Maryland Law Review

Volume 37 | Issue 2 Article 7

Attorney Advertising is Commercial Speech Protected by the First Amendment - Bates v. State Bar

ATTORNEY ADVERTISING IS COMMERCIAL SPEECH PROTECTED BY THE FIRST AMENDMENT: *Bates v. State Bar*

INTRODUCTION

In *United States v. O'Brien*,[1] the Supreme Court stated what one respected commentator, John Hart Ely, believes is the general analytic framework within which the Court adjudicates the constitutionality of laws that in some way impinge upon an individual's right of freedom of speech.[2] The *O'Brien* Court said that a governmental regulation that allegedly violates the first amendment is constitutionally sound (1) "if it furthers an important or substantial governmental interest;" (2) "if the governmental interest is unrelated to the suppression of free expression;" and (3) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[3] Professor Ely has suggested that the second criterion of this test serves a switching function.[4] When the Court finds that a challenged regulation is related to the suppression of free expression, its constitutionality will be determined under a rigorous categorization analysis. Ely has indicated that a court, when determining whether a law is related to the suppression of information, should analyze the causal connection between the asserted state interest and the regulation designed to achieve this interest. The critical question would be

> whether the harm that the state is seeking to avert is one that grows out of the fact that the defendant is communicating, and more particularly out of the way people can be expected to react to his message, or rather would arise even if the defendant's conduct had no communicative significance whatever.[5]

Where the regulation is found to be related to the suppression of free expression, it will be upheld only if the suppressed speech is found to fall within one of a small number of categories of unprotected speech that the Supreme Court in prior decisions has established as being amenable to comprehensive state regulation.[6] Traditionally, these unprotected categories

---

1. 391 U.S. 367 (1968).

2. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484 (1975) [hereinafter cited as Ely].

3. 391 U.S. at 377 (numbers in parentheses added).

4. Ely, *supra* note 2, at 1484.

5. *Id.* at 1497 (footnote omitted).

6. *Id.* at 1496-1502. *But see The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 145-47 & nn.23-36 (1976). The author of this student piece contends that two recent Supreme Court cases, Elrod v. Burns, 427 U.S. 347 (1976), and Buckley v. Valeo, 424 U.S. 1 (1976), indicate that the Court may have abandoned this analysis. Instead, it is

have been obscenity,[7] libel,[8] fighting words,[9] and any speech that satisfied some variant of the clear and present danger test.[10] Where, however, the regulation is found to be unrelated to the suppression of free expression, that is, where the harm that the state is seeking to avoid does not stem from the way people may be expected to react to a particular communication, a balancing approach will be utilized[11] to determine whether the state's interest is sufficient to justify any incidental effects which the regulation might have on an individual's first amendment rights.

Although the Court has never explicitly stated that commercial speech falls within the set of unprotected categories,[12] it initially treated commercial speech as serving little, if any, first amendment interest. The anomalous situation existed whereby the Court permitted lower courts to deny constitutional protection to this speech, not explicitly singled out as unprotected, even where it was the subject of a regulation that suppressed its

---

suggested that where a suppression is found the Court will subject the regulation to "exacting scrutiny" requiring: (1) that the state's interest be compelling; (2) that the chosen means substantially further those interests; and (3) that the challenged regulation be the least intrusive way of achieving the government's purposes. It is not exactly clear, however, that the regulations involved in *Elrod* and in *Buckley* were suppressions of speech. Indeed, in a footnote to the *Elrod* opinion the Court implied that the legislation in *Buckley* did not " 'focus on the ideas expressed by persons or groups subjected to [it] . . . .' " 427 U.S. at 363 n.17 (quoting *Buckely,* 424 U.S. at 17). *Elrod,* however, does appear to evaluate a regulation which is related to the suppression of free expression. There, plaintiffs challenged the system of political patronage as it was practiced in Cook County, Illinois, where state job holders were fired if they did not manifest loyalty to the political party in power. The restriction was clearly directed at the content of the ideas expressed. It would appear, therefore, that *Elrod* does not comport with Professor Ely's analysis.

7. *See, e.g.,* Roth v. United States, 354 U.S. 476, 481-85 (1957).

8. *See, e.g.,* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

9. *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

10. *See, e.g.,* Bradenburg v. Ohio, 395 U.S. 444 (1969).

11. Professor Ely notes that the Court has established two balancing techniques. The weaker approach asks only whether there exists any "less restrictive alternative capable of serving the state's interest *as efficiently as it is served by the regulation under attack.*" Ely, *supra* note 2, at 1484-85 (emphasis in original) (footnote omitted). This formulation would invalidate only laws that can be said to gratuitously inhibit expression. The stronger approach implies real balancing. It asks whether there are alternatives available, and, if so, whether the marginally greater effectiveness of the original regulation justifies its greater burden on communication. Ely states that the strong balancing approach is ordinarily used when dealing with "traditional" modes of expression, such as circulation of pamphlets, picketing, public speeches, and rallies. *Id.* at 1488, 1490.

12. *See* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 430-31 (1971). The author notes that the Court "seems to" apply the protected-unprotected approach to commercial speech. In fact, it has never included commercial speech within the litany of categories which it has noted as unprotected. *See, e.g.,* Bigelow v. Virginia, 421 U.S. 809, 819 (1975). Professor Redish argues that commercial speech is not in the same class as libel, slander, fighting words, or incitement because, unlike those forms of speech, it is not harmful in and of itself.

dissemination.[13] Recently, however, the Court has reevaluated the first amendment interests represented by commercial speech. First in the area of product advertising, then extending its reasoning to cover professional advertising, the Court has stated that commercial communications contain valuable information that should be protected by the first amendment. Although the Court has continued to recognize that certain "common sense differences" between commercial and other varieties of speech dictate that it should be treated somewhat differently, it now appears that the Court is unlikely to uphold a state regulation designed to suppress commercial speech because of the effect which that speech may have upon its recipients. Instead, the Court is likely to apply an analysis containing elements of both an exacting scrutiny test,[14] and the categorization approach described by Professor Ely. The application of this analysis will almost inevitably result in the striking down of any regulation that suppresses commercial information.

This Note will trace the history and evolution of the Court's treatment of commercial speech. Next, it will discuss the recent case of *Bates v. State Bar*,[15] where a five member majority of the Court concluded that a state regulation prohibiting advertising by attorneys violated the first amendment. Finally, this Note will discuss the recently adopted amendments to the American Bar Association's rules on attorney advertising. It will examine these rules in light of the *Bates* decision to determine whether they present any significant constitutional problems.

HISTORY OF COMMERCIAL SPEECH

Until recently, it had been widely accepted that commercial speech was outside the scope of first amendment protection.[16] This understanding of what was known as the "commercial speech exception" derived from the Supreme Court's opinion in the 1942 case of *Valentine v. Chrestensen*.[17]

In *Chrestensen*, the owner and exhibitor of a submarine, upon attempting to distribute handbills soliciting paying visitors, was advised of an ordinance prohibiting the distribution of commercial advertising matter in city streets, but was informed that circulation of handbills devoted to social protest was permissible. He then circulated a second bill identical to the first but containing a protest against the City Dock Department on the reverse side. The Court of Appeals for the Second Circuit found this political

13. *See, e.g.*, Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972).

14. *See* note 6 *supra*.

15. 97 S. Ct. 2691 (1977).

16. *See, e.g.*, Breard v. City of Alexandria, 341 U.S. 622 (1951); United States v. Hunter, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972); *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967).

17. 316 U.S. 52 (1942). For a discussion of the Court's treatment of commercial speech prior to *Chrestensen*, see Bayus, *The Constitutional Status of Commercial Expression*, 3 HASTINGS CONST. L.Q. 761, 765-68 (1976).

protest sufficient to invoke first amendment protection.[18] The Supreme Court did not. In upholding the constitutionality of the ordinance, the Court merely stated that the Constitution imposes no restraints upon a state when that state regulates the dissemination of commercial advertising.[19] Despite the Court's failure to provide rationale or authority supporting its decision,[20] it did imply that commercial advertising — commercial speech — does not communicate information or ideas that the first amendment protects.

After *Chrestensen,* the Supreme Court further developed its policy that commercial communications do not enjoy first amendment protection. In *Breard v. City of Alexandria,*[21] the Court concluded that an ordinance making it a misdemeanor to solicit for sale, or sell, goods, wares, or merchandise at private residences without having been invited by the owner or occupant was constitutional when applied to the door-to-door selling of magazine subscriptions. The Court distinguished *Martin v. City of Struthers,*[22] where an ordinance prohibiting door-to-door distribution of handbills had been held unconstitutional. It noted that in *Martin* the ordinance at issue forbade the distribution of all handbills or circulars,

18. Chrestensen v. Valentine, 122 F.2d 511 (2d Cir. 1941), *rev'd,* 316 U.S. 52 (1942). A majority of the Second Circuit believed the second, two-sided, handbill deserved constitutional protection. Speaking for the majority, Judge Clark expressed his belief that an absolute prohibition against commercial handbilling would be of "doubtful validity." *Id.* at 516. But the majority did not reach this question. Beginning with the assumption that speech is commercial if the advertiser's primary purpose is to make a profit, the court examined Chrestensen's purpose and was unable to decide whether he had been primarily engaged in an "advertising plot" or whether he "really believe[d] in his wrongs." *Id.* Because the court felt that borderline cases should be resolved in favor of the cherished right of freedom of speech, it concluded that the handbill was not commercial and was thus protected. *Id.* Dissenting, Judge Frank took issue with both points. He believed constitutional protection should not be accorded commercial communications merely because they can be subsumed under the rubric of "speech." To do so, he thought, would be to "'thingify' the words 'free speech' and 'free expression', and to become forgetful of the vital ideas . . . and 'the processes . . .' for which they stand."*Id.* at 525 (Frank, J., dissenting) (footnote omitted). Secondly, in a somewhat metaphysical discussion, Judge Frank stated that there were in fact two handbills in issue; he would have determined the primary purpose for each. Because the purely paper tie was an arbitrary choice of their common author, he felt Chrestensen was estopped from maintaining that the two handbills were inseparable for the purpose of "the delicate judicial power of nullifying legislation." *Id.* at 517. Accordingly, he would have considered only the commercial side when determining the author's purpose. *Id.* at 517-22.

