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FIRST AMENDMENT—PROFESSIONAL DISCIPLINE AND THE RIGHT TO ADVERTISE

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

The absolute ban on lawyer advertisements enforced by the bar since the beginning of this century[1] was held unconstitutional in *Bates v. State Bar of Arizona*.[2] The five-four decision extended limited first amendment protection to the "commercial speech" of two Arizona attorneys. Although commercial advertisements—like libels,[3] obscenities[4] and fighting words[5]—were once considered totally undeserving of first amendment protection,[6] recent Supreme Court decisions have recognized limited first amendment protection of advertising.[7] *Bates* reinforced the modern position of commercial advertising along the first amendment spectrum somewhere between protected and unprotected speech. However, the Court indicated that the "limited" first amendment guarantee is a bit more limited than previous commercial speech cases had suggested. The majority Justices found that the first amendment overbreadth doctrine would not be available in a commercial context.[8] Thus, while noncommercial speakers may secure the invalidation of speech regulations merely by showing that those regulations could be applied unconstitutionally in a hypothetical case, an advertiser must show that the regulation he is challenging was applied unconstitutionally *to him*.

In explicitly confining its decision to protect the "restrained"[9] and truthful[10] newspaper advertisement of fees for various routine legal services,[11] the Supreme Court suggested that, in another context, the first amendment might permit regulation of special advertising problems not presented in the case at bar—including problems of advertisements broadcast over electronic media;[12] representations of service quality;[13] in-person solicitation;[14] false, decep-

[1] 63 A.B.A.J. 1126 (1977).

[2] 97 S. Ct. 2691 (1977).

[3] Libel—traditionally considerd to be outside the first amendment realm—may have been brought "within" the area of constitutionally protected speech by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *Gertz* recognized constitutional limitations on private individuals' ability to recover for defamation. *See, e.g.*, N. DORSEN, P. BENDER & B. NEUBORNE, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 524 (1976).

[4] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

[5] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[6] *See, e.g.*, Valentine v. Christensen, 316 U.S. 52 (1942).

[7] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809 (1975), and Virginia Pharmacy Board v. Virginia Consumers' Council, 425 U.S. 748 (1976).

[8] 97 S. Ct. at 2707. The Court had previously allowed an advertiser access to the overbreadth doctrine in Bigelow v. Virginia, 421 U.S. 809, 817 (1975). However, the *Bates* Court did not distinguish or discuss the *Bigelow* ruling on overbreadth.

[9] The Court twice indicated that its opinion referred to "restrained" advertising. 97 S. Ct. at 2703, 2705.

[10] *See, e.g., id.* at 2709.

[11] *Id.*

[12] *Id.* Following the *Bates* decision, the American Bar Association House of Delegates approved a revision of the Code of Professional Responsibility to provide for certain limited types of attorney advertisements. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY, revised Ethical Consideration 2-8, Disciplinary Rule 2-101(B), (D) [subsequent citations are to Ethical Considerations, EC, or to Disciplinary Rules, DR] Although television was not among the media which the Code listed as acceptable for attorney advertisements, Disciplinary Rule 2-101(C) authorizes an attorney to seek special bar permission to advertise on other media and to advertise information not specifically permitted by the Code. Under the revised provisions, attorney advertisements generally "should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers." EC 2-2. Advertisements are also to convey their information in a "dignified" manner, DR 2-101(B), although one could argue that an individual attorney's unconventional style or flamboyancy would be among the factors relevant to a potential client's selection of appropriate counsel.

[13] According to the Court, representations of the quality of legal services "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." 97 S. Ct. at 2700. The revised ABA Code, in an advisory Ethical Consideration, disapproves of representations of quality. EC 2-9.

[14] 97 S. Ct. at 2700. The revised ABA Code continues to prohibit person-to-person solicitation of clients, except for close friends, relatives, former

tive or misleading information;[15] time, manner and place of advertising;[16] or other activity which "might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising."[17]

The *Bates* decision also considered whether the ban on lawyer advertising constituted an illegal restraint of trade in violation of the Sherman Act. The Court held that the federal antitrust statute did not apply to the Arizona Bar regulation, which amounted to sovereign activity of the state.[18]

