

January 1978

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### Recommended Citation

Baine Ker, *Bates v. State Bar of Arizona: A Consumers' Rights Interpretation of the First Amendment Ends Bans on Legal Advertising*, 55 *Denv. L.J.* 103 (1978).

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**Bates v. State Bar of Arizona: A Consumers' Rights Interpretation of the First Amendment Ends Bans on Legal Advertising**

## COMMENTS

### *Bates v. State Bar of Arizona:*

## A CONSUMERS' RIGHTS INTERPRETATION OF THE FIRST AMENDMENT ENDS BANS ON LEGAL ADVERTISING

### INTRODUCTION

The Supreme Court, in *Bates v. State Bar of Arizona*,<sup>1</sup> delivered an opinion that will prove critical to new developments in first amendment adjudication. The Court held that blanket suppression of legal advertising does not violate the Sherman Act, but does abridge first amendment rights. By so holding, the Court confounded its historic valuation of speech categories and significantly enhanced its evolving protection of consumers' rights.

The legal advertising controversy, which in the two years prior to *Bates* had stirred the American bar to unparalleled debate and self-analysis,<sup>2</sup> was finally channeled into a constitutional question of the first order by two Phoenix, Arizona lawyers, John R. Bates and Van O'Steen. On February 22, 1976, the attorneys placed an advertisement<sup>3</sup> in the *Arizona Republic* announcing fees for certain routine services provided by their legal clinic. They were well aware that they were violating a disciplinary rule of the Arizona Supreme Court.<sup>4</sup> The state bar initiated discipli-

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<sup>1</sup> 97 S. Ct. 2691 (1977).

<sup>2</sup> See, e.g., Smith, *Making the Availability of Legal Services Better Known*, 62 A.B.A.J. 855 (1976) (winner of the ABA's Ross essay competition for 1976). The debate was ushered in by *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in which the Court held that legal services may be subject to federal antitrust laws. *Goldfarb* did not directly address the question of legal advertising; nevertheless, the fact that the legal profession could be brought within the compass of the Sherman Act, and thus its surrounding case law which holds that restraints on advertising are potentially illegal restraints on trade, led to the inescapable conclusion that traditional bans against the advertising of legal services were open to challenge. The question was finally settled in *Bates*, where the Court concluded that restrictions on legal advertising do not violate federal antitrust laws. 97 S. Ct. at 2696-98. See note 83 *infra*.

<sup>3</sup> The advertisement is reproduced in Appendix I.

<sup>4</sup> ARIZ. SUP. CT. R. 29(a) (Supp. 1977). The rule provides 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

nary proceedings and recommended that the attorneys be suspended for one week.<sup>5</sup> On appeal, the Arizona Supreme Court affirmed the constitutionality of the disciplinary rule<sup>6</sup> but reduced the sanction to censure because the attorneys had acted "in good faith to test the constitutionality" of the rule.<sup>7</sup> Bates and O'Steen brought an immediate appeal to the United States Supreme Court, which had hinted broadly in two prior cases<sup>8</sup> that it was prepared to decide the legal advertising question. The case proceeded swiftly to oral argument on January 18, 1977, and the groundwork was laid for the dismantling of one of the oldest canons of professional conduct in Anglo-American law.

That dismantling came about on June 27, 1977. In an opinion canvassing the justifications traditionally advanced by the bar in support of advertising bans, Justice Blackmun, writing for a 5-4 majority,<sup>9</sup> held that the disciplinary rule was an unconstitutional abridgment of first amendment rights. The holding, while pointedly narrow, declared all across-the-board bans of legal advertising constitutionally impermissible and presented guidelines for the promulgation of rules to prevent misleading legal advertisements.<sup>10</sup> In the course of his opinion, Justice Blackmun in effect upbraided the legal profession for clinging to hidebound justifications for antiquated protectionist practices, and appealed to the bar to heal itself.

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commercial publicity, nor shall he authorize or permit others to do so in his behalf.

The Arizona rule on attorney advertising, like those of the other states, is borrowed almost verbatim from the ABA formulation. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1976).

<sup>5</sup> The proceedings were held pursuant to an official complaint filed by the president of the State Bar of Arizona. A special committee heard the matter and recommended a suspension of six months. Upon further review the board of governors of the bar revised the recommendation to a one-week suspension. 97 S. Ct. at 2695.

<sup>6</sup> *In re Bates*, 113 Ariz. 394, 555 P.2d 640 (1976).

<sup>7</sup> *Id.* at 400, 555 P.2d at 646.

<sup>8</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>9</sup> Justices Brennan, White, Marshall, and Stevens joined Justice Blackmun in the majority opinion. Chief Justice Burger and Justices Powell and Rehnquist filed opinions concurring in that portion of the majority opinion dealing with the antitrust claim, and dissenting from the Court's determination on the first amendment claim. Justice Stewart joined the opinion of Justice Powell.

<sup>10</sup> 97 S. Ct. at 2708-09. The holding was limited to newspaper advertising of prices and availability of certain routine legal services. See text accompanying notes 72-93 *infra*.

*Bates* completes a series of cases which began with *Bigelow v. Virginia*.<sup>11</sup> Although these cases have been noted primarily for the abolition of the commercial speech doctrine,<sup>12</sup> they are even more significant in their cautious development of a constitutional basis for the affirmative protection of advertising as first amendment speech. *Bates* was preceded by an intriguing permutation of doctrine that gradually gathered definition. The essence of that doctrine is that, in the interest of informed decisionmaking, the public has a compelling first amendment right to receive commercial information.

*Bates'* ramifications for first amendment methodology and philosophy could ultimately overshadow the practical effect of its holding on the subject of legal advertising. The Court expatiated on a first amendment strict scrutiny test which had earlier been expressed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>13</sup> and *Linmark Associates v. City of Willingboro*.<sup>14</sup> This test has taken the form of a rigorously skeptical examination of the acceptability of asserted state justifications for suppressing speech. *Bates* may signal the Court's intent to abandon its long tradition of applying a double standard of preferred and less preferred speech,<sup>15</sup> and to institute instead a single strict standard for reviewing any legislation that infringes upon protected speech. The decision also marks a triumph for the democratic idealism that prizes an informed polity over the paternalism that values social institutions as stewards of the public

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<sup>11</sup> 421 U.S. 809 (1975). See text accompanying notes 33-46 *infra*.

<sup>12</sup> The commercial speech doctrine was enunciated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and abandoned in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The doctrine held that purely commercial speech, which included advertising, was entitled to no first amendment protection. See note 21 *infra*.

<sup>13</sup> 425 U.S. 748 (1976).

<sup>14</sup> 97 S. Ct. 1614 (1977). See text accompanying notes 69-71 *infra*.

<sup>15</sup> A double standard which applied to first amendment protections was articulated in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Prior to that case, the Court had been struggling with a long history of judicial preference for economic over human liberties in several areas, notably due process. *Carolene* criticized that order of preferences, and suggested that it be reversed by the establishment of a presumption in favor of state regulation in the economic area. *Bates* appears to indicate not a return to a pre-*Carolene* scale of values, but a disavowal of a hierarchical system of first amendment protections.

interest. In *Bates* the consumerism of this decade has found an eloquent statement.

### I. THE "SLIPPERY SLOPE" FROM *Bigelow* TO *Bates*

As Justice Blackmun emphasized in his majority opinion,<sup>16</sup> the bedrock of the *Bates* rationale was the Court's repudiation of the commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*.<sup>17</sup> Justice Rehnquist, dissenting in *Bates*, expressed alarm at this development, arguing that it placed the Court on a "slippery slope" away from a doctrine that was "constitutionally sound and practically workable."<sup>18</sup> In fact, the commercial speech doctrine never enjoyed a great deal of favor with either the Warren or the Burger Court. After its "casual, almost offhand"<sup>19</sup> appearance in *Valentine v. Chrestensen*,<sup>20</sup> it somehow lingered for thirty-three years as an adventitious doctrine of convenience, never independently controlling a decision, asserted most often to shore up principal theories, and regularly impugned by the Court's critics.<sup>21</sup> The eviscer-

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<sup>16</sup> 97 S. Ct. at 2700.

<sup>17</sup> 425 U.S. 748 (1976).

<sup>18</sup> 97 S. Ct. at 2720 (Rehnquist, J., dissenting).

<sup>19</sup> So Justice Douglas described the genesis of the commercial speech doctrine. *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

<sup>20</sup> 316 U.S. 52 (1942).

<sup>21</sup> The commercial speech doctrine's advent in *Valentine* was accompanied by almost no explanation other than an implicit warning that commercial motives would deny first amendment protection to the publication of information. The doctrine was first applied in three "handbilling" cases: *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943). The last two cases established a primary motive test by which door-to-door canvassing would be protected against anti-littering ordinances if it could be shown that the chief purpose of the activity was the dissemination of ideas or information, or the proselytizing of religion.

