

## Oklahoma City University School of Law

---

From the Selected Works of Lawrence K. Hellman

---

1978

# The Oklahoma Supreme Court's New Rules on Legal Advertising: Some Practical, Legal, and Policy Questions

Lawrence K. Hellman, *Oklahoma City University School of Law*



Available at: [https://works.bepress.com/lawrence\\_hellman/42/](https://works.bepress.com/lawrence_hellman/42/)

# OKLAHOMA LAW REVIEW

---

VOLUME 31

SUMMER, 1978

NUMBER 3

---

## THE OKLAHOMA SUPREME COURT'S NEW RULES ON LAWYER ADVERTISING: SOME PRACTICAL, LEGAL, AND POLICY QUESTIONS

LAWRENCE K. HELLMAN\*

### *Introduction*

On January 27, 1978, the Oklahoma Supreme Court promulgated significant amendments<sup>1</sup> to Canon 2 of the Code of Professional Responsibility of the Oklahoma Bar Association<sup>2</sup> on the subject of commercial advertising by lawyers. The court was acting in response to the mandate of the United States Supreme Court in *Bates v. State Bar of Arizona*,<sup>3</sup> decided seven months to the day before the Oklahoma court's order. The *Bates* opinion required the highest courts in virtually every state to reconsider their stance on the lawyer advertising question. This article uses the

\*B.S., 1966, Washington and Lee University; J.D., 1970; M.B.A., 1967, Northwestern University; Associate Professor of Law and Associate Dean, Oklahoma City University. Member, Oklahoma Bar.— *Ed.*

<sup>1</sup> In the matter of the Adoption of Amendments to the Code of Professional Responsibility of the Oklahoma Bar Association, 49 OKLA. B.A.J. 130 (1978) [hereinafter cited as Oklahoma Supreme Court Order]. Amended Disciplinary Rules are codified at 5 OKLA. STAT. ch. 1, app. 3 (Cum. Supp. 1978).

<sup>2</sup> The Oklahoma Code of Professional Responsibility is adopted and enforced by the Oklahoma Supreme Court, which acts in the name of the state acting as sovereign, without any intervention of the state legislature. On December 4, 1969, the supreme court adopted the Model Code of Professional Responsibility approved by the American Bar Association on August 12, 1969. See Rules Creating and Controlling the Oklahoma Bar Association (*as amended*), art. IX, intro. and § 7, 1978 OKLA. BAR ASS'N HANDBOOK 7 [hereinafter cited as OBA HANDBOOK]. The ABA Model Code contains both Ethical Considerations (EC's) and Disciplinary Rules (DR's). The Disciplinary Rules are codified at 5 OKLA. STAT. ch. 1, app. 3 (1971 and Supp. 1977). The Ethical Considerations are apparently only incorporated by the reference in the OBA HANDBOOK and are not individually set out elsewhere.

An attorney who violates a Disciplinary Rule in the Code is subject to official sanctions, which are imposed by the Oklahoma Supreme Court. OBA HANDBOOK, *supra* at § 7. See also Code of Professional Responsibility, DR 1-102(A) (1), 5 OKLA. STAT. ch. 1, app. 3 (1971). The Oklahoma approach to regulation of the bar is typical of most states.

<sup>3</sup> 433 U.S. 350, 356 (1977). See Oklahoma Supreme Court Order, *supra* note 1, at 130.

Oklahoma experience as a vehicle for discussing problems common to every jurisdiction. The new Oklahoma rules will be examined from three perspectives. First, from the practical perspective, it will be demonstrated that the new rules are more restrictive than they need to be in order to protect the public from any potential abuses on the part of advertising attorneys. Second, as a legal matter, portions of the amended rules will be shown to be more restrictive than they are allowed to be under the first amendment to the United States Constitution, as construed in *Bates*. Finally, on the policy level, the rules will be shown to be more restrictive than they should be if the legal profession is to fulfill its responsibility "in making legal service fully available."<sup>4</sup>

### *I. Bates in its Historical Perspective*

*Bates* came to the Supreme Court from the Arizona Supreme Court, which, acting upon the recommendation of the Board of Governors of the Arizona State Bar,<sup>5</sup> had censured two Arizona attorneys for having placed an advertisement in a newspaper of general circulation in Phoenix, where the advertisers' office was located.<sup>6</sup> This discipline was based upon Disciplinary Rule 2-101(B) (hereafter DR) of the Arizona Code of Professional Responsibility,<sup>7</sup> which forbade any and all types of commercial advertising by attorneys.<sup>8</sup> Mr. Justice Blackmun, writing for a five-

<sup>4</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1.