The Arizona Supreme Court Decision

Bates, along with his law partner, O'Steen, opened a "legal clinic" in Phoenix and sought to provide a high-volume, moderately-priced array of routine[19] legal services primarily for moderate income persons who did not quite qualify for government aid. "To attract clients,"[20] Bates and O'Steen placed an advertisement in the *Arizona Republic*, a daily Phoenix-area newspaper, stating that their "legal clinic" was offering services at "very reasonable fees," and listing fees for uncontested divorce or legal separation, uncontested adoption, nonbusiness bankruptcy and change of name.[21] The attorneys conceded that their advertisement was clearly in violation of the Arizona State Bar Association's Disciplinary Rule against attorney advertising, which was contained in the state Supreme Court rules enacted by the Arizona legislature.[22] The rule provided, in part:

> A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so on his behalf.[23]

Following a complaint and hearing, a Special Local Administrative Committee recommended that Bates and O'Steen be suspended from the practice of law for not less than six months each.[24] Later, the Board of Governors recommended that the punishment be reduced to a one-week suspension for each.[25] Upon review in the Arizona Supreme Court, a plurality reduced the penalty to censure and upheld the advertising ban against challenges based on the Sherman Anti-Trust Act,[26] the first amendment, the equal protection clause of the fourteenth amendment and claims of vagueness.[27]

The Arizona court first dismissed the antitrust claim, concluding that (1) the state prohibition against advertisements by attorneys was unlike classic illegal "price-fixing"; and (2) even if price-fixing would have been apparent, the ban on advertising would have been exempt from the federal anti-trust statute because it was established by the state, acting as sovereign.[28]

In holding that the first amendment would not protect the lawyers' advertisement against state restraint, the Arizona court emphasized the difference between restrictions on professional activity and those on other forms of commercial activity. "Restrictions on professional activity, and in particular advertising, have repeatedly survived constitutional challenge,"[29] the court said, explaining that such

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clients (where advice given is germane to the former employment), or one whom the lawyer reasonably believes to be a client. *See, e.g.*, EC 2-3, 2-4; DR 2-103(A), 2-104(A)(1).

[15] 97 S. Ct. at 2708. *See also* EC 2-9; DR 2-101(A).

[16] 97 S. Ct. at 2709.

[17] *Id.* at 2700.

[18] *Id.* at 2696 (citing Parker v. Brown, 317 U.S. 341 (1943)).

[19] Services considered "routine" included uncontested divorces, uncontested adoptions, simple personal bankruptcies and changes of name. *Id.* at 2694.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] DR 2-101(B); ARIZ. SUP. CT. R. 29(a).

[24] 97 S. Ct. at 2695.

[25] *Id.*

[26] 15 U.S.C. § 1, 2 (1970).

[27] *In re* Bates, 113 Ariz. 394, 555 P.2d 640 (1976).

[28] *Id.* at 642–43. The Arizona Court distinguished Goldfarb v. Virginia State Bar, 421 U.S. 773 (1973), where the United States Supreme Court held that a county bar association's fee schedule effectively established an artificially high price floor for various legal services and thus constituted classic price-fixing violative of the Sherman Act. The Arizona court also cited Parker v. Brown, 317 U.S. 341 (1943), where the Supreme Court held the federal antitrust statute inapplicable to sovereign activities of the state.

[29] 555 P.2d at 643. The Arizona court cites decisions of the United States Supreme Court based on fourteenth amendment challenges to professional regulation: Williamson v. Lee Optical Co., 348 U.S.

forms of "solicitation" have been deemed "contrary to the best interest of society."[30] Further, the Arizona court distinguished legal services from prepackaged drugs, advertisements of which were held to be constitutionally protected against restraint by the pharmacy profession in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[31] In *Virginia Pharmacy,* the United States Supreme Court ruled that even professional advertising could claim first amendment protection in some situations. But the Court explicitly limited its holding to the case before it.[32] That limitation was emphasized by the Arizona court:

> [Q]uite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law.
>
> The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice. . . .
>
> Physicians and lawyers, for example, do not dispense standardized products; they render professional *services* of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.[33]

The Arizona court, in upholding the bar's ban on advertising, nonetheless reduced the penalties of Bates and O'Steen from one-week suspension to censure because the court concluded that the attorneys had acted in good faith in testing the constitutionality of the rule.[34] Bates and O'Steen appealed.