*Martin* broke from this pattern by balancing homeowners' interests in privacy and burglary prevention against first amendment rights in a religious handbilling context. The Court found first amendment freedoms paramount, as handbilling was "essential to the poorly financed causes of little people." 319 U.S. at 146. *Martin* might be seen as having presaged *Bigelow's* balancing test except that the Court continued to employ the motive analysis initiated in *Valentine*. In addition, all three cases might well be distinguished as having been concerned with religious freedoms. *Breard v. Alexandria*, 341 U.S. 622 (1951), enforces that view. *Breard's* door-to-door sale of magazine subscriptions was held to be unprotected, unlike *Murdock's* sales of religious tracts. Although *Breard* became the hallmark of the *Valentine* motive test, the opinion also employed an alternative-means-of-distribution test: The availability of other methods of obtaining subscriptions to magazines which did not intrude on homeowners' privacy militated toward the reasonableness of the regulation. It is likely that the commercial speech doctrine did not actually engender the outcome of these four cases, that each was either a religion case, or a time, place,

ation of the *Valentine* doctrine from *Bigelow v. Virginia*<sup>22</sup> through *Bates* should be viewed not only as the step-by-step emancipation of a previously unprotected category of speech, but as the vehicle for an expansion of first amendment theory. *Bates* stands as both the epitaph of the commercial speech doctrine and the efflorescence of the use of the first amendment to advance consumers' rights.

The apparatus for this development was the gradual shaping

and manner case, masquerading in freedom-of-expression garb.

After *Breard*, active use of the doctrine declined, but its availability as an ancillary theory continued, to the distress of its critics. In three unfortunate opinions, the doctrine operated as a kind of scapegoat—a supportive argument used to carry the burden of some questionable results. In *Ginzburg v. United States*, 383 U.S. 463 (1966), pandering of materials not clearly obscene in themselves stripped the purveyor of first amendment rights. Though the finding that commercial exploitation is not protected speech certainly reflects the *Valentine-Breard* primary commercial motive test, the opinion was principally supported by an inference of obscenity derived from the appeal which pandering allegedly makes to prurient interests. The commercial speech doctrine was mentioned by analogy. 383 U.S. at 474 n.17.

In *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973), classified advertisements segregated by sex were held to be "classic examples of commercial speech," unprotected, and therefore subject to equal rights regulation. *Id.* at 385. The newspaper's argument that such regulation interfered with protected editorial discretion in selection and layout of the advertisements was rejected. *Id.* at 387. *Pittsburgh Press* would have marked a revival of the doctrine except for the decisive fact that the advertisements were illegal. *Id.* at 388. The Court, even while relying on the doctrine, forecast its demise: That "the exchange of information is as important in the commercial realm as in any other" may, in other contexts, warrant discontinuing "the distinction between commercial and other speech." *Id.*

In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), decided one term before *Bigelow*, a prohibition against political advertisements on bus placards did not trigger first amendment guarantees. This normally highly protected public speech, merely because it was in commercial form, merited only a cursory minimum rationality test. The plurality opinion was written by Justice Blackmun, who guided the abolition of the commercial speech doctrine in the *Bigelow-Virginia Pharmacy-Bates* trilogy. Justice Douglas concurred. *Lehman* remains inexplicable, an example of the dangers of not discarding obsolete doctrine, but probably aberrational in light of that doctrine's subsequent debasement.

The commercial speech doctrine has controlled the outcome of one or more issues in a number of state and lower federal court cases. See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1306 (2d Cir. 1971); *Jeness v. Forbes*, 351 F. Supp. 88, 96-97 (D.R.I. 1972); *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821, 825 (W.D. Va. 1969) (an unsuccessful attack on the same statute ruled unconstitutional in *Virginia Pharmacy*) (*Patterson Drug Co.* is discussed in note 47 *infra*); *United Advertising Corp. v. Borough of Raritan*, 11 N.J. 144, 152, 93 A.2d 362, 366 (1952) (Judge Brennan, prior to his appointment to the United States Supreme Court, here affirming the lack of all protection for commercial speech); *Supermarkets Gen. Corp. v. Sills*, 93 N.J. Super. 326, 346, 225 A.2d 728, 739 (1966); *HM Distrib. v. Department of Agriculture*, 55 Wis. 2d 261, 272-73, 198 N.W.2d 598, 605 (1972).

<sup>22</sup> 421 U.S. 809 (1975).

of a standard of review for judging the suppression of commercial information. The Court experimented with a succession of tests—analyzing motive, then content, then balancing interests—before evolving a first amendment strict scrutiny capable of striking bans on legal advertising.

In *New York Times v. Sullivan*,<sup>23</sup> the Court made its first break from the *Valentine v. Chrestensen* "primary motive" doctrine which had held that speech for the purpose of profit was not protected.<sup>24</sup> *Sullivan* focused on the unprotected category of libelous speech, not commercial speech. But if *Valentine* had had any real clout, the libel issue would not have been reached. The *Times*' purpose in publishing the clergymen's advertisement was primarily commercial: The editors had no voice in the content of the advertisement, and it was sold in the same quotidian manner as any other advertising space.<sup>25</sup> An application of *Valentine* would, therefore, have stripped the advertisement of constitutional protection.<sup>26</sup> But the Court contrived a content analysis, characterizing the advertisement not as commercial but editorial—"for the promulgation of information and ideas . . ."<sup>27</sup> By means of a content analysis, the Court could circumvent the commercial speech doctrine and reach the desired result.

*Sullivan* was prematurely heralded as signaling a golden age in first amendment adjudication;<sup>28</sup> the Supreme Court appeared to have embraced Professor Meiklejohn's thesis that the first amendment is the mainstay of an enlightened democracy. The source of this fanfare was the *Sullivan* content test, by which speech directed to "public affairs" could be protected despite

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<sup>23</sup> 376 U.S. 254 (1964).

<sup>24</sup> 316 U.S. at 54. See note 21 *supra*.

<sup>25</sup> The advertisement was purchased by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. It contained a lengthy description of the tribulations of the civil rights movement in the South, and the resistance of local officials to the movement. It also appealed for contributions. For a criticism of *Sullivan*'s disposal of the commercial speech issue, see Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45, 60-68.

<sup>26</sup> See, e.g., *Breard v. Alexandria*, 341 U.S. 622 (1951). See note 21 *supra*.

<sup>27</sup> 376 U.S. at 266.

<sup>28</sup> See, e.g., Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191. Professor Kalven quotes Professor Meiklejohn's response to the *Sullivan* decision: "It is . . . an occasion for dancing in the streets." *Id.* at 221 n.125.

<sup>29</sup> See text accompanying notes 123-27 *infra*.



defamatory content (absent malice), despite commercial form, and, implicitly, despite commercial motive.<sup>30</sup> Subsequent developments have subjected the Meiklejohn thesis to a curious twist at the hands of the Supreme Court. It has been in the area of commercial and not political expression that the argument for the first amendment's service to an informed polity has borne fruit since *Sullivan*.<sup>31</sup> Meanwhile a double standard which derogates commercial speech and elevates political expression, as embodied in the *Sullivan* content analysis,<sup>32</sup> has withered on the vine.

But eleven years later Justice Blackmun turned to the *Sullivan* content analysis when striking the first overt blow against the commercial speech doctrine in *Bigelow v. Virginia*.<sup>33</sup> Bigelow, managing editor of a Charlottesville, Virginia newspaper, had been convicted under a state statute making it a misdemeanor to publish, by advertisement or otherwise, any information that would "encourage or prompt the procuring of an abortion or miscarriage . . ."<sup>34</sup> Bigelow's weekly newspaper had carried an advertisement purchased by a New York City abortion-referral agency. The Supreme Court struck down the conviction, explicitly stating what could have been inferred from *Sullivan*: Advertising per se is not unprotected.<sup>35</sup> In other words, commercial form does not preclude protectable content. *Valentine*<sup>36</sup> was somewhat incorrectly distinguished, as it would be in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>37</sup> as having proposed merely time, place, and manner restrictions, rather than exception from protection for commercial speech.<sup>38</sup>

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<sup>30</sup> The *Valentine* primary motive test surfaced again after *Sullivan* in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). See note 21 *supra*.

<sup>31</sup> Justice Brennan, interestingly, has stated that his majority opinion in *Sullivan* was not necessarily an expression of the Meiklejohn thesis, but rather a restatement of the redeeming social importance test he had devised for obscenity cases. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 19 (1965).

<sup>32</sup> In a sense the Supreme Court has not abandoned a content test; rather, the content of "mundane commercial transactions" is now viewed as equally worthy of the protection given "urgent political dialogue." 97 S. Ct. at 2699.

<sup>33</sup> 421 U.S. 809 (1975).

<sup>34</sup> *Id.* at 812-13.

<sup>35</sup> *Id.* at 820.

<sup>36</sup> 316 U.S. 52 (1942).

<sup>37</sup> 425 U.S. 748 (1976).

<sup>38</sup> 421 U.S. at 819.

