ATTORNEY ADVERTISING: BATES AND A BEGINNING

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TABLE OF CONTENTS

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I. INTRODUCTION

On June 27, 1977, the Supreme Court issued a landmark decision regarding professional advertising in the case of *Bates v. State Bar of Arizona*.[1] The controversy surrounding this subject was reflected by the closeness of the decision in which the Court held that state bar associations can *not* place blanket prohibitions on attorney advertising.[2] The import of this ruling is accentuated by its implications for other

1. 433 U.S. 350 (1977) (5-4 decision).
2. *Id.* at 384.

professions in the near future.[3]

The delivery of legal service, which has become a major concern for both attorneys and consumers,[4] could be substantially altered as a result of the *Bates* case. Especially important is the concept of marketing professional services,[5] which appears to have been introduced by the Court's decision. This new process not only affects the competitive structure in the legal profession, but also contains important implications for the consumer's choice process. In the legal profession alone, the few studies that have been conducted indicate that the public is not utilizing the legal profession adequately—either ignoring the risks involved in not obtaining legal services or choosing to avoid fees.[6] In general, there has been a lack of information upon which to select legal counsel. These problems of ignorance and noncommunication between the supplier and consumer of legal and other professional services could be alleviated by a new consumer awareness facilitated by the *Bates* decision.[7]

The major purpose of this Article is to review the *Bates* decision, noting the legal reasoning pursued by the Court, precedents relied upon, and conclusions reached. In addition, the problems involved in the decision and its likely implications will be discussed. Finally, this Article will present the results from a national survey of lawyers regarding their opinions on the use of advertising by the legal profession. This data will be analyzed in an attempt to predict the future behavior of attorneys regarding this recently authorized competitive strategy. First, however, the development of professional advertising proscriptions, dating back to fourteenth century England, will be considered.

II. HISTORY AND DEVELOPMENT OF ATTORNEY ADVERTISING RESTRAINTS

A. *The Policies Behind Professional Advertising Restraints*

An historical perspective is helpful in understanding the reasons behind the change in the delivery of legal services. In medieval Eng-

3. In this article, "professionals" will refer primarily to members of the medical, legal, pharmaceutical, and engineering professions.

4. *See, e.g.*, B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS: SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES (1970); Allison, *Problems in the Delivery of Legal Services*, 63 A.B.A.J. 518 (1977); Johnson, *A Critical Review of the Delivery of Legal Services*, WIS. B. BULL., May 1977, at 9.

5. Kotler & Conner, *Marketing Professional Services*, J. MARKETING, Jan. 1977, at 71-76.

6. *See* Stone & White, *The Public Image of the Legal Profession 1960-1975*, 49 N.Y. ST. B.J. 298, 298-99, 330 (1977).

7. In one survey, readers ranked low public regard of the legal profession as the major issue facing the legal profession today, and unequal distribution of legal services as the third major issue. Incompetence of lawyers was ranked second. Staff Report, *Incompetence Rising*, JURIS DOCTOR, July-Aug. 1977, at 23.

land, lawyers were few in number and of independent means. Earning a living was incidental to performing a public service; consequently, there was no purpose in soliciting. Additionally, lawyers, as members of the aristocracy, held trade in such contempt that advertising would have been beneath their dignity.[8] Ethical prohibitions, many unwritten, were viewed as rules of professional "etiquette rather than of ethics."[9]

Specific prohibitions against maintenance (assisting another financially in presenting a suit), champerty (maintaining a financial interest in the outcome), and barratry (initiating groundless proceedings) developed in English common law.[10] Unnecessary litigation had to be discouraged since the medieval legal process often involved trial by ordeal or battle.[11]

These English traditions were not formalized into a code of ethics until 1887.[12] In 1908, more specific restrictions were adopted by the American Bar Association [ABA] in the Canons of Professional Ethics.[13] Even at that time, advertising was thought to be unnecessary to establish a professional reputation or to communicate one's availability.[14]

The Canons were replaced in 1969 by the Code of Professional Responsibility, which has been adopted in every state, except California, and in the District of Columbia and Puerto Rico. Canon 2 of the Code restricted advertising in any manner except for the listing of certain limited facts on professional cards,[15] announcements,[16] station-

8. *See* H. DRINKER, LEGAL ETHICS 5, 210 (1953).

9. *Id.* at 22.

10. Zimroth, *Group Legal Services and the Constitution*, 76 YALE L.J. 966, 970 (1967).

11. *See* H. DRINKER, *supra* note 8, at 11-12.

12. *See* A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 29 (1976). Before 1887, principles of professional responsibility had been a part of either the common law of the profession or the statutory law of a particular jurisdiction. *Id.*

13. *Id.*

14. Canon 27, as originally adopted by the ABA, provided: "The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust." ABA CANONS OF PROFESSIONAL ETHICS No. 27; B. CHRISTENSEN, *supra* note 4, at 128-29.

15. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102 (A)(1) (1976). For examples of how this provision has been applied, see ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 256 (1943) (although not all members admitted to practice in state where card is published, it is proper to list card in law list as long as it is clear which members are licensed to practice in state); *id.* No. 260 (1944) (improper to solicit employment for lawyers knowledgeable in tax law by placement of professional card in newspaper); *id.* No. 82 (unpublished) (improper to stamp professional card on reprint of law article by attorney).

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102(A)(2) (1976). For examples of how this provision has been applied, see ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1108 (1969) (improper to distribute notice to attorneys with an IRS taxing district that attorney was former assistant to the regional counsel of IRS); *id.* No. 1075 (1968) (attorney who had entered private practice and was formerly an IRS specialist may state in his announcement that he had held that position).

ery,[17] office door signs,[18] and certain reputable law lists.[19] Although attorneys have given various interpretations to the provisions of Canon 2, its underlying premise—that advertising was somehow unprofessional—remained intact.

B. *The Growing Need for Fewer Restraints in Promotion*

While these restraints have become more institutionalized over time, the circumstances that generated them have been altered substantially. Where formerly the lawyer-client relationship was developed personally, the urbanization of American society has restricted such relationships. With a mobile populace, large numbers of attorneys, and the use of mass media as a major communicative device, many lawyers can no longer rely on a neighborhood reputation to support them. The assumption that a good reputation produces unsolicited recommendations, leading to a satisfactory practice, may have been warranted a half century ago, but today it is less meaningful for many lawyers. Even extremely talented new lawyers will obtain little work without some fairly active solicitation on their behalf.[20]

The economics of practicing law has also changed.[21] Legal practice is no longer the elite endeavor it once was. It is a lucrative profession, which, like other occupations, is undertaken by people desirous of earning a living. With this change in the economic structure of the legal profession has come a decrease in the number of personal lawyer-

17. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-102(A)(4) (1976).

18. *Id.* DR 2-102(A)(3).

19. *Id.* DR 2-102(A)(6). These include the *Attorney's Register*, which is an ABA-approved service, and the *Martindale-Hubbell Law Directory*. Although the latter is quite familiar to the profession, it is unknown to most lay people. Hobbs, *Lawyer Advertising: A Good Beginning Is Not Enough*, 62 A.B.A.J. 735, 736 (1976). "Although many of the ABA-approved lists are directories which give the names and addresses of all attorneys within a specific geographic area, more than half are selective, limiting . . . lawyers who may purchase space." Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C.L.L. REV. 77, 83-84 (1973). In *Martindale-Hubbell*, for example, "not every attorney is permitted to advertise his or her professional autobiography, prestigious associations and important clients . . . . One must await an invitation from the publisher to apply for an 'a' rating, which can be achieved only upon submission of favorable references from 16 judges and attorneys who have themselves already received an 'a' rating. For all other members of the profession, *Martindale-Hubbell* is a closed book." M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 117 (1975).

20. Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 253 (1968). This thesis is supported by the fact that the initial advertising after *Bates* is being done by younger lawyers.

> The drama in this case rests in part on youth versus age. Before the Court stood two young lawyers asserting constitutional rights in face of organized repression by comfortably established members of their profession. The majority senses the gravity of their cause, and responded by citing the importance both as a business builder for young lawyers and a source of information for the public.

Moskowitz, *The Great Ad Venture*, JURIS DOCTOR, Sept. 1977, at 17.

21. *See generally* Freeman, *Legal "Cobwebs": A Recursive Model of the Market for New Lawyers*, 57 REV. ECON. & STATISTICS 171, 172-73 (1975); Rosenberg, *The Bar Should Put Unemployed Lawyers to Work for the Poor*, BAR LEADER, Sept.-Oct. 1977, at 24; York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. LEGAL EDUC. 1 (1973).

client relationships. Modern clients rarely know lawyers over extended periods of time but rather employ them for a specific case for a limited time period.

The old prohibitions also assumed that there was no advertising being done by attorneys. Although the old axiom "Church, Rotary, Country Club and Wait" has been, to a large extent, adhered to, practitioners have taken advantage of these traditional methods of contacting potential clients to insure the procurement of an adequate clientele.[22] Most large firms have not needed advertising, since their solicitation has been of a different type—the utilization of personal and subtle social forms that have not been the subject of ethical admonitions. These machinations have not gone unnoticed, however, and studies indicate that bar committees have probably spent more time dealing with the various types of proscribed practices of advertising and solicitation than with any other ethical issue.[23]

To a limited extent, the traditional assumption that advertising is not necessary to attract clients may be valid for the more affluent members of American society,[24] but middle and low income persons are not part of this select community where communications are open and available and legal services are appreciated and utilized. Since these persons were not reached through traditional channels, new avenues had to be explored.

From its inception, the Code of Professional Responsibility has emphasized the need for informing the public about legal rights and remedies and the availability of legal assistance.[25] However, it was not until 1976 that the ABA amended the Code to permit advertising in telephone directories and other ABA-approved lists of legal specializations.[26] This development was a start in the direction of assisting the public in obtaining proper counsel and was prompted by a recognition that past techniques of disseminating this information proved to be in-

22. One lawyer claimed deductions for tax purposes for private club dues, costs of restaurants and cocktail bars, boating expenses, and flowers for goodwill purposes, all incurred with the "hope of thereby increasing petitioner's law practice." Hearn v. Commissioner, 309 F.2d 431, 432 (9th Cir. 1962). These deductions were denied. *Id.*

23. Fully one-third of the opinions of the ABA Committee on Professional Ethics concern these practices. Outcault & Peterson, *Lawyer Discipline and Professional Standards in California: Progress and Problems*, 24 HASTINGS L.J. 675, 697 n.135 (1973); *see* Schuchman, *supra* note 20, at 245.

24. *See In re* Cohn, 10 Ill. 2d 186, 196, 139 N.E.2d 301, 306 (1956). In a specially concurring opinion, Justice Bristow noted that "opulent lawyers and large law firms" spend large sums of money for membership in country clubs, entertainment in fashionable surroundings, and other similar amenities of social intercourse and concluded "that the primary purpose of these expenditures is the attraction of law business and not hospitality is attested by the fact that such lawyers regularly claim and the Internal Revenue Department regularly allows deductions for these expenditures as 'business' and not 'personal' expenses." *Id.*

25. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1976).

26. *Id.* EC 2-10.

adequate.[27] Furthermore, the impact of the amended rule is largely dependent on individual states, since the rule contains a proviso that the published data shall be disseminated only to the extent and in such format and language as prescribed by the various states.

C. *The Consumer Viewpoint and Present Delivery Systems*

Added to the difficulties young lawyers have in reaching potential clients are the difficulties the consumer experiences in obtaining competent legal counsel. To meet consumer needs, various means of delivering legal services have been considered, including the development of legal clinics,[28] prepaid legal services,[29] lawyer referral services,[30] group

27. *See id.* EC 2-7; Hobbs, *supra* note 19, at 736.

28. The term "legal clinic" is used to describe a self-sufficient or profit-making vehicle providing legal services to middle income people by using a lawyer minimally and making maximum use of cost-saving devices and paralegals. Such clinics usually limit their services to matters amenable to big volume systemization and the use of sub-professionals. Services rendered are normally personal, non-business problems such as simple divorces, real estate transactions, and name changes. To be certified by the American Legal Clinic Association, a clinic must have low fees for its area, make its services and fees known to potential clients, and be open some nights and Saturdays. For a listing of legal clinics now in operation, see Downey, *The State of the Art*, JURIS DOCTOR, Sept. 1977, at 22.

29. "Prepaid legal services" designates a type of legal insurance under which, for a premium, a member is entitled to a designated group of legal services. These services usually include common problems such as divorce, probate, and handling misdemeanors. The primary purpose of prepaid legal services is to ease the financial burden on those individuals at the middle income levels of American society. Generally, these individuals do not seek legal assistance because they fear that such assistance is unaffordable. The prepaid legal services plan removes the financial obstacle and encourages consultation before the crisis arises. Experience with the oldest prepaid plan seems to support this thesis. The plan started in Shreveport, La., in 1971, and the number of union members using the legal services doubled after the plan went into effect. For a description of this program, see Meserve, *Our Forgotten Client: The Average American*, 57 A.B.A.J. 1092, 1093-95 (1971). *See generally* Missouri Bar—Prentice-Hall, *Survey*, in A.B.A. COMPILATION OF REFERENCE MATERIALS IN PREPAID LEGAL SERVICES 4 (1973); Cheatham, *A Lawyer When Needed: Legal Services for the Middle Classes*, 63 COLUM. L. REV. 973 (1963); Sorenson, *Prepaid Legal Services and Their Relation to the Code of Professional Responsibility—A Threat or Blessing?* 62 ILL. B.J. 614 (1974); Comment, *Group Legal Services and the New Code of Professional Responsibility*, 20 BUFFALO L. REV. 507 (1970); Note, *Group and Prepaid Legal Services in New Mexico*, 4 N.M. L. REV. 225 (1974).

30. A lawyer referral service is one in which an organization, such as a state or local bar, refers persons to attorneys who have submitted their names for the list. One of the arguments against the effectiveness of lawyer referral services as a delivery system is that they are little more than an expanded yellow page advertisement and actually mislead the client. "There is almost no screening of attorneys who sign up for them, nor is there any real attempt to determine whether an attorney who signs up for a particular field is qualified in that field. In that respect, the reference services are misleading to the clients who naturally infer that the lawyer [*sic*] whose names they receive are somehow specially recommended by the Bar Association." Meyers, *Consumerism and the Delivery of Legal Services*, 49 CAL. ST. B.J. 256, 258 (1974).

In studies conducted in Texas and Florida, it was shown that clients do not rely extensively on bar referral services nor the yellow pages. Stone & White, *supra* note 6, at 328-29. One author argues that advertising can make lawyer referral services more effective. *See* Martyn, *Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections*, 23 WAYNE L. REV. 167, 172 n.29 (1976). *See also* J. Blakslee, *Lawyer Referral Service and the Canons of Professional Ethics*, in A HANDBOOK OF THE A.B.A. STANDING COMMITTEE ON LAWYER REFERRAL SERVICE 4 (6th ed. 1968); Elson, *Canon 2—The Bright and Dark Face of the Legal Profession*, 12 SAN DIEGO L. REV. 306, 312 (1975).

One of the problems with lawyer referral services may be due to the public's incomplete

legal services,[31] and specialization.[32] Public education directed at making people aware of their legal rights has also been suggested.[33]

Traditionally, the delivery of services has been the problem of bar associations, but with professional services rapidly becoming an important part of the nation's economy—generating over $200 billion in annual revenues—the government has taken a strong interest in the controversy[34] and has noted that these services, "far from being a luxury, are a necessity for most people."[35] Some have suggested that the burden of delivery problems ought to rest with bar associations.[36] However, this position has been criticized as being too restrictive, and it can be argued that group promotions can never be as effective as individual ones because there is not enough self-interest in groups to rally sufficient motivation. Individual promotions were not previously allowed; however, the major breakthrough came with the *Bates* decision.