The United States Supreme Court Decision

The United States Supreme Court first disposed of the antitrust claim. It unanimously agreed with the Arizona court that the advertisement ban was not the kind of illegal restraint of trade prohibited by the Sherman Act since the bar regulation amounted to state sovereign action.[35] The Justices followed *Parker v. Brown,*[36] where the Court had found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."[37]

Bates distinguished the facts at bar from those present in two post-*Parker* decisions, where "state action" was interpreted narrowly to find the anticompetitive activities to be "private action" not shielded from Sherman Act sanctions. First, *Bates* considered the quantum of state involvement in a voluntary county bar association's fee schedule, held to be illegal price-fixing in *Goldfarb v. Virginia State Bar.*[38] In *Goldfarb,* the state bar and the state supreme court indicated their intent to enforce the minimum fee schedule by enforcement of an ethical rule against solicitation.[39] In *Bates,* however, the Supreme Court found that the Arizona Bar's ban on attorney advertising was established by the affirmative command of the state supreme court.[40] The Court also distinguished *Cantor v. Detroit Edison Co.,*[41] where an electric utility regulated by a state commission was found to use its monopoly power illegally to restrain competition in the sale of lightbulbs. *Cantor* was said to involve actions of a utility—"a private party"[42]—whereas, the Justices in *Bates* reasoned, the Arizona Supreme Court was the real party in interest in the case at bar. Further, the *Bates* Court stated that "regulation of the activities of the bar is at the core of the State's power to protect the public," whereas in *Cantor* the state possessed no "independent regulatory interest in the market for light bulbs."[43]

483 (1955); Barsky v. Board of Regents, 347 U.S. 442 (1954); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935).

[30] 555 P.2d at 643.

[31] 425 U.S. 748 (1976).

[32] *Id.* at 773 n.25.

[33] 555 P.2d at 644–45 (citing 425 U.S. at 774 (Burger, C. J., concurring)). The distinction was also suggested by the majority in *Virginia State Board of Pharmacy,* 425 U.S. at 773 n.25.

[34] 555 P.2d at 646.

[35] 97 S. Ct. at 2698.

[36] 317 U.S. 341 (1943).

[37] *Id.* at 350–51. *Parker* upheld a California legislative restraint on competition in the raisin-growing industry, the apparent goal of which was to maintain raisin prices and avoid "demoralization" of the industry. The Court there found that the program was not aimed at commerce and did not discriminate against commerce, "although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments." *Id.* at 367.

[38] 421 U.S. 773 (1975).

[39] *Id.* at 777.

[40] 97 S. Ct. at 2697.

[41] 428 U.S. 579 (1976).

[42] 97 S. Ct. at 2697.

[43] *Id.* at 2697–98.

Regarding the first amendment question, a divided Supreme Court invalidated the Arizona Supreme Court holding and ruled that the absolute ban on attorney advertisements violated whatever free speech protection is enjoyed by such advertisements.[44] The Court stressed that only a limited amount of first amendment protection was at issue, since the Bates-O'Steen advertisement did not present questions of false, deceptive or misleading information, unverifiable claims of service quality, or in-person-solicitation.[45] The Court noted that first amendment protection had been accorded paid advertisements in other contexts—including the commercial advertisements of pharmacists who "did not wish to report any particularly newsworthy fact or to comment on any cultural, philosophical, or political subject,"[46] and the political advertisements of candidates for public office[47] and defamers of public officials.[48]

In recognizing a first amendment interest in such advertisement, the *Bates* Court located at least part of that interest in the listener—as opposed to the speaker—when it wrote:

> The listener's interest is substantial; the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. . . . In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.[49]

Indeed, the Court considered the listener's first amendment interest sufficiently compelling to warrant a presumption that commercial information "is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed."[50] The Court said that in the face of a "paternalistic" effort to withhold information from the public for its own good, "[t]he choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice 'that the First Amendment makes for us.'"[51]

Against these first amendment considerations, the Court analyzed and refuted six avowed state interests in perpetuating the absolute ban on attorney advertisements:

(1) *The Adverse Effect on Professionalism.* The Court found that the traditional distaste for attorney advertisements was rooted in old English etiquette, which forbade such advertisements on the theory that lawyers were public servants and "above" trade.[52] Finding this an anachronism, the Court said that the "real-life fact that lawyers earn their livelihood at the bar" should not be concealed from themselves or their clients.[53] No persuasive connection was found between limited advertising and the hypothetical erosion of true professionalism—particularly since the bar's Code of Ethics required that the basis of attorneys' fees be discussed with clients at the commencement of the relationship.[54] Further, the Court said that lawyers' failure to advertise could be associated with their failure to reach out to the community.[55]