Justice Blackmun offered the following indicia of protectability: The speech contains "factual material of clear 'public interest,'" communicates newsworthy information and opinion of value to a diverse audience on matters pertaining to constitutional interests, and is legal.<sup>39</sup> These presumably would be guidelines for culling from the commercial context that speech worthy of constitutional protection, such as information relating to abortion, civil rights, or politics.<sup>40</sup>

In a later opinion, Justice Blackmun somewhat exaggerated the effect of *Bigelow* by stating that in it "the notion of unprotected 'commercial speech' all but passed from the scene."<sup>41</sup> What *Bigelow* actually accomplished was the displacement of a pure content determination of what is or is not protected speech. Although the Court, following *Sullivan*, initially evaluated the advertisement by its content, the case was decided by a balancing analysis, wherein the right to speak and the public benefits were weighed against the state's interest in regulating the speech.<sup>42</sup> The introduction of a balancing test precluded the mechanical assertion of either the pure content test of *Sullivan*, or the primary motive test of *Valentine*. This shift in methodology had the effect of inviting a new argument that important constitutional interests might exist in wholly commercial speech. *Bigelow* thus put the Supreme Court on what Justice Rehnquist called "the slippery slope"<sup>43</sup> away from the commercial speech doctrine, and blazed a trail for the genuine pioneering that would take place in *Virginia Pharmacy*.

Another notable aspect of *Bigelow* was the shading of the editor's press and speech freedoms into the public's interest in receiving information. But the *Bigelow* approach seems primitive

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<sup>39</sup> *Id.* at 821-22. That the abortion information was legal in New York was the Court's toehold for distinguishing *Bigelow* from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

<sup>40</sup> For an extensive recent discussion of political speech, see *Buckley v. Valeo*, 424 U.S. 1 (1976). See note 54 and text accompanying notes 53-56 *infra*.

<sup>41</sup> 425 U.S. at 759.

<sup>42</sup> The Court balanced Virginia's interest in maintaining the quality of medical care against *Bigelow's* freedoms of speech and press, coupled with the public's interest in the advertised information. Virginia's interest was given "little, if any, weight," because the abortion clinic was in New York and thus did not adversely affect medical care in Virginia. 421 U.S. at 826-28.

<sup>43</sup> 97 S. Ct. at 2700.

by contrast to the strong public interest rationale that was decisive in *Virginia Pharmacy* and *Bates*.<sup>44</sup>

By holding that commercial form and purpose do not alone undermine first amendment guarantees, *Bigelow* clarified *Sullivan's* evasiveness about the commercial speech doctrine. But *Bigelow's* analytical weaknesses were cognate with *Sullivan's*. Their content tests have at least two serious drawbacks: the inconsistency of protecting commercially-motivated speech only when it treats certain acceptable subject matter, and the burden on courts to determine in each case what is or is not of public interest. *Bigelow* took the necessary first step of dispelling any notion that speech in commercial form was peremptorily beyond the scope of the first amendment.<sup>45</sup> It remained for *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>46</sup> to resolve the issue of commercial content.

In *Virginia Pharmacy* a consumer group challenged a state prohibition against the advertisement of prescription drug prices. The Court held that (1) Prescription drug consumers were entitled to the same first amendment protection as advertisers; (2) advertising, regardless of content, did deserve first amendment protection; and (3) even substantial state interests did not justify the prohibition of the dissemination of drug price information.<sup>47</sup> This combination of factors—that the listener's interest could outweigh the state's, that first amendment protection would not be accorded strictly on the basis of content, and that state claims would be strictly scrutinized where they operated to curb commercial expression—created a formidable new weapon which, as *Bates* demonstrated, would be capable of outlawing any wholesale suppression of commercial speech.

That the plaintiffs in *Virginia Pharmacy* were consumers was a crucial factor in the decision.<sup>48</sup> In *Bigelow*, the plaintiff was the

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<sup>44</sup> 425 U.S. at 765; see, e.g., 97 S. Ct. at 2704.

<sup>45</sup> Otherwise astute critics have failed to see that *Bigelow* was an important point of departure. Professor Schiro wrote that *Bigelow* was "best viewed as an attempt to buttress . . . the abortion decisions." Schiro, *supra* note 25, at 78. He even claimed that the case "declared that commercial speech has no First Amendment status." *Id.* at 87.

<sup>46</sup> 425 U.S. 748 (1976).

<sup>47</sup> 425 U.S. at 756-57.

<sup>48</sup> *Id.* at 753. An unsuccessful action to invalidate the same statute had been brought by pharmacists as frustrated potential advertisers several years earlier. *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969).

speaker-publisher, and the Court was forced to tailor its decision to traditional first amendment theory regarding the rights of the speaker and the press. In *Virginia Pharmacy*, however, the listeners'-consumers' rights to receive information had been violated; thus the Court could directly engage the ideal of informed decisionmaking which had colored but not controlled the decision in *Bigelow*. In *Virginia Pharmacy* Justice Blackmun asserted that "the free flow of commercial information . . . is indispensable to the formation of intelligent opinions."<sup>49</sup> With a direct reference to the Meiklejohn theory and to *Sullivan*, Blackmun then suggested that such information could well serve "to enlighten public decisionmaking in a democracy."<sup>50</sup> He pronounced that speech which does "'no more than propose a commercial transaction'"—the touchstone of the *Valentine* doctrine—does not necessarily lack "all protection."<sup>51</sup> In effect, commercial speech was promoted to the status of public speech, and for public speech of any type there would be one standard of review.

That standard was discussed at great length in *Buckley v. Valeo*,<sup>52</sup> which in part considered political information presented in commercial form.<sup>53</sup> *Buckley's* version of first amendment strict scrutiny is based on the following premise: Even a substantial government interest (in this instance, preventing public corruption) is an inadequate ground absent compelling justification, for a regulation which "heavily burdens core First Amendment expression."<sup>54</sup> The Court had traditionally reserved the method of

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<sup>49</sup> 425 U.S. at 765.

<sup>50</sup> *Id.* & n.19. For a discussion of the Meiklejohn theory, see text accompanying note 29 *supra* and text accompanying notes 123-27 *infra*.

<sup>51</sup> *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). This language would appear to be a direct criticism of the reasoning of that case, and its reliance on the commercial speech doctrine.

<sup>52</sup> 424 U.S. 1 (1976). The decision is 293 pages long.

<sup>53</sup> *Buckley* held unconstitutional certain provisions of the Federal Election Campaign Act of 1971 which imposed ceilings on campaign expenditures by candidates, limited independent political expenditures by individuals and groups, and limited candidates' personal expenditures. The Court said these restrictions impermissibly burdened the right of free expression and could not be sustained on the basis of governmental interests in preventing corruption or in equalizing candidates' resources.

The Court characterized the test employed as "exacting scrutiny," *id.* at 16, and a "rigorous standard of review," *id.* at 29. "The subordinating interests of the state must survive exacting scrutiny." *Id.* at 64. The strict test was applied in detail to each provision in issue; some succumbed and some survived.

<sup>54</sup> *Id.* at 48.

exacting scrutiny for questions that turned on political expression, racial discrimination, access to justice, and other important constitutional interests. *Virginia Pharmacy's* real doctrinal innovation was to apply this first amendment methodology to purely commercial speech, when a mere minimum rationality test might have been expected.<sup>55</sup>

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Precedents for the exacting scrutiny test in *Buckley* are found in *United States v. O'Brien*, 391 U.S. 367 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); and *NAACP v. Alabama*, 357 U.S. 449 (1958).

In *O'Brien*, a Vietnam War protester unsuccessfully challenged his conviction under a provision of the Selective Service Act which made it a crime to burn or destroy a draft card. Chief Justice Warren formulated the following test:

[A] government regulation [of speech] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

In *Button* the NAACP challenged a Virginia statute that made it an offense for an organization to solicit business for an attorney. The NAACP had offered the services of its legal staff for suits challenging racial discrimination. The Court held that the state interest in prohibiting professional misconduct by attorneys was insufficient to justify the state's abridgment of constitutional rights of expression and association. The *Button* strict scrutiny analysis was phrased to require that broad prohibitions of protected first amendment activity be justified by a "substantial regulatory interest" in preventing "substantive evils." 371 U.S. at 444. The Court noted that "[b]road prophylactic rules in the area of free expression are suspect." *Id.* at 438.

*Button* differed from *Bates* in that it focused on litigation as political expression and as the means to achieve equal treatment under the law. Solicitation was not regarded as advertising but as group activity. Therefore, the holding had no actual precedential value for *Bates*, except as an example of strict scrutiny in a closely related area.

*NAACP v. Alabama* held a state statute requiring organizations to disclose the identity of their members an unconstitutional abridgement of the members' first amendment rights of free association. The statute was deemed to lack a "controlling justification" for a "compelling" or "substantial" state interest. 357 U.S. at 463-66.

Other cases which have employed analyses which could be designated as strict scrutiny of first amendment violations include *Elrod v. Burns*, 427 U.S. 347, 362 (1976); *Procunier v. Martinez*, 416 U.S. 396, 413 (1974); *Kusper v. Pointikes*, 414 U.S. 51, 59 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305, 307 (1965); *Sherbert v. Verner*, 374 U.S. 398, 408 (1963); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>55</sup> Under the minimum rationality test, if a regulation may reasonably be expected to further a purpose legally within the state's purview, it can withstand constitutional attack. For an extreme example in the freedom-of-expression context, see *Gitlow v. New York*, 268 U.S. 652 (1925) (the Court affirming *Gitlow's* conviction for advocating mass labor strikes under New York Criminal Anarchy Statute on the ground that the statute was not an unreasonable exercise of state police power).

