal A also require notice to the consumer that the actual fee may vary.\(^{161}\) Furthermore, as has already been noted, the Code requires that the lawyer perform the service if it is advertised at a fixed fee for not more than that fee. In such circumstances, it does not matter whether the services advertised were routine or not.

While this area of the amendments will be a source of experimentation by the bar, the guidelines place both definitional responsibility and liability on the advertising lawyer. It is more likely that attorneys will place advertisements replete with caveats and disclaimers or even devoid of price quotations rather than depend on an ABA list of routine services. This approach, even with the possible risk of litigation from clients, is the preferable route. To wait until the ABA defines these services would be an unnecessary delay for both the attorney who wishes to advertise and for the public who needs the information.

**Changes in the Profession**

The permission of advertising may presage other changes in the legal profession. Two areas are predominant: solicitation and specialization. The legal profession has traditionally held solicitation in the same suspect realm as advertising.\(^{162}\) Solicitation may suffer the same perception problems as advertising did when it was debated, depending on whether it is perceived as merely informing persons of availability through personal contact or envisioned as "ambulance chasers" plaguing the injured in emergency rooms. To prevent harassment of injured parties, a solicitation ban may be justified. Yet, under normal circumstances, a significant number of

\(^{159}\) In Proposal A, see DR 2-101(b)(25), at note 119 *supra*. In Proposal B, see DR 2-101(B)(6)(b) at note 126 *supra*.

\(^{160}\) DR 2-101(B) in Proposal B states in part:

Without limitation a false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:

(7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.

\(^{161}\) See note 119 *supra*.

\(^{162}\) In *re Greathouse*, 189 Minn. 51, 248 N.W. 735 (1933).
people have no way of meeting attorneys and would welcome the contact. While the commercial speech doctrine has developed through a series of advertising cases, the distinction between advertising and solicitation may be too fine a line to draw, banning completely one form while permitting the other. Protection may also be extended in another manner. Solicitation has been granted first amendment protection when associated with the exercise of religious freedom. It is easy to argue, as was suggested in the analysis of Bigelow, that this type of expression is necessary to protect a distinct constitutional right of access to the courts. Given a case involving solicitation of clients in a non-emergency situation, the same balancing test that led to legal advertising may result in allowable, but regulated, solicitation.

The advertising decision may also accelerate the bar's move toward specialization in both conscious and sub-conscious ways. It appears from early reports that most attorneys are including their area of practice, even more so than their fees, in their advertisements. The ABA guidelines permit the inclusion of certified specialties in advertisements. Specialty information was permitted prior to Bates but only in the Code-approved forms of yellow page listings and law directories. An attorney who practices within a general field of law but whose state does not grant certification may identify his area of practice in an advertisement so long as official certification is not implied. This advertising may lead to further specialization in practice. Where an attorney advertises his practice in a given field of law, more individuals needing that type of service are likely to become his clients. Over time, the attorney may devote more of his attention to that subject area than would have occurred without advertising, thus leading to greater individual specialization. In addition, the attorney may increasingly limit the nature of his practice so as to achieve economies of scale through the use of


166. See note 87 supra. This response to Bates prompted one state bar to issue their proposed guidelines on specialization. Morrison, Field Advertising—Special Competence or Ordinary Hucksterism? We Need a Specialization Rule Now, 66 Ill. Bar J. 78 (1977).

167. See note 21 supra.

168. EC 2-14 of Proposal A states in part: "If a lawyer discloses areas of law in which he practices or to which he limits his practice, but is not certified in [the jurisdiction], he, and the designation authorized in [the jurisdiction], should avoid any implication that he is in fact certified."
standardized forms and paralegal services. This would be particularly true in the area of routine services such as those performed by the Law Clinic of Bates and O'Steen. State licensing of specialties may have to be accelerated to assure that those claiming abilities actually have them.

CONCLUSION

The impact of Bates and O'Steen v. State Bar of Arizona on the practice of law will be felt more by the implementation of the ABA guidelines than by the development of the case's constitutional doctrine. Certainly, the expansion of commercial speech to protect advertisements of services will quickly be used to support challenges to advertising bans in other professions. But the real benefit to the consumer depends on the pace and the extent to which the states adopt the new guidelines. The decision gives the consumer a chance to obtain information vital to the selection of a particular lawyer, as well as to the initial decision to employ the services of an attorney. It is hoped that the state bar associations will take enthusiastic rather than grudging steps to support this recognized public interest.

ANN FIELD DUKER

169. It was the conscious philosophy of the Bates & O'Steen Clinic to take only routine matters, thus, assuring the economies of scale necessary to keep prices low. 97 S. Ct. at 2694.

170. In Louisiana Consumers League, Inc. v. Louisiana State Bd. of Optometry Examiners, 46 U.S.L.W. 2117 (1977), Bates was used successfully to challenge a state ban on eyeglass price advertising.