(2) *The Inherently Misleading Nature of Attorney Advertising.* The Court gave three reasons why restrained professional advertisements would not necessarily mislead the public. First, the Court found that legal services are not so individualized as to preclude informed comparison on the basis of information contained in ads.[56] On this point, the Justices reminded the Arizona bar that standardized rates had been used in its own Legal Services Program, and that minimum fee schedules for standardized legal tasks had been utilized by private attorneys prior to *Goldfarb v. Virginia State Bar*.[57] The Court reasoned that in any case,

[44] *Id.* at 2709. Four Justices dissented on the first amendment issue: Mr. Chief Justice Burger, and Justices Powell, Stewart and Rehnquist.

[45] *Id.* at 2700.

[46] *Id.* at 2698 (citing *Virginia State Board of Pharmacy,* 425 U.S. at 761 (1976)).

[47] 97 S. Ct. at 2698 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

[48] 97 S. Ct. at 2698 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

[49] 97 S. Ct. at 2699.

[50] *Id.* (citing *Virginia State Board of Pharmacy,* 425 U.S. at 770).

[51] *Id.* (citing *Virginia State Board of Pharmacy,* 425 U.S. at 770).

[52] *Id.* at 2702–03.

[53] *Id.* at 2701–03.

[54] *Id.* at 2701 (citing EC 2-19, as effective prior to revision in August, 1977).

[55] *Id.* at 2702.

[56] *Id.* at 2703.

[57] *Id.* (citing Goldfarb v. Virginia, 421 U.S. 773 (1975)). See notes 38–40 *supra* and accompanying text.

"[t]he only services that lend themselves to advertising are the routine ones."[58] Second, the Justices found that a potential client can ordinarily identify for himself the general type of legal service he wants.[59] And third, the Court acknowledged that advertising would not provide a complete basis for selection of an attorney, but found that "the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."[60] Without advertising, the Court said, information as to the qualifications or reputations of lawyers is not available to many, and if available, it may be inaccurate or biased.[61]

(3) *The Adverse Effect on the Administration of Justice.* The Court agreed with the state bar that some additional litigation might be "stirred up" by attorney advertisements. However, the Court found that prospect a welcome one for the not-quite-poor whom the legal system inadequately served—partly because those individuals may know relatively little about how to choose a suitable attorney, and partly because they may fear the costs of litigation.[62]

(4) *The Undesirable Economic Effects of Advertising.* The Court rejected the Arizona bar's claims that advertising would increase attorney overhead, ultimately driving up legal fees, and that new attorneys who could not afford expensive ad campaigns would be handicapped against established attorneys.[63] The Court found that, although the effect of advertising on the price of *services* is not yet certain, retail *product* prices are often dramatically lower than they would be without advertising.[64] Further, the Court reasoned that in the absence of advertising an attorney who is seeking clients must rely upon contacts developed over time and therefore, advertisements could actually facilitate the new attorney's market penetration.[65]

(5) *The Adverse Effect of Advertising on the Quality of Service.* Essentially, the Arizona bar argued that the existence of advertised standard packages would encourage attorneys to use those packages, regardless of how well they fit a client's needs. Again, the Court reminded the bar that its own prepaid Legal Services Program had provided standard packages of services and concluded: "Restraints on advertising . . . are an ineffective way of deterring shoddy work."[66]

(6) *Problems of Enforcement.* The Arizona bar finally warned that a vigilant regulatory mechanism would be required to monitor attorney advertisements for falsity or deception, since adequate enforcement could not depend upon complaints by unsophisticated consumer-victims who might not realize that they were duped. The Court rather casually disposed of that problem by reassuring the bar: "For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward."[67] The Court did not, however, cite its authority for the one-to-"thousands" ratio.

Having disposed of the state's six justifications for the general ban on attorney advertisements, the Court could do little else but extend at least some free speech protection to such ads.[68] However, the Court explicitly limited the extent of free speech protection to be enjoyed by commercial advertisers, noting the "'common-sense differences' between commercial speech and other varieties."[69] Basically, the

[58] 97 S. Ct. at 2703. "[A]dvertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets, than in the marketing of unique products or services." *Id.* at 2703 n.25. The Court did not, however, consider whether the rare advertisement for a unique legal service would be inherently misleading.