The Court theoretically continued to "balance" interests in *Virginia Pharmacy*. However, as in other first amendment strict scrutiny cases, the Court applied the balancing test with a decidedly libertarian cast,<sup>56</sup> weighting speech heavily and placing the burden on the state to justify its suppression. Justice Blackmun determined that three interests were furthered by advertising: The consumer's interest in receiving information, the societal interest in the allocation of resources in a free enterprise system, and the advertiser's interest in free expression.<sup>57</sup> These he balanced against the state's regulatory interests, especially that of "maintaining professionalism"<sup>58</sup> in the pharmaceutical business. The state interests were characterized not as "compelling" but nevertheless as "indisputably . . . strong."<sup>59</sup> Justice Blackmun described his analysis of whether the ban in fact furthered that strong interest not as "strict scrutiny," but as "close inspection."<sup>60</sup>

The analysis was indeed close. The Court found not only that Virginia's justifications were patently insubstantial next to the interests of the consumer, but that the likely effect of an advertising ban would be to protect the profits of inferior pharmacists<sup>61</sup>—the opposite result from that claimed for the ban. The analysis was completed with an implicit inquiry into whether the restriction was "no greater than is essential" to the furtherance of the state interest.<sup>62</sup> The Court asserted that the ban was "a protection based in large part on public ignorance,"<sup>63</sup> and was certainly not the least restrictive alternative available for accomplishing that state purpose of maintaining professionalism.

But the Court hedged in several important ways in its analysis.<sup>64</sup> The meaning of Blackmun's assertion that advertising mer-

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<sup>56</sup> See note 96 *infra*.

<sup>57</sup> 425 U.S. at 762-65.

<sup>58</sup> *Id.* at 766.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 769.

<sup>61</sup> *Id.*

<sup>62</sup> Overbreadth is the last element in the four-part test in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See note 54 *supra*. For a discussion of the overbreadth doctrine as it colors *Virginia Pharmacy* see Note, *Commercial Speech and the First Amendment*, 6 CAP. U.L. REV. 75, 88 (1975). But see note 73 *infra* and accompanying text: In *Bates*, the overbreadth doctrine was expressly not applied. 97 S. Ct. at 2707.

<sup>63</sup> 425 U.S. at 769.

<sup>64</sup> See *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 142, 147 n.34 (1976). The

ited a different degree of protection from other protected speech is unclear. It could be read as signifying either *less* protection, in the *Valentine*<sup>65</sup> tradition, or simply different regulatory characteristics. It was difficult to discern from the opinion whether the rigorous test could be correctly designated as strict scrutiny, whether it would be applied in future commercial speech cases, or to what infractions it would attach. Despite the stirring language in *Virginia Pharmacy*, the opinion remains ambiguous as to what constitutional standard of review would be controlling in the commercial speech area.

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author identified *Virginia Pharmacy's* test as strict scrutiny, but stressed its ambiguity: "[T]he degree of rigor with which it will be applied in the future is uncertain. This is particularly true of the 'compelling interest' component of the test."

Express exceptions to comprehensive protection for commercial speech were: (1) Advertising is subject to time, place, and manner restrictions (the bounds of which were left completely undefined in both *Virginia Pharmacy* and *Bates*); (2) the electronic broadcast media present "special problems"; (3) advertising is specially suited to regulation to prevent untruth and deception because it is more verifiable than such speech as political commentary. Commercial speech might warrant a "different degree of protection" than does other speech in that: Advertisements may be required to appear in a certain form, or to contain warnings, information, or disclaimers; prior restraint prohibitions may be inapplicable; advertising regulations will be less susceptible to attack on the ground that they "chill" speech. 425 U.S. at 771 n.24. These exceptions were each incorporated into the regulatory guidelines of *Bates*. See text accompanying notes 75-85 *infra*.

A fourth explicit hedge was the provocative footnote 25, now mooted by *Bates*. Its salient language reads: "[W]e express no opinion as to other professions . . . Physicians and lawyers, for example, do not dispense standardized products, they render professional services . . . with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." 425 U.S. at 773 n.25. Footnote 25 may be the most curious episode in the checkered history of commercial speech. It added enormously to the ambiguity of *Virginia Pharmacy's* holding. Its apparent expression of disfavor with advertising professional services does not comport with the reasoning of the case, and certainly did little to adumbrate *Bates*. One analyst has noted that footnote 25 did not even comport with *Bigelow*, which treated an advertisement for medical services. See Note, *Constitutional Law—Limitation of the Commercial Speech Exception to First Amendment Protection*, 51 TUL. L. REV. 149, 153-54 (1976).

There are several possible explanations for the inclusion of footnote 25. The Court may have been genuinely undecided. The Court may have wanted to restrain lawyers from immediately advertising on the strength of the holding. The Court may have wanted to direct conspicuous attention to the issue. Considering Justice Stewart's and Chief Justice Burger's hesitant commitments to the holding, footnote 25 was perhaps required to cement a majority. Both Chief Justice Burger and Justice Powell, in their dissents in *Bates*, insisted on reading it according to its more obvious light: that advertising of commodities, not services, merited protection. 97 S. Ct. at 2710, 2712. It seems certain that footnote 25—shrugged off by Justice Blackmun, and forming the principal thesis of the dissents—was the dividing point between the majority and minority in *Bates*.

<sup>65</sup> 316 U.S. 52 (1942).

Justice Rehnquist's image of a "slippery slope"<sup>66</sup> suggests that once the Court took the first tentative step away from *Valentine* it was bound to lose its balance and tumble headlong into the abyss of *Bates*. In fact the passage from *Bigelow*<sup>67</sup> to *Bates* was an exceedingly orderly one, with each succeeding case correcting and building on the doctrinal foundation laid by its predecessor. An incremental process was probably required to refine first amendment methodology to the point of being capable of striking down bans against legal advertising. *Sullivan*<sup>68</sup> and *Bigelow* had responded to the failure of the primary motive test to protect highly valued speech. But *Bigelow*'s balancing test, encumbered by the commercial speech doctrine, would have proven unwieldy with any but the most compelling public speech. *Virginia Pharmacy* resolved these inadequacies by eliminating the commercial speech doctrine, and by modifying the balancing process with strict scrutiny. But *Virginia Pharmacy*'s ambiguities still needed to be clarified, and its rigor tried.

The first opportunity to test the *Virginia Pharmacy* protections came with *Linmark Associates v. City of Willingboro*.<sup>69</sup> There the Court applied the new doctrine to a city ordinance which prohibited homeowners from posting "For Sale" signs in front of their houses. The municipality claimed that the ordinance would further stable, racially-integrated housing, the idea being that a block littered with "For Sale" signs would provoke panic selling by whites. Justice Marshall, writing for a unanimous Court, found that the ordinance restricted the flow of truthful commercial information, was directed at the content of speech rather than its time, place, or manner,<sup>70</sup> and as such was an unconstitutional abridgment of first amendment rights.

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<sup>66</sup> Justice Rehnquist himself is left on the summit, the lone supporter of the *Valentine* doctrine, having dissented in *Bigelow*, *Virginia Pharmacy*, and *Bates*, and having not participated in *Linmark*.

<sup>67</sup> 421 U.S. 809 (1975).

<sup>68</sup> 376 U.S. 254 (1964).

<sup>69</sup> 97 S. Ct. 1614 (1977).

<sup>70</sup> *Id.* at 1618-19. One commentator assessing the appellate court opinion, 535 F.2d 786 (3d Cir. 1976), assumed that the Supreme Court would treat the ordinance as a time, place, and manner regulation. 11 GA. L. REV. 230 (1976). This comment is a good example of how the ambiguity of the *Virginia Pharmacy* test could lead one astray. The author read the test as conventional balancing and felt confident that the Willingboro ordinance would survive based on the municipal interest in the stabilization of neighborhoods. But *Virginia Pharmacy* had not proposed conventional balancing, and the ordinance in *Linmark* was strictly scrutinized.



*Linmark* expanded the protections accorded to advertising in *Virginia Pharmacy*, and advanced the first amendment doctrine which that case had announced for commercial speech. It is noteworthy that homeowners' and consumers' interests in commercial information were strong enough to prevail over the traditionally highly valued objective of integrated housing. Thus, the protected status of commercial speech was substantially fortified by this case.

But by itself *Linmark* would have been weak precedent for *Bates*: The ordinance arguably bore *no* relation to preventing "white flight," and thus could have been stricken by a minimum rationality test.<sup>71</sup> The fact that Marshall seized the occasion to apply an exacting scrutiny test in the name of *Virginia Pharmacy* is accountable as part of the seriate development of protection for commercial speech. When Justice Blackmun wrote *Bates*, all the doctrinal tools necessary to a smooth and logical analysis were available, and a majority of the Court stood ready to put aside the most durable and problematical of the bans on advertising. *Linmark* was a test run for a first amendment theory that was about to come of age, a necessary flexing of new strength prior to *Bates*.