19. 316 U.S. at 54.

20. *See* Redish, *The First Amendment in the Market Place: Commercial Speech and the Values of Free Expression,* 39 GEO. WASH. L. REV. 429, 450 (1971). Given the dissension in the court below, *see* note 18 *supra,* it is odd that the Court treated this subject so superficially. One member of the *Chrestensen* Court, Justice Douglas, later remarked that "[t]he ruling was casual, almost off hand." Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). The decision has been described as "one of those curious judicial judgments which so often illustrate the psychology which accompanies war." Gardner, *Free Speech in Public Places,* 36 B.U. L. REV. 239, 239 (1956) (footnote omitted).

21. 341 U.S. 622 (1951).

22. 319 U.S. 141 (1943).

whereas the ordinance before the *Breard* Court prohibited only the circulation of commercial solicitations.

Breard was the last case in which the Supreme Court denied first amendment protection to speech because of its commercial character.[23] Although lower courts continued to apply the "commercial speech exception," thus denying commercial advertising first amendment protection,[24] some members of the Supreme Court began to recognize the valuable role commercial speech plays in our society and indicated that it might, to some extent, be protected by the first amendment.[25]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,[26] the Court was called upon to determine whether a newspaper that carried help-wanted advertisements in sex-designated columns, in violation of a municipal ordinance, was entitled to first amendment protection. A five member majority of the Court considered but did not adopt the commission's argument that the regulation was constitutionally permissible because commercial speech is unprotected. The Court agreed that the advertisements before it were classic examples of commercial speech: they were merely proposals of possible employment and did not express a position on whether, as a matter of social policy, an employer should be able to use gender as a factor in deciding who should fill a certain position.[27] The Court did not, however, base its decision to deny first amendment protection upon its finding that the want-ad display was commercial speech. Rather, it held that the display was unprotected because the advertisements proposed an illegal activity: sex-based employment discrimination.[28] Indeed, for the first time, the Court indicated that there might be a "First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation . . . ."[29] The Court hinted that in an appropriate situation it might find commercial advertising to be constitutionally protected. In *Bigelow v. Virginia*,[30] decided in 1975, the Court was presented with such a situation.

The defendant in *Bigelow* was an editor of a Virginia newspaper that published an advertisement soliciting patrons for an abortion referral service operating out of New York. He was convicted under a Virginia law

---

23. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976).

24. *See, e.g.*, United States v. Hunter, 459 F.2d 205, 211-12 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), and cases cited therein; 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 551-55 (law school ed.) (4th ed. 1976).

25. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-06 (Douglas, J., dissenting), *denying cert. to* 438 F.2d 433 (3d Cir. 1971).

26. 413 U.S. 376 (1973).

27. *Id.* at 387-88.

28. *Id.*

29. *Id.* at 389.

30. 421 U.S. 809 (1975).

making it a crime to advertise, encourage, or promote the procuring of an abortion. Virginia's highest court affirmed,[31] stating that the advertisement was unprotected because it was commercial speech. The Supreme Court reversed the conviction, holding that the ordinance upon which it was based was unconstitutional because it unduly infringed upon protected expression. The majority appeared to have based its holding that the advertisement served first amendment interests upon alternative grounds. First, the Court disposed of *Chrestensen* by describing the case as having held only that commercial advertising is subject to reasonable regulation of its manner of distribution.[32] The majority implied that commercial speech has always enjoyed some degree of first amendment protection.[33] Second, the majority distinguished the advertisement before it from that involved in *Chrestensen*. It found the distinguishing feature of the abortion advertisement to be that it contained factual material of public interest.[34]

Although it can be maintained that the *Bigelow* Court, by emphasizing the public interest aspect of the defendant's speech, implied that only commercial communications which contain factual material of public interest are protected, it is uncertain what the Court believed the first amendment interest of the abortion advertisement to be. The Court did, however, engage in a balancing analysis, concluding that Virginia's interest did not outweigh the first amendment interest at stake. It observed that the state's objective was, in effect, to deny its citizens information about activities outside its borders — an objective which the Court clearly believed to be impermissible.[35]

The *Bigelow* Court's reliance upon its finding that the advertisement contained factual material of public interest engendered varying interpreta-

31. Bigelow v. Commonwealth, 213 Va. 191, 191 S.E.2d 173 (1972), *rev'd*, 421 U.S. 809 (1975). For an analysis of the case in the Virginia courts, see 60 VA. L. REV. 154 (1974).

32. 421 U.S. at 819. Most of the case law and commentary dealing with commercial speech however, have considered *Chrestensen* to stand for the proposition that commercial communications are wholly unprotected by the first amendment. *See, e.g.*, United States v. Hunter, 459 F.2d 205, 211-12 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

33. 421 U.S. at 820-21. Justice Blackmun cited Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (*see* text accompanying notes 26 to 29 *supra*) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964) as authority for this assertion. In *Pittsburgh Press*, however, the Court merely said that commercial speech *might* be protected by the first amendment. *See* text accompanying note 28 *supra*. Nor does the *New York Times* case stand for the proposition that commercial speech enjoys some degree of protection. There, when a newspaper published a full page advertisement soliciting funds for the committee to defend Martin Luther King, Jr., the Court's holding that the advertisement was protected was based upon its finding that it was not commercial speech. Because the advertisement "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives were matters of the highest public interest and concern," the Court felt that it could be distinguished from the commercial advertisement before it in *Chrestensen*. 376 U.S. at 266.

34. 421 U.S. at 822.

35. *Id.* at 824-25.

tions of the protection it had afforded commercial speech. Some courts held that *Bigelow* demanded a balancing of interests whenever commercial speech was involved; others interpreted the case as having recognized a narrow category of unprotected commercial speech reserved for those communications devoid of factual material of public interest.[36] Because the Court's public interest analysis could be interpreted to function either as a means of removing the abortion advertisement from the category of commercial speech or as a criterion for determining the value of commercial communications within the context of a first amendment balancing analysis, the degree of protection which the *Bigelow* Court extended to commercial speech was uncertain. In retrospect, it appears that the *Bigelow* Court sought to prevent a state's use of the label "commercial speech" to justify the suppression of valuable information. By rereading *Chrestensen* to obliterate the commercial speech exception, the Court accomplished this objective. Yet the Court's public interest and balancing analyses created the possibility that a state regulation could constitutionally suppress those commercial communications that lacked factual material of public interest. In its very next term the Court resolved this confusion.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[37] a consumer group challenged the constitutionality of a Virginia statute that prohibited the advertisement of prescription drug prices by pharmacists.[38] At the outset, a seven member majority of the Court acknowledged that after *Bigelow* the "commercial speech exception" might still retain some validity because the subject matter of the *Bigelow* advertisement had not been purely commercial.[39] The majority, therefore, explicitly stated that the question whether commercial speech is unprotected was squarely before the Court.[40] Speaking for the Court, Justice Blackmun further defined the issue as being whether "speech which does 'no more than

36. For a list of post *Bigelow* cases split along these lines, see Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. CHI. L. REV. 205, 218 n.87 (1976).

37. 425 U.S. 748 (1976).

38. According to VA. CODE § 54-524.35 (1974), a pharmacist was guilty of unprofessional conduct if he

> (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.

Other states have invalidated similar laws. *See* Florida Bd. of Pharmacy v. Webb's City, Inc., 219 So. 2d 681 (Fla. 1969) (no reasonable relation to public health, safety, morals or general welfare); Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973) (held to violate state and federal due process clauses); Pennsylvania State Bd. of Pharmacy v. Pastor, 441 Pa. 186, 272 A.2d 487 (1971) (held to violate state due process standard). *But see* Supermarkets General Corp. v. Sills, 93 N.J. Super. 326, 225 A.2d 728 (1966); Urowsky v. Board of Regents, 38 N.Y.2d 364, 342 N.E.2d 583, 379 N.Y.S.2d 815 (1975). A federal court has also invalidated a similar state law. *See* Terry v. California State Bd. of Pharmacy, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd,* 426 U.S. 913 (1976).

39. 425 U.S. at 760.

40. *Id.* at 760-61.

propose a commercial transaction,' . . . is so removed from any 'exposition of ideas,' . . . and from ' "truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government," ' . . . that it lacks all protection."[41] The Court held that it was not.

Justice Blackmun began his analysis by recognizing that important individual and societal interests are served by the free flow of commercial information. He noted that both the advertiser — the pharmacist — and the public have an interest in maintaining the free flow of drug price information. He stated that the pharmacist's interest, although predominantly economic, deserved consideration.[42] Justice Blackmun observed that the Court has long recognized that employees and employers engaged in labor disputes enjoy first amendment rights despite the fact that their interests are economic rather than political.[43] He believed also that the consumer has an interest in receiving price information, an interest which he characterized as perhaps "keener by far, than his interest in the day's most urgent political debate."[44] He reasoned that, to the consumer of prescription drugs, who is often aged and on a fixed income,[45] knowledge of the varying prices of medication might make it unnecessary to choose between the alleviation of physical pain and the enjoyment of basic necessities.[46]

Justice Blackmun also suggested that the free flow of commercial information would serve vital societal interests by facilitating democratic public decisionmaking.[47] In a free market economy, where the allocation of resources depends largely upon numerous private economic decisions, the

---

41. *Id.* at 762 (citations omitted).