[59] 97 S. Ct. at 2704.

[60] *Id.* at 2704 n.30.

[61] *Id.*

[62] *Id.* at 2705.

[63] *Id.* at 2705–06.

[64] *Id.* at 2706. See also note 58 *supra*.

[65] *Id.* at 2706.

[66] *Id.*

[67] *Id.* at 2707. The inadequacy of bar policing machinery was discussed in the dissenting opinion of Mr. Justice Powell, joined by Mr. Justice Stewart. Noting that there are approximately 400,000 lawyers in this country, he wrote: "In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proven to be extremely difficult." *Id.* at 2715.

The ABA Special Commission on Evaluation of Disciplinary Enforcement, Problems & Recommendations in Disciplinary Enforcement (1970) found that disciplinary action is virtually nonexistent in many jurisdictions.

[68] 97 S. Ct. at 2708.

[69] *Id.* at 2707–08.

Court reasoned that full first amendment protection is less essential in a commercial context because "advertising is linked to commercial well-being,"[70] its truthfulness "presumably" can be determined in advance of publication,[71] and the danger of chilling such speech is therefore less compelling.

The Court's opinion reflected two significant limitations on the first amendment's protection of commercial speakers. First, *Bates* found that the overbreadth doctrine would not be available in the context of professional commercial advertising, and might not even apply "in the ordinary commercial context."[72] Second, the Court said that the limited free speech protection would not preclude some regulation of advertising.[73]

The first amendment overbreadth doctrine represents a departure from traditional rules which generally preclude a person, to whom a statute may be constitutionally applied, from challenging that statute on the ground that it could possibly be applied in an unconstitutional manner to others.[74] Generally, constitutional rights are personal and may not be asserted vicariously, since "under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws."[75] However, an exception to this policy is made where "weighty countervailing policies" are at stake.[76] Thus, where free expression is concerned, the danger of discouraging protected speech is so great that the Courts' overbreadth doctrine will permit invalidation of an overly-broad speech restraint without proof that the restraint was unconstitutionally applied. The only necessary proof is that the restraint could have been unconstitutionally applied to someone. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[77]

Bates reasoned that the overbreadth doctrine is required where "the possible harm to society from allowing unprotected speech to go unpunished is outweighed by the possibility that protected speech will be muted."[78] However, the Court concluded that there was little danger of chilling commercial speech because "commonsense" indicated that such speech is linked to commercial well-being and lends itself to prior determinations of whether the information was truthful and protected.[79] Thus, the Court concluded that "the justification for the application of the overbreadth analysis applies weakly, if at all, in the ordinary commercial context."[80]

Bates proceeded to describe the "clearly permissible limitations" of commercial advertising.[81] The Court said that advertising's limited first amendment right did not preclude regulation of false, deceptive, or misleading advertisements; representations of quality or service; in-person solicitation; mandatory consumer warnings or disclaimers; time, manner and place of advertising; and special problems of advertisements broadcast over the electronic media.[82]

However, the Court rejected the claim that

[70] *Id.* at 2707.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2708–09.

[74] *See, e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973). There, the Supreme Court reviewed the first amendment overbreadth doctrine and refused to apply it to the expressive conduct, as opposed to "pure speech" of civil servants who alleged that an Oklahoma statute prohibited their protected as well as unprotected political activity.

[75] 413 U.S. at 610–11.

[76] United States v. Raines, 362 U.S. 17, 22–23 (1960).

[77] 413 U.S. at 612.

[78] 97 S. Ct. at 2707.

[79] *Id.*

[80] *Id.* The *Bates* Court did not distinguish or even discuss its prior application of the overbreadth doctrine in a commercial context. For instance, in Bigelow v. Virginia, 421 U.S. 809 (1975), a newspaper editor who had published an ad containing abortion information was allowed to use the overbreadth doctrine to challenge a state statute making it a misdemeanor to encourage procurement of an abortion by sale or circulation of any publication. The *Bigelow* Court concluded that it was error to deny the appellant standing "where 'pure speech' rather than conduct was involved, without any consideration of whether the alleged overbreadth was or was not substantial." *Id.* at 817. However, the *Bigelow* Court invited a distinction based on the nature of the speaker: "The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or practitioner. The prosecution thus incurred more serious First Amendment overtones." *Id.* at 828.

[81] 97 S. Ct. at 2708–09.