III. BATES V. STATE BAR OF ARIZONA

A. *Background: Lower Court Decision*

In March 1974, John R. Bates and Van O'Steen opened a law office in Phoenix which they termed a "legal clinic." Their purpose was to provide legal services at modest fees to persons of moderate income who did not qualify for legal aid from the government. They did this by handling only "routine" legal matters such as uncontested divorces,

knowledge of them. In a private survey on advertising in Illinois, of 604 respondents, 54% had heard of a lawyer referral service, whereas only 27% understood how it operated. J. Haefner, Advertising Effectiveness Study 1 (Apr. 1977) (unpublished paper prepared for the Illinois State Bar Association).

31. Group legal services are a form of prepaid legal services in which the services are purchased for a group, rather than by individuals themselves. Previously, lawyers were prohibited from promoting the formation of group legal service programs where clients were channeled to them through lay advertising. *See* Lorenz, *State of Seige: Group Legal Services for the Middle Class*, in VERDICTS ON LAWYERS 144-57 (R. Nader & M. Green eds. 1976).

32. Specialization designates the area in which an attorney concentrates his practice. *See* Brink, *Let's Take Specialization Apart*, 62 A.B.A.J. 191, 191 (1976); Fromson, *The Challenge of Specialization: Professionalism at the Crossroads*, NW. ST. B.J., Nov. 1976, at 540.

In a 1960 Missouri study clients indicated that specialization was important in choosing a lawyer. Stone & White, *supra* note 6, at 330. "Apparently, the public feels more secure with the prospects of receiving legal advice from an attorney who has concentrated his study and practice in one or a few areas rather than the broad spectrum of the law." *Id.*

33. One author has indicated that this education should be done exclusively by the bar associations. "Since education of the public as to its legal needs by the lawyer selling the services to satisfy those needs is so readily subject to abuse and difficult to regulate, this should be left to the American Bar Association and to state and local bars." Smith, *Making the Availability of Legal Services Better Known*, 62 A.B.A.J. 855, 861 (1976).

34. Shenefield, *Warning: The Justice Department Has Its Eye on the Professions*, BAR LEADER, Sept. 1977, at 21.

35. *Id.*

36. Stone & White, *supra* note 6, at 331. It has been pointed out that as far back as 1938 the ABA Committee on Legal Ethics stated: "Advertising which is calculated to teach the layman the benefits and advantages of preventive legal services will benefit the lay public . . . ." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 179, at 45 (1938), *quoted in* Agate, *Legal Advertising and the Public Interest*, 50 L.A.B. BULL. 209, 211 (1975).

uncontested adoptions, name changes, and personal bankruptcies. Extensive use was made of paralegals, automatic typewriting equipment, and standardized forms and procedures.[37] After two years of practice, they decided that advertising was necessary in order for their practice and clinical concept to survive.[38] They inserted an advertisement in a Phoenix newspaper enumerating the prices and types of legal services they provided.[39]

The advertisement violated Disciplinary Rule [DR] 2-101(B) of the Code of Professional Responsibility which had been adopted as Rule 29(A) by the Supreme Court of Arizona. The disciplinary rule provided that:

> 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 advertisement in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.[40]

Acting under the rules prescribed by the Arizona Supreme Court, the state bar filed a complaint recommending that both lawyers be suspended for a period of six months. Upon review by the Board of Governors of the State Bar of Arizona, the penalty was reduced to a one-week suspension.[41]

On appeal to the Arizona Supreme Court, it was argued that the advertising ban was a violation of sections 1 and 2 of the Sherman Act[42] because of its tendency to limit competition, and that the ban infringed on their first amendment right to freedom of speech. The state court rejected both claims.[43] The court reasoned that the advertising ban was exempt from the Sherman Act because of the state action exemption of *Parker v. Brown*,[44] and that it passed constitutional

37. Bates v. State Bar of Arizona, 433 U.S. 350, 354 (1977).

38. It has been suggested that advertising will increase legal business. *See* Hobbs, *supra* note 19, at 736. A layer referral service that had advertised was referred more than 11 times as many clients as one that had not advertised. *Id.*

39. The advertisement is reprinted in the *Bates* opinion. 433 U.S. 350, 385 (1977). The advertisement was headed "Do You Need a Lawyer? Legal Services at Very Reasonable Fees" and listed several services with the corresponding fees. Included among these services were uncontested divorces, personal bankruptcies, and name changes. *Id.*

40. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) (1976).

41. This reduction was given in light of the fact that the violation was "undertaken as an earnest challenge of the validity of the rule they conscientiously believe to be invalid." *In re* Bates, 113 Ariz. 394, 396, 555 P.2d 640, 642 (1976).

42. The Sherman Act provides: "Every contract combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1976).

Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ." *Id.* § 2.

43. *In re* Bates, 113 Ariz. 394, 396, 555 P.2d 640, 642 (1976).

44. 317 U.S. 341 (1943). In *Bates* the court held that the "regulation of the State Bar by the

muster on the first amendment issue based upon past cases allowing restrictions of professional advertising.[45] The court agreed with the Board of Governors that the advertising was a good faith challenge of the constitutionality of the ban on advertising and, therefore, ruled that the attorneys should be censured only.[46]

B. *The United States Supreme Court's Decision*

On appeal to the United States Supreme Court, the antitrust and first amendment issues were considered. Although fourteenth amendment due process and equal protection arguments were also applicable and have been considered in the past,[47] they were not presented to the Court in *Bates*.

1. *The Antitrust Question.*

Appellants argued that the regulation of lawyer advertising constituted a "combination" in restraint of trade within the meaning of section 1 of the Sherman Act which provides that "[e]very contract, combination . . . or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal."[48] Thus, an analysis of the challenged ban on advertising should have been subjected to a two-pronged inquiry: (1) whether the ban was an unlawful restraint of trade in interstate commerce;[49] and (2) whether this restraint was accomplished by contract, combination, or a conspiracy of private persons, either individual or corporate.[50]

As applied to the legal profession, restraint of trade has been expressly defined to include the price-fixing effect of minimum fee schedules.[51] In *Bates*, the Court did not expressly state that a ban on advertising was a restraint of trade. However, by implication, the Court indicated that attorney advertising is subject to the Sherman Act, since the Court's analysis of the antitrust claim focused immediately on

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Supreme Court is an activity of the State of Arizona acting as sovereign and exempt by the very provisions of the Sherman Act." 113 Ariz. 394, 397, 555 P.2d 640, 643 (1976).

45. 113 Ariz. at 397, 555 P.2d at 643. The Arizona court relied on decisions such as Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935), where, however, the Supreme Court did not resolve a first amendment issue.

46. *In re* Bates, 113 Ariz. 394, 400, 555 P.2d 640, 646 (1976).

47. *See, e.g.*, Head v. Board of Examiners, 374 U.S. 424, 432 n.12 (1963). It has been argued that the ban on advertising found in the Code denies persons access to the information necessary to locate an attorney or to realize that problems may be resolved through the judicial process and, hence, results in a denial of an opportunity to be heard. *See* Comment, *supra* note 19, at 91-96. No attempt is made to cover this topic in this Article.

48. 15 U.S.C. § 1 (1976).

49. *See* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958); Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 971 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

50. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 483 (1940); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

51. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

the possible exemptions to its application—the "learned profession" exemption and the "state action" exemption.

a. *The "Learned Profession" Exemption.* The "learned profession" exemption was developed from the distinction between a profession and a trade, a distinction that normally excludes professions from the application of the Sherman Act. This exemption originated in the conclusion by Justice Story that fishing was a trade: "Wherever any occupation, employment, or business is carried on for the purpose of profit or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade."[52] Because the Sherman Act applies by its terms to activities in restraint of trade, this dictum has been used to support an exemption from the Act for the activities of professionals. The Supreme Court never recognized this as a legitimate exception to the Sherman Act[53] but left open in *Goldfarb v. Virginia State Bar*[54] the possibility that the professions could be treated differently.[55] Importantly, the *Bates* decision may have finally laid this exemption to rest, for the *Bates* Court never indicated any reason to treat persons in the professions differently from those engaged in other occupational endeavors.[56]

b. *The "State Action" Exemption.* The second exemption to the application of the Sherman Act is termed "state action." The Supreme Court found that the ban on advertising fell within this exemption. This exemption is based upon the state's right, as a *sovereign*, to legislate, and exempts from the antitrust laws anticompetitive activity required by the state that would ordinarily be an antitrust violation if effected by a private person.[57] The purpose of the state action exemption is to prevent confrontations between a state and the federal government in situations where certain economic behavior, allowed by a

52. The Nymph, 18 F. Cas. 506, 507 (C.C.D. Me. 1834) (no. 10,388).

53. In United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974), the court said that the Supreme Court cases "thus leave open the question whether there is a 'learned profession' exception to the Sherman Act." *Id.* at 515.

54. 421 U.S. 773 (1975).

55. "The *public service* aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Id.* at 788-89 n.17 (emphasis added). *See generally* Coleman, *The Learned Professions*, 33 A.B.A. ANTITRUST L.J. 48 (1967); Pogue, *The Rationale of Exemptions from Antitrust*, 19 A.B.A. SECTION ANTITRUST L. 313 (1961); Comment, *Private Physician Unions: Federal Antitrust and Labor Law Implications*, 20 U.C.L.A. L. REV. 983 (1973).

56. The Court patently eschewed this distinction by stating: "[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." 433 U.S. at 368. For a more detailed discussion of the "learned profession" doctrine, see Coleman, *supra* note 55; Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962).

57. *See* Parker v. Brown, 317 U.S. 341, 350-52 (1943).

particular state, contravenes provisions of the federal antitrust laws.[58]

The state action exemption was developed by the Court in *Parker v. Brown*.[59] In *Parker*, an individual raisin producer sued to enjoin the California Director of Agriculture from establishing a raisin marketing program that restricted sales. In upholding the marketing program, the Court distinguished acts of the state from those of private persons, and found that the Sherman Act was not intended "to restrain a state or its officers . . . from activities directed by its legislature."[60] The reasoning behind the *Parker* "state action" exemption has been analyzed by a number of commentators.[61] The most cogent analysis emerges when analyzing the case from a policy standpoint. The *Parker* decision came at a time of severe economic crisis and overproduction. The California act was intended to stabilize the market and maintain prices and, thereby, to preserve the number of competitors, a goal that is consistent with federal antitrust policy.[62] Hence, the purposes of the Sherman Act would have been violated if applied in *Parker*, and the Court created an exemption to meet this need. In this instance, the spirit of the Sherman Act was favored over the letter of the law.

Goldfarb v. Virginia State Bar[63] was the first application of the federal antitrust laws to the legal profession. In a unanimous decision, the Court held that minimum fee schedules mandated by the state bar association were anticompetitive and, therefore, violated the Sherman Act. Moreover, the Court stated that, in order to come within the state action exemption, the anticompetitive activity "must be compelled by . . . the State acting as a sovereign."[64] The fee schedules in *Goldfarb*

58. *See id.* at 362-63. State activity will be invalid under the supremacy clause only if it interferes with the federal policy. *See, e.g.*, Flood v. Kuhn, 443 F.2d 264, 267-68 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

59. 317 U.S. 341 (1943).

60. *Id.* at 350-51.

61. *E.g.*, Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW., 570, 598-601 (1975); Donnem, *Federal Antitrust Law Versus Anticompetitive State Regulation*, 39 A.B.A. ANTITRUST L.J. 950 (1970); Duesenberg, *The Antitrust State Approved Transaction Exemption*, 4 VAL. U.L. REV. 239 (1970); Jacobs, *State Regulation and the Federal Antitrust Laws*, 25 CASE-W. RES. L. REV. 221, 231-56 (1975); Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the Parker v. Brown Doctrine*, 43 U. CIN. L. REV. 61 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U.L. REV. 71 (1974); Note, *Federal Antitrust Policy v. State Anticompetitive Regulation: A Means Scrutiny Limit for Parker v. Brown*, 1975 UTAH L. REV. 179; Comment, *The Anatomy of Judicial Exemptions from Antitrust: A Study in Gap-Filling*, 15 WAYNE L. REV. 813 (1969); Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

62. The federal antitrust laws promote three general policies: to preserve competition and thus maintain allocative efficiency; to preserve competition and thus protect consumers by ensuring adequate quality at a fair price; and to preserve small competitors as a way of approximating the perfect market. *See* Bork & Bowman, *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363, 363-64 (1965).

63. 421 U.S. 773 (1975).

64. *Id.* at 791.

were not state action since they were set by the county bar association and not dictated by the Virginia Supreme Court.

The *Parker* doctrine underwent additional explanation in *Cantor v. Detroit Edison Co.*[65] In this case, a state agency approved a public utility rate schedule that included a free light bulb exchange program. The program had been initiated by the utility company and was merely approved by the state agency.[66] The program was challenged, and the Court held that the anticompetitive effect on an otherwise unregulated business—the distribution of light bulbs—was not state compelled and therefore not entitled to an exemption under the state action theory.[67] The Court distinguished *Cantor* from *Parker* and *Goldfarb* on the basis that the regulation of the distribution of light bulbs was approved by the state after the program was submitted by the utility company. In *Parker* the action was mandated by the state and was necessary in order to effectuate the state regulatory scheme.

To decide the antitrust question in *Bates*, the Court looked once again to the *Parker* doctrine. The Court distinguished *Bates* from *Goldfarb* on the basis that the fee schedule mandated by the Virginia State Bar was not required by the Virginia Supreme Court rules and, therefore, did not constitute a requirement of anticompetitive activities by the state of Virginia. As the *Goldfarb* Court noted: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign."[68] In *Bates*, the prohibition against advertising was an affirmative command of the Arizona Supreme Court under its rules 27(a) and 29(a).[69] This qualified for the state action exemption because the Arizona Supreme Court "is the ultimate body wielding the state's power over the practice of law."[70] The Court also differentiated *Bates* from *Cantor* where the state had no independent regulatory interest in the market for light bulbs. Conversely, *Bates* involved the regulation of the activities of the bar, an area which "is at the core of the State's power to protect the public."[71] Interpreted in this manner, *Cantor* appears to establish a very narrow

65. 428 U.S. 579 (1976).
66. *Id.* at 583.
67. *See id.* at 592-95.
68. 421 U.S. at 790. The Arizona court had recognized this distinction in that *Goldfarb* involved a voluntary county bar association's fee schedule. *In re* Bates, 113 Ariz. 394, 396-97, 555 P.2d 640, 642-43 (1976).
69. 433 U.S. at 360.
70. *Id.*
71. *Id.* at 361. The Court also cited Cohen v. Hurley, 366 U.S. 117 (1961), to support this contention, 433 U.S. at 362, but that case has in all other respects been overruled, *see* Spevack v. Klein, 385 U.S. 511 (1967). In addition, the *Parker* holding, which was limited to official action taken by state officials, was not controlling in *Cantor*, since the only defendant in *Cantor* was a private utility. 428 U.S. 579, 591-92 (1976).

scope for the state action doctrine.[72]

Appellants in *Bates* attempted to analogize their situation to that presented in *Cantor*. They argued that since the disciplinary rule was derived from the ABA Code of Professional Responsibility, no immunity should result from the bar's success in having the Code adopted by the state. However, the Court rejected this argument for two reasons. First, in *Cantor*, the suit was against a private party, not a state official. Whereas in *Bates*, the Court indicated that the Arizona Supreme Court, not the bar, was the real party in interest, since the bar's role was completely defined by the Court and under its continuous supervision.[73] Second, in *Cantor*, the state had no independent regulatory interest in the market for light bulbs, and an exemption for the program was not essential to the state's regulation of electric utilities. By contrast, the *Bates* Court indicated that bar regulations were central to the state's power to protect the public.[74] Thus, after noting that the state has traditionally exercised control over solicitation and advertising by attorneys and that federal interference was unwarranted, the Court concluded that the appellants' Sherman Act claim was barred by the *Parker* exemption.[75]

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72. *See also* Surety Title Ins. Agency, Inc., v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *vacated & remanded*, 571 F.2d 205 (4th Cir. 1978). The state bar in an advisory opinion held that conducting a title search constitutes the practice of law. Although the district court acknowledged the legitimate state interest in ensuring the competence and integrity of persons rendering legal services, it found that these objectives could be accomplished without the anticompetitive effects of the advisory opinion process. That process permitted financially interested private attorneys to define the extent of their legal monopoly. Accordingly, the court held that the advisory opinion process could claim no antitrust shelter under the state-action doctrine. *Id.* at 309.