42. *Id.*

43. *Id.* (citing NLRB v. Gissel Packing Co., 395 U.S. 575, 617-18 (1969); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469, 477 (1941); AFL v. Swing, 312 U.S. 321, 325-26 (1941), Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

44. *Id.* at 763.

45. *See id.* at n.18.

46. *Id.* at 764. The regulation effectively prevented all comparison shopping for prescription drugs. The prices of these drugs had been found to vary by as much as 1200% within the same city. *Id.* at 754 n.11.

A comparison of Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969), with Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683 (E.D. Va. 1974), *aff'd*, 425 U.S. 748 (1976), illustrates just how important a consumer's interest in receiving drug price information can be. In both cases the regulation ultimately overturned in *Virginia Pharmacy* was challenged. In *Patterson Drug* the district court's holding that the first amendment did not protect commercial speech seemed to have been influenced by the fact that the plaintiff was a drug company. When, as in *Virginia Citizens*, the plaintiffs were consumers, the district court held that the ordinance was unconstitutional, noting that the plaintiffs' interest was fundamentally deeper than a trade consideration, 373 F. Supp. at 686. *See generally* Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Note, *Constitutional Law — State Statute Prohibiting Pharmacists from Publishing Prescription Drug Prices Violates Consumers' Right to Know*, 23 KAN. L. REV. 289 (1975); Note, *Constitutional Law: The Constitutionality of a Statute Prohibiting Advertising of Prescription Drug Prices*, 28 OKLA. L. REV. 350 (1975).

47. 425 U.S. at 765.

public interest would be served by the availability of adequate information enabling citizens to make intelligent economic decisions.[48] Justice Blackmun further maintained that information which is indispensable to the proper allocation of resources in a free enterprise system is also indispensable to the development of intelligent opinions as to how that system should be regulated or altered.[49]

Having established that advertising — commercial speech — is within the scope of the first amendment because it is instrumental in the process of enlightened public decisionmaking, Justice Blackmun considered and rejected the asserted justifications for the advertising ban. He acknowledged that the state had a strong interest in maintaining the professionalism of its pharmacists.[50] Yet he noted that the state's attempt to regulate the profession, by prohibiting all advertising of prescription drugs, was a suppression of commercial information.[51] Under the close inspection required when evaluating laws which suppress expression, he found that the advertising ban did not directly affect professional standards one way or another.[52] Apparently because the state's means did not substantially further its objective, the Court concluded that the first amendment mandated the protection of the information which the State of Virginia sought to suppress.[53]

---

48. *Id.*

49. *Id.* The Court indicated that even advertisements that appear to contain no material of public interest should be protected. Thus, the Court conclusively decided that the public interest criterion should not be utilized when determining the first amendment protection afforded particular advertisements. *Id.* Perhaps the Court abandoned the public interest criterion because of the difficulties which that standard produced when it was applied in libel cases decided after the Court's landmark decision of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) ("all human events are arguably within the area of 'public or general concern' "). Indeed, shortly after the *Bigelow* decision, one commentator prophetically suggested that "subjective analysis [of the public interest content of advertisements] will be avoided by declaring all but intentionally deceptive advertising to be of public interest . . . ." *The Supreme Court, 1974 Term,* 89 HARV. L. REV. 47, 117 (1975) (footnotes omitted).

If protection were commensurate with the public interest value of an advertisement, a court would scrutinize the content of each communication to determine the appropriate degree of protection. Yet, as Justice Rehnquist pointed out in his dissent to *Bigelow,* the Court believes it is improper to make first amendment decisions on the basis of the content of the speech. Bigelow v. Virginia, 421 U.S. 809, 831 (1975) (Rehnquist, J., dissenting).

50. 425 U.S. at 766.

51. *Id.* at 769–70.

52. *Id.* at 769.

53. Justice Rehnquist, dissenting, objected to the majority's analysis, insisting that the Virginia Legislature is charged with the regulation of that state's pharmacists, 425 U.S. at 783 (Rehnquist, J., dissenting), and that the free enterprise system presupposed by the majority is not required by the Constitution. *Id.* at 784 ("[T]here is certainly nothing in the United States Constitution which requires the Virginia Legislature to hew to the teachings of Adam Smith . . . ."). These words echo Oliver Wendell Holmes, Jr.'s attack on substantive due process in Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("the Fourteenth

The decision in *Virginia Pharmacy,* however, was not without its caveats. The Court noted that certain "common sense differences" between commercial and other varieties of speech might suggest that a different degree of protection be accorded commercial communications.[54] Because commercial speech is the *sine qua non* of commercial profits, and thus extremely durable, and because it is also particularly susceptible to verification by its disseminator, it may be less necessary to tolerate inaccurate statements for fear of silencing the speaker.[55] Furthermore, it may be appropriate to require additional messages, warnings, or disclaimers so as to prevent deception.[56] In addition, the general prohibition against prior restraints may not apply.[57] The Court also cautioned that only truthful commercial speech is protected; a state is free to suppress false and misleading advertisements.[58] Finally, the *Virginia Pharmacy* Court warned that it had considered only product advertising and that advertising of professional services might require special consideration.[59] Indeed, in his concurring opinion Chief Justice Burger stated that advertisements for professional services could be inherently deceptive, because professional judgment, a factor which can not be readily measured, is the subject of the transaction.[60] Accordingly, he would uphold a regulation that suppressed advertising by professionals.

Despite these substantial qualifications, the *Virginia Pharmacy* opinion made it clear that the Court is not likely to tolerate a regulation that suppresses commercial speech. The opinion contained language which makes it difficult to determine whether the Court will utilize an exacting scrutiny[61] or a categorization test[62] when evaluating legislation that suppresses commercial advertising. Justice Blackmun appeared to apply an exacting scrutiny analysis,[63] yet, he also stated: "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of

---

Amendment does not enact Mr. Herbert Spencer's Social Statics . . . [a] constitution is not intended to embody a particular economic theory.") *See also* Note, *Purely Commercial Speech and Its Relationship to the First Amendment,* 37 LA. L. REV. 263, 267-70 (1976).

54. 425 U.S. at 771 n.24.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 770-72. Justice Blackmun also noted that ordinances which suppress advertisements proposing illegal activities and time, place, and manner restrictions that are enacted without regard to content would be constitutional. *Id.* Additionally, the Justice hinted that commercial speech that is disseminated through the electronic media might receive less protection. *Id.* at 773.

59. *Id.* at n.25. *But cf.* Morrison, *Institute on Advertising Within the Legal Profession — Pro,* 29 OKLA. L. REV. 609, 614-15 (1976) (suggesting that the *Virginia Pharmacy* majority knew that the logical development of its decision would be an invalidation of bans on attorney advertising).

60. 425 U.S. at 774-75 (Burger, C.J., concurring).

61. *See* note 6 *supra.*

62. *See* text accompanying notes 6 to 10 *supra.*

63. *See* text accompanying notes 50 to 53 *supra. See also The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 145-47 (1976).

its misuse if it is freely available, that the First Amendment makes for us."[64] This language appears to state the categorization test. Although the former approach makes the suppression of protected speech theoretically possible, it is doubtful that the Court would ever uphold such a regulation. The Court's discussion of the common sense differences of commercial speech does, however, indicate that commercial speech will be given unique treatment when it is the subject of a regulation not related to the suppression of information.[65]

Further support for this analysis is found in *Linmark Associates Inc. v. Township of Willingboro*.[66] In that case, a community attempted to prohibit

---

64. 425 U.S. at 770.

65. It is unclear, however, how much protection will be accorded commercial speech when it is being regulated by a content-neutral time, place, or manner ordinance. Perhaps in this situation the common sense differences between advertising and other speech, which suggest that it receives a different degree of protection, will allow the state greater leeway in regulating commercial communications. Consider, for example, the recent New York case of People v. Remeny, 40 N.Y.2d 527, 355 N.E.2d 375, 387 N.Y.S.2d 415 (1976).

In *Remeny*, the defendant was arrested for distributing handbills for a jazz concert under an ordinance prohibiting all commercial handbilling inside the New York City limits. The court, in a plurality opinion, cited *Virginia Pharmacy* as having held that advertising enjoyed first amendment protection. Although the court admitted that commercial speech may be reasonably regulated, it concluded that the ordinance was an unconstitutional regulation of commercial speech because it prohibited the distribution of all advertising handbills.

The court appears to have found that the regulation suppressed speech. Yet, because the city had not sought to prohibit people from acting upon the ideas communicated by the advertising handbills, but had attempted only to prevent littering — a content-neutral objective — the city ordinance was, at least arguably, not a suppression but a time, place, or manner restriction. As such, the court should have weighed the city's interest against the first amendment interest of the defendant to determine the constitutionality of the regulation.

Moreover, although the court was correct when it stated that an absolute prohibition of political or religious handbilling would not be a reasonable time, place, and manner regulation, the same ordinance when applied to commercial speech might well be constitutional. In balancing the interests at stake a court should consider one of the "common sense differences" of commercial speech: its durability. Because advertising is the *sine qua non* of commercial profits, it is unlikely to be chilled by a regulation of this nature. In fact, commercial enterprises have survived in New York City for years under this ordinance. Because there are alternative channels for disseminating this information and because the city's interests in preventing littering and traffic congestion are so strong, it is likely this ordinance would be considered constitutional. *See also Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1035 (1967), noting that because commercial advertising creates increased revenues an advertiser is more able to afford newspaper and broadcast media outlets than is a political or religious speaker.

Indeed, in a dissenting opinion in *Remeny*, Judge Jasen stated that the court should have engaged in a balancing approach. He felt that because commercial speech may occupy a lower position on the scale of first amendment values it may be susceptible to especially keen regulation. Taking cognizance of the "crushing financial plight of the central cities," he would have upheld the regulation. 40 N.Y.2d at 542, 355 N.E.2d at 385, 387 N.Y.S.2d at 424 (Jasen, J., dissenting).