[82] *Id.*

the Bates-O'Steen advertisement was misleading and therefore suppressible.[83] The Justices concluded that the ad's use of the term "legal clinic" was not vague or misleading, since the term would be readily understood by the public to refer to an operation, like the one advertised, which generally provided standardized services. Further, the Court did not find deception in the ad's claim that "very reasonable" prices would be charged; the Court accepted that representation as fair in light of customary charges by other law firms, even though the Arizona bar had argued that the prices were not a "bargain." And finally, the Court held that it was not deceptive to announce a fee for a name change without stating that the change could be accomplished without the aid of an attorney.[84]

Thus, the Court concluded that attorney advertisements could not constitutionally be subject to blanket suppression, and that whatever regulation might be permissible in another context, Bates and O'Steen's nondeceptive newspaper advertisement of fees for routine legal services was protected by the first amendment.[85]

The Effect of the Bates Decision

In reinforcing the notion that commercial speech is worthy of at least some first amendment protection, *Bates* further undermined two early Supreme Court decisions which appeared to place commercial speech totally outside the scope of protected expression. *Valentine v. Christensen*[86] introduced the exclusionary commercial speech doctrine in 1942 with the simple assertion that "the constitution imposes no . . . restraint on government as respects purely commercial advertising."[87] *Valentine* did not cite precedent or principles to support its conclusion. Nor did the Court limit its broad declaration to permit governmental restraint on commercial advertising where the manner of its dissemination was objectionable, although such a qualification might have been asserted based on the facts of the case. In *Valentine,* the Court upheld the validity of an ordinance banning the distribution of handbill advertisements on a public thoroughfare. The handbill distributer apparently sought to circumvent the ordinance by adding a public interest message on the reverse side of his advertisement. The Court indicated that the first amendment might not tolerate a similar restraint on the distribution of noncommercial handbills; but the Court said that once advertising was added, the constitutional protection disappeared.

Nine years later, the first amendment was interpreted so as not to protect door-to-door magazine sellers against an ordinance forbidding such solicitation. In *Breard v. City of Alexandria,*[88] the Court suggested that the "element of the commercial" removed first amendment protection from the sellers' efforts to disseminate their publications. It was that commercial element which the Court emphasized in distinguishing the facts at hand from those in *Martin v. Struthers,*[89] where Jehovah's Witnesses were granted a first amendment right to sell religious pamphlets door-to-door for twenty-five cents. *Breard,* also, could have been narrowly constructed so as to sanction regulation of advertising when the manner of its dissemination is intrusive.[90]

Valentine and *Breard* have never been explicitly overruled; indeed, *Valentine* was cited as recently as 1973 for the proposition that the first amendment did not protect advertisements furthering illegal commercial activity. In *Pittsburgh Press Co. v. Human Relations Commission,*[91] the Supreme Court upheld the validity of an ordinance prohibiting newspapers from segregating want ads on the basis of sex, since employment discrimination on the basis of sex was illegal.

Recently, however, the Court has admitted the "doubtful validity"[92] of the early exclusionary commercial speech doctrine. Indeed, one of *Valentine's* majority Justices had second thoughts seventeen years after the decision and

[83] *Id.* at 2708.
[84] *Id.*
[85] *Id.* at 2708-09.
[86] 316 U.S. 52 (1942).
[87] *Id.* at 54.
[88] 341 U.S. 622 (1951).
[89] 319 U.S. 141 (1943).
[90] The *Breard* Court took notice of the intrusive manner in which the magazines were being disseminated: "[I]t may be thought not really sporting to corner the quarry in his home and through his open door put pressure on the prospect to purchase. . . . [T]he exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity [*sic*] of the fireside. . . . " 341 U.S. at 627.
[91] 413 U.S. 376 (1973).
[92] Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759 (1976).

wrote: "The ruling was casual, almost offhand. And it has not survived reflection."[93] In 1974, four Justices wrote that "[T]here is some doubt concerning whether the 'commercial speech' distinction retains continuing validity."[94] But in spite of the shaky foundation of broad, offhand assumptions, the commercial speech doctrine continues to exist and take on new meaning.