Both *Cantor* and *Surety Title* provide clear warning that any antitrust immunity claimed by virtue of state regulation will be subject to close judicial scrutiny. Unless anticompetitive legal practices are eliminated, other professionals may be able to take on "legal" functions. *See, e.g.*, State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 206, 109 N.W.2d 685, 692 (1961) (real estate brokers allowed to perform certain services formerly done only by attorneys).

73. 433 U.S. 350, 361 (1977).

74. *Id.* at 361-62. Interestingly, the Court treated the state as a guardian of the public on the antitrust issue, but found the public less needy of state protection when analyzing the first amendment challenge. See text & note 105 *infra*.

75. 433 U.S. at 361-62. For a discussion of possible tests to apply under the *Parker* doctrine, see Note, *Price Advertising of Legal Services: The Move Towards a Balancing Test*, 16 WASHBURN L.J. 683, 692-99 (1977).

In deciding the claim was barred by the *Parker* exemption, the Court's reasoning was inconsistent with its analysis of the first amendment challenge where it stated that "habit and tradition are not in themselves an adequate answer to a constitutional challenge." 433 U.S. at 371. It is difficult to understand why tradition should be an adequate answer to a statutory challenge.

Although the *Bates* Court dismissed the antitrust challenge via the state action exemption, another consideration should be addressed in order to predict future cases which may arise under the *Parker* doctrine—whether or not the practice of law constitutes interstate commerce. The Sherman Act was passed pursuant to Congress' power to regulate interstate commerce and, in accordance with legislative intent, courts have interpreted the scope of the Sherman Act to be as broad as the commerce clause allows. *See* Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 743 (1976); United States v. Frankford Distilleries, Inc., 324 U.S. 293, 297-98 (1945); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

In *Goldfarb*, where the minimum fee schedules for title examinations were questioned, the Court found that funds for home financing came from outside the state, and that financiers re-

c. *Antitrust after Bates.* Antitrust questions in the area of professional advertising continue despite the *Bates* decision. It appears that the prohibitions against advertising and solicitation curtail competition between lawyers,[76] and the *Parker* exemption may not be applicable in other antitrust cases. Rules regulating lawyer conduct, for example, may not result from direct court order in states other than Arizona but may be mandated by the bar.[77] In such a case, distinctions drawn between *Bates* and *Goldfarb* may no longer apply, and arguments that advertising and solicitation prohibitions violate antitrust laws may be sustained.

Since exemptions from the Sherman Act—both statutory and judicial—are to be narrowly construed,[78] the professions should not rely on the *Bates* decision as strong precedent against other antitrust attacks. The Court has indicated that Sherman Act challenges may be valid in other contexts, including school accreditation, residency requirements, and other restrictive practices.[79]

For the professions, it would be wiser to focus on the implications

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quired title examinations which under Virginia law could only be performed by lawyers. Accordingly, it was concluded that these title examinations were an integral part of the real estate transaction, and the setting of minimum fee schedules for title searches sufficiently affected interstate commerce. 421 U.S. at 783-86. In dictum, the Court stated that "there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act." *Id.* at 785-86. Unfortunately, the Court did not elaborate on this idea in *Bates*. This remains a tenuous foundation upon which to base a defense for an antitrust action; however, it would be a rare legal activity that would clearly fall outside of the interstate commerce requirement. Even the ABA has acknowledged this:

> Much of the clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states.

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 316, at 1-2 (Supp. 1968). The concept of interstate commerce is so broad today that given the activities of modern lawyers, any ban restricting advertising by attorneys would arguably affect interstate commerce. *See* Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 COLUM. L. REV. 1 (1976). "With the broadened conception of interstate commerce which now prevails, virtually every business, no matter how local, spills over, to some extent at least, into activities that can be said to affect commerce." *Id.* at 17.

76. *See* Hummel, *Antitrust Problems of Industry Codes of Advertising, Standardization and Seals of Approval*, 13 ANTITRUST BULL. 607, 609 (1968); Turner, *Advertising and Competition*, 26 FED. B.J. 93, 93-94 (1966).

77. *Lawyers Venture into Advertising Era with Caution and Questions*, 63 A.B.A.J. 1065, 1067 (1977).

78. *See* Silver v. New York Stock Exch., 373 U.S. 341, 348 n.5 (1963) (withholding of a valuable service important to business and competition is enough to create a violation of the Sherman Act). *See generally* Tyler, *Goldfarb v. Virginia State Bar: The Professions are Subject to the Sherman Act*, 41 MO. L. REV. 1 (1976). The commercial aspects of even the learned professions may come within the scope of the Act. *See* Marjorie Webster Junior College, Inc. v. Middle States Ass'n, 432 F.2d 650, 654-55 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (activities based upon commercial motives would be subject to antitrust prohibitions).

79. Accreditation of schools is apparently subject to antitrust laws. BUS. WEEK, Apr. 25, 1977, at 102. *See also* Comment, *Applying the Sherman Act to Restrictive Practices of the Legal Profession*, 34 MD. L. REV. 571 (1974); Comment, *The Sherman Act and Bar Admission Residence Requirements*, 8 U. MICH. J.L. REF. 615 (1975); Note, *Parker v. Brown: A Preemption Analysis*, 84 YALE L.J. 1164 (1975).

of *Goldfarb*, in which it was clearly indicated that the Sherman Act was applicable to the "learned professions."[80] The traditional distinction between a profession and other trades and occupations was based primarily upon a profession's devotion to public service rather than personal gain.[81] However, this distinction may no longer exist under present market conditions. The ethical considerations and personal efforts involved in professional dignity, formerly deemed unique and not directly related to the everyday notions of production and competition,[82] may have nurtured a belief that a valid distinction, sufficient to create antitrust immunity, existed between the professions and other occupations. This belief appears to have vanished.

Additionally, the import of the *Goldfarb* holding has not been lost in the antitrust enforcement agencies but is presently being implemented in cases filed against other professionals.[83] It appears that more challenges will be forthcoming, even though the Court has recognized that professional activity is not identical in all respects to other activity routinely made subject to the Sherman Act.[84] Also, the *Parker v. Brown* doctrine will not be applicable in many cases.[85]

Another important consideration not raised in *Bates* is that unfair methods of competition or practices in commerce may violate section 45 of the Federal Trade Commission Act [FTC Act].[86] Hence, even if

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80. 421 U.S. at 786-88.

81. *See* Becker, *The Nature of the Profession*, in EDUCATION FOR THE PROFESSIONS 38-39 (1962).

82. FTC v. Raladam Co., 283 U.S. 643, 653 (1931); Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922); United States v. Oregon State Bar, 385 F. Supp. 507, 515-16 (D. Ore. 1974).

83. *See* United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978, 982 (D.C. Cir.), *cert. granted*, 434 U.S. 815 (1977); *In re* AMA, ANTITRUST & TRADE REG. REP. (BNA), No. 744 (Dec. 23, 1975). Consumer groups have also begun filing complaints. Consumers Union of the United States v. American Bar Ass'n, 427 F. Supp. 506 (E.D. Va. 1976), *vacated & remanded*, 433 U.S. 917 (1977).

84. This point was implied in *Goldfarb* when the Court, in holding that the legal profession has certain business aspects that may be within the scope of the Sherman Act, stated:

> It would be unrealistic to view the practice of the professions as interchangeable with other business activities and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. 773, 788-89 n.17.

85. The *Parker* doctrine does not exempt private action masquerading as state action. *See* Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502, 509 (4th Cir. 1959). The real question is whether the actual decision-makers are public officials or members of the professions. Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1293-96 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 33 n.8 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

86. 15 U.S.C. § 45 (1976). "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." *Id.* § 45(a)(1). For a listing of the various areas of FTC investigation, see *Advertising Lawsuits and FTC Investigation Are Pending*, 62 A.B.A.J. 1567, 1567-68 (1976). For an overview of FTC power, see Thompson, *Advertising and the FTC: The Role of Information in a Free-Enterprise Economy*, 8 ANTITRUST L. & ECON. REV. 73 (1973).

activities do not violate the antitrust laws, an FTC attack may be valid. A limitation here, however, is that private parties can not raise violations of section 45 of the FTC Act as a basis for private action.[87] Although no major cases have yet raised this issue, there is no reason to suspect that this trend will continue. The past is relevant but not binding.

2. *The First Amendment Challenge.*

The *Bates* appellants were not the first to raise the first amendment issue over advertising proscriptions.[88] The Court had well-established principles to consider in deciding the issue.

a. *The Commercial Speech Doctrine.* In analyzing the first amendment issues, the *Bates* Court initially considered the extent of protection afforded to "commercial" speech. The Supreme Court has never held that all forms of speech merit first amendment protection. Under the "commercial speech doctrine," which first arose in *Valentine v. Chrestensen*,[89] the regulation of commercial speech does not constitute a violation of first amendment guarantees.[90] In that case, the Court upheld a ban on the distribution of handbills, finding that advertisements inspired primarily by economic motives are undeserving of first amendment protection.[91] This doctrine was strengthened in *Breard v. Alexandria*[92] where the Court upheld a local ordinance that prohibited door-to-door solicitation without the homeowner's prior consent.

In subsequent cases, however, the Court appeared to acknowledge that speech with a commercial purpose may also contain information necessary to the public's free exchange of ideas and avoided finding commercial motives dispositive of first amendment protection.[93] In

87. Frederick Chusid & Co. v. Marshall Leeman & Co., 326 F. Supp. 1043, 1063 (S.D.N.Y. 1971); LaSalle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1006 (N.D. Ill. 1968), *aff'd in part, rev'd in part*, 445 F.2d 84 (7th Cir. 1971).

88. *See, e.g.*, United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 219, 221-22 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 2 (1964); NAACP v. Button, 371 U.S. 415, 428-29 (1963). Some cases challenged advertising proscriptions on due process and equal protection grounds. A Montana case approved advertising activities of a legal services association, suggesting that making poor people aware of legal rights is an aspect of equal protection. *In re* Professional Ethics, 160 Mont. 490, 495, 503 P.2d 531, 534 (1972). *But see* Head v. Board of Examiners, 374 U.S. 424, 432-33 n.12 (1963) (advertising restrictions were upheld despite challenges based on due process and equal protection grounds).

89. 316 U.S. 52 (1942).

90. *See id.* at 54-55.

91. In *Valentine*, commercial speech, or communication for private profit, was held to be freely regulable. *Id.* at 54.

92. 341 U.S. 622 (1951).

93. The Court has given first amendment protection to speech where it was not "purely commercial." New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964); Thomas v. Collins, 323 U.S. 516, 533-37 (1945); Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943). It would appear that

New York Times Co. v. Sullivan,[94] the Court held that an advertisement in the newspaper which "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support" for a movement of highest public interest was entitled to first amendment protection.[95] This was the initial attempt by the Supreme Court to define the boundaries of the commercial speech doctrine.

The interest of the consumer was a relevant factor in establishing the principle that speech is not rendered commercial by the mere fact that it relates to an advertisement.[96] For example, in *Bigelow v. Virginia*,[97] an advertisement for abortion services in New York which appeared in a Virginia publication was allowed despite a Virginia law that prohibited the publicizing of abortion services in Virginia. The Court held that the advertisement did not merely propose a commercial transaction but disseminated information of public interest: that abortions were legal in New York.[98]

The commercial speech doctrine was largely abandoned in the case of *Virginia Pharmacy Board v. Virginia Consumer Council*.[99] In this case it was determined that a Virginia statute, declaring that a pharmacist was guilty of unprofessional conduct if he advertised prescription drug prices, was an infringement of the first amendment. The Court noted the distinction between commercial speech and ideological speech, and suggested that a different degree of protection may be afforded to commercial speech to insure that the flow of truthful and legitimate information is unimpaired.[100] Having eschewed the commercial speech doctrine in this fashion, the Court employed a balancing test to analyze first amendment rights and the state interest in regulation. First amendment protection is to be extended if the inter-

where a consumer has a constitutional "right to know," the doctrine of commercial speech will be inapplicable. *See* text accompanying notes 107-23 *infra*.

94. 376 U.S. 254 (1964).

95. *Id.* at 266.

96. "[C]ommercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." Ginzburg v. United States, 383 U.S. 463, 474 (1966). *See also* Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971); Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191 (1965).

97. 421 U.S. 809 (1975).

98. *Id.* at 821-22.

99. 425 U.S. 748 (1976).

100. *Id.* at 770. The Court admitted that the protected speech in *Virginia Pharmacy* was of no cultural, philosophical, or political import. *Id.* at 762. This case dealt a major blow to the commercial speech doctrine, but more importantly, it allowed consumers to contest restrictions based upon their first amendment "right to receive" information. *Id.* at 757. *See also* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., dissenting); Dun & Bradstreet, Inc. v. Grover, 404 U.S. 898 (1971) (Douglas, J., dissenting from denial of certiorari); Cammanaro v. United States, 358 U.S. 498, 514 (1954) (Douglas, J., concurring). *See generally* Comment, *The Right to Receive and The Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975); Comment, *Constitutional Law: The Commercial Speech Doctrine and the Consumers' Right to Receive*, 16 WASHBURN L.J. 197 (1976).

ests of consumers in receiving information in a particular commercial advertisement outweigh the state's interest in regulating that form of speech.[101]

In *Virginia Pharmacy* the Court found that consumers with small or fixed incomes had a strong interest in the free flow of information on prescription drug prices since this information allowed them to patronize pharmacies with the lowest prices.[102] The state interest in regulation was not sufficient to impede the flow of this information.

It is clear from the *Bigelow* and *Virginia Pharmacy* decisions that the information contained in advertisements about legal services is protected by the first amendment. Thus, the question arising in *Bates*, whether state regulation of the distribution of information about these services abridges the first amendment right to receive information or whether state regulation can be justified, was answered with reference to *Bigelow* and *Virginia Pharmacy*.

Although the commercial speech doctrine was largely thought to be extinct after *Virginia Pharmacy*, the *Bates* Court further refined the doctrine. If the speech serves individual and societal interests, it is entitled to some first amendment protection: "Even though the speaker's interest is *largely economic*, the Court has protected such speech in certain contexts."[103] Analogizing the disciplinary rule in *Bates* to the Vir-

101. In *Virginia Pharmacy*, the state's interest in regulation did not have to be compelling. 425 U.S. at 766-70. Close inspection is merited by "[t]he challenge now made . . . based upon the First Amendment" in contrast to past decisions upholding advertising bans on 14th amendment grounds. *Id.* at 769. By contrast, bar regulations, unlike pharmacy regulations, can be limited only by a compelling state interest. State interests in bar regulation are "compelling." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). When faced with countervailing first amendment rights, the state must choose the least restrictive means of satisfying a regulatory purpose. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 363 (1976); Buckley v. Valeo, 424 U.S. 1, 64 (1976); Procunier v. Martinez, 416 U.S. 396, 413 (1974). *See also* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

102. 425 U.S. at 763-64.