66. 431 U.S. 85 (1977).

the posting of "For Sale" or "Sold" signs on the lawns of its citizens' homes, thereby effecting a suppression of information.[67] The Township sought to justify the ban by claiming that its goal was to promote stable, racially integrated housing.[68] While the Court acknowledged the importance of this goal, it noted that the Township had failed to establish that its ordinance was essential to the maintenance of Willingboro's status as an integrated community.[69] Moreover, the Court indicated that even if Willingboro had demonstrated this connection, the regulation would still be unconstitutional. Thus, Justice Marshall, the Court's spokesman in *Willingboro,* seemed to believe that *Virginia Pharmacy* mandated the application of the categorization test. He said, "[t]he constitutional defect in this ordinance, however, is far more basic. The Township . . . acted to prevent its residents from obtaining certain information. . . . *Virginia Pharmacy Bd.* denies government such sweeping powers."[70]

It was against this backdrop that the state of Arizona sought to justify its regulation which effectively suppressed all advertising by attorneys.

THE *Bates* CASE

On February 22, 1976, John Bates and Van O'Steen, members of the Arizona State Bar, placed an advertisement[71] in *The Arizona Republic,* a daily newspaper, offering their legal services and setting forth their prices for performing the legal work necessary for name changes, uncontested personal bankruptcies, uncontested adoptions, and uncontested divorces. The advertisement violated Disciplinary Rule 2-101(B) of the Arizona Supreme Court,[72] which prohibited lawyer advertising. The president of the state bar filed a complaint with a special administrative committee and a

67. The township has not prohibited all lawn signs — or all lawn signs of a particular size and shape — in order to promote aesthetic values or any other value 'unrelated to the suppression of free expression,' . . . . Rather, Willingboro has proscribed particular types of signs based on their content because it fears their 'primary' effect — that they will cause those receiving the information to act upon it.

Id. at 93-94 (footnotes omitted). In the decision below, the Third Circuit mistakenly characterized the ordinance as a time, place, or manner regulation. Linmark Assoc. v. Town of Willingboro, 535 F.2d 786, 795 (3d Cir. 1976), *rev'd,* 431 U.S. 85 (1977). Due to this finding and the court's belief that commercial speech should receive less than full protection, *id.* at 797, it upheld the ordinance. In a perspicacious dissent, however, Judge Gibbons pointed out that the regulation did in fact present a content-directed suppression of information. *Id.* at 813-15 (Gibbons, J., dissenting).

68. 431 U.S. at 94.

69. *Id.* at 95-96.

70. *Id.* at 96-97.

71. A copy of the advertisement can be found at the end of this Comment.

72. ARIZ. SUP. CT. R. 29(a), DR 2-101(B) (Supp. 1977-78), which provided in part:
(B) 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.

hearing was held. The committee recommended that Bates and O'Steen be suspended from the practice of law for not less than six months. Upon review by the board of governors of the state bar, the penalty was modified to a one-week suspension.[73]

The attorneys appealed to the Supreme Court of Arizona,[74] arguing that the disciplinary rule violated sections 1 and 2 of the Sherman Anti-Trust Act,[75] the first and fourteenth amendments[76] to the United States Constitution, and should be declared void for vagueness. A majority of the court rejected these arguments, concluding that the rule had been violated and that neither the Constitution nor the Sherman Act precluded its enforcement.[77] Despite this agreement as to the result, no majority opinion was written. Two of the five justices concurred in a plurality opinion, affirming the constitutionality of the rule but reducing the penalty to censure because they concluded that the advertisement had been placed with a good faith intention to test the constitutionality of the rule.[78] One justice concurred with the plurality's result and basically agreed with its analysis, but felt compelled to express his fear that attorney advertisements that included prices or statements about the quality of the legal services

---

73. *See* Bates v. State Bar, 97 S. Ct. 2691, 2695 (1977).

74. *In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar, 97 S. Ct. 2691 (1977).

75. 15 U.S.C. §§ 1 & 2 (Supp. IV 1974). Section 1 of the act declares, with certain exceptions, that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," is illegal. Section 2 states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall" incur a stated penalty.

76. Bates and O'Steen maintained that the rule violated the equal protection clause of the fourteenth amendment because it permitted advertising by qualified legal services organizations but prohibited any other attorney advertising. *In re* Bates, 113 Ariz. 394, 399, 555 P.2d 640, 645 (1976), *aff'd in part, rev'd in part sub nom.* Bates v. State Bar, 97 S. Ct. 2691 (1977). *Cf. id.* at 403-04, 555 P.2d at 649-50 (Holohan, J., dissenting) (rule discriminates between advertising in a law directory and advertising in traditional print media). They also alleged that they had been denied due process by both the special administrative committee and the Board of Governors because the members of these bodies, being lawyers, had a pecuniary interest in the outcome. *Id.* at 400, 555 P.2d at 646.

77. *See In Re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976), *aff'd in part, rev'd in part sub. nom.* Bates v. State Bar, 97 S. Ct. 2691 (1977). The plurality, citing Parker v. Brown, 317 U.S. 341 (1943), *see* note 82 *infra*, concluded that the Arizona Supreme Court's regulation of the state bar was an act of the state in its capacity as sovereign and, therefore, not within the coverage of the Sherman Act. 113 Ariz. at 396-97, 555 P.2d at 642-43. In rejecting the first amendment claim, the plurality observed that restrictions on professional advertising had withstood constitutional challenge in the past, and that those cases in which commercial speech had been afforded first amendment protection could be read to deny protection to advertisements for professional services. *Id.* at 397-99, 555 P.2d at 643-45. *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 n.25 (1976) (Burger, C.J., concurring).

78. 113 Ariz. at 400, 555 P.2d at 646.

offered might mislead or deceive the public.[79] A fourth justice, although agreeing with the plurality's analysis, dissented, finding the penalty the court imposed too lenient. The fifth justice dissented, concluding that the advertisements were speech protected by the first amendment.[80] Bates and O'Steen appealed to the United States Supreme Court.

In an opinion[81] discussing only the antitrust and first amendment claims, the Supreme Court found Bates' and O'Steen's Sherman Act objection barred by the state action exception of *Parker v. Brown*,[82] but held that the prohibition against attorney advertising violated the first

---

79. *Id.* at 401-02, 555 P.2d at 647-48.

80. *Id.* at 402-04, 555 P.2d at 648-50.

81. Bates v. State Bar, 97 S. Ct. 2691 (1977).

82. In Parker v. Brown, 317 U.S. 341 (1943), a raisin producer-packer challenged a state raisin marketing program that had been designed to maintain market prices by restricting competition among growers. 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. *Parker*, however, has been limited by the recent cases of Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

In *Goldfarb*, the Court held that a state bar's enforcement of a minimum fee schedule published by a county bar violated § 1 of the Sherman Act. Although the bar associations argued that they fell within the *Parker* exemption, the Court concluded that the action was not protected because the state did not require such anti-competitive activities. 421 U.S. at 790-92. The *Bates* Court noted that DR 2-101(B) was, by contrast, an affirmative command of the Arizona Supreme Court. Because the state had invested that court with the power to regulate the legal profession, the restraint was compelled by the state acting as a sovereign and was thereby within the *Parker* exemption. 97 S. Ct. at 2696-98.

In *Cantor*, the question whether an action had been mandated by the state of Michigan was more problematic. There, a retailer of electric light bulbs claimed that a private utility which distributed free light bulbs to its residential consumers was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs. The Court found that no antitrust immunity was conferred upon the utility because the state had merely authorized and had not required the utility to adopt the program. 428 U.S. at 592-98. Bates and O'Steen, attempting to draw an analogy, argued that DR 2-101(B) should not acquire Sherman Act immunity simply because it had been accepted by the state. Moreover, they maintained that the interest in free competition embodied in the Sherman Act should prevail over the interest in regulating advertising, especially in view of the fact that the advertising ban had not been narrowly drawn. 97 S. Ct. at 2697.

In rejecting the appellants' contentions, the Court distinguished *Bates* by citing the context in which *Cantor* arose. The defendant in that case was a private party. If it had been a state official or agency, the result might have been different. 97 S. Ct. at 2697. In *Bates*, however, the appellants' claims were directed against the state itself. Moreover, unlike *Cantor*, regulation of a bar's activities is at the core of a state's power to protect its citizens. Federal interference with a state's regulation of a profession is entirely unlike the intrusion that the Court sanctioned in *Cantor*. 97 S. Ct. at 2697-98. Finally, the *Bates* Court noted that because the disciplinary rules were created and enforced by the Arizona Supreme Court, the "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced. . . ." *Id. See generally* Note, *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, 67-82 (1976); Note, *Sherman Act Scrutiny of Bar Restraints on Advertising*

amendment guarantee of freedom of speech.[83] Justice Blackmun, speaking for the majority, reasoned that the constitutional principles which the Court had cited in recent cases as supporting the extension of first amendment protection to product advertising compelled the Court to grant similar protection to attorney advertising.[84]

The Arizona Bar contended in *Bates* that its Disciplinary Rule 2-101(B) differed sufficiently from the ordinances overturned in previous commercial speech cases to survive a first amendment challenge. The rule, which prohibited any advertisement or announcement in newspapers or magazines, or on radio or television, publicizing a lawyer, his partner or his firm,[85] undeniably was a suppression of speech. Yet the Bar argued that the strong governmental interests that had traditionally been served by regulating advertising by professionals compelled a finding in its favor.[86]

Justice Blackmun, representing the majority of five Justices, began his analysis by carefully narrowing the issue before the Court. He noted that the Court was not dealing with advertisements concerning the quality of legal services: claims going to the quality of a lawyer's work appear less likely to receive protection as they "are not susceptible to precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."[87] Nor were the special problems attending the in-person solicitation of clients before the Court. That type of solicitation might also remain unprotected because it involves "dangers of overreaching and misrepresentation."[88] Rather, the precise issue presented in the *Bates* case concerned the constitutionality of prohibiting attorneys from advertising, in newspapers, the prices for which routine services would be performed.[89]

The Arizona Bar presented six arguments supporting its prohibition against attorney advertising. First, it asserted that attorney advertising would commercialize the legal profession. The Bar was fearful that

---

and Solicitation by Attorneys, 62 VA. L. REV. 1135 (1976); Note, *Price Advertising of Legal Services: The Move Towards a Balancing Test*, 16 WASHBURN L. REV. 683, 683-701 (1977).