## II. ANALYSIS OF *Bates*

### A. *The Holding*

The holding in *Bates* was confined to its facts: The state may not suppress truthful advertising of the availability and terms of routine legal services.<sup>72</sup> A narrow holding was required by the Court's determination that the overbreadth doctrine did not apply to commercial speech: Legal advertising regulations can be attacked only as applied to the plaintiff's advertisement.<sup>73</sup> But a narrow holding also served the Court's purposes. It carried a clear rejection of any across-the-board legal advertising ban, and it

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<sup>71</sup> See note 55 *supra*.

<sup>72</sup> 97 S. Ct. at 2709.

<sup>73</sup> Under the overbreadth doctrine, a plaintiff can challenge the constitutionality of an entire regulation on the ground that it may sweep some protected speech into its prohibitory scheme. Without the overbreadth doctrine, a plaintiff is limited to showing that the regulation is unconstitutional as applied to him. Justice Blackmun argued that, because advertisers "can determine more readily than others whether their speech is truthful and protected," advertising regulations would not be likely to "chill" such "verifiable" speech, and the overbreadth doctrine was therefore unnecessary. *Id.* at 2707.

encouraged a creative response from the bar by allowing flexibility in promulgating new rules.<sup>74</sup>

Justice Blackmun offered a series of suggestions as to the permissible scope of new regulations: "[R]egulation to assure truthfulness,"<sup>75</sup> which might sweep too broadly in other areas, such as libel,<sup>76</sup> will be upheld for commercial speech. False, deceptive, or misleading advertising may be banned outright. Only routine services may be advertised.<sup>77</sup> Advertising claims as to the quality of services apparently may be prohibited,<sup>78</sup> but judgment was reserved on "that issue for another day."<sup>79</sup> In-person solicitation will continue to be disallowed,<sup>80</sup> illegal transactions may not be advertised,<sup>81</sup> and warnings or disclaimers may be required.<sup>82</sup> Regulations of legal advertising in general will be free from attack

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<sup>74</sup> Chief Justice Burger characterized the Court's opinion as "draconian." *Id.* at 2711 (Burger, C.J., dissenting). Justice Powell described it as the "imposition of hard and fast constitutional rules." *Id.* at 2718 (Powell, J., dissenting). In view of the considerable leeway the Court provided, these criticisms seem less than just.

<sup>75</sup> *Id.* at 2708-09.

<sup>76</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Blackmun stressed that advertising is "calculated," not "spontaneous" speech, and, as such, is susceptible to specific restrictions against misleading content. 97 S. Ct. at 2709.

<sup>77</sup> *Id.* at 2703.

<sup>78</sup> Blackmun's extension of this exception became a bit troublesome. He supposed that "different degrees of regulation may be appropriate in different areas" depending on the legal sophistication of the audience. *Id.* at 2709 n.37. He did not advise how to measure sophistication or to separate audiences, and it remains difficult to see how legal advertisements in the *National Enquirer* might be subject to greater restrictions than those in the *Wall Street Journal*.

<sup>79</sup> *Id.* at 2700. Blackmun's diction is interestingly qualified: "[W]e need not address the peculiar problems associated with advertising claims relating to the quality of legal services. Such claims probably are not susceptible to precise measurement or verification and, under some circumstances might well be deceptive or misleading to the public, or even false." *Id.* (emphasis added and omitted). Conceivably, with language as guarded as this, restrictions against some claims as to quality might be unconstitutional as applied.

<sup>80</sup> This exception was one of several ways the *Bates* reforms did not go as far as those proposed in an important suggested revision of Canon 2 of the A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY. Note, *Advertising, Soliciting, and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972), cited in *Bates*, 97 S. Ct. at 2703 n.25. The author of the note also would not have ruled out advertising of quality of services. As a means of judging deceptive content, the author argued for using the Federal Trade Commission opinions, with the usual FTC standard of protecting the credulous man raised, for legal advertising, to protecting the reasonable man. 81 YALE L.J. at 1197. The suggested reforms, thus, greatly exceed those of *Bates*.

<sup>81</sup> 97 S. Ct. at 2709.

<sup>82</sup> *Id.*

either on antitrust grounds<sup>83</sup> or by means of the overbreadth doctrine.

Justice Blackmun noted that "there may be reasonable restrictions on the time, place, and manner of advertising,"<sup>84</sup> but offered no specifics other than the cryptic caveat that the "special problems" of the broadcast media "will warrant special consideration."<sup>85</sup> The lack of time, place, and manner guidelines can inspire a "parade of horrors":<sup>86</sup> billboards opposite city jails or emergency rooms, bus placards,<sup>87</sup> skywriting, sandwich boards, or neon facsimiles of the scales of justice announcing weekly specials. But it seems more likely that the bar's capacity for self-regulation has been not only clarified but also strengthened through *Bates*.<sup>88</sup> Blackmun's guidelines are far less detailed, for example, than were those of *Miller v. California*<sup>89</sup> for obscenity regulation, and, as obscenity litigation has shown,<sup>90</sup> this is perhaps just as well. The bar, after *Bates*, is left with a mandate to reform and a free hand for doing so. *Bates* should certainly not

<sup>83</sup> *Id.* at 2696-98. The Sherman Act claim that bans on legal advertising illegally restrained trade was held barred by the "state action" exemption, enunciated in *Parker v. Brown*, 317 U.S. 341 (1943), for acts of state governments from antitrust actions.

<sup>84</sup> 97 S. Ct. at 2709.

<sup>85</sup> *Id.*

<sup>86</sup> Justice Powell foresaw legal advertising in magazines, buses, and subways; through posters, handbills, and mail circulations. *Id.* at 2718 n.12 (Powell, J., dissenting). He urged that time, place, and manner regulations can and should have "a significantly broader reach with respect to professional services than as to standardized products." *Id.* at 2717 (Powell, J., dissenting).

<sup>87</sup> See *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). *Lehman* might be exceedingly difficult to reconcile with such a method of publication. See note 21 *supra*.

<sup>88</sup> A few days prior to the *Bates* decision, the ABA Task Force on Lawyer Advertising composed and circulated two alternative proposals for revising Canon 2 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY. After hearings held on August 4, 1977, the proposals were submitted to the ABA Board of Governors, having been amended in light of *Bates* only in that radio, but not television, was added as a permissible advertising medium. The ABA House of Delegates followed the Board of Governors recommendation that Proposal A be incorporated into the ABA CODE OF PROFESSIONAL RESPONSIBILITY but that both proposals be circulated to state bar associations and high courts for their consideration. Proposal A has a negative thrust, described as "regulatory," in that it limits lawyers to certain listed forms of advertising. Proposal B was termed "directive"; it allows for any advertising that would not be misleading, and establishes guidelines for determining what may be misleading. 63 A.B.A.J. 1234 (1977). On December 29, 1977, the Colorado Supreme Court adopted Proposal A, with certain modifications (including permitting television advertising). The full text of Colorado's new DR 2-101 is reprinted in Appendix II.

<sup>89</sup> 413 U.S. 15 (1973).

<sup>90</sup> See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 94-101 (1973) (Brennan, J., dissenting).

produce the earthshaking consequences feared by the dissenters and by certain commentators,<sup>91</sup> and probably will encourage advertising primarily on the Bates and O'Steen model.

But an intriguing aspect of the opinion is the forcefulness with which Blackmun urged these rather moderate reforms. He frankly disparaged the ABA's revision of the *Code of Professional Responsibility*, in which the bar somewhat relaxed its long aversion to attorney advertising.<sup>92</sup> He called on the bar to play a special role "in assuring that advertising by attorneys flows both freely and cleanly."<sup>93</sup> And the major portion of the opinion was occupied with unexampled criticism of the conventional wisdom comprising the legal profession's objections to advertising.

### B. Methodology

The opinion can be separated into seven parts: The facts, the antitrust issue, a lengthy summary of *Virginia Pharmacy*,<sup>94</sup> a consideration of the state's reasons for prohibiting legal advertising, a dismissal of the overbreadth doctrine, a consideration of whether Bates' and O'Steen's advertisement was misleading, and guidelines for new rules. Discounting the recital of facts and the antitrust issue, two-thirds of the opinion was taken up with a rigorous examination of the bar's reasons for banning attorney advertising.

As Justice Blackmun noted, *Bates* proceeds "a fortiori"<sup>95</sup>

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<sup>91</sup> Justice Powell wrote that "today's decision will effect profound changes in the practice of law." 97 S. Ct. at 2712 (Powell, J., dissenting). A news magazine warned that "[t]he legal profession faces an era of change, the likes of which it has rarely, if ever encountered." U.S. NEWS & WORLD REP., July 11, 1977, at 21.