103. 433 U.S. 350, 364 (1977) (emphasis added). Notwithstanding this reaffirmation of the commercial speech doctrine, there do not appear to be many instances where speech would be entirely without individual and societal interest. Perhaps the Court's continued retention of the commercial speech doctrine rests on a reluctance to grant first amendment protection to all commercial speech and to distinguish such cases as Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). In that case, the Pittsburgh Press Company violated a municipal ordinance by categorizing help-wanted advertisements in "male" and "female" columns. The Court held that the advertisements did not convey information on public issues, and since they furthered illegal activity—sex discrimination—they were not entitled to first amendment protection. *Id.* at 389.

In addressing the issue, the *Bates* Court keyed on the interest of the consumer and indicated that for commercial speech to be distinguished, it must be by content alone:

> 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. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensible role in the allocation of resources in a free enterprise system.

433 U.S. 350, 364 (1977).

ginia statutes, the Court found that the effect of the prohibition on advertising was "to inhibit the free flow of commercial information and to keep the public in ignorance."[104]

The notion that the public can fend for itself was reiterated many times by the *Bates* Court when it addressed the need for state regulation.[105] Protectionist arguments were disfavored by the Court, which stated:

> [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 that the argument rests on an underestimation of the public.[106]

Thus, the consumers' interest in making an informed choice was used by the *Bates* Court as a justification for extending first amendment protection to commercial speech. Accordingly, future applications of the commercial speech doctrine are likely to depend on the expected benefits to the audience.

b. *The Consumer's Interest: The Constitutional Right-to-Know.* While considering the application of the commercial speech doctrine, the *Bates* Court implicitly took into account a relatively new constitutional concept: the public's "right to know."[107] In *Virginia Pharmacy*, an action brought by consumers, the Court said that the first amendment presupposes a willing speaker, and when that speaker exists, "the protection is afforded to the communication, to its sources and to its recipients . . . ."[108] In *Bates*, the case was initiated by two lawyers asserting their own first amendment rights. However, the Court only tangentially treated their interest and chose instead to focus on the needs of the recipients.

The concept of an associational "right to know" was first recognized in *NAACP v. Button*.[109] There the Court faced the question of whether the state of Virginia could prohibit, as improper solicitation of legal business, certain activities of the NAACP which, in effect, amounted to the solicitation of plaintiffs for lawsuits attacking racial

104. 433 U.S. at 365.

105. This is in contrast to the treatment afforded under the antitrust analysis and indicates the Court's hesitancy in applying the antitrust laws. See text accompanying notes 74, 75.

106. 433 U.S. at 374-75.

107. The concept of the "right to know" will be used interchangeably with the concept of the "right to receive."

108. 425 U.S. at 756. It is apparently of no consequence in these types of cases who initiates the case, although when the same question presented in *Virginia Pharmacy* was brought by pharmacists, the statutory prohibition against advertising was held to be valid. Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 823 (W.D. Va. 1969) (case not appealed). The Arizona court noted this in *Bates*. See text & note 116 *infra*.

109. 371 U.S. 415 (1963).

discrimination. The Court stated that the NAACP was constitutionally free to inform its members of their legal rights in challenging segregation, even in the face of the state bar's ban on advertising and solicitation.[110] In a subsequent action, *United Mine Workers v. Illinois State Bar Association*,[111] it was held that informing trade union members of their legal rights in small and nonpolitical cases was constitutionally protected.[112] The solidarity of the "right to know" concept was emphasized by the Court in *Kleindienst v. Mandel*,[113] where it stated: "It is now well established that the Constitution protects the right to receive information and ideas. This freedom [of speech and press] . . . necessarily protects the right to receive."[114] Although the Supreme Court in *Virginia Pharmacy* did not explicitly address the "right to know" concept, the lower court had emphasized that the consumer had a right to know drug prices.[115] Similarly, Mr. Justice Holohan, dissenting in the Arizona Supreme Court's opinion in *Bates*, indicated that the case should have been framed in terms of "the right of the public as consumers and citizens to know about the activities of the legal profession."[116]

It could have been argued in *Bates* that the prohibition on advertising legal services violates a general right to know, not only the prices of legal services but their nature as well.[117] Since this was not explicitly raised for the Supreme Court to consider, it remains a curious problem. It could be argued that price information is useless without the accompanying explanation of the type and quality of services offered.

In order for a regulation that limits information content to survive a constitutional attack predicated on the right to know doctrine, a substantial, overriding interest in that regulation must be shown.[118] When

110. *Id.* at 438-44. Subsequent cases involving legal service plans have held that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the first amendment. See cases cited note 91 *supra*. Thus, the Court has evidenced its concern that aggrieved individuals be provided with information regarding their legal rights and the names of attorneys who might assist them. Logically, those individuals without the assistance of an organization would have a greater need for protection, as did the clients of Bates and O'Steen.

111. 389 U.S. 217 (1967).

112. *Id.* at 223.

113. 408 U.S. 753 (1972). However, in *Kleindienst* the Court held that Americans did not have a first amendment right to hear the views of a foreign Marxist theoretician who had been denied a visa to enter the United States. *Id.* at 768-70.

114. *Id.* at 762-63.

115. Virginia Citizens Consumer Council, Inc. v. State Bd. of Pharmacy, 373 F. Supp. 683, 687 (E.D. Va. 1974).

116. *In re* Bates, 113 Ariz. 394, 402, 555 P.2d 640, 648 (1976) (Holohan, J., dissenting).

117. *See* Brown, *Shop Talk at Thirty*, EDITOR & PUBLISHER, May 17, 1975, at 40. The Consumer Council litigants stipulated that pharmacy was a profession, presumably with status equal to any other profession. If the "right to know" is permitted to form a basis for a first amendment attack against state regulations prohibiting advertising by that profession, then it may provide a basis for action by other professions.

118. To determine the constitutionality of any infringement of first amendment rights, the

a state's interest in regulating the bar conflicts with the first amendment, a compelling state interest must be shown for the regulation to be upheld.[119] Whether the state interest is sufficiently compelling is determined by balancing the first amendment rights of the individual against the state's expressed need to regulate.[120]

In *Virginia Pharmacy*, the state's interest in maintaining professionalism among pharmacists did not justify an advertising ban.[121] The Court noted that "on close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance."[122] The interest in public welfare, which justified statutory bans in previous cases,[123] was thus replaced with a recognition that, given appropriate information, the consumer could make up his own mind.

In *Bates*, the Court looked to the vital interest of the consumer in receiving information on the availability of legal services and the critical role advertising can play in assuring that the fundamental rights of an individual's access to the courts is not impaired. Balanced against those interests is the state's right to regulate the legal profession. This state interest must be substantiated by specifying definite evils which would result from lawyer advertising. In addition, the state's regulatory interest must be such that it could be affected only via advertising prohibitions. Appellees in *Bates* offered a number of such justifications to the Court.

c. *Arguments Offered to Support the Advertising Ban.* To determine whether the state has a substantial, overriding interest in prohibiting advertising and to what extent the first amendment rights under the commercial speech doctrine and the public's constitutional right to know could be limited, the Court analyzed the arguments presented by the State Bar of Arizona. In doing so, decisions had to be made largely upon speculative evidence, since empirical evidence is scant in the area of the advertising of professional services.

Court must balance the state's interest in regulating professional advertising against the freedom of speech involved. *See* Konigsberg v. State Bar of California, 366 U.S. 36, 51 (1961). If the "compelling state interest" test is used, the burden on the state is higher. *See* NAACP v. Button, 371 U.S. 415, 438-39 (1963).

119. NAACP v. Button, 371 U.S. 415, 438 (1963).

120. Regulations restricting first amendment rights will not be sustained "merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

121. 425 U.S. at 768-69.

122. *Id.* at 769.

123. Head v. Board of Examiners, 374 U.S. 424, 428 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489-90 (1955); Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935).

(1) *Adverse effect on professionalism.* The first justification addressed by the Court was the assertion that price advertising would have an adverse effect on professionalism. Appellees claimed that price advertising would generate commercialism, undermining an attorney's sense of dignity and self-worth. Advertising, it was argued, would tarnish the dignified public image of the profession.[124]

This argument was rejected by the Court for three reasons. First, it found that "the postulated connection between advertising and the erosion of true professionalism [was] severely strained" and that this argument presumed "that attorneys must conceal from themselves and their clients the real-life fact that lawyers earn their livelihood at the bar."[125] This seems to be in accord with the Court's avoidance of distinguishing the professions from other trades and occupations.[126] Second, the Court noted that there was no solid evidence upon which to base an opinion. The Court stated that "the assertion that advertising will diminish attorneys' reputations . . . is open to question"[127] and indicated that both bankers and engineers advertise without loss of integrity.[128] On the contrary, a lack of advertising was seen as a possible culprit. "Indeed, cynicism 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."[129] Third, the Court found little merit in the philosophy that the legal profession was "somehow 'above' trade."[130] After comparing this argument to those made in *Virginia Pharmacy*, where high professional standards was the reason given for a prohibition against prescription drug advertising,[131] the *Bates* Court stated that these high standards could, in large part, be assured by close regulation. Thus, the Court did not agree that advertising by attorneys would adversely affect professionalism in legal practice.

(2) *The misleading nature of advertising.* The second major ar-

124. 433 U.S. at 368. Studies have shown that the public respect for attorneys is based upon the quality of services rendered. Loss of prestige is due to delays in the legal process, excessive costs, and outright injustice, not advertising. *See* B. CHRISTENSEN, *supra* note 3, at 1-8.

125. 433 U.S. at 368. *See* Note, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1190 (1972).

126. The distinction that the legal profession attempted to make between a trade and a profession was discarded earlier by the Court. American Medical Ass'n v. United States, 317 U.S. 519, 528 (1943); Comment, *Minimum Fee Schedules as Price Fixing: A Per Se Violation of the Sherman Act*, 22 AM U.L. REV. 439, 450-54 (1973).

127. 433 U.S. at 369.

128. *Id.* at 369-70.

129. *Id.* at 370-71.

130. *Id.* at 371-72.

131. 425 U.S. at 766-68.

gument of the State Bar of Arizona was that attorney advertising is inherently misleading. This argument was based upon the supposition that legal problems and services are so individualized as to preclude consumer comparison.[132] Even "honest" advertising would be deceptive, since the consumer might not be familiar with some type of meaningless advertised credential.[133] Specific allegations against the Bates and O'Steen advertisement as misleading included: the argument that the advertisement referred to a "legal clinic," which is as yet an undefined term; the reference to "very reasonable prices"; and the fact that the advertisement did not inform the consumer that a name change could be obtained without the assistance of an attorney.[134]

To answer these assertions, the Court looked to the general level of public intelligence: "We suspect that the public would readily understand the term legal clinic . . . to refer to an operation like that of appellants that is geared to provide standardized and multiple services."[135] This confidence in the general public's level of intelligence is consistent with the development of the constitutional right to know doctrine.

The Court answered the "very reasonable prices" argument by comparing the prices to general legal prices in the Phoenix area, finding the charges by Bates and O'Steen to be reasonable. Finally, to the argument that a person may get a name change without legal assistance, the Court noted that the right to represent oneself was generally accepted and that such affirmative disclosure was unnecessary.[136]

Although the Court recognized that there were substantial dangers of false and misleading advertising in the legal area, it did not find that an absolute proscription of all advertising was the only efficacious means of control.[137] The Court also differentiated between types of advertising, noting that this problem did not apply to "some of the basic factual content of advertising: information as to the attorney's name,

132. 433 U.S. at 372.

133. *See id.* Two suggested means of controlling deceptive advertising are through either the FTC or by a bar association review board. 2 G. ROSEN & P. ROSEN, THE LAW OF ADVERTISING 17.01-.04, 42.01 (1973).

The Bates Court also demeaned this notion by stating:

> [I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the 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.

433 U.S. at 374-75.

134. 433 U.S. at 381.

135. *Id.* "And the clinical concept in the sister profession of medicine surely by now is publicly acknowledge and understood." *Id.* at 382.

136. *Id.*

137. *Id.* at 373-75. *See generally* Darby & Karni, *Free Competition and the Optional Amount of Fraud*, 16 J.L. & ECON. 67 (1973).

address, and telephone number, office hours and the like."[138] But simultaneously, the Court indicated that such information alone would not be sufficient for consumers: "an advertising diet limited to such spartan fare would be scant nourishment."[139]

Although acknowledging that possibilities of fraud and deception may exist and that these dangers can be regulated in legal advertising as in other fields, Justice Blackmun circumscribed this argument by stating that "[t]he only services that lend themselves to advertising are routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants."[140] The idea that certain services were routine was supported by the Arizona State Bar itself which sponsored a legal program featuring standardized rates.[141]

(3) *Difficulties in regulation.* In the event that the Court would allow attorney advertising, the Arizona State Bar was further concerned with the associated problems of regulation. In fact, the Court decided that in cases of misleading or deceptive advertising the onus of correction was placed on the bar. "If the naiveté 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."[142] Notwithstanding the Court's ruling on this issue, it is presently unknown whether regulation of attorney advertising will be necessary.[143] If needed, the appropriate regulation regarding the time, manner, and place of the advertising can be used to curb potential abuse.[144] In addition, the Court indicated that when necessary "the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture" and said that "the preferred remedy is more disclosure, rather than less."[145] This

138. 433 U.S. at 366.

139. *Id.* at 367.

140. *Id.* at 372. This is one of the reasons that Justice Powell dissented, since the definition of what is a "routine" legal service is questionable:

> Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of the problems that may be encountered even when handling a matter that at the outset seems routine.

Id. at 392.

141. *Id.* at 373. The majority noted that the bar retains the power to define the services that must be included in a package. *Id.* at 373 n.28.

142. *Id.* at 375.

143. For a discussion of the effect of regulated and unregulated advertising, see Cochran, *Legal Advertising: Don't Panic, But the Hour Is at Hand*, BARRISTER, Winter 1976, at 6.

144. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Cohen v. California, 403 U.S. 15, 19 (1971); Adderley v. Florida, 385 U.S. 39, 47 & n.6 (1966); Cox v. Louisiana, 379 U.S. 536, 558 (1965); Kovacs v. Cooper, 336 U.S. 77, 81-82 (1949).

145. 433 U.S. at 375.

language seems to indicate that a positive duty may be placed on the bar to ensure that lawyer advertisements are not misleading.

Much of the argument concerning the regulation of advertising was viewed as unrealistic. The Court answered the argument that the difficulties of enforcement alone should justify the ban on advertising. "It is at least somewhat incongruous for 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."[146]

The Court's position that the bar could control the actions of its members is not untenable. Arguably, a strong professional association could control deceptive advertising by its members. If these associations were strong enough to prevent their members from advertising in the past, they are probably strong enough to prevent the use of deceptive advertising in the future.[147] Moreover, licensing provisions and the threat of malpractice suits would help prevent situations where clients would be injured by deceptive advertising.