83. 97 S. Ct. at 2698-2709.

84. *Id.* at 2700.

85. *See* note 72 *supra*.

86. In three previous cases, the Supreme Court had upheld the right of a state to regulate advertising by professionals in the health services field. None of these cases, however, had been decided on first amendment grounds. *See* Head v. New Mexico Bd. of Examiners, 374 U.S. 424 (1963) (New Mexico's ban of advertising by optometrists applied against Texas optometrists whose radio broadcast reached New Mexico; upheld against charge that it burdened interstate commerce); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (statute banning solicitation for sales of eyeglasses upheld against due process challenge); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935) (statute providing for revocation of the license of any dentist who advertised upheld against due process, equal protection, and contract clause challenges).

87. 97 S. Ct. at 2700.

88. *Id.*

89. *Id.* at 2709.

commercialization would undermine an attorney's sense of dignity and self-worth, adversely affect the service orientation of the profession, damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve, and, because the client would find his attorney to be profit-motivated, erode the client's trust in his attorney.[90] The *Bates* majority, however, found the "connection between advertising and the erosion of true professionalism to be severely strained."[91] Similarly, it rejected the Bar's related contention that the profit motive revealed by advertising would be detrimental to the attorney-client relationship. The Court pointed out that clients certainly realize that their attorneys earn a living by rendering their services. It noted that the American Bar Association itself recommends that an attorney and his client agree upon a fee schedule as soon as the attorney has been employed.[92] Moreover, the Court cited studies which indicated that increasing public disillusionment with the legal profession might stem from the failure of lawyers to publicize their services and fees.[93] The majority suggested that the availability of this information would serve the best interests of the profession.[94]

In a second argument supporting its rule, the Bar warned of an undesirable economic effect of attorney advertising: advertising would result in increased overhead costs which would in turn be passed on to the consumer.[95] Justice Blackmun responded that this argument was no different from that advanced in *Virginia Pharmacy,* and that it was not "relevant to the First Amendment."[96] Moreover, in citing studies that show that prices decrease when product advertisements are undertaken,[97] the

---

90. *Id.* at 2701.

91. *Id.* at 2709.

92. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-19 (1976).

93. 97 S. Ct. at 2702. *See also* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 115-16 (1975); Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb,* 24 U.C.L.A. L. REV. 475, 516-17 (1977). Moreover, there is evidence that the public believes that lawyers charge more for their services than they are worth. *See* B. CURRAN & F. SPALDING, THE LEGAL NEEDS OF THE PUBLIC 96 (1974) (33.7% of sample strongly agree that lawyers charge too much, 28.3% agree slightly, 10.2% strongly disagree). This perception may or may not be based upon experience, because the above sample involved both users and non-users of legal services. *Id.* at 36.

94. 97 S. Ct. at 2702-03.

95. *Id.* at 2705. The Bar also suggested that advertising would create an entry barrier for young attorneys because advertising expenditures would increase the cost of practice and, thereby, prevent them from setting up their own practice. The Court, however, thought that, absent advertising, an attorney must rely on contacts in the community to generate a flow of business. Since these contacts develop only over time, the Court felt the ban actually favors the entrenched members of the profession. *Id.* at 2705-06.

96. *Id.* at 2706.

97. *Id.* at 2706 n.34. The Court cited Benham, *The Effect of Advertising on the Price of Eyeglasses,* 15 J. L. & ECON. 337 (1972). The study found the prices of eyeglasses lower in cities allowing advertising than in cities prohibiting advertising. Benham noted that there is no firm theoretical basis for predicting whether advertising will raise or lower prices. It is said that prices of advertised products will

Justice noted that attorney advertising might reduce the cost of legal services.[98]

In a third argument, the Bar emphasized the difficulties involved in policing the community of advertising lawyers. The Bar felt that the close scrutiny necessary for proper regulation would be impossible. The Court replied that it is likely that only a few of the many attorneys who will advertise will take unscrupulous advantage of the situation, and that it would be in the best interest of the Bar to weed out those who do.[99]

In two other arguments, the Bar asserted that advertising would have the undesirable effects of stirring up or encouraging litigation[100] and of adversely affecting the quality of legal services rendered.[101] The Court noted, however, that it has traditionally favored facilitating access to legal services.[102] While it admitted that advertising might ultimately increase the case load of the courts, the Court felt that, in principle, it is not improper to litigate an actionable wrong.[103] Responding to the quality argument, the Court simply rejected the notion that advertising will induce lawyers to provide substandard services, stating "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising."[104]

A final argument, and the Bar's strongest point supporting a distinction between its disciplinary rule and the regulations invalidated in other commercial speech cases, was the claim that attorney advertising inescapably will be misleading.[105] The Bar felt that attorney advertising would be inherently misleading because legal services are so individualized with regard to content and quality that a consumer could not make an intelligent

---

be higher because consumers will pay for the persuasive aspects of advertising, and for its product differentiation effects. Advertising of goods can, however, economize the consumer's search, increase the probability of locating low-priced sellers, and lower the prices of manufacturers due to an ability to utilize economies of scale. *Id.*

98. 97 S. Ct. at 2706.

99. *Id.* at 2707. Justice Blackmun thought it incongruous that the Bar would extol the virtues of the profession when discussing the effect advertising would have on professionalism but later assert that its members would seize this opportunity to mislead. *Id.*

100. *Id.* at 2704.

101. *Id.* at 2706.

102. *Id.* at 2705 n.32 (citing United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222-24 (1967); Brotherhood of Railroad Trainmen v. Virginia Bar, 377 U.S. 1, 7 (1964); NAACP v. Button, 371 U.S. 415, 438-40 (1963)).

103. 97 S. Ct. at 2705.

104. *Id.* at 2706.

105. This argument is strongest not because it is most deeply rooted in empirical fact but due to its constitutional significance. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting). Because commercial speech is protected, a regulation that suppresses truthful advertising will be subject, at a minimum, to exacting scrutiny by the Court. Advertising which is deceptive or misleading, however, remains unprotected. A state will not encounter a first amendment problem when it attempts to regulate this type of commercial speech. *See id.* at 770-71.

comparison of attorneys solely on the basis of an advertisement.[106] The Bar also suggested that attorney advertising would be misleading because it would tend to emphasize "irrelevant factors" rather than the relevant factor of skill.[107]

Justice Blackmun agreed that some attorney services were unique and noted that "it is doubtful that any attorney would or could advertise fixed prices for services of that type."[108] He stated, however, that there were other "routine" services such as "the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like"[109] which would not be misleading if advertised, provided the lawyer does the required work at the specified price. Moreover, he cited the State Bar of Arizona's Legal Services Program, under which attorneys agree to perform such services at standardized rates, as evidencing the feasibility of this approach.[110]

The Court recognized that attorney advertisements have the potential to deceive, but said that the remedy lay in providing more information, not less. Specifically, the majority noted that the Bar is authorized to require that certain services be included in an advertised package.[111] The majority felt that it is the Bar's responsibility to educate the public: if consumers are better informed of the work included within advertised legal services, the likelihood of deception or misunderstanding would decrease.[112]

Not every member of the Court, however, thought the routine-unique dichotomy could mitigate the problem of deception presented by attorney advertising. In a dissenting opinion, with which Justice Stewart concurred, Justice Powell concluded that professional advertising differed from product advertising in two important respects: professional advertising has an enhanced potential for deception, and it is not amenable to effective regulation in the public interest.[113] In his discussion of the deception point, Justice Powell concluded that the majority's distinction between routine and unique services was unsatisfactory. He pointed out that the majority left the categories largely undefined and noted the relative nature of "routine services."[114] He observed that a marital trust provision of a will might well be routine for an experienced tax and estate lawyer, but would be quite another matter for an attorney who specializes in negligence. Moreover, Justice Powell thought that price advertising of even the services listed in the *Bates* advertisement inevitably would mislead because the consumer

106. 97 S. Ct. at 2703.

107. *Id.*

108. *Id.* (footnote omitted).

109. *Id.*

110. *Id.* The Court noted that the Maricopa County Bar had also utilized a minimum fee schedule until the decision in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). *See* Morgan, *The Evolving Concept of Professional Responsibility,* 90 HARV. L. REV. 702, 714 (1977).

111. 97 S. Ct. at 2703 n.28.

112. *Id.* at 2704.

113. 97 S. Ct. at 2713 (Powell, J., concurring in part, dissenting in part).

114. *Id.* at 2713-14.

and the attorney usually do not know in advance the extent of the services which a legal problem might require.[115] For example, does the fee for an uncontested divorce include alimony, support and maintenance for children, child custody, visitation rights, interest in life insurance, community property, tax refunds, or tax liability.[116] Justice Powell was of the opinion that the average lay person would have no knowledge of the services included or excluded from the package divorce and, consequently, would be misled by an advertisement fixing a single price for the entire transaction.[117]

Regarding what he perceived as the other major difference between professional and product advertising — the difficulties of effective regulation — Justice Powell accused the Court of seriously understating the problems which will arise when the state seeks to regulate attorney advertising. He cited the large number of attorneys and the impossibility of empirically verifying certain claims[118] as aggravating factors. Because questions such as what services are routine, can the services be described accurately and understandably, and what fees are reasonable, do not admit of truthful "answers," Justice Powell thought effective regulation "could prove to be a wholly intractable problem."[119]

Having rejected all the arguments supporting the ban, the Court, in the usual first amendment case, would have declared the rule unconstitutional because of its overbreadth.[120] Justice Blackmun, however, declined to apply the overbreadth doctrine to this case because it involved commercial rather than political speech. He believed that the rationale underlying the application of the overbreadth doctrine did not apply to cases involving professional advertising.[121] Instead, the Court evaluated the *Bates* advertise-

115. *Id.* at 2714.