<sup>92</sup> The Court remarked of the 1976 ABA revision: "[A]n advertising diet limited to such spartan fare would provide scant nourishment." 97 S. Ct. at 2701. The revised disciplinary rule permits attorneys to list, in a "law list," legal directory, or in the yellow pages of the telephone book, information including the following: The fee for an initial consultation, and the availability upon request of a fee schedule or fee estimates; availability of credit; the specialties of the attorney and his firm; the names of references and clients; and various professional credentials. ABA CODE OF PROFESSIONAL RESPONSIBILITY, D.R. 2-102(A)(6) (1976).

One possible reason for the explicit criticism of the ABA may have been to put to rest complaints that current and future ABA reforms represent "less drastic alternatives" than striking advertising bans as unconstitutional. That is, Justice Blackmun was forced to label the ABA revisions inadequate. See 97 S. Ct. at 2711 (Burger, C.J., dissenting); *id.* at 2716-17 (Powell, J., dissenting).

<sup>93</sup> 97 S. Ct. at 2709.

<sup>94</sup> 425 U.S. 748 (1976).

<sup>95</sup> 97 S. Ct. at 2700.

from *Virginia Pharmacy*. That case had emphasized the individual and societal interests in the free flow of information to the public and had employed a strict scrutiny test to evaluate regulations which impinged on those interests. The form of the Court's decision was that of a balancing test; in effect, however, the Court heavily loaded the scales in favor of the public's right to information, causing the ballast to shift to the side of speech.<sup>96</sup> This methodology, and the first amendment doctrine underlying it, resulted in a strict scrutiny test for regulations that burdened the availability of commercial information to the public.

As applied in *Bates*, the strict scrutiny analysis required that (1) the "justifications"<sup>97</sup> for suppressing the flow of information be "acceptable,"<sup>98</sup> and (2) the state interest served be "strong."<sup>99</sup> The word "acceptable" carries an almost deliberate ambiguity. But the opinion established that "acceptability," whatever it means, is a difficult standard to meet. In fact, the Court suggested that where there has been "blanket suppression"<sup>100</sup> of speech that is of value to consumers, perhaps *no* justification would be acceptable.<sup>101</sup>

In *Goldfarb v. Virginia* the Court had already recognized that "[t]he interest of the States in regulating lawyers is especially

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\* It was Justice Harlan's view that all first amendment speech cases should be resolved according to a balancing test. Harlan stated the balancing test simply as "a balancing by the courts of the competing private and public interests." *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). In fact, Harlan preferred to ballast his scales in favor of the government in first amendment speech cases. See, e.g., *Scales v. United States*, 367 U.S. 203 (1961); *Konigsberg v. State Bar*, 366 U.S. 36 (1961); *Barenblatt*.

Justice Black consistently maintained that a balancing test was entirely inappropriate for first amendment adjudication. In a direct reply to Justice Harlan's "balancing," Justice Black, joined by Chief Justice Warren and Justice Douglas, countered that he did not agree that "laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process." 360 U.S. at 141 (Black, J., dissenting).

<sup>97</sup> 97 S. Ct. at 2701.

<sup>98</sup> *Id.* at 2707.

<sup>99</sup> *Id.* at 2699.

<sup>100</sup> *Id.* at 2708.

<sup>101</sup> There are two tests in *Bates*: The strict scrutiny of the general ban on advertising, and a test for whether the regulation was unconstitutional as applied. The latter test simply evaluates whether the advertisement's information is misleading. If it is not misleading (as with the *Bates-O'Steen* ad), it is protected. Justice Blackmun dismissed three challenges to the *Bates-O'Steen* ad: That the words "legal clinic" were misleading; that the words "very reasonable" unjustifiably implied bargain prices; and that the advertisement did not inform the consumer that he may obtain a name change without the services of an attorney. *Id.*

great. . . ."<sup>102</sup> It remained for Justice Blackmun to assess the acceptability of the Arizona bar's justifications for serving that interest through a ban on attorney advertising. The Court's willingness to inveigh against the state's justifications for the restriction is worthy of attention.

The first of the six justifications asserted by the state was the need to maintain professionalism, the same point argued in *Virginia Pharmacy*.<sup>103</sup> It was claimed that attorneys' pride, dignity, and "obligation selflessly to serve" would be adversely affected by advertising,<sup>104</sup> and that advertising would demonstrate to clients that lawyers were in fact motivated by profit and not purely by "a commitment to the clients' welfare."<sup>105</sup> But Justice Blackmun suggested that the argument was not a little disingenuous:

[W]e find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception.<sup>106</sup>

With this observation, Justice Blackmun struck the tone that characterizes his entire treatment of the bar's argument: suspicious, even accusatory, occasionally ironic to the point of persiflage.<sup>107</sup>

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<sup>102</sup> 421 U.S. 773, 792 (1975). Evidently, the state interests were greater in *Bates* than they had been in *Virginia Pharmacy*. *Bates* is consequently the stronger establishment of consumers' rights against the state. Some commentators had predicted that this phrase from *Goldfarb* would prevent the Court from striking legal advertising bans. See, e.g., De Soto, *Advertising and the Legal Profession*, 6 U.C.L.A.-ALAS. L. REV. 67, 87 (1976).

<sup>103</sup> 425 U.S. 748 (1976).

<sup>104</sup> 97 S. Ct. at 2701.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> The Court had this to say about the bar's argument that dishonest lawyers will abuse an advertising privilege: "It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort." *Id.* at 2707. The Court accuse the bar of hypocrisy: "[C]ynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients." *Id.* at 2702. The bar's implicit connecting of advertising with barratry received this rebuttal: "Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action." *Id.* at 2705.

That attorney advertising is inherently misleading was the bar's strongest justification for continuing the ban on attorney advertising. The argument stated that legal services are too individualized, too dependent on a lawyer's particular skills, and too unknowable in advance to be advertised without being deceptive.<sup>108</sup> Justice Blackmun countered that routine legal services lack those disadvantages, and that only routine legal services will be advertised. Also, even if an advertisement cannot present a complete picture of services available, some information is better than none.

The next justification was that advertising would increase litigation. Justice Blackmun responded with statistics which indicated that legal services are under-utilized, and he urged that advertising would be a means to facilitate access to the legal profession for that seventy percent of the population not adequately served by it.<sup>109</sup> Next, the Court considered, and dismissed as unfounded, the argument that advertising would result in higher fees.<sup>110</sup> Another claim was that advertising would harm the quality of legal work by encouraging cutrate "package" service in place of individual attention.<sup>111</sup> Justice Blackmun rejected the point perhaps a bit cavalierly, noting that "[a]n attorney who is inclined to cut quality will do so regardless of the rule on advertising,"<sup>112</sup> and that standardized services are not necessarily inferior services. Finally he addressed an argument made much of by the principal dissenter: Oversight of advertising will impose severe and unmanageable administrative burdens on the state.<sup>113</sup> Justice Blackmun responded with a confidence in the "integrity and honor" of the profession not to abuse its new privilege.<sup>114</sup>

The running theme of the Court's analysis was that times have changed and the profession must follow. Complementing the conclusion that the bar's justifications were almost uniformly factitious were a countertone of faith in the public to make its own decisions wisely and persuasive reasoning that legal advertis-

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<sup>108</sup> *Id.* at 2703.

<sup>109</sup> *Id.* at 2705.

<sup>110</sup> *Id.* at 2705-06.

<sup>111</sup> *Id.* at 2706.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2711 (Burger, C.J., dissenting); *id.* at 2715-16 (Powell, J., dissenting).

<sup>114</sup> *Id.* at 2707.

ing will in fact be salutary. The conclusions were also supported by a wealth of extrinsic data, on the order of a Brandeis brief, which catalogued the inadequacies of legal services and the benefits of advertising, and included a brief history of attorney advertising bans. The result is a finely-wrought opinion, persuasively skeptical of the purposes behind restricting speech, backed by sociological and historical data, and redounding finally into an article of faith in consumers' rights.

### C. *First Amendment Philosophy*

The debate over attorney advertising inescapably translates into a philosophical dispute over the proper relationship between the people and those who govern the people. One view is characterized by faith in the people to make the correct decision if they have access to the correct information. This view is epitomized by Justice Blackmun's eloquent response to the bar's argument that attorney advertising is inherently misleading:

[T]he argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. . . . [T]he preferred remedy is more disclosure, rather than less.<sup>115</sup>

The contrary view is epitomized by Justice Powell's dissent in *Bates*, wherein he questioned whether the public should receive information of this nature. The dissenters' position distills into two main arguments: (1) Consumers' rights to information are "marginal" at best, and (2) of greater importance than the consumer's right is the state's right in not having its administrative machinery overburdened by the regulation of attorney advertising.<sup>116</sup> By contrast, the majority, while not gainsaying the importance of state regulatory interests, elevated the consumer's right to be informed to a special position, the abuse of which would engage the vigorous scrutiny of "acceptability."

The theories behind the majority and the dissent can be characterized as utilitarian. Both purport to strive for the greatest good to the greatest number, and both call for an adjustment

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<sup>115</sup> *Id.* at 2704.