(4) *The adverse effect on the administration of justice.* A fourth major argument of the appellees was that advertising would have a detrimental effect on the administration of justice by "stirring up litigation."[148] The Court, however, found little merit in this reasoning and rejected the notion that "it is always better for a person to suffer a wrong silently than to redress it by legal action."[149] This sentiment is consistent with modern reasoning:

> While the stirring up of frivolous or fraudulent claims is undoubtedly evil, the stirring up of legitimate claims that would otherwise go unasserted because of the prospective claimants' poverty, weakness, ignorance, or naiveté may in fact be a positive good . . . . A blanket rule against all stirring up of litigation seems clearly unjustified.[150]

The argument advanced by the bar, that the interest in minimizing the incidence of barratry, maintenance, and champerty is sufficiently compelling to justify a total ban on advertising, had already been rejected in *NAACP v. Button*.[151]

(5) *The adverse economic effects of advertising.* A fifth major argument of the appellees was that attorney advertising would adversely

146. *Id.* at 379.
147. For arguments against this, see J. CARLIN, LAWYER'S ETHICS: A SURVEY OF THE NEW YORK CITY BAR 159-61 (1966).
148. 433 U.S. at 375. The assumption that litigation is evil per se has been rejected by the Court. NAACP v. Button, 371 U.S. 415, 439-44 (1963).
149. 433 U.S. at 376.
150. B. CHRISTENSEN, *supra* note 4, at 145.
151. 371 U.S. 415, 439 (1963).

affect the economic structure of legal practice. Specifically, the bar reasoned that advertising expenses would be passed on to the consumer in the form of higher prices for legal services. Additionally, the bar contended that large advertising budgets would create barriers to entry for young lawyers in the legal service field.[152] Although technically not relevant to a first amendment consideration, these charges were nevertheless addressed by the *Bates* Court.

To determine whether or not advertising might have an undesirable effect in terms of increasing overhead costs and creating substantial barriers to entry, the Court looked to the evidence that resulted from the allowance of price advertising in the prescription drug and eyeglasses fields.[153] Since consumers had benefited in the form of lower prices from advertising in these areas, the Court stated that consumers would probably also benefit from advertising in the legal area.

> Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.[154]

Although appellees argued that advertising would increase costs of services to the consumer, the Court stated that it was entirely possible that the effect would be just the opposite and would *reduce* the cost of legal services.[155]

Notwithstanding the possible error in comparing results in product markets with those of a service,[156] the Court found no reason to differ-

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152. 433 U.S. at 377.

153. *Id.* For studies on eyeglass and prescription drugs, see Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J.L. & ECON. 337 (1972). The mean price of eyeglasses was almost 100% less in the least restrictive states than in the most restrictive. *Id.* at 342.

In a second study, Benham sought to determine whether this phenomenon of lower prices reflected not only a lack of competition in restrictive states, but also a relationship between the degree of restriction on various practices by the professional and demand for professional services. He concluded that the degree of advertising permitted in a state directly affected both the price and frequency of use of the service in the state. Benham & Benham, *Regulating Through the Professions: A Perspective on Information Control*, 18 J.L. & ECON. 421, 424 (1975). Thus, the result of various occupations' attempts to "professionalize"—to raise the dignity of their endeavors by imposing restrictions on advertising and solicitation, with the ostensible purpose of protecting the public—has been to drastically reduce the consumption of each occupation's services. *See generally* STAFF REPORT TO THE FTC, ADVERTISING OF OPHTHALAMIC GOODS AND SERVICES 42-43 (1976); Lambin, *What Is the Real Impact of Advertising?*, HARV. BUS. REV., May-June 1975, at 139.

154. 433 U.S. at 377.

155. *Id.*

156. The *Virginia Pharmacy* Court stated: "Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinte variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake *certain kinds* of advertising." 425 U.S. at 773 n.25 (emphasis added).

It has been argued that the Court did not intend to make a distinction between goods and services in the *Virginia Pharmacy* case when it said: "We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinions as to other professions, the distinctions, historical and functional, between professions, may re-

entiate between the two. Since numerous legal services can and have been standardized, particularly those used by low and middle income groups, the Court apparently felt that such services could be likened to a product. This reasoning is underscored by situations such as the one found in the *Goldfarb* case, where fee schedules were commonly employed for standardized legal services.[157]

To the argument that advertising would create barriers of entry to young attorneys, the Court found that the free flow of information would probably aid the competitor in entering the market.[158] Thus, the Supreme Court rejected both of the Arizona State Bar's arguments regarding the adverse economic effects of advertising.

(6) *Advertising as harming the quality of services.* Appellees argued that advertising would have a harmful effect on the quality of services rendered. This quality reduction would occur if advertising fostered price competition, resulting in a reduction of attorney revenues. Because attorneys would earn less income per case, it was argued that they could be expected to spend less time and effort on each case, thereby reducing the overall quality of legal service. The Court rejected this argument, however, finding that restraints on advertising would not deter shoddy work: "An attorney who is inclined to cut quality will do so regardless of the rule on advertising."[159]

This argument—that competition among professionals would lead them to make more compromises or to take more shortcuts—would have been easy to reject on other bases. There are strong disincentives in existence, including malpractice suits and stockholder suits as well as loss of goodwill, to prevent this type of behavior. Other safeguards are also built into the legal system to insure that quality standards are met. Since bar associations have set standards for admission, and many states have continuing legal education requirements, the public should be able to assume that a licensed lawyer is competent to practice. Within this basic presumption of confidence, there should be room for every type of service, from the high-cost personal attention of the prestigious law firm to the low-cost efficient operation of a legal clinic, for "if costs are too high people will do without legal service at all. . . . The choice, then, is not the bar association's poor service versus quality

quire consideration of quite different factors." *Id.* "An artificial distinction between goods and services is not at issue, but rather the inherent lack of standardization of legal services." Note, *Price Advertising of Legal Services: The Move Towards a Balancing Test*, 16 WASHBURN L.J. 683, 704 (1977).

157. See text & notes 63-64 *supra*. *See also* United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir. 1977), *cert. granted*, 434 U.S. 815 (1977).

158. 433 U.S. at 378.

159. *Id.*

service, but is more likely to be low cost service versus no service."[160]

Within this context, it is interesting to note that the Court only lightly touched upon the appellant's contention that the Code of Professional Responsibility might be construed to impose a duty to advertise in order to make legal services fully available to the public.[161] The need and right of the public to make an informed choice of a lawyer may be paramount to all other considerations. Professional dignity and public confidence may be considered unrelated to advertising because such qualities can only be earned by competent performance in the marketplace. While valid fears of overreaching, overcharging, and underrepresentation do exist,[162] these are specifically prohibited by other ethical considerations and have no need of the advertising vehicle to either promote or prevent their occurrence.

Aside from the sanctions which exist to prevent low quality work, the assumption upon which the appellees based their argument may be challenged. The idea that advertising increases competition is not always valid. In concentrated industries, for example, high levels of advertising expenditures may eliminate potential competition by creating barriers to entry.[163] In addition, advertising can generate perceived differences in brands or services that may actually be homogeneous.[164] To the extent that consumers are brand loyal to such products or services, competition is effectively reduced. Normally, it is informational advertising that is considered to enhance competition.[165]

The obvious benefits of competition were not considered by the appellees. As the Court noted in *Goldfarb*, competition which spurs the development of more and better services is desirable, and by preventing competition "lawyers have slowly, but surely, been committing economic suicide as a profession."[166] It is a fair observation to say that many legal services need streamlining in order to free the attorney from time-consuming and non-technical work. Some of the work now being

160. *See* Agate, *supra* note 36, at 213.

161. 433 U.S. at 377.

162. *See* Note, *Legal Ethics—Ambulance Chasing*, 30 N.Y.U.L. REV. 182, 185 (1955). Overreaching refers to the high competition among solicitors which results in attorneys approaching potential clients at times when they could not possibly consider retaining a lawyer, for example, right after an accident. *See* Luther, *Legal Ethics: The Problem of Solicitation*, 44 A.B.A.J. 554, 555-56 (1958). Perhaps the best deterrent to overreaching by attorneys may be clients armed with information about comparable services available from other attorneys. Subsequent decisions disfavoring personal solicitation by attorneys may also curb such an abuse. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978).

163. *See, e.g.*, Comanor & Wilson, *Advertising Market Structure and Performance*, 49 REV. ECON. & STAT. 423 (1967); Mann & Meehan, *Advertising and Concentration: New Data and an Old Problem*, 16 ANTITRUST BULL. 101 (1971).

164. Smith & Lusch, *How Advertising Can Position a Brand*, J. ADVERTISING RESEARCH, Feb. 1976, at 37-43.

165. *See* STAFF REPORT TO THE FTC, ADVERTISING OF OPTHALAMIC GOODS AND SERVICES 42-43 (1976); STAFF REPORT TO THE FTC, PRESCRIPTION DRUG PRICE DISCLOSURE 48-56 (1975).

166. 421 U.S. at 786 n.16.

done by lawyers could be channeled into other professional processes, computerized, or simply eliminated.[167] These advancements, in the long range self-interest of the profession, may be hastened by increased competition.[168]

3. *Conclusion of the Supreme Court.*

In summary, the *Bates* Court was faced with balancing the interests of consumers against the interests of the state in deciding the first amendment issue. While acknowledging the continued existence of the commercial speech doctrine, the Court said that when a consumer interest is at stake the doctrine may not be applicable. After noting the public's constitutional right-to-know, the Court indicated that this first amendment interest could only be limited if a substantial state interest were shown. The Court then analyzed the six arguments profferred by the state bar and found that none of the interests were sufficient to warrant upholding a total ban against advertising. Hence, the disciplinary rule that proscribed advertising was found to be unconstitutional as applied to the newspaper publication of a truthful advertisement concerning the availability and terms of routine legal services.

4. *Problems with the Bates Decision.*

a. *Legal Problems.* Despite the Court's careful consideration in *Bates*, several problems have emerged as a result of the decision. Of these, the most critical seem to be the problems with price advertising, whether or not the quality of services can be advertised, what constitutes "routine" legal services, and whether or not lawyer advertising has been limited to print media.

(1) *Price advertising.* The decision limited advertising by attorneys to price advertising of routine legal services. As argued by appellees, the price of a legal service fluctuates widely depending on the amount of effort involved in the case.[169] Lawyers could possibly use low initial prices to attract clients and then escalate the prices as the case progresses. However, there appear to be two factors which would deter such practice. First, the state bar can regulate and sanction such behavior. Second, the expected loss of clients' goodwill in a profession

167. For discussions of the various systems used to streamline legal services, see Gullickson, *Lawyering Systems*, 4 TOL. L. REV. 391 (1973); Prendergast, *The Use of Data Processing in Litigation*, 10 LOY. L.A.L. REV. 285 (1977); Turner, *The Employment of Modern Techniques and Technology in Trial Preparation*, 11 FORUM 797 (1976).

168. *See* Allison, *supra* note 4, at 519.

169. *See* 433 U.S. 350, 372-73. The dissent concurred with appellees' argument. *Id.* at 391 (Powell, J., dissenting).

where numerous referrals are generated by word-of-mouth communication would likely be a self-inhibiting factor.

Nevertheless, price advertisements may still be somewhat deceiving if they fail to reflect total costs. A $250 divorce, for example, may cost substantially more upon completion if a complicated tax problem arises. In this instance, however, the client should expect to pay more as additional services are provided. Advertisements which provide at least a "ballpark" estimate of prices are still helpful to prospective clients, who formerly were not provided with any information on the costs of legal assistance and often overestimated them.[170]

The expected problems regarding price advertising may not materialize, however, if attorneys choose not to communicate this type of information. Advertisements placed subsequent to *Bates* show that information on the cost of legal services takes a distant second to information on the kind of law the lawyer practices.[171] Possibly the major benefit from lawyer advertising will be the opportunity for attorneys to identify themselves and describe the types of legal service they can provide. In this situation price advertising would not be limited and, hence, would not be a major problem.

(2) *Quality of service.* No mention was made by the Court about advertising the quality of legal service because it did not perceive this as an issue presented in *Bates*. The Court did indicate that advertisements relating to the quality of services "are not susceptible to precise measurement or verification."[172] Implicit in the Court's decision, however, was a judgment concerning the quality of legal services. The Court's determination that the advertised prices were "very reasonable" is, arguably, a judgment that these were normal services of average quality being rendered to clients.[173] This was noted by Justice Powell in his dissent:

> [T]he fee customarily charged in the locality for similar services has never been considered the sole determinant of the reasonableness of a fee. This is because reasonableness reflects both the quantity and quality of the service. A $195 fee may be reasonable for one divorce and unreasonable for another; and a $195 fee may be reasonable when charged by an experienced divorce lawyer and unreasonable when charged by a recent law school graduate.[174]

170. *See* Sims, *Professional Responsibility and the Informed Choice: The Ethics of Lawyer Advertising*, 1977 MD. L.F. 47, 51.

171. Woytash, *Lawyer Advertising: Now That It's Here, Is It Really So Bad?*, 63 A.B.A.J. 1058, 1058 (1977).

172. 433 U.S. at 383.

173. *See id.* at 382.

174. *Id.* at 394-95 (Powell, J., dissenting).

Notwithstanding differences of opinion as to the reasonableness of fees, it is unlikely that most lawyers would attempt to guarantee their services in other respects. This is predicated on the fact that a judge, and not the attorney, makes the final determination in a judicial outcome. This should dissuade attorneys from boasting far-reaching claims about the quality of their services, for such claims could lead to suits by the bar or the client for misrepresentation, breach of warranty, or malpractice.

(3) *"Routine" legal services.* As pointed out by the dissent, what may be classified as a "routine" legal service is highly subjective.[175] In the context of the *Bates* decision, it may be fairly said that the specific type of cases enumerated by the Court—the uncontested divorce, the uncontested adoption, simple personal bankruptcy, and name change—may now be considered to all under the "routine" classification. Cases regarding landlord-tenant, finance company, zoning, and workmen's compensation problems might also be termed routine. Similarly, a law firm specializing in contracts or business documents may consider these services routine; for a specialized criminal lawyer, many small criminal cases may reasonably be termed routine as well. This problem was also noted by the dissent:

> What legal services are "routine" depends on the eye of the beholder. A particular service may be quite routine to a lawyer who has specialized in that area for many years. The marital trust provisions of a will, for example, are routine to the experienced tax and estate lawyer; they may be wholly alien to the negligence litigation lawyer. And what the unsophisticated client may think is routine simply cannot be predicted. Absent even a minimal common understanding as to the service, and given the unpredictability in advance of what actually may be required, the advertising lawyer and prospective client often will have no meeting of the minds.[176]

Should the definition of "routine" be determined by the consumer or by the lawyer who offers the service? If the latter, many services could fall into the Court's category.

The problem surrounding the concept of what is a routine service may be an illusion. One author has answered this complex argument with an analogy to the banking industry:

> Advertising which tells one where a bank's branches are, its hours of service, its interest rates and banking charges, its range of services . . . gives one only a part of all the information necessary in making a fully informed choice as to which bank to patronize. That does not,

175. *Id.* at 392 n.3 (Powell, J., dissenting).
176. *Id.*

> though, make it misleading, even though banking is indeed a complex business. Bank advertising serves to start the laymen off with some important initial information to aid him in dealing with that complexity. Could not the same be true with respect to legal services?[177]

Numerous legal problems faced by middle and low income people require fairly standardized legal assistance. This notion is supported by fee schedules that were common until outlawed. If this reasoning is followed, the problem of routineness may be only rhetorical.

(4) *Limitation to the print media.* The Court's reservation on the treatment of advertising in the electronic media is a source of immediate concern to members of the bar. The lack of even outlined guidelines in the opinion has spurred a number of attorneys to test the breadth of the decision by immediately utilizing electronic media.[178] Although in previous cases foreclosure of the use of television and radio commercials occurred,[179] there has been no definitive statement by the Supreme Court on the issue. If past experience with group legal service advertising is to presage what will happen for the private attorney, as did the *NAACP v. Button*[180] case for *Bates*, then it is predicted that radio and television will be an acceptable medium for lawyers to utilize. In fact, such public dissemination may be advisable. In 1971, a non-profit public interest law firm ran "spot" advertisements on area radio and television stations. The ads were found "praiseworthy" by the D.C. Bar Association.[181] A similar result has been experienced by the Illinois Bar Association in running institutional legal advertising.[182]

The second problem left open in *Bates* concerns what other types of printed solicitation may be utilized by lawyers. Although the *Bates* decision was limited to newspaper advertisements, the printed media extends much further to include billboards, magazines, and direct mail materials. As noted by the dissent:

> The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to

177. See Sims, *supra* note 170, at 50.

178. *See* WIS. ST. J., Sept. 21, 1977, at 6.