The Court's recent piecemeal extension of "limited" constitutional protection to various paid advertisements has reflected judicial reluctance to totally abandon precedent, however unprincipled. In *New York Times v. Sullivan,* the Court carved out an "exception" to the commercial speech "exception" by extending free speech protection to a paid advertisement which solicited monetary contributions. The Court explained that the ad was not purely commercial; rather, the Justices preferred to consider it a political or "editorial" advertisement which communicated information of public interest and concern.[95] Subsequently, in *Bigelow v. Virginia,* the Court brought a *commercial* advertisement within the scope of the first amendment where the ad also contained factual material of clear public interest.[96] In *Virginia Pharmacy Board v. Virginia Consumers' Council,* the Court extended free speech protection to commercial advertising containing nothing particularly newsworthy, editorial, cultural, philosophical or political.[97] The Court explained that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn."[98] Yet, along with the Supreme Court's consistent expansion of free speech protection of advertising, the Justices have warned that regulation of commercial speech would still be tolerated[99] and that the first amendment would not fully protect such speech.[100]

The current distinctions between commercial and noncommercial speech rest not merely upon dubious, offhand assumptions and strained adherence to precedent. According to *Virginia Pharmacy* and *Bates,* the distinctions are also rooted in "commonsense."[101]

First, the Court's commonsense rationale postulated that the commercial speaker may be in a better position to verify information about his product or service than a newsreporter or political commentator would be.[102] In reality, however, it is not altogether clear that the advertiser "can determine more readily than others whether his speech is truthful and protected."[103] The Court's unsupported declaration suggests that the owner of a corner hardware shop is in a better position to vouch for representations concerning complicated electronic gagdets manufactured elsewhere, than is a reliable and thorough investigative reporter able to stand behind details of his reportorial "product."

Second, the Court asserts that advertising as an institution is sufficiently "durable" to withstand restraints which could chill other forms of speech.[104] It apparently presumes that, in the face of government restraint on commercial speech, advertisers will take care of themselves. "Since advertising is the *sine qua non* of commercial profits," the Court reasons, "there is little likelihood of its being chilled by proper regulation and foregone entirely."[105] However, even if advertising as an institution continues to exist, it does not follow that the volume or content of advertising will not be chilled. Any restraint on commercial speech could certainly

[93] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

[94] Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting).

[95] 376 U.S. 254, 265–66.

[96] 421 U.S. 809 (1975). Also see note 80 *supra* and accompanying text. According to the *Bigelow* Court, "Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in [advertisement] form." *Id.* at 818. However, "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest." *Id.* at 826. It is the duty of the courts to balance the first amendment interest against the public interest allegedly served by the regulation. *Id.* The *Bigelow* Court noted that its decision, resting on first amendment grounds, was "in no way inconsistent with" the cases involving regulation of professional activity and the Fourteenth Amendment." *Id.* at 825 n.10. For those fourteenth amendment-professional regulation cases, see note 29 *supra.*

[97] 425 U.S. 748 (1976).

[98] *Id.* at 765.

[99] *See, e.g.,* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., where the Court said: "[W]e of course do not hold that it [commercial speech] can never be regulated in any way." *Id.* at 770.

[100] *See, e.g., Bates,* 97 S. Ct. at 2708.

[101] 425 U.S. at 771–72 n.24; 97 S. Ct. at 2708.

[102] 425 U.S. at 771–72 n.24.

[103] 97 S. Ct. at 2707.

[104] 425 U.S. at 771–72 n.24.

[105] *Id.*

discourage an individual advertiser from entering the marketplace of commercial ideas; further, the value of the commercial information he selects for dissemination may be eroded by any regulatory incentive for him to "play it safe" with useless jingles or slogans.

The Court's assumptions concerning the durability of advertising fail to provide any principled basis for distinguishing protected from unprotected speech. If durability of the institution or importance to the speaker are to be tests of constitutional speech protection, much vital editorial and political speech would necessarily fall beyond the scope of first amendment safeguards. For instance, a newspaper might be sufficiently "durable" to stay in business even after the imposition of government regulation or censorship; yet there is no evidence to suggest the Court believes that wholesale regulation or censorship of newspapers would be permissible, or that the mere ability to publish safe, bland irrelevancies is all the first amendment protects. Similarly, the Court does not suggest that politicians enjoy less constitutional speech protection than do ordinary individuals, yet it is difficult to imagine statements more important to their speaker's well-being than statements of political candidates or public officials whose ability to influence public opinion lies at the heart of their access to power.