<sup>116</sup> *Id.* at 2717-19 (Powell, J., dissenting).



of first amendment philosophy to reach that goal. Both positions would reject the absolutist view of the first amendment advanced by Justice Black,<sup>117</sup> as well as Justice Douglas' arguments for an inherent right of free expression.<sup>118</sup> A utilitarian view lies in back of any balancing process but comes particularly to the fore in what has been called the first amendment's "majoritarian" context,<sup>119</sup> where it is not the interests of a minority (as in equal protection cases) or of a speaker that are being attended, but those of the public itself. But the majority and the dissent would undertake the protection of the public in fundamentally different ways. The one view expressed a profound faith in the wisdom of the people, and the other, a profound faith in the wisdom of the government to act beneficently for the people.

The minority expounded a narrow utilitarianism by which the greatest good for the greatest number would be accomplished by leaving undiminished the state's power to regulate. In the legal advertising context, this view is reflected in Justice Powell's argument that the public is best served when certain of its interests are entrusted to the organized legal profession. Justice Powell wrote: "As a result [of the average person's lack of legal knowledge], the type of advertising before us inescapably will mislead many who respond to it. In the end, it will promote distrust of lawyers and disrespect for our own system of justice."<sup>120</sup> Chief Justice Burger put it more bluntly: "[T]he public needs protection from the unscrupulous or the incompetent practitioner anxious to prey on the uninformed."<sup>121</sup> The *Bates* reforms, which may corrode the traditional authority and dignity of social institutions such as the organized bar, are to be abjured.

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<sup>117</sup> See Black, *The Bill of Rights and the Federal Government*, in *THE GREAT RIGHTS* 43 (Cahn ed. 1963).

<sup>118</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Douglas, J., concurring); *United States v. O'Brien*, 391 U.S. 367 (1968) (Douglas, J., dissenting). Justice Rehnquist has discussed the distinction between Justice Douglas' and Justice Black's "individualist" philosophies of the first amendment, and the utilitarian approach. Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 *GONZ. L. REV.* 1 (1976).

<sup>119</sup> See, e.g., Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 *U. OF ILL. L.F.* 1080.

<sup>120</sup> 97 S. Ct. at 2714 (Powell, J., dissenting).

<sup>121</sup> *Id.* at 2711 (Burger, C.J., dissenting). The Chief Justice proposed a less drastic alternative: The bar can have "programs" which would announce the "range" of fees of "truly routine" services. But such a range of fees may well (despite Chief Justice Burger's claims to the contrary, *id.* n.2) operate as a minimum fee schedule rather than as a catalyst to competition.

The *Bates* majority adopted a broad utilitarian philosophy, arguing that the public would be benefited most when benefited directly, pursuing the ideal of an enlightened, self-sufficient citizenry. The people, thus, are most effectively served by increasing the information for, and encouragement of, independent decision-making. The first amendment is an imperative prescribing the widest possible dissemination of information and ideas.

The thesis that the first amendment is different in kind from the rest of the Bill of Rights draws on an honorable tradition going back to Oliver Wendell Holmes<sup>122</sup> and Thomas Jefferson. Under this view, the primary function of the first amendment is not to protect the minority from the tyranny of the majority, but to upgrade the working of a majoritarian democracy by mandating the free exchange of ideas. The most effective recent advocate of this theory was Alexander Meiklejohn.<sup>123</sup> Meiklejohn argued that the Constitution was conceived in response to the people's wish to govern themselves. The first amendment was the cynosure of that ambition. About its axis were certain "governing powers"<sup>124</sup> effectuating not private rights but governmental responsibilities. The state should be absolutely prevented from regulating within the orbit of these powers, which included freedom to vote and the right to be free of any governmental intrusion whatsoever into education, philosophy, science, literature, the arts, or the free flow of political information.<sup>125</sup> Essential to this view of the first

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<sup>122</sup> Holmes' metaphor for this idea—the marketplace of ideas—is quite familiar, if somewhat banal. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). More elaborate statements of similar notions have been made by Milton, Voltaire, and John Stuart Mill. Most poetic perhaps was Mao Tse-Tung's flowerbed of ideas: "Let a hundred flowers blossom. Let a hundred schools of thought contend." Speech by Mao Tse-Tung, Peking (Feb. 27, 1957).

<sup>123</sup> See Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245; A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

<sup>124</sup> Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254. The effect of the Meiklejohn approach would be to abandon the clear-and-present-danger test (also advocated by T. E. Emerson. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 911 (1963)), and all other first amendment balancing when public issues were the subject of the speech.

<sup>125</sup> Meiklejohn, *supra* note 124, at 262. Meiklejohn had some difficulty conferring the cachet of absolute protection on great literature. A system that would naturally favor any political tract over Shakespeare must be in need of some refining. As Professor Redish asked, "[I]s the performance of the political function the real reason we find it desirable to protect great literature . . . ?" Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 437 (1971).

amendment as "an absolute" was the derogation of "private speech" not connected to activities of "governing importance."

Meiklejohn did not conceive of advertising as an activity by which we govern ourselves in a democracy.<sup>126</sup> Blackmun disagreed, and in so doing illuminated a blind spot in the Meiklejohn vision. Blackmun perceived the flow of commercial information as a serious matter of public affairs, to be valued according to the Meiklejohn theory that society benefits from the spreading of information and opinion. While the absolute protection Meiklejohn proposed was not considered, his vision of a freely informed polity, and his ideal of self-government carried the day in *Bates*. The Meiklejohn thesis, epitomized in his famous statement that "[p]olitical freedom is not the absence of government. It is self-government,"<sup>127</sup> is, of course, a theory of political freedom. But it becomes a canon of consumerism when applied to economic freedom, as it was in *Bates*.

Professor Redish, in an article which criticized Meiklejohn for not applying his thesis to the commercial speech area, effectively anticipated *Bates* six years before it was written.<sup>128</sup> Redish argued that commercial speech, unlike the other unprotected types (fighting words, libel, obscenity, incitement), does no direct damage to state interests.<sup>129</sup> Furthermore, advertising has important social uses in that it is informational; it increases consumer sophistication; it promotes efficient use of time and effort by the consumer; and, as it provides grounds for choosing one product over another, it aids rational choice.<sup>130</sup> Redish argued generally for "the belief in the intelligent free will of the individual, who is capable of listening, thinking, reasoning, and, on the basis of those activities, making his personal decision as to how he should be governed."<sup>131</sup> And the individual "asserts his dignity most strikingly when he uses his power of reason to decide how his life

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<sup>126</sup> Both Meiklejohn and his peer as a first amendment theorist, T. E. Emerson, blithely accepted without question the notion that commercial speech is entitled to less protection than political speech. A. MEIKLEJOHN, *POLITICAL FREEDOM* 37 (1960); Emerson, *supra* note 124, at 949 n.3.

<sup>127</sup> Meiklejohn, *supra* note 124, at 253.

<sup>128</sup> Redish, *supra* note 125, at 431.

<sup>129</sup> *Id.* at 432-34.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 441.

should be run and then carries out those decisions. . . ."<sup>132</sup> The first amendment, therefore, should protect information important to daily decisions in individuals' personal affairs. Although great literature and "perhaps" political debate add somewhat more to the process of rational development,<sup>133</sup> advertising should no longer be berated as less-protected speech.

One might note with irony that the more noble intellectual pursuits—art, literature, philosophy, the "public discussion of public issues"<sup>134</sup>—have received no special solicitude from the Burger Court, while advertising has. One might detect in *Bates* an economic rationale suggestive of freedom of contract. Indeed, in *Virginia Pharmacy*<sup>135</sup> and *Bates*, Blackmun added to the balance a societal interest in the free enterprise system. The Court's philosophy in these cases appears to echo Adam Smith: A bargain struck between A and B will benefit A, B, and society in general, and the "invisible hand" of the market is all the regulation that the conduct of those who sell and buy requires.<sup>136</sup> But, although some members of the Burger Court doubtless may wish to dissociate their reasoning from what could be thought of as libertarian elitism, it should be remembered that the gravamen of the protections of *Virginia Pharmacy* and *Bates* is not the advertiser's right to trade freely, but the consumer's right to information. The economic philosophy that presides over these cases is not laissez-faire capitalism but consumerism, and the goals of the two often conflict.

*Bates* also might be viewed as encouraging the notion of an affirmative right of access to the media.<sup>137</sup> The proponents of this theory, which is based on listeners' rights to hear the "robust debate" of public issues, as reflected in *Sullivan*<sup>138</sup> and *Red Lion Broadcasting Co. v. FCC*,<sup>139</sup> advert to the need for government

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<sup>132</sup> *Id.* at 442.

<sup>133</sup> *Id.* at 444.

<sup>134</sup> Meiklejohn, *supra* note 124, at 257.

<sup>135</sup> 425 U.S. 748 (1976).

<sup>136</sup> A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 194 (1952) (No. 39, GREAT BOOKS OF THE WESTERN WORLD).

<sup>137</sup> See Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

<sup>138</sup> 376 U.S. 254 (1964).