179. New York State Broadcasters Ass'n v. United States, 414 F.2d 990, 995-96 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970) (Congress enacted a prohibition against broadcasting lottery information); *cf.* Banzhaf v. FCC, 405 F.2d 1082, 1085 (D.C. Cir. 1968), *cert. denied sub nom.*, Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) (FCC required radio and television stations which carry cigarette advertisements to devote broadcast time to anti-smoking information).

180. 371 U.S. 415 (1963).

181. Memorandum from Stern Community Law Firm to the D.C. Bar Association Committee on Legal Ethics and Grievances (1971), at 1-2, 4. The two advertisements were entitled "A Public Service Legal Opinion Addressed to Any D.C. Resident Who Wishes to Adopt a Child" and "A Public Service Opinion About Your Child's Hazardous Toys." Individual attorney's names were not allowed in the ads, however.

182. *See* J. Haefner, *supra* note 30, at 16.

> price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means—for example, magazines, signs in buses and subways, posters, handbills and mail circulations.[183]

Due to the wide divergence of possible devices that could be employed to reach the consumer, it is understandable that Chief Justice Burger thought that the *Bates* decision was a "Draconian 'solution' " to the problem.[184]

b. *Practical Problems Resulting from the Bates Decision.* In addition to the legal questions raised in *Bates*, practical problems are immediately resultant. The two most important are: what information should attorney advertisements contain, and who should regulate these advertisements?

(1) *Information content of attorney advertising.* While acknowledging that the consumer has a constitutional right to know,[185] the Court did not prescribe guidelines as to what specific types of information the consumer may demand under this theory. The decision in *Bates* was limited to price advertising of routine legal services. Thus, since the Court did not address advertising content relaying additional information, its status remains questionable. In addition, the Court reserved judgment on other professions and indicated that it was possible that different professions may bring unique constitutional considerations into play.[186] Furthermore, the Court did not address the question of the differing content that advertisements might contain. The strong emphasis on the need for economic information, expressed in *Virginia Pharmacy* and reinforced in the *Bates* decision, indicates the Court's preference for the consumer to make decisions based upon the free flow of information. If this "right to know" refers to economic information only, then it may not extend to advertisements containing quality claims.[187] The Court limited its decision to the issue of whether or not lawyers could constitutionally advertise the prices at which certain routine services would be performed.[188] It is important to keep this consideration in mind, since it may take on new significance when applied to other types of information content.

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183. 433 U.S. at 402 n.12 (Powell, J., dissenting).
184. *Id.* at 388. (Burger, C.J., dissenting in part).
185. See text & note 112 *supra.*
186. 433 U.S. at 365.
187. With the Court's emphasis on the need for "truth" in advertising, advertisements indicating quality may not be readily ascertainable as truthful and hence may be disallowed. *See* text & notes 172-74 *supra.*
188. 433 U.S. at 384.

(2) *Who should direct and regulate lawyer advertising?* Although there is a long history of self-regulation in the professions, this may change. The controversy in *Bates* may foreshadow greater federal involvement in the entire area of legal services.[189] State bars can probably avoid comprehensive federal intervention by accomodating reasonable pressures towards reform. As one advertising advocate stated, the bar should "enter the Twentieth Century and use well-conceived and tasteful advertising campaigns to inform the public of its services."[190] But bar associations should be careful in drawing up both plans and guidelines for lawyers, since some are already being questioned as to their constitutionality.[191] Self-regulation by local state bars may subject the bar to an antitrust action.[192] In the past, self-regulation by trade and professional associations has been found to constitute a violation of section 1 of the Sherman Act.[193] The theory behind such an action would be that rather than regulating advertising by attorneys for the benefit of consumers the members of the bar would devise regulations to further their own economic self-interest. Federal authorities seem willing to attack regulations that fail to protect the interests of consumers in receiving information about attorneys' prices and services.[194] Whether such attacks would be successful will turn on the scope afforded the state action exemption, where regulations have been approved by the state's supreme court.

The FTC may also be an impeding regulatory body, as it was in the prescription drug and eyeglass areas. A trade regulation rule could be established to govern conduct.[195] This would provide a positive approach to the problem of deceptive advertising, since a rule could be actively employed to require disclosure of critical characteristics of the services that would enable the buyer to make a rational choice among alternatives. Since the FTC has already filed suit against the American

189. See text & notes 83, 86 *supra*.

190. Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586, 586 (1975). The article includes four advertisements prepared by a New York advertising firm.

191. Note, *Attorneys: New Developments in Lawyer Advertising—Will the New Oklahoma Plan Pass Constitutional Muster?*, 30 OKLA. L. REV. 376 (1977); Comment, *Advertising and the Legal Profession: An Analysis of the Requirements of the Sherman Act and the First Amendment*, 6 U.C.L.A.-ALAS. L. REV. 67 (1976).

192. *See* Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities*, 82 YALE L.J. 313, 333-34 (1972).

193. *See* Silver v. New York Stock Exch., 373 U.S. 341, 349-361 (1962); Fashion Originators' Guild v. FTC, 312 U.S. 457, 467-68 (1941).

194. *See* Shenefield, *supra* note 34, at 22.

195. See cases cited note 83 *supra*. Trade regulation rules have recently been established in the areas of prescription drugs and eyeglasses. *See Trade Regulation Rule to Prohibit State Bans on Price Advertising of Prescription Drugs*, ANTITRUST & TRADE REG. REP. (BNA), No. 716 (June 3, 1975), at A-2; *Trade Regulation Rule to Remove State Bans on Price Advertising of Eyeglasses*, ANTITRUST & TRADE REG. REP. (BNA), No. 745 (Jan. 6, 1976), at A-8 & E-1.

Medical Association,[196] intervention in the legal area is entirely possible.

IV. IMPLICATIONS OF THE BATES DECISION

The probable effects of the *Bates* decision on the delivery of legal services are not restricted to the problems noted above. Several other consequences can be expected.

A. *Recognition of the Need for Legal Services*

The decision recognized that there is an alarming percentage of the public whose legal needs are not being met. Studies estimate that approximately seventy percent of the population is not presently serviced by the legal profession.[197] Other studies have indicated that the nonuse of lawyers may be attributed to the fact that people are not even aware of their need for a lawyer.[198] If advertising increases consumer awareness of legal services, and the consumers utilize those services, it is possible that attorneys themselves may become more proficient in the application of the law. In one study of the awareness of consumer laws, it was found that an equal percentage of consumers and attorneys were unknowledgeable in the consumer law area.[199] It was hypothesized that this resulted from lawyers not being presented with enough consumer problems; consequently, there was no need to become versed in that area of law.[200]

196. *See In re* American Medical Ass'n, No. 9064 (F.T.C., Nov. 13, 1978), 47 U.S.L.W. 2356 (1978).

197. B. CURRAN & R. SPAULDING, THE LEGAL NEEDS OF THE PUBLIC (1974). This 1974 nationwide survey of nonbusiness legal needs revealed that only 24.5% of those who have recently had a legal problem consulted a lawyer. About 70% of those surveyed had encountered a legal problem in the five years from 1969 to 1974. *Id.* at 83-84.

198. The Missouri Bar study in 1963 was statewide and showed that 36% of the public had never used a lawyer. Of those who had, only one-third used their lawyers on a regular basis. Forty-three percent of those who did consult a lawyer did so only once in the previous five years. Missouri Bar—Prentice-Hall, *Survey*, in A.B.A. COMPILATION OF REFERENCE MATERIAL ON PREPAID LEGAL SERVICES 4 (1973).

In another survey of family needs for legal services, 47.6% of the working class respondents and 12.3% of the middle class respondents indicated that the reason for not consulting a lawyer when needed was the perceived inability to afford the fee. Koos, *The Koos Survey*, in A.B.A. COMPILATION OF REFERENCE MATERIAL ON PREPAID LEGAL SERVICES 7, 11 (1973).

199. In the 10 areas of consumer law researched, lawyers scored as low as consumers on knowledge about the law. The lack of information demonstrated by all income segments of the consumer sample suggested that what is needed is not more and tougher laws, but rather more information made available to more individuals concerning their rights as consumers. Cunningham & Cunningham, *Consumer Protection: More Information or More Regulation?*, J. MARKETING, Apr. 1976, at 63-68.

200. "Since lawyers are prohibited from soliciting business by the Bar Association, and since consumers do not often know that they have been taken advantage of and, therefore, do not contact an attorney, there is little incentive on the part of attorneys to study this particular legislation." *Id.* at 67.

B. *Increased Specialization*

In the past few decades there has been a decline in the total percentage of individual practitioners with a concomitant increase in associates and partners. The reason for this may be the need for lawyers to band together so that each can specialize and, thus, better serve the clients' needs.[201] If increased competition caused by advertising generates lower prices, lawyers will have to become more proficient in certain areas of law in order to have an economically sound practice. This can result only if there is increased specialization in the legal profession. Since specialization is the basis for our entire economic structure, there seems to be no reason to deny consumers the benefits of legal service.

C. *Effect on Other Professions*

The *Bates* decision cannot be ignored by professionals in other fields. One advertising ban against physicians has already been found to be unconstitutional,[202] and other anticompetitive practices of professional organizations are presently in the process of being litigated.[203]

Antitrust attention, initiated in *Goldfarb*, will be given to private professionals in defining the scope of their legal monopolies, in establishing standards for entry, in accrediting professional schools, and in imposing discipline.[204] Protection of the public may be the only legitimate goal justifying multistate practice restrictions, and this justification may be closely scrutinized in light of *Bates*. The Court may see this protection as being more economic than legitimate.[205] Competition engendered by the *Bates* decision may also give rise to low cost services in the professions as well as quality services at lower fees. This may be the price paid for providing more information to the consumer and may be justifiable only by noting that a greater proportion of persons benefit by the rule. One author has noted this in the medical field:

201. *See* York & Hale, *supra* note 21, at 7-8.

202. Health Systems Agency of Northern Virginia v. Virginia State Bd. of Medicine, 424 F. Supp. 267, 273-75 (E.D. Va. 1976). The *Health Systems* case involved a Virginia statute which prohibited physicians from furnishing factual information regarding their educational credentials, standard fees, billing procedures, and office practices to a health planning agency that intended to publish such information in a directory in order to help persons select physicians. The district court relied on *Bigelow* and *Virginia Pharmacy* to find that the statute was in violation of the first amendment. *Id.*

203. *See, e.g.*, United States v. National Soc'y of Professional Eng'rs, 555 F.2d 978 (D.C. Cir.), *cert. granted*, 434 U.S. 815 (1977) (rule of organization which prohibited all competitive bidding by engineers violated antitrust laws); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) (agreement to require membership in national dental association as condition precedent to membership in local dental associations can be challenged as a violation of the Sherman Act).

204. *See The Troubled Professions*, BUS. WEEK, Aug. 16, 1976, at 126.

205. See Shenefield, *supra* note 34, at 22.

> Shocking as this may seem to those who cherish the practice of medicine as much more than a way to make a living, *it seems fair to say the patient now has no way at all to estimate the ability or skill of his physician*. Perhaps competition may give rise to better as well as less expensive care.[206]

D. *Institutional Advertising by the Bar*

The *Bates* Court seemed to indicate that the bar played an important role in regulating advertising, a role in which affirmative, complete disclosure may be required.[207] If that is the case, many bar associations should be considering the feasibility of institutional advertising campaigns, not only to inform the public of possible legal needs, but also to warn them against possible deceptive practices by lawyers. A few states have already instituted such programs with apparent success.[208] Institutional advertising may also have another benefit for lawyers. One study indicated that such advertising created a positive attitude change in the amount of confidence respondents had in lawyers.[209]

E. *Major Changes in the Legal Profession*

1. *Change of the Economic "Mix" of the Profession.*

The *Bates* decision may lead to major economic changes in the legal profession. Many small- and medium-sized firms currently engaged in general law practice will perhaps find it desirable to specialize in those services evidencing the greatest public need in order to maximize firm profits. A trend towards the organization of legal clinics may also be hastened.[210] The use of paralegals may be increased, along with computerization of standardized forms and services.[211] Specialization may become the rule and not the exception. As the market dictates the ways in which services are rendered, the general practitioner may disappear in the same manner as the house-calling family doctor.

Consumers will benefit from becoming newly informed of their legal rights and may be more willing to utilize legal personnel. Consumers may also benefit if increased competition and efficiency reduce fees.

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206. Sheehan, *What the Goldfarb Decision Means to the Medical Profession*, J. LEGAL MED., Nov.-Dec. 1975, at 29 (emphasis added).

207. 433 U.S. at 383-84.

208. See J. Haefner, *supra* note 30, at 1. The Oklahoma Bar Association has also instituted such a program.

209. *Id.*

210. Cooperatives are another growing form of delivering legal services. Examples of this type of service are Consumer's Group Legal Services, 1414 University Ave., Berkeley, Cal., and Cooperative Services, Inc., 4253 W. Beltline Road, Madison, Wis.

211. See sources cited note 167 *supra*.

2. *Recognition of the Profession as a "Business."*

Professionals can no longer serve only the monied elite. Legal services should be reorganized so that they can be delivered to every segment of the population. In this instance, the professional's self-esteem, as being "something more than a 'mere' businessman,"[212] may be threatened. "It is our burden and our glory that we are expected to live by a high professional standard and earn a living at the same time . . . . We have to carry the standards of the temple into the marketplace and practice our trade there."[213] The nation is shifting its perception of professions from a public interest model to a business model, with little weight being given to the self-serving claims by the professions that their primary concern is public service.

With the utilization of the business model in the professions, problems in the marketing of legal services will also emerge, and the concepts underlying their use will change. Promotion will no longer be seen as an evil. "Because of the bars or bans against selling, professional services show little interest in the subject of marketing, having made the error of equating marketing with selling."[214] If the introduction of advertising helps to promote competition and thereby increases efficiency, lowers prices, and increases services, both the professionals' and the public's feelings about marketing will be more favorable.

The employment of a business model in the professions is not an undesirable development. If the production of something is useful and honorable, then its distribution, including promotion, is also honorable. Advertising should be given its proper place in this system. "The purpose of advertising . . . is to provide information to potential buyers—to tell consumers that a certain product exists, that it has a certain price, and that it can be bought at certain times and places, and so forth."[215] If this is to be the case with professional advertising, more information with regard to the type of service offered, when it is offered, and why, may become more prevalent in promotions.