The Court also referred to a third "commonsense" distinction between commercial and noncommercial speech, based on the proposition that the spontaneity of the former will not be undesirably inhibited because its contents are generally calculated.[106] However, the degree to which one previously contemplated his speech would seem to have little to do with whether the first amendment should protect its dissemination. If that were the case, carefully-prepared statements of one politician would enjoy less constitutional protection than the impulsive verbal "shots from the hip" of another politician.

The result of the Court's "commonsense" distinction between commercial and noncommercial speech is that the same information could be subject to restraint when it appears one day in an advertisement, and be fully protected by the first amendment the following day when it is picked up by a newspaper columnist. Such commonsense is, politely speaking, nonsense.

However, the Court's "commonsense" distinctions serve a very practical, if not principled, purpose. They allow the Court theoretical room to permit continued regulation of advertising where the first amendment might not permit regulation of protected forms of speech. But regulation does not necessarily require the denial of full first amendment protection, since "[t]he First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses."[107] The Court could avoid the strain of distinguishing commercial advertising from noncommercial speech by extending first amendment safeguards regardless of commercial form. The Court could characterize the protection of advertising as full but defeasible upon a showing that strong countervailing interests demand restraint. Instead of allocating the first amendment protection on the basis of an arbitrary speech category, the Court could base free speech protection upon a balancing of interests.[108] And since the Court's "commonsense" considerations do not, in reality, support the proposition that commercial speech is less vulnerable to the chilling effects of regulation, the first amendment overbreadth doctrine should apply to commercial speech with full force.

Conclusion

Now that the First Amendment has been read to protect, in some fashion, an attorney's advertisement, important issues concerning the scope of that protection have been opened for future litigation. *Bates* indicated that *some* reg-

[106] 97 S. Ct. at 2709.

[107] Breard v. City of Alexandria, 341 U.S. 622, 642 (1951).

[108] The balancing approach makes sense in light of experience and established principle. For instance, the first amendment will ordinarily protect a speaker's criticism of another, until that protection is defeased upon a showing of unprivileged defamation; similarly, one may address a theater crowd with full first amendment protection, but if the speaker falsely shouts "fire" and causes panic, his utterances will lose their protection. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (dictum). In these situations, the interest in free speech may be weaker than the interest of an individual in his good name, or the interest of society in avoiding disaster. It is suggested that in all but the rare, compelling situation, the free speech interest should prevail.

ulation of attorney ads will be permitted in the public interest, particularly with respect to truthfulness, manner, time, place and the possibility of misleading consumers. Additionally, the Court has indicated that the extent of permissible regulation may depend at least partly on *who* is doing the advertising. Indeed, professionals may be among those subject to stricter public interest standards than those which are constitutionally applicable to ads of nonprofessionals.[109]

However these issues are resolved, the new qualified right of attorneys to advertise could prompt some change in the practice and structure of the legal profession, potentially adding new demand on legal services and judicial machinery, lowering fees for heavily-advertised services through increased price competition, and diminishing reliance on reputation and contacts by attorneys seeking to attract clients. Ultimately—if attorney advertising does indeed catch on—a new image of the legal profession could be fostered.[110]

[109] "[M]isstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." 97 S. Ct. at 2709.

[110] Munford, *Sherman Act Scrutiny of Bar Restraints on Advertising and Solicitation of Attorneys*, 62 VA. L. REV. 1135, 1167 (1976): "This pressure would be particularly strong in the market for standardized services, the relative merits of which consumers can more readily judge." It has been suggested that in the absence of attorney advertising, it costs consumers more to acquire information about attorneys and, in some cases, reduced fee competition increases the cost of ultimate services. *Id.* at 1168. Although it would be foolhardy to attempt to predict with any certainty the effects of advertising on the legal profession, some tentative possibilities have been suggested: Large law firms may be least affected by the opportunity to advertise, to the extent that they tend to offer less standardized services and have wealthy individual and corporate clients who tend to have more reliable information concerning the relative reputations of attorneys. Further, these clients may benefit somewhat from the extent to which absence of attorney advertising results in failure of less-informed individuals to assert their legal rights. And, it is said to be likely that large firms tend to include larger numbers of attorneys committed to the traditional self-image of the profession. These factors could somewhat counteract the spectre of large firms gaining increasing dominance because of their ability to spend more on advertising; the result of such a situation if pushed far enough could provide large firms with a protected market position and an ability to charge high, "monopolistic" prices. Note, *Advertising, Solicitation, and the Professional's Duty to Make Legal Counsel Available*, 81 YALE L. J. 1181 (1972).