<sup>139</sup> 395 U.S. 367 (1969).

intervention to guarantee fair coverage of all public issues and a lively interchange of competing ideas. The concept relies on a substructure of listeners' rights<sup>140</sup> that would also support the consumerism of *Virginia Pharmacy* and *Bates*. But positive government interference with a speaker's discretion in saying what he wants seems an ominous warping of the spirit of the first amendment from which the latter two cases stand wholly apart.

Instead, *Bates* accords with the traditional model of using the first amendment to undo government interference with the free flow of communication. The innovation of the line of cases studied here was that the public's interests, not the speaker's, inspired the Court's activism. Rather than an affirmative use of the first amendment as a "sword" in government's regulatory scabbard, *Bates*' freedom of expression operated as a shield for consumers against government regulations.

*Bates* expressed the classic democratic idealism of the Bill of Rights. Justice Blackmun's credo of trust in the people, with society's duty being to inform them rather than to keep them in ignorance,<sup>141</sup> is resonant with a Jeffersonian timbre. The *Bates* philosophy of the first amendment, distilled to its essence, can be found in these words of Jefferson:

"I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them; but to inform their discretion by education."<sup>142</sup>

*Baine Kerr*

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<sup>140</sup> See *Proconier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (dicta); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965).

<sup>141</sup> See text accompanying note 115 *supra*.

<sup>142</sup> Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) (WHITMAN, *JEFFERSON'S LETTERS* 338-39). In the following passage, Jefferson could have been speaking (from his Enlightenment bias) of the minority and majority opinions in *Bates*:

Men by their constitutions are naturally divided into two parties, first, those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes. Secondly, those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist and in every one where they are free to think, speak, and write, they will declare themselves.


Letter from Thomas Jefferson to Henry Lee (Aug. 10, 1824) (S. PADOVER, *A JEFFERSON PROFILE* 336 (1956)).

APPENDIX I

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

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

Bates' and O'Steen's advertisement, which appeared in the *Arizona Republic*, February 22, 1976.

### LEGAL SERVICES AT REASONABLE RATES



THE LEGAL CLINIC OF  
**SADNEY TRATTLER & WAITKUS**  
1501 N. W. 14th STREET  
DENVER, COLORADO 80202  
Telephone: (303) 399-1701

**DISSOLUTION OF MARRIAGE**, uncontested with no disagreement as to property division, maintenance, child custody and support.

Without Separation Agreement ..... \$150  
With Separation Agreement ..... \$175  
The above charges do not include \$27 Court filing fee and costs of service of process

**SIMPLE WILL**, one person with no trust ..... \$45

**DRIVING UNDER INFLUENCE**, settled at the pre-trial conference ..... \$150

**BANKRUPTCY**, individual, non-business, assets under \$5,000, non-contested ..... \$200  
Plus \$55 Court filing fees

Information regarding other types of cases will be furnished upon request. The fees quoted are for matters within the City and County of Denver.

## NEED AN ATTORNEY?

### THE SILVERN LEGAL CLINIC IS PLEASED TO ANNOUNCE ITS FEES

<p><b>DIVORCES</b> <small>(\$27 Court Fee Additional)</small></p> <p>Prepares all court papers; "Do-it-Yourself" counseling ..... \$75 Simple Non-contested; handled by attorney ..... \$125 Non-contested; agreement on custody, support, property, etc. .... \$200</p>	<p><b>BANKRUPTCY</b> <small>(\$50 each Court Fee additional)</small></p> <p>Non-Business, no contested proceedings</p> <p>Individual ..... \$200 Wife and Husband ..... \$285</p>
<p><b>DEFENSE OF DRUNK DRIVING OR DRIVING UNDER SUSPENSION</b></p> <p>Case settled before trial ..... \$200 Trial of case (report witness fees additional) ..... \$325</p>	<p><b>PERSONAL INJURY CONTINGENCY FEES</b> <small>\$41 court fee additional</small></p> <p>24% if settled before filing suit 27% if settled before trial 30% if case is tried</p>

Information regarding other types of cases furnished on request.

**THE SILVERN LEGAL CLINIC**  
1711 Pennsylvania, Suite 202  
Denver, Colorado 80203

**FOR AN APPOINTMENT CALL 861-8426**  
Saturday appointments available

Two advertisements which were placed 72 hours after *Bates* was announced, and appeared in the *Rocky Mountain News*, July 1, 1977, at 32, 26.

## APPENDIX II

The following amendments to DR 2-101 of Canon 2 of the Colorado Code of Professional Responsibility were adopted by the Colorado Supreme Court December 29, 1977, and were made effective January 2, 1978.\* They incorporate the ABA's Proposal A for amending Canon 2 (*see note 88 supra*) with modifications which include the following: Television advertising is permitted in Colorado (paragraph B); in-person solicitation is expressly prohibited (paragraph J); fee listings must include mention of factors which might affect such fees (paragraph B(14)(f)); apparently DR 2-101 is exclusive in that lawyers may advertise only in the manner described therein (paragraph H). In addition, the Colorado Supreme Court, among other changes, added a detailed and rather restrictive definition of "legal clinic" to the "Definitions" section of Canon 2 (not reprinted here).

## DR 2-101 Publicity.

- (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 promote the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish in print media or broadcast on radio or television, subject to DR 2-103, the following information 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 lawyers therein;
  - (2) addresses and telephone numbers;
  - (3) a statement of one or more fields of law in which the lawyer or law firm practices, or a statement that the practice is limited to one or more fields of law;

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\* *Lawyer Advertising: Amendments to Canon 2*, 7 COLO. LAWYER 189 (1978).

- (4) a statement that the lawyer or law firm engages in the general practice of law, which may be accompanied by a statement indicating one or more fields of law in which the lawyer or law firm does not practice;
- (5) a statement that the lawyer or law firm specializes in a particular field of law practice to the extent permitted by rules of the Colorado Supreme Court;
- (6) date of birth;
- (7) date and place of admission to the bar of any state or federal court, U.S. territory, District of Columbia, or foreign country, provided that if the terms of such admission contain restrictions thereon, the nature of such restrictions shall also be disclosed;
- (8) schools attended, with dates of graduation and degrees;
- (9) technical and professional licenses;
- (10) foreign language ability;
- (11) prepaid or group legal services programs in which the lawyer participates;
- (12) a statement as to whether credit cards or other credit arrangements are accepted;
- (13) office and other hours of availability;
- (14) legal fee information limited to the following:
  - (a) fees charged for an initial consultation;
  - (b) the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific service or the availability of a written schedule of fees for group legal service organizations;
  - (c) hourly rates, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to a particular matter and that the client is entitled, without obligation, to an estimate of the fee likely to be charged;
  - (d) fixed fees for routine legal services which are specified therein, such as simple wills, a change in name, an uncontested personal



- bankruptcy, an uncontested adoption, and an uncontested dissolution of marriage;
- (e) range of fees for services, provided that the statement discloses that the specific fee within such range will vary depending upon the client's particular matter and that the client is entitled, without obligation, to a written estimate of the fee within the range likely to be charged;
  - (f) a statement that contingent fee rates or schedules are available upon request; provided that any such printed legal fee information, including that which is printed on television, discloses (in print size equivalent to the largest print used in setting forth the fee information) all variables and other relevant factors which could affect such fee;
- (C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), may apply to the Colorado Supreme Court for an amendment to DR 2-101(B) to permit such expansion. Any such application shall also be served upon any entity or committee so designated by the Colorado Supreme Court, which shall be heard, together with the applicant, on the issue.
- (D) All advertisements in their entirety shall be retained by the lawyer for a period of three years following the publication or broadcast of such advertisement and upon five days' request shall be produced and delivered to the Colorado Supreme Court, any Justice thereof, or that Court's Grievance Committee or other designated committee. If the advertisement is communicated over radio or television, it shall be prerecorded, approved for broadcast by the lawyer, and a recording, audio tape, videotape or comparable method of retention shall be maintained by the lawyer. If the advertisement is published in a newspaper of general circulation, the lawyer shall maintain a record of the text of the advertisement and dates of publication, in lieu of maintaining copies of each and every issue of the particular publication.
- (E) If a lawyer renders legal services for which a fee had been advertised, the lawyer must render that service for

no more than the advertised fee.

- (F) If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, such lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.
- (G) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.
- (H) Except to the extent permitted in DR 2-101, 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 city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf. However, a lawyer recommended by, paid by or whose legal services are furnished by, a qualified legal assistance organization may authorize or permit or assist such organization to use means of dignified commercial publicity, which does not identify any lawyer by name, to describe the availability or nature of its legal services or legal service benefits. This does not prohibit limited and dignified identification of a lawyer as well as by name:
  - (1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

- (2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.
  - (3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.
  - (4) In and on legal documents prepared by him.
  - (5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.
  - (6) In communications by a qualified legal assistance organization, along with the information permitted under DR 2-101(B) and DR 2-101(A)(5), directed to a member or beneficiary of such organization.
- (I) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication media in anticipation of or in return for professional publicity in a news item.
- (J) Unless specifically authorized under DR 2-101(B) or DR 2-104, in-person or other direct solicitation of business is prohibited.