116. *Id.* at 2713-14.

117. *Id.* at 2714.

118. *Id.* at 2715. *But cf.* Consumers Union v. ABA, 427 F. Supp. 506, 519 (E.D. Va. 1976), *vacated sub nom.* Consumers Union v. Virginia State Bar, 97 S. Ct. 2993 (1977) (expert witnesses testified that it would be easier to enforce rules regarding deceptive advertising against published statements rather than against those made in the privacy of an office).

119. 97 S. Ct. at 2716 (Powell, J., concurring in part, dissenting in part).

120. Indeed, where the United States District Court for the Eastern District of Virginia was faced with a similar problem, it declared DR 2-102(A)(6) of the Virginia Code of Professional Responsibility (found at 215 Va. 859 (1975)) an unconstitutionally overbroad infringement on first amendment rights. *See* Consumers Union v. ABA, 427 F. Supp. 506 (E.D. Va. 1976), *vacated sub nom.* Consumers Union v. Virginia State Bar, 97 S. Ct. 2993 (1977). In that case, state and national consumer groups sued the American Bar Association, the State Bar of Virginia, and others claiming that they had a first amendment right to publish a directory containing selected information including fees for certain services. The district court believed that it followed from the *Virginia Pharmacy* decision that a state rule prohibiting advertising of material which is not inherently deceptive would be unconstitutional. *Id.* at 521. Because the court concluded that both non-fee information and fee information for standardized and adequately specified tasks would not be inherently misleading if advertised, it concluded that the ban was an overbroad prohibition. *Id.* at 522-23.

121. 97 S. Ct. at 2707-08. Overbreadth is an exception to traditional rules of standing. Ordinarily, a defendant may successfully challenge the constitutionality of

ment and found that it could not have been suppressed by even the most narrowly drawn statute.[122]

The result reached by the *Bates* Court is entirely consistent with the rationale underlying the recent extension of first amendment protection to commercial speech. Indeed, Justice Blackmun stated that the result might be said to flow *"a fortiori"* from the *Virginia Pharmacy* decision.[123] Once the Court concluded that advertisements for attorneys' services would not be inherently misleading, it was unlikely that the Bar could muster the strong showing necessary to justify a suppression of information. Thus, in *Bates,* the Court applied an exacting scrutiny analysis, and found that the relationship between the state's purpose and the means chosen to achieve that purpose was not close enough to justify the suppression of attorney advertising.[124] Although one cannot criticize the *Bates* Court for properly extending the reasoning underlying the *Virginia Pharmacy* decision, it is less clear that the reasoning in that seminal case is equally immune to criticism. In his effort to justify the new protection he sought for commercial speech, Justice Blackmun maintained in *Virginia Pharmacy,* that because advertising is indispensable to the proper allocation of resources in a free enterprise economy, it is also indispensable to the formulation of intelligent opinions regarding the governing of that system.[125] By this analysis, he

a regulation only when his conduct is itself constitutionally protected. Under the overbreadth doctrine, one whose conduct properly may be proscribed by a more narrowly drawn statute is given standing to claim that the regulation is overbroad with respect to hypothetical defendants whose constitutionally protected expression would be punished under the statute. The successful overbreadth challenge results in the invalidation of the entire statute rather than a declaration that it is unconstitutional as applied in a particular case.

The overbreadth doctrine is grounded in the Court's fear that a speaker might remain silent because of his uncertainty that his first amendment rights would not prevail when challenged. Overbreadth is used where the Court feels "the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted." 97 S. Ct. at 2707. For an appraisal of how overbreadth has fared under the Burger Court, see Note, *Overbreadth Review and the Burger Court,* 49 N.Y.U. L. REV. 532 (1974). *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

The *Bates* Court, however, felt that the common sense differences of commercial speech — its durability and objectivity — render overbreadth analysis inapplicable. Although it held specifically that overbreadth did not apply to professional advertising, it is very likely that the Court will also refuse to apply overbreadth to product advertising because that speech is more easily verified than is services advertising.

122. 97 S. Ct. at 2708.

123. *Id.* at 2700. In fact, in his dissent to *Virginia Pharmacy* Justice Rehnquist stated, "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 (Rehnquist, J., dissenting).

124. Unlike *Virginia Pharmacy, see* text accompanying notes 61 to 64 *supra,* the *Bates* decision contained no language which would suggest that a categorization test was applied. This suggests that Justice Blackmun has concluded that exacting scrutiny is the proper test for regulations suppressing commercial speech.

125. 425 U.S. at 765 n.19.

sought to show that commercial speech was necessary for enlightened public decision making in our democratic state. This is the criterion which Alexander Meiklejohn, a leading first amendment theorist whose ideas are favored by the Court,[126] suggests should determine the scope of first amendment protection.

Yet Meiklejohn might well reject Justice Blackmun's analysis. Meiklejohn believes that the first amendment protects speech that is necessary for the proper operation of self-government, and not the right to speak per se. When people speak as voters, lawmakers, or rulers, even as philosophers and scientists, they are speaking as the governors of their nation, and their speech should be absolutely protected. But, when they speak as private individuals, their "private rights, including the right of 'private speech,'" should receive only due process protection.[127] Commercial speech, it seems, could be considered either "private" or "public" discourse, but because of its intimate connection with commercial activity inclines toward the former. Indeed, Meiklejohn has said, "The Constitutional status of a merchant advertising his wares . . . is utterly different from that of a citizen who is planning for the general welfare."[128] A similar conclusion was reached by another leading first amendment scholar, Professor Thomas Emerson. He has noted that "[c]ommunications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression."[129]

Putting these theoretical difficulties aside, however, it appears that the decision to extend first amendment protection to attorney advertisements almost certainly will yield some salutary results. A survey, commissioned by the American Bar Association, concluded that the seventy percent of the American public too poor to afford counsel but not poor enough to receive legal aid does not receive adequate legal assistance.[130] The underutilization of legal services by this group has been attributed to their inability to locate a suitable attorney, and their fear, often unfounded, of prohibitively high prices.[131] Price advertising by attorneys should go a long way towards alleviating this very disturbing problem. Also, the prohibition against lawyer advertising has led to criticism and perhaps even mistrust of the profession.[132] One commentator has stated that the advertising ban was created not to protect the public but to protect lawyers from the revenue-

126. *See id.*; A. MEIKLEJOHN, POLITICAL FREEDOM 78-83 (1948). *See also* Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

127. *See* MEIKLEJOHN, *supra* note 126, at 35-36, 80.

128. A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 39 (1948).

129. Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 948 n.93 (1963). *See generally Developments in the Law — Deceptive Advertising,* 80 HARV. L. REV. 1005, 1027-29 (1967).

130. AMERICAN BAR ASSOCIATION, REVISED HANDBOOK ON PREPAID LEGAL SERVICES 2 (1972).

131. *See* 97 S. Ct. at 2702 nn.22 & 23 and sources cited therein.

132. *See* note 93 *supra.*

diminishing effects of competition.[133] Truthful, nondeceptive price advertising by attorneys is likely to increase the public's confidence in the profession by showing that lawyers are more concerned with the delivery of their services than with preventing competition within the profession.

Finally, the economic ramifications of the *Bates* decision may also be positive. Although no study of the effects of attorney advertising has ever been completed,[134] there is some empirical evidence suggesting that product advertising tends to lower prices.[135] It is quite possible that the price of legal services will undergo a similar reduction. Yet, even if consumers pay less for legal services it does not follow that attorneys will earn less. Indeed, one commentator recommended advertising as a means of protecting the bar from a diminution of revenues.[136] Citing the tremendous increase in the number of practicing attorneys, he suggested that advertising will supply the larger market necessary to support the swollen bar. While this argument is plausible it is unlikely that it has done much to assuage the fears of practicing attorneys, for the reaction of many lawyers, and in particular of the ABA, has been to narrowly construe the profession's new right to advertise.

THE AMERICAN BAR ASSOCIATION'S RESPONSE TO THE *Bates* DECISION

The Board of Governors of the ABA established a task force on lawyer advertising shortly before the *Bates* decision was rendered.[137] Responding to the Supreme Court's directive in *Bates* that the bar assure the free and clean flow of attorney advertising,[138] the task force drafted two proposals for amendments to Canon 2 of the ABA Code of Professional Responsibility.[139] These proposals were widely circulated and were the subject of a public hearing at which lawyer, media, and consumer representatives testified.[140]

133. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 114-15 (1975). *See* Jacksonville Bar Ass'n v. Wilson, 102 So. 2d 292, 295 (Fla. 1958) ("Of course, competition is at the root of abuses in advertising."). *See generally* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977) (Professor Morgan's thesis is that the ABA Code of Professional Responsibility is "consistently self-serving"); J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

134. Bates v. State Bar, 97 S. Ct. at 2710 n.1 (Burger, C.J., concurring).

135. *See* note 97 *supra*. *See also* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1205-07 & nn.160 & 161 (1972).

136. *See* Frierson, *Legal Advertising*, 2 BARRISTER 6, 8 (1975). *Cf.* B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 20-22 (1970) (demand for services probably elastic as was demonstrated by legal aid experience where demand soon outstripped supply). *But cf.* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 716 n.51 (demand for legal services relatively inelastic, simple advertising would not increase use of attorneys).