3. *Increased Awareness of the Consumer Standpoint.*

Studies indicate that lawyers are not held in as great esteem in the public eye as they would like to believe.[216] Lawyers have been rated below doctors, teachers, businessmen, ministers, and bankers in terms

212. *See generally The Troubled Professions, supra* note 204, at 127.
213. Redlich, *Lawyers, The Temple, and the Marketplace*, 114 TR. & EST. 219, 219 (1975).
214. Bloom, *Advertising in the Professions: The Critical Issues*, J. MARKETING, July 1977, at 103.
215. Kotler & Conner, *supra* note 5, at 72. One of the flawed assumptions made by professionals is that quality speaks for itself. *Id.*
216. See Kotler & Conner, *supra* note 5, at 71-76; Stone & White, *supra* note 5, at 330.

of helping the community.[217] With advertising, this image may improve.[218]

Middle income people have tended to be unaware of the different ways in which lawyers could help them. In some situations, such as divorce or arrest, the need for a lawyer is readily recognized. But for other problems, such as libel, estate planning, discrimination, and creditor harassment, many individuals fail to consider legal help.[219] Numerous people complacently accept their losses because they do not understand that their problem is a legal one.[220] If the legal profession is to serve these people, it should help to make them aware of their problems. Attorney advertising could assist this effort. Limiting the attorney's role to the prosecution or defense of claims presented by the client is unrealistic. For one to suspect that a legal problem exists, knowledge of the law is a necessity. Therefore, the attorney, by virtue of his knowledge of the law as well as the functioning of the legal system, should be bound to help the legally ignorant layman recognize his legal problems.[221]

Accessibility must also be directed at the consumer. The services should be available in the suburbs and during office hours convenient for working people. The legal profession has largely ignored these consumers' needs by placing their law offices in the downtown business centers. "How would a wage earner go about locating an inexpensive divorce attorney who takes clients during the evening and has offices near his home—assuming such an attorney existed?"[222]

V. ATTORNEY OPINIONS ON PROFESSIONAL ADVERTISING

With its carefully constructed decision in *Bates*, the Supreme Court ruled that advertising of routine services by members of the legal profession can not be prohibited. The resulting situation leaves the future of attorney advertising to the lawyers themselves; they will decide which forms of advertisements to implement and what other issues to test. Accordingly, to predict the short-run future of advertising by the legal profession, attorneys across the United States were polled shortly

217. Kotler & Conner, *supra* note 5, at 71-76; Stone & White, *supra* note 6, at 331.

218. See Haefner, *supra* note 30.

219. A Massachusetts survey showed that 56% of those with incomes in the $3,000 to $5,000 range, when asked "What should a person do if his wife is suing for a divorce?" gave a response indicating recognition that the problem was a legal one. Similarly, the percentages for other questions were: arrest, 86%; death, 11%; and threatened repossession, 22%. A. ROCKWELL, A STUDY OF THE LAW AND THE POOR IN CAMBRIDGE, MASS. 37 (1968).

220. U.S. NEWS & WORLD REP., Feb. 28, 1977, at 39.

221. Note, *Ethical Problems and Considerations Arising From the Legal Profession's Duty to Assist Laymen to Recognize Legal Problems*, 22 CLEV. ST. L. REV. 502, 530 (1973).

222. Meyers, *supra* note 30, at 258.

after the Supreme Court decision to determine their attitudes on this issue.

A. *The Study*

The basic goal of the survey was to identify attorney attitudes in three areas related to the professional advertising issue: respondents' opinions of attorney advertising in general; respondents' opinions regarding the probable effects of attorney advertising; and respondents' opinions regarding the attorney selection process employed by clients. In addition to these data, information was collected on the attorneys themselves in order to describe the responding sample for possible bias and nonrepresentation.

The questionnaire was five pages in length and consisted mainly of dichotomous and Likert-type scales.[223] It was sent to a national random sample of 500 practicing attorneys in the United States. This sample was drawn from the master tape of a commercial mailing list firm that contained over 450,000 attorneys. The sample purposely omitted corporate and government attorneys since professional advertising would have little meaning to them in their present capacities. Attorneys specializing in these areas but under their own employ were included, however. The questionnaires were mailed on August 1, 1977, and returns were accepted until October 31, 1977. Following this procedure a total of 186 usable surveys were obtained. This response rate, of 39.2%, compares favorably with similar studies in other professions[224] and is likely a result of the substantial interest attorneys have shown in this issue since the Supreme Court's ruling.

1. *Nonresponse Bias.*

An important issue in survey research is nonresponse bias. That is, the results of the attorneys who returned the questionnaires may not be representative of the entire population if certain groups refused to participate. Because attorney interest in this issue was considerable, and because of the relatively high response rate, nonresponse bias was not anticipated to be a major problem in this study. In order to verify this assumption, however, information was collected from the responding attorneys on three characteristics that could potentially distort the findings.

223. A dichotomous scale represents a statement which the respondent can select as appropriate or not appropriate. A Likert scale presents a statement followed by a series of response intervals, normally labeled from "strongly agree" to "strongly disagree," one of which respondent selects as best representing his or her opinion.

224. Bloom & Loeb, *If Public Accounts are Allowed to Advertise*, 25 MICH. ST. U. BUS. TOPICS 57, 58 (1977).

The first of these criteria was the number of years the attorney had been practicing law. This dimension could differentially influence dispositions on the professional advertising issue in two ways. For example, it is possible that "new" attorneys would favor advertising as a more rapid method of soliciting clients rather than relying on slower, more traditional techniques. On the other hand, newer attorneys might dislike professional advertising, since compared to older more established practitioners, many new attorneys would not have sufficient funds to allocate to promotional efforts. In any event, a sample containing a disproportionate number of "new" or "old" attorneys could artificially affect the results of this study. Table 1 displays the actual distribution of number of years in practice for the respondents of this study.

TABLE 1

Distribution of Number of Years in Practice

Number of Years in Practice	Percentage of Respondents
1 – 5	3.6
6 – 10	10.2
11 – 15	13.8
16 – 20	21.0
21 – 25	16.2
26 – 30	22.2
31 – 35	2.4
36 – 40	4.2
41 – 45	2.4
46 – 50	3.6
51 – 55	.6
	100.0

Average number of years in practice for attorney sample = 22.1 years.

It appears that all groups are adequately represented, and thus nonresponse bias is not introduced on this dimension.

A second characteristic that could influence the data is size of law firm affiliation. Here, small attorney associations or individual practitioners could be expected to be more negatively disposed toward the dismissal of advertising prohibitions, because larger firms could take advantage of advertising economies of scale. Table 2 presents the distribution of law firm affiliation in the responding sample.

TABLE 2

Distribution of Law Firm Affiliation Size

Size of Firm	Percentage of Respondents
Large firm (over 40 attorneys)	3.6
Medium size firm (10-39 attorneys)	14.7
Small firm (3-9 attorneys)	50.6
Partnership (2 attorneys)	25.9
Individual practice	3.5
Other	1.7
	100.0

Similar to the data on number of years in practice, the responding sample here seems to adequately include the different possible sizes of law firms.

The third criterion used to describe the participating attorneys was whether the respondent practiced general law or specialized in a particular area of legal service. This dimension was deemed important since an attorney who specializes might expect to gain greater benefits from advertising and, thus, be more favorably disposed toward it. Once again, as demonstrated in Table 3, the respondents included in the study appear to be sufficiently representative both as to attorneys who specialize and those who do not.

TABLE 3

Respondents' Specialization in Legal Practice

Area of Concentration	Percentage of Respondents	
General Practice		43.7
Negligence Actions	8.4	
Tax/Estate Planning	7.6	
Real Estate	5.9	
Commercial Law	5.0	
Corporate Law	5.0	
Criminal Law	5.0	
Probate	5.0	
Patent/Trademark/Copyright	3.9	
Divorce/Family Planning	1.7	
Administrative Law	.8	
Labor Law	.8	
Other	7.2	
Total respondents specializing		56.3
		100.0

In summary, responses to three major questions included in the survey to describe participating attorneys indicate that nonresponse bias should not be a significant limitation of the study. Accordingly, the findings discussed below are believed to possess adequate generalizability to all practicing attorneys.

B. *General Opinions on Professional Advertising*

A major purpose of this study was to investigate respondents' attitudes on the issues of whether attorneys should be allowed to advertise their services, and if so, what form of promotion should be allowed. The question used to assess these opinions along with the responses to it are displayed in Table 4.

TABLE 4

Question 1: Should Attorney Advertising be Allowed?

Which statement best describes your own *personal* opinion on the issue of allowing attorneys to advertise their services?

	Percent
1. Lawyers should not be allowed to advertise	50.3
2. Lawyers should be allowed to advertise only if strict *limitations* are imposed on the types of information they could provide	34.5
3. Lawyers should be allowed to advertise within *general guidelines*	10.2
4. Lawyers should be allowed to advertise any type of information they wish, with no limitations	5.0
	100.0

Initially, these findings appear to be somewhat conservative with slightly over half of the respondents against any form of attorney advertising. Thus, despite the Supreme Court's encouragement of this activity, the majority of attorneys sampled are not likely to engage in promotional efforts, unless of course they are forced to participate due to its implementation by competitors. These results seem more progressive, however, when viewed against the backdrop of past traditions and prohibitions of advertising, plus the natural tendency for successful people to endorse the status quo. In this instance, the fact that 49.7% of the attorneys polled favored some form of advertising seems to represent considerable forward thinking. It is also possible that many of the

negative dispositions result from the lack of any experience with advertising as a sophisticated business practice. It will be interesting to see how the response distribution to this question will change as attorneys gain an understanding of professional advertising and the results it can elicit.

Responses to Question 1 were further analyzed to determine if any systematic relationships existed. Specifically, these replies were cross-classified with the three characteristics discussed above to see if number of years in practice, degree of speciality, or size of law firm affiliation affected the attorneys' responses. Chi-square analysis[225] demonstrated that the answers to Question 1 were independent of the number of years the respondent had practiced law.[226] Neither "newer" nor "older" attorneys were significantly more likely to be favorably (or negatively) disposed to professional advertising. Instead, regardless of how long the respondents had practiced law, their opinions of advertising by lawyers was extremely consistent. Similarly, responses to Question 1 were independent of whether the respondent specialized in a particular area of law or practiced general law. Here the chi-square statistic indicated that neither group displayed divergent response patterns.[227] Size of law firm affiliation, however, did demonstrate significant differences in response tendencies as indicated in Table 5.

TABLE 5

Chi-Square Analysis of Question 1 by Size of Respondent's Firm: Responses to Question 1

Number of Attorneys in Respondent's Firm	No Advertising Percent (n)	Yes, With Strict Limitations Percent (n)	Yes, With General Guidelines Percent (n)	Yes, With No Limits Percent (n)	
Over 40	40.0 (2)	20.0 (1)	40.0 (2)	0.0 (0)	100%
10-39	44.0 (11)	28.0 (7)	16.0 (4)	12.0 (3)	100%
3-9	44.8 (42)	33.7 (29)	12.8 (11)	4.7 (4)	100%
2	54.5 (24)	45.5 (20)	0.0 (0)	0.0 (0)	100%
1	66.7 (4)	16.7 (1)	0.0 (0)	16.7 (0)	100%

The chi-square statistic here demonstrates that lawyers representing smaller firms are more negatively disposed toward unlimited forms

225. Chi-square analysis tests a cross-classification of two or more variables for independence. Normally, the probability (P) of obtaining the given distribution should be less than .05 for a conclusion of dependency to be drawn.

226. In fact, the chi-square statistic (X^2) of 19.97 with 30 degrees of freedom (df) was significant (p) at only the .917 level, indicating a surprisingly stable response distribution.

227. The chi-square statistic in this case was 5.00 with three degrees of freedom and was significant at the .17 level.

of attorney advertising.[228] For example, there is a monotone increase in the percentage of respondents (from 40% to 66.7%) against any form of advertising ("no advertising") as the size of the firm decreases. Apparently, attorneys from smaller firms believe that advertising within the profession would generate a comparative disadvantage for them. Possibly this is due to the belief that the amount of funds available for advertising in the smaller firms would be insufficient to compete with the larger firms' advertising budgets. In this instance, promotional economies of scale would seem to accrue to the larger firms.

To summarize the results from Question 1, the respondents were evenly split on the issue of attorney advertising with 50.3% against any form of advertising and 49.7% in favor of some type of advertising. Attorneys surveyed still appeared somewhat conservative on this issue, however, since of the 49.7% favoring promotion, 34.5% wanted strict limitations to be prescribed. Also, the number of years practicing law and the extent of specialization made no significant differences in attorneys' responses to this question. However, lawyers representing small firms were more negatively disposed toward unlimited forms of advertising.

The second major question of this study asked respondents to select which types of information attorneys should be allowed to advertise. Since the Supreme Court's decision was somewhat ambiguous on this issue, it is likely that attorneys will test various forms of advertising content. In fact, some lawyer promotions have already included information other than prices of routine services.[229] Accordingly, the responses displayed in Table 6 might indicate the types of information to be contained in future advertisements.

On the basis of popularity with attorneys, these responses seem to fall into three different groups. The first cluster includes location of office, area of speciality, office hours, law firm affiliation, and legal services available. These types of information were viewed favorably by respondents with each having at least a 68.5% vote of confidence. The second most popular types of information include amount of experience, cost of legal service, and law school attended. It is noteworthy that cost information, which was encouraged by the Supreme Court's decision, was preferred by less than one-third of the respondents. Since the attorneys will ultimately determine the content of any professional advertising, consumer price advertising might well be the exception rather than the rule. Early evidence seems to support this contention as

228. The chi-square statistic here was 30.98 with 12 degrees of freedom and significance at the .029 level.

229. *Case Made for Lawyer Ads*, ADVERTISING AGE, Sept. 19, 1977, at 73.

TABLE 6

Question 2: Information Content of Professional Advertising

Which, if any, of the following types of information do you think lawyers should be allowed to advertise?

	Percent*
1. Location of office	87.7
2. Area of specialty	83.0
3. Office hours	77.4
4. Law firm affiliation	68.5
5. Legal services available	68.5
6. Amount of experience	34.9
7. Cost of legal services to public	32.7
8. Law school attended	27.3
9. Awards received	7.7
10. Endorsements from past clients	4.9
11. Past court record	4.9
12. Other	5.7

* Percentage of attorneys in favor of advertising each type of information.

one study reported that of the attorney advertisements appearing in the *Los Angeles Times* only fourteen percent contained price information.[230] The least popular types of information were awards received, endorsement from past clients, and past court records, each of which was supported by only a small percentage of respondents. One could reasonably expect that attorney advertising will omit these types of information. The responses to Question 2 indicate some rather fundamental differences between attorneys and the Supreme Court as to what types of information will be included in future professional advertisements. The lawyers appear to favor conservative content while the Supreme Court seems more inclined for them to promote price information.

Respondents' media preferences were examined in a third major question of the survey. This question and the attorney responses are presented in Table 7.

The percent column represents the percentage of the respondents who were in favor of advertising[231] and who selected the various media

230. Woytash, *supra* note 171, at 1058.

231. The percentage of respondents in favor of advertising was 49.7% as shown in Table 4, *supra*.

TABLE 7

Question 3: Attorney Media Preferences

In which of the following media do you think lawyers should be allowed to advertise?

	Percent
1. Bar journals	88.4
2. Newspapers	76.9
3. Brochures in office	63.2
4. Consumer magazines	43.7
5. Direct mail	26.4
6. Radio	20.6
7. Television	18.2
8. Outdoor boards	10.3
9. Other	42.5

as appropriate for attorney advertising. It is somewhat unusual that bar journals and brochures in offices were ranked so favorably since consumer exposure to these media is minimal. Of the consumer media, newspapers were the most popular, 76.9%, followed by consumer magazines, 43.7%, and direct mail, 26.4%. These responses probably reflect the attorneys' reactions to the *Bates* decision in which the court specifically recommended the print media. Similarly, the relative low rankings of the broadcast media, 20.6% for radio and 18.2% for television, are likely a reaction to the Court's comment that the broadcast media warrant special consideration.[232]

However, individuals schooled in advertising might find the popularity of newspapers somewhat surprising, since this is generally regarded as the poorest quality reproduction media due to the use of porous printstock. Also, newspapers tend to be cluttered with many poorly constructed retail display advertisements competing for the reader's attention. To lawyers concerned with the effects of advertising on the respect and esteem of their profession, magazines, direct mail, or even broadcast media would appear to be more appropriate vehicles. However, attorneys with limited promotional budgets are generally unattractive clients for advertising agencies, and thus they might be forced to rely upon the free advertising production services that newspapers furnish.

Finally, the attorneys were asked their opinions of who should reg-

232. 433 U.S. at 384.

ulate and enforce professional advertising guidelines. These questions and the responses are displayed in Table 8.