137. *See* 46 U.S.L.W. 2089 (Aug. 23, 1977).

138. 97 S. Ct. at 2709.

139. *ABA Code of Professional Responsibility Amendments*, 46 U.S.L.W. 1 (Aug. 23, 1977) [hereinafter cited as *Amendments*].

140. *Id.*

Ultimately, the House of Delegates of the ABA adopted the more restrictive of the two sets of amendments.[141] The adopted amendments were designed to ensure that attorney advertising would facilitate the intelligent selection of counsel by providing accurate, relevant, and truthful information to the consumer of legal services.[142] The heart of these amendments, DR 2-101(A) and (B),[143] specify the permissible content of an advertisement, the media through which it may be disseminated, and the manner in which it may be presented. DR 2-101(A) prohibits, in general terms, public communication of false, fraudulent, misleading, deceptive, self-laudatory or unfair statements or claims. Disciplinary Rule 2-101(B)(1) to (25) delineates the categories of information which a lawyer may publish, including biographical statements, certain fee information, client references, and the availability and terms of credit arrangements. Although it is conceded that it is constitutionally permissible to regulate both the content of an advertisement which is

---

141. 46 U.S.L.W. 2089 (Aug. 23, 1977). One proposed set, A, was deemed regulatory — it authorized lawyers to advertise only certain specified information — whereas proposal B was deemed directive — it allowed the publication of all information which is not false, fraudulent, misleading, or deceptive. *Id.* at 2. Proposal A was adopted.

142. *See, e.g., Amendments, supra* note 139, at 4 (EC 2-9).

143. *Amendments, supra* note 139, at 5. DR 2-101 provides in part:

> (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
>
> (B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:
>
> (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
>
> (2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
>
> (3) Date and place of birth;
>
> (4) Date and place of admission to the bar of state and federal courts;
>
> (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
>
> (6) Public or quasi-public offices;
>
> (7) Military service;
>
> (8) Legal authorships;
>
> (9) Legal teaching positions;
>
> (10) Memberships, offices, and committee assignments, in bar associations;
>
> (11) Membership and offices in legal fraternities and legal societies;

deceptive, fraudulent, misleading, or which proposes an illegal transaction,[144] and the time, place, and manner of an advertisement, it is submitted that the ABA rules, in particular DR 2-101(B), may exceed the scope of acceptable regulation of constitutionally protected speech by severely limiting the manner, medium, and content of attorney advertising.

Although the task force did not provide a standard by which to determine whether an advertisement is deceptive or misleading, it did emphasize that an attorney, ever mindful of the sophistication of his audience, should present reliable, accurate information in an objective manner.[145] Given the ABA's apparent desire to maintain tight control over attorney advertising, it is probable that the standards for deception which the bar ultimately engineers will be quite broad. Moreover, it is equally probable that a broad definition of deception will be favorably received by

---

(12) Technical and professional licenses;

(13) Memberships in scientific, technical and professional associations and societies;

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request for a written schedule of fees and/or estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to DR 2-106(C), 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 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 rate, 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, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information;

(footnotes omitted).

144. *See, e.g.*, Bates v. State Bar, 97 S. Ct. 2691, 2708-09 (1977).

145. *See, e.g., Amendments, supra* note 139, at 4 (EC 2-9).

the courts. Since the public benefit derived from commercial speech is contingent upon its reliability, there is no justification for permitting misleading advertising.[146] Furthermore, the *Bates* majority specified that because the public lacks sophistication regarding the purchase of legal services, misstatements that might be tolerated in other forms of advertising might be inappropriate in attorney advertising.[147] Indeed, even in less sensitive areas, government regulatory agencies have traditionally had significant leeway when evaluating potentially false or deceptive advertising. For example, when scrutinizing suspect advertising, the Federal Trade Commission considers the sophistication of the target audience, the overall impression of the ad, and the possibility of multiple interpretations.[148] Despite its literal truth, an advertisement may be found to be false or misleading if its total impression invites a misleading interpretation.[149] Further, if only one of several possible constructions of the advertisement is misleading, the advertisement can be considered deceptive.[150] The FTC also has the discretion to determine the meaning of an ad. This discretion is a significant factor because it is a principal reason why the FTC has managed to prevail in the appellate courts in the overwhelming majority of its cases.[151]

If government enjoys significant leeway when it regulates product advertising, practical considerations dictate that it should have at least as much authority and perhaps even more when regulating attorney advertising. One reason for increased regulatory power, is, as the Court noted, the public's lack of sophistication with regard to legal services.[152] Another reason is that, in the legal services industry, service performance is highly uncertain, and consequently false claims are difficult to detect. Thus, advertising by attorneys may provide a hospitable environment for fraud.[153] Not only should broad definitions of deceptive advertising be utilized, but they must also be vigorously enforced. It has been suggested that moderate enforcement of any law regulating deceptive advertising leads to an increase in the presence of deceptive advertisements. Where consumers are aware of the existence of government regulation, they are less apt to be suspicious of an advertiser's claims.[154] This increase in consumer confidence provides an incentive for deceptive practices. Vigorously enforced laws, however, tend to prevent deceptive practices by assuring that the advertiser is punished for

---

146. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976).

147. 97 S. Ct. at 2709.

148. *See* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 HARV. L. REV. 661, 675-76 (1977).

149. *Id.* at 676.

150. *Id.*

151. *Id.* at 677-78.

152. 97 S. Ct. at 2709.

153. *See* R. POSNER, REGULATION OF ADVERTISING BY THE F.T.C. 8 (1973).

154. *See* Nelson, *Advertising as Information,* 82 J. POLITICAL ECON. 729, 749 (1974).

his purposeful deception.[155] Thus, with regard to deceptive advertising by attorneys, it is both likely and proper that the bar will regulate extensively and vigorously.

Other aspects of the ABA amendments may, however, be viewed less favorably by the courts. The manner restrictions of DR 2-101(B) will undoubtedly present many close constitutional questions. Televised advertisements are expressly prohibited unless the state authority which has adopted the ABA Rules determines that televised broadcasts are necessary to reach a significant segment of the public.[156] The mailing of circulars or similar cards containing fee information is also prohibited. Moreover, the rule allows only print media or radio advertising which is presented in a dignified manner. Presumably, this would exclude the use of handbills and billboards as well as such ostentatious mediums as electric signs and sound trucks.

The constitutional status of the ban on televised attorney advertising will certainly be a major issue. Indeed, the *Bates* Court was careful to note that it was reserving judgment on this point. The Court did, however, acknowledge that the special problems associated with electronic media advertising would warrant special considerations.[157] Electronic media are

---

155. *See id.*

156. *See Amendments, supra* note 139, at 5 (DR 2-101(B) & (C)). ("[A] lawyer may . . . broadcast over [the] radio . . . in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides . . . .") *But see Amendments, supra* note 139, at 3 (EC 2-2) where it is stated that "[i]f the interests of lay persons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonable [*sic*] be formulated, television advertising may serve a public interest." It must be noted that EC 2-2 is only a regulation of ethical consideration and does not have the effect of a disciplinary rule. Yet it is significant that the ABA has recognized that televised attorney advertising could be a vital and necessary instrumentality which would facilitate the dissemination of information relevant to selecting a lawyer.

157. 97 S. Ct. at 2709. The Court cited Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.* Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972). There, a three judge district court upheld an F.C.C. order which prohibited cigarette advertising on any electronic medium which was subject to the jurisdiction of the F.C.C. The court rejected both the first amendment and due process claims advanced by owners of radio stations who were challenging the rule. The first amendment argument was rejected essentially because the two member majority believed that commercial speech was entitled to little, if any, constitutional protection. They noted that the broadcasters were not prohibited from airing public interest spots devoted to the controversy but were forbidden only from collecting revenue for carrying commercial advertisements. *Id.* at 584. However, in light of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) and subsequent decisions, it is doubtful that this aspect of the case retains force or validity.

On the due process point, the court felt that there was a rational basis for permitting cigarette ads in print media while forbidding them on the electronics media. They said that unlike print media which required an affirmative act to effect communication, *i.e.,* reading, broadcast messages are "in the air" and thus immediately communicated. The court appeared to be leery of the power of the

subject to considerable regulation by the Federal Communications Commission. Increased governmental regulation has traditionally been justified by the need to ensure that all persons have equal access to this means of communication because it is characterized as having a limited number of channels.[158] If a policy reason for extensive regulation of the electronic media is to ensure the public's right to be informed, it would seem contrary to that policy to regulate the media so as to proscribe the dissemination of constitutionally protected speech. This is especially true in light of the Supreme Court's statements in *Virginia Pharmacy*,[159] *Linmark*,[160] and *Bates*[161] that commercial speech is protected because it is valuable information. Permissible televised attorney advertising, of course, would not include deceptive or misleading content, and it is arguably true that television is a more fertile medium for deceptive and self-laudatory ads than are the print media. It is clear, however, that at least some televised attorney advertisements would be no more deceptive than print media advertisements. For example, a television advertisement which screened a card, perhaps similar to the advertisement employed by Bates and O'Steen, and featured an unseen announcer who merely read the card, complete with any required disclaimers, would seem to present no additional potential for deception. Thus, despite the argument that television may pose special problems regarding deception, a ban of all televised attorney advertising would have to overcome strong constitutional objections.

DR 2-101(B) restricts all advertisements to radio or print media, and requires that they be presented in a dignified manner. It is not clear whether the rule would prohibit advertising via handbills or posters. Yet it is probable that the task force would not consider the use of billboards, electric signs or soundtrucks to come within the ambit of permissible advertising. Although the *Bates* Court did note that attorney advertisements may be subject to time, place, and manner regulations,[162] these regulations must not be drafted with the purpose of suppressing speech of a particular content. The ABA manner regulations will be upheld only if the purpose of the regulations is to prevent an evil which is unrelated to the idea communicated.[163] If the requirement that advertisements be dignified is interpreted to apply to the content of the advertisement, so as to prevent certain ideas from being published, then it is possible that the regulation will be considered a suppression of speech. If, however, only the manner in which the advertisement is to be presented must be dignified, then it would appear that the state's purpose would be to prevent commercialization of the profession,

---

electronic medium warning of the "subliminal impact" of its "pervasive propaganda." 333 F. Supp. at 585-86. Presumably, it is this problem which troubles the Supreme Court and has convinced it that it would be wise to tread carefully in this area.

158. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); National Broadcasting Co. v. F.C.C., 516 F.2d 1101, 1112 (D.C. Cir. 1974).

159. 425 U.S. 748, 764-65 (1976).

160. 431 U.S. 85, 96 (1977).

161. 97 S. Ct. 2691, 2699 (1977).

162. *Id.* at 2709.

163. *See* text accompanying note 5 *supra*.

and any infringement upon expression would be only incidental. If the disciplinary rule infringes only incidentally upon speech, a less rigorous balancing test will be applied to determine its constitutionality.[164] Yet even if the dignity requirement is found to apply only to the manner of advertising, it would appear likely that some mediums other than those included in a narrow reading of "print media" should properly be allowed to carry attorney advertisements. Indeed, Justice Powell, in his dissenting opinion in *Bates,* indicated that he could discern no reason for distinguishing between the publication of attorney advertisements in newspapers, and their publication in "a rather broad spectrum of other . . . [media], for example magazines, signs in buses and subways, posters, handbills, and mail circulations."[165]

It is possible, however, that the exact extent to which the bar may regulate the time, place, and manner of attorney advertisements will not be known for some time. Ordinarily, the requirement that advertisements be dignified would be the object of attack by a plaintiff alleging that this is an overbroad proscription which results in the chilling of first amendment rights. The issue would be whether application of DR 2-101 would be substantially overbroad in relation to its plainly legitimate sweep. The Court, however, has held that the overbreadth doctrine does not apply where commercial speech is involved. Therefore, the inquiry will focus upon the specific advertisement which is the subject of the case. The result will be a decision that determines the constitutionality only of a particular advertisement rather than the facial validity of the time, place, or manner restriction. Several such adjudications may be necessary before it is clear whether a particular regulatory scheme is tenable.

Finally, the disciplinary rules also appear to prohibit the mailing of circulars advertising fee information.[166] If this restriction is challenged it is likely that the bar would contend that the mailing of circulars constitutes solicitations rather than mere advertising, and therefore this specific prohibition is not affected by the *Bates* decision. Yet the *Bates* case noted only that "in-person solicitations" in situations which breed "undue influence," such as solicitations at the hospital or the accident site, might pose real dangers of over-reaching and misrepresentation.[167] Moreover, the Court has often cautioned that a state may not foreclose the exercise of constitutional rights by the attachment of mere labels.[168] Thus, the prohibition on the mailing of circulars might well pose first amendment problems.

---

164. *See* note 11 *supra.*

165. 97 S. Ct. at 2718 n.2 (Powell, J., concurring in part, dissenting in part).

166. *See Amendments, supra* n.139, at 6 (DR 2-102(A)(2)).

167. 97 S. Ct. at 2700.

168. NAACP v. Button, 371 U.S. 415, 429 (1963). The Court will have an opportunity to clarify its position on solicitation this term. Appeals have been filed in *In Re* Smith, 233 S.E.2d 301 (S.C. 1977), *appeal docketed,* 46 U.S.L.W. 3041 (U.S. Aug. 8, 1977) (No. 77-56) and in Ohralik v. Ohio State Bar Ass'n, 48 Ohio St. 2d 217, 357

Ultimately, the fate of the ABA amendments, as well as a state's rules on attorney advertising, will depend upon the way courts interpret *Bates*. Despite Justice Blackmun's attempt to fashion a narrow decision, it appears that there is substantial disagreement regarding the scope of that case. Some commentators feel that only false or misleading attorney advertisements can be prohibited,[169] yet the trend exhibited by those in whom the responsibility for redrafting the rules regulating attorney advertising is vested has been to opt for a narrow reading of *Bates*.[170] Given the slim majority in *Bates* and the sensitive nature of the subject matter, it is likely that many courts will narrowly construe the scope of permissible attorney advertising. Moreover, in light of the Supreme Court's discussion of the common sense differences of commercial speech, it is also likely that substantial control over the time, place, and manner of the distribution of attorney advertising will ultimately be constitutional. If, however, those

---

N.E.2d 1097 (1976), *appeal docketed*, 45 U.S.L.W. 3824 (U.S. June 21, 1977) (No. 76-1650).

In *Smith*, an ACLU attorney contacted persons who had been sterilized, allegedly as a condition precedent to receiving medicaid benefits, and offered the services of the ACLU in bringing damage actions against the physicians who performed the operations. The attorney was reprimanded for violating the ABA's ban on solicitation. He has challenged the reprimand on first amendment as well as other grounds.

The *Ohralik* case involves an attorney who was indefinitely suspended from the practice of law for violating a provision of the Ohio Code of Professional Responsibility forbidding solicitation of clients. The attorney was suspended after he visited two victims of an automobile accident, one in the hospital and the other in her home, and solicited and obtained agreements to represent them in litigation arising out of the accident. He alleges that Ohio's total ban on solicitation is a violation of the first amendment.

169. *See* Freedman, *Bates Comes to Town, D.C. and the Supreme Court Decision on Advertising*, 2 DIST. LAWYER 24, 28 (1977).

170. *See, e.g.*, THE COURT OF APPEALS OF MARYLAND STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, 61ST REPORT (undated) (proposed amendment to Maryland Code of Professional Responsibility) (allowing publication of prescribed data only in newspapers and periodicals).

Shortly before this Note went to press, the Maryland Court of Appeals, the body with the ultimate responsibility for regulating the practice of law in Maryland, rejected the proposed amendments submitted by the Standing Committee on Rules of Practice and Procedure. Court of Appeals of Maryland, *Notice of Proposed Rules Action, Maryland Rules of Procedure, Appendix F*, CODE OF PROFESSIONAL RESPONSIBILITY, The Daily Record, Jan. 14, 1978, at 2 col. 1. After considering the 61st Report, as well as oral and written comments received as a result of a public hearing held on December 1, 1977, the Court of Appeals drafted its own set of proposed amendments to Canon 2 of the Code of Professional Responsibility. *Id.*

The amendments proposed by the Court of Appeals would, if adopted in toto, be the most liberal rules governing attorney advertising in effect anywhere in the United States. The proposed amendments are similar in concept to the ABA's Proposal B, *see Amendments, supra* note 139, at 2, that is, they are directive rather than regulatory. Yet the Maryland amendments appear to allow the advertising attorney even more leeway than did proposal B. For unlike the ABA's proposal, they do not contain an exhaustive and limiting list of examples of deceptive or misleading statements or claims. Furthermore, the rules proposed by the Court of Appeals seem to

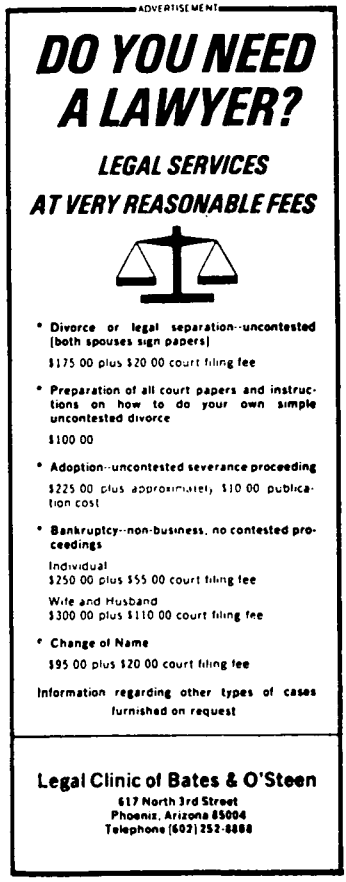
controls are actually suppressions of speech, where the control is enacted because of the feared effect which that speech will have on those who receive it, then a court will and should declare the regulation unconstitutional.

---

permit televised attorney advertisements, which both ABA Proposals prohibited. The Maryland rules would forbid only:

> [A]dvertisement or other public communication containing information about the services of particular lawyers or law firms which:
> (1) contains a misstatement of fact;
> (2) is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
> (3) is intended or is likely to create false or unjustified expectations of favorable results;
> (4) contains any other statement that is intended or likely to cause a reasonable person to misunderstand or be deceived; or
> (5) constitutes, is part of, or is a device for carrying out, an otherwise unlawful act.

Id. Although it is likely that members of the Maryland Bar will be quite critical of these proposed amendments, it is the position of this Note that the Court of Appeals acted commendably, and that the legal profession, as well as the consumer public, will ultimately benefit from the flow of information which these liberal rules would permit.


ADVERTISEMENT

DO YOU NEED A LAWYER?

LEGAL SERVICES AT VERY REASONABLE FEES

- Divorce or legal separation--uncontested (both spouses sign papers)
  $175 00 plus $20 00 court filing fee
- Preparation of all court papers and instructions on how to do your own simple uncontested divorce
  $100 00
- Adoption--uncontested severance proceeding
  $225 00 plus approximately $10 00 publication cost
- Bankruptcy--non-business, no contested proceedings
  Individual
  $250 00 plus $55 00 court filing fee
  Wife and Husband
  $300 00 plus $110 00 court filing fee
- Change of Name
  $95 00 plus $20 00 court filing fee

Information regarding other types of cases furnished on request

Legal Clinic of Bates & O'Steen
617 North 3rd Street
Phoenix, Arizona 85004
Telephone (602) 252-8888