TABLE 8

Questions 4 and 5: Regulation and Enforcement of Attorney Advertising

4. If advertising by attorneys is to be required, who do you think should be in charge of establishing these guidelines?

	Percent
1. The State Bar Association	59.2
2. The American Bar Association	15.5
3. The County Bar Association	9.2
4. A federal agency	2.3
5. An independent association of attorneys	1.1
6. Other	12.7
	100.0

5. Who do you think should be in charge of enforcing guidelines established for attorney advertising?

	Percent
1. The State Bar Association	64.4
2. The County Bar Association	11.7
3. The American Bar Association	6.5
4. A federal agency	2.3
5. An independent association of attorneys	1.1
6. Other	14.0
	100.0

Clearly, the majority of sampled attorneys favors regulation and enforcement at the state level. These responses are not surprising since the state bar association is the level of authority to which attorneys presently report in most instances. It is also likely that advertising guidelines will vary from state to state, and thus the American or county bar association would be ill-equipped to handle the situation. Finally, since attorneys have the opportunity to serve on state bar committees, this would best enable them to control their own fate.

C. *Opinions on the Probable Effects of Attorney Advertising*

A second group of questions included in the survey asked attor-

neys to estimate the effects that advertising would have on the delivery of legal services. Specifically, respondents were asked how professional advertising would affect the cost of legal services, the demand for legal services, the quality of legal services, the extent of specialization by attorneys, the public's respect and esteem for attorneys, and whether large firms would benefit at the expense of small firms. Table 9 presents the responses to these questions.

TABLE 9

Estimated Effects of Attorney Advertising

Question—Statement	Response Categories				
	Increase Greatly	Increase Slightly	No Effect	Decrease Slightly	Decrease Greatly
1. In your opinion how would advertising by lawyers affect the *cost* of legal services to the public?	8.5%	23.9%	47.2%	17.0%	3.4%
2. In your opinion how would advertising by lawyers affect the *demand* for legal services?	9.1	41.5	48.3	1.0	0.0
	Strongly Agree	Agree	Neither Agree Nor Disagree	Disagree	Strongly Disagree
3. Advertising by lawyers will decrease the quality of services offered.	20.0%	21.7%	25.7%	26.3%	6.3%
4. Advertising by lawyers will cause lawyers to specialize in one or two services.	5.2	27.0	30.5	29.9	7.5
5. Advertising by lawyers will generally lower the public's respect and esteem for lawyers.	34.7	34.7	11.9	13.6	5.1
6. Advertising by lawyers will benefit larger firms at the expense of small firms or individuals.	17.2	23.6	20.7	31.0	7.5

The first effect investigated was how attorney advertising would influence the cost of legal services to the public. The responses, presented in line 1 of Table 9, indicate that most attorneys, 47.2%, believe consumer costs would not be affected by promotion. A decrease in cost was anticipated by a total of 20.4% of the respondents, and

32.4% indicated a belief that consumer prices would rise as a result of professional advertising.

Several comments seem to be in order on this important issue. First, it is clear that most of the attorneys polled in this survey are not experts on the economic effects of advertising. Accordingly, it is difficult to judge the validity of their responses which were possibly heavily influenced by the respondents' general dispositions toward professional advertising. In this instance, it could be expected that participants who indicated a negative disposition toward attorney advertising would also estimate a cost increase as its result. This line of reasoning is supported by chi-square analysis when the cost effect estimates are cross-classified by the respondents' general dispositions toward attorney advertising.[233] For example, eighty percent of the respondents indicating a belief that advertising would "greatly increase" the cost of legal services also responded that attorney advertising should not be allowed in any form. Similarly, sixty percent of those predicting costs would "decrease greatly" as a result of advertising had been in favor of unlimited attorney advertising. Thus, replies to the cost effects of professional advertising are definitely dependent on the respondents' general attitude toward attorney advertising.[234]

Possibly a more reliable indication of how advertising might influence the cost of legal counsel could be obtained by observing the effect of advertising on fees in professions which have not universally prohibited this form of promotion. Two studies have been reported by Baird, one dealing with optometry and the other with pharmacy.[235] In the first study, the prices for eyeglasses and eyeglasses with an examination were compared between states allowing advertising by optometrists and states restricting such advertising. For eyeglasses alone, the price was 25.4% less in states that allowed promotion and for eyeglasses with examination the price was 10.4% less. These results were subsequently tested to verify that socio-economic differences between states allowing advertising and those restricting it did not account for the price differentials. Thus, it can reasonably be concluded that for eyeglasses and eye examination, advertising significantly reduces costs to consumers. Cady found similar results in the pharmacy profession and reported that in states with no restrictions on advertising the average price for

233. The resulting chi-square statistic of 56.30, with 15 degrees of freedom, is significant beyond the .001 level.

234. Of course, the direction of causality here is left unspecified. That is, respondents may feel that advertising costs would have to be passed on to consumers in the form of increased prices for legal services and, therefore, oppose attorney advertising. Conversely, they may generally resent professional advertising and, therefore, predict consumer prices would rise as a result of it.

235. C. Baird, Advertising by Professionals (1977) (monograph published by the International Institute for Economic Research).

ten common prescription drug items was 5.2% less than in states restricting pharmaceutical promotion.[236] While both of these studies deal with physical products as well as with professional services, there is little reason to suspect that attorney advertising would generate substantially different results.

Respondents were also asked to predict how attorney advertising would affect the demand for legal services, and the results are presented in line 2 of Table 9. Here, slightly over half of the attorneys surveyed, 50.6%, envisioned an increase in the demand for legal services, with 9.1% expecting a significant increase. However, a large proportion of the respondents, 48.3%, anticipated no change in demand as a result of promotional efforts. These responses should once again, however, be interpreted with the knowledge that answers to this question were not independent of the attorneys' general dispositions toward advertising.[237] Chi-square analysis demonstrates a significant dependency in these responses[238] with, for example, 65.6% of the respondents who anticipated no change in the demand for legal services also against any form of attorney advertising. Again, the direction of this relationship is left unspecified, but since advertising would normally be expected to increase demand, it seems likely that respondents who were against attorney advertising tended to respond to other questions in a negative manner. In any event, the majority of respondents expected an increase in the demand for their services as a result of advertising.

A decline in the quality of legal service is one possible result from professional advertising. If, for example, advertising increases demand as the attorneys predict and there is no concomitant increase in supply, lawyers may be forced to spend less time with each client, thereby reducing the quality of service. Respondents seem to indicate some recognition of this possibility, as their answers in line 3 of Table 9 indicate. A total of 41.7% of the respondents demonstrated agreement with the statement that advertising would result in a decrease in the quality of legal services. Apparently, changes in the structure of legal services might be required to accommodate any increase in demand in order to prevent a quality decline. For example, legal assistants or paralegal aids may have to increasingly handle routine types of service thus freeing attorneys for the more intricate aspects of legal practice. Another alternative, of course, would be to train additional attorneys.

It is interesting to note that in Cady's study quality of service was

236. J. CADY, RESTRICTED ADVERTISING AND COMPETITION: THE CASE OF RETAIL DRUGS 11 (1976).

237. See Question 1, Table 1, *supra*.

238. The chi-square statistic was 4.89 with 12 degrees of freedom and significance at the .001 level.

also compared between states restricting advertising and those which did not.[239] In Cady's research, quality was operationalized as the availability of five types of auxiliary services: delivery, credit, emergency service, family prescription monitoring, and a prescription waiting area.[240] Results showed no statistically significant differences in quality, although availability of emergency service was greater in states not restricting advertising.[241] Cady's study demonstrates that quality of service need not decline, even though prices were 5.2% lower, when professional advertising is employed. However, it is unlikely that demand for prescription drugs would be as responsive to advertising as the demand for legal services, and thus the analogy between these two professions might attenuate somewhat at this point. Since quality of service is an important issue, the possibility of a decline as a side effect of advertising should be given careful consideration.

Attorney attitudes as to whether advertising will foster specialization are represented in line 4 of Table 9. Since the distribution of these responses approximates a normal curve, it is difficult to ascertain whether or not attorneys anticipate an increase in specialization as a result of promotion. Conceptually, however, since specialization represents a competitive advantage that is easily communicated, more attorneys could be expected to follow this path in the future than have selected it in the past.

There is much less equivocation by respondents as to how advertising might affect the public's opinion of lawyers. As displayed in line 5 of Table 9, most attorneys surveyed, 69.4%, believed that the use of advertising would lower the public's respect and esteem for the legal profession. Possibly these results represent the feeling that by resorting to ordinary commercial practices such as advertising, the legal profession may be associating itself with less dignified occupations such as retailing or manufacturing. In addition to this, there is the danger that false, misleading, or deceptive advertisements employed by a few attorneys would contaminate the entire profession. While these results are possible, it seems equally likely that dignified advertising by the majority of attorneys could actually increase the consumers' respect for lawyers. A Florida survey, for example, revealed that on the characteristics of honesty, prestige and leadership in the community, and interest in helping people, attorneys were ranked lower than businessmen and last in the latter two categories.[242] Thus, if attorney advertising is maintained at a respectable level, it is difficult to imagine

239. *See* J. CADY, *supra* note 236, at 7.
240. *Id.* at 10.
241. *Id.*
242. Stone & White, *supra* note 6, at 301.

how the public would think less of the legal profession from the added understanding promotional information would bring them. On the contrary, "[a]dvertising probably will help the whole image of the law profession by helping people learn just what it is that lawyers do."[243] Nevertheless, many respondents apparently believe that the less knowledge the public has about attorneys, the more they will respect the legal profession.

A final question assessing lawyers' opinions of the effects of advertising dealt with the differential benefit to large versus small associations of attorneys. The responses, presented in line 6 of Table 9, indicate that the lawyers sampled were fairly evenly divided on this issue. A total of 40.6% agreed that advertising would benefit larger firms at the expense of smaller firms, while 38.5% disagreed with this statement. Thus, respondents' opinions on this issue are split and offer no consensus of opinion. Economically, however, advertising would appear to benefit most the larger firms since advertising economies of scale may occur. Groups of lawyers could pool their resources to generate substantial advertising budgets and thereby put smaller firms or individuals at a comparative disadvantage. In addition to the increase in repetition available with a large advertising budget, such firms would be much more attractive to advertising agencies and thus would gain from having higher quality advertisements produced for them. Perhaps these reasons explain why attorneys representing small firms are more negatively disposed toward professional advertising.[244]

In summarizing attorneys' expected results from advertising, it should be remembered that due to lack of past experience and training with promotion as a business strategy, attorney predictions may significantly depart from the realities of the situation. Nevertheless, as a highly educated group, with considerable experience in dealing with the public, their opinions on these issues are certainly revealing. In general, attorneys believe that advertising will slightly increase the cost of their services to the public, although this has not occurred in other professions. Also, the respondents anticipate an increase in the demand for legal services, possibly because consumers will be better informed of their rights. In addition, many attorneys expect a slight decrease in the quality of their services to the public and a decrease in consumer respect for the legal profession. Finally, attorneys seem evenly divided on whether advertising will cause increased specializa-

243. See Table 5 *supra*.

244. *Lawyers Venture into Advertising Era with Caution and Questions*, 63 A.B.A.J. 1065, 1067 (1977).

tion, and whether large firms will consequentially benefit at the expense of small firms.

D. *Respondents' Opinions of the Attorney Selection Process*

In the *Bates* decision, the Supreme Court noted that the information content of attorney advertising should allow consumers the benefit of a more informed choice of attorneys.[245] In order to better understand this issue, respondents were polled as to their perceptions of the lawyer selection process. Since attorneys ultimately interact with their clients, they should have considerable knowledge of the bases upon which they were selected. To identify the important criteria in this situation, respondents were asked two questions:

1. Which of the following criteria do you believe clients *usually* use when selecting an attorney?
2. How important do you feel the following criteria *should be* when an individual selects a lawyer? (very important = 1, important = 2, moderately important = 3, slightly important = 4, not at all important = 5).

The responses to these questions are summarized in Table 10.

Several conclusions can be drawn from these responses. First, much of the information that has been available to consumers in the past—listings in yellow pages, referrals by state or county bar associations, referrals by legal aid, and location of office—are rated by attorneys as the least important. Since these criteria represented much of the information that was available to consumers, this indicates that individuals have probably failed to make informed choices for legal counsel in the past.

Second, the two most commonly used criteria by consumers—recommendation by a friend and personal acquaintance—were rated by attorneys as relatively unimportant. Recommendation by a friend was ranked eleventh in importance and personal acquaintance was ranked tenth. It seems clear from the data presented in Table 10 that substantial differences exist between the types of information consumers have been using to select legal counsel, as perceived by attorneys themselves, and the types of information the legal profession considers most useful. Thus, in instances where consumers have had little information of substance to guide their attorney selection process, this critical decision has approached a "blind" choice situation. It would appear that one of the most important benefits of professional

245. 433 U.S. at 358. *See generally Lawyer Advertising Gets Mixed Reviews,* TRIAL, Jan. 1979, at 5.

TABLE 10
Respondents' Opinions of the Attorney Selection Process

Criteria	Mean Importance Rating	Perceived Importance Rank	Perceived Use of Criteria by Consumers Rank
1. Integrity of lawyer	1.11	1	6
2. Quality of service	1.12	2	4*
3. Promptness of service	1.40	3	7
4. Past experience of lawyer	1.61	4	8
5. Past representation of client by lawyer	1.62	5	3
6. Area of specialty	1.78	6	9
7. Recommendation by other attorney	2.06	7	4*
8. Number of years that lawyer has practiced	2.61	8	10
9. Cost of services	2.64	9	11
10. Personal acquaintance	2.80	10	2
11. Recommendation by friend	2.85	11	1
12. Office hours	3.58	12	15
13. Location of lawyer's office	3.70	13	12
14. Law school awarding lawyer's degree	3.85	14	17
15. Referral by state/county bar	3.97	15	14
16. Referral by legal aid	4.12	16	16
17. Listing in yellow pages	4.61	17	17

* Items tied for fourth place and are each assigned a rank of 4.

advertising could be the provision of substantial information about attorneys, thereby making the choice process less arbitrary.

A third conclusion from the data in Table 10 involves the importance of cost as an information cue to consumers. The relatively low ranking of cost in the perceived use list probably reflects the past unavailability of this information to consumers before selecting a lawyer. Its low importance rating and rank, however, indicate that attorneys believe this selection criteria to be only moderately important to consumers in the choice of legal counsel. Apparently, respondents believe that the cost of legal services can only be evaluated in light of the quality of service received. In this instance, legal service is viewed in a manner similar to the way other professional services (especially medicine) are viewed; the final verdict or outcome is valued much more than the price paid to obtain it. Although consumers may differ in their perceptions of this situation, it is difficult to imagine that many clients would

prefer to sacrifice quality of legal counsel in return for cost savings. Even low income consumers would probably prefer to protect their rights rather than their bank accounts.[246] Thus, although the Supreme Court's decision encouraged price advertising, it appears that attorneys may elect to communicate the types of information they believe to be most important, such as their integrity, the quality of their service, and their past experience.

VI. CONCLUSION

It appears that professional advertising holds the promise of significantly changing the attorney selection process presently employed by consumers. As more information is provided via promotion, the selection of legal counsel should be accomplished on a more enlightened and competitive basis. This seems to be a major advantage of the Supreme Court's decision for the public.

Clearly, the results of the survey represent attorney dispositions just after the Supreme Court's decision. Changes in these opinions can be expected as advertising is adopted as a standard practice in the legal profession. Nevertheless, the results contained in this study provide a foundation from which the future behavior of the legal profession regarding the promotion of their services can be estimated.

246. This analysis of the importance of cost to consumers in selecting legal services has been supported in a consumer survey. Smith & Meyer, Consumer Views of Attorney Advertising (1977) (unpublished working paper).