<sup>5</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 356 (1977).

<sup>6</sup> *Id.* at 354.

<sup>7</sup> *Id.* at 355-58. The Board of Governors had recommended that the advertising attorneys be suspended from practice for one week. *Id.* at 356. The Arizona Supreme Court reduced the sanction to mere censure because the advertising "was done in good faith to test the constitutionality of DR 2-101(B) [of the Arizona Code]." *Id.* at 358, quoting *In re Bates*, 113 Ariz. 394, 400, 555 P.2d 640, 648 (1976). The Arizona Supreme Court, like the Oklahoma Supreme Court, has the ultimate authority to impose sanctions for violations of the Code of Professional Responsibility by attorneys admitted to practice in its jurisdiction. See note 2, *supra*. This authority is derived from the respective state constitutions. See, e.g., ARIZ. CONST. art. III; OKLA. CONST. art. 7, § 1. See also *In re Integration of State Bar*, 185 Okla. 505, 95 P.2d 113 (1939).

<sup>8</sup> 433 U.S. 350, 385 (1977). The pertinent language of the 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 advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf." DR 2-101(B), of Rule 29(a) of the Supreme Court of Arizona, 17A ARIZ. REV. STAT. ANN. (Cum. Supp. 1975).

The Oklahoma Code, *supra* note 2, contained an identical provision until the Oklahoma Supreme Court amended it by its Order of Jan. 27, 1978, *supra* note 1. This similarity in approach to the question of lawyer advertising is attributable to the fact that the supreme courts of both Oklahoma and Arizona had adopted, essentially verbatim, the Code proposed by the American Bar Association as a model code for adoption by the responsible tribunal in each state. See OBA HANDBOOK, *supra* note 2, at Preamble. The Model Code is amended by the ABA from time to time, but adoption of amendments is at the discretion of the responsible state tribunal. Compare,

member majority of the United States Supreme Court,<sup>9</sup> carefully analyzed the contents of the challenged ad<sup>10</sup> and found the ad to be neither untruthful nor misleading.<sup>11</sup> Having made these findings of fact,<sup>12</sup> the Court determined that the first amendment to the United States Constitution<sup>13</sup> would be violated if a state<sup>14</sup> sought to prohibit such a benign communication.<sup>15</sup> The Supreme Court's holding was simple and direct: A state may not "prevent the publication in a newspaper of...truthful advertisement[s] concerning the availability and terms of routine legal services."<sup>16</sup>

The *Bates* holding had been resisted strenuously by the organized bar.<sup>17</sup> The five-to-four division of the Supreme Court reflected the controversial nature of the issue. The prestigious American Bar Association,<sup>18</sup> seeking to avoid a judicial determination of the question, began considering a relaxation of its Model Code of Professional Responsibility's<sup>19</sup> tradi-

---

*e.g.*, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) with Code of Professional Responsibility, DR 7-102(B)(1), 5 OKLA. STAT. ch. 1, app. 3 (1971).

<sup>9</sup> Joining Justice Blackmun were Justices Brennan, Marshall, Stevens, and White. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented.

<sup>10</sup> The advertisement in question, although small and circumspect, contained (1) a headline in bold 1/4-inch type ("DO YOU NEED A LAWYER? Legal Services At Very Reasonable Fees"), (2) a logo (a graphic of the "Scales of Justice"), (3) a list of specific routine legal services (uncontested divorces, uncontested adoptions, uncontested bankruptcies, and name changes), (4) a set fee for each specific routine legal service listed in item (3), (5) an offer to furnish on request information regarding types of legal services not listed in the ad, and (6) the name, address, and phone number of the law firm placing the ad ("Legal Clinic of Bates & O'Steen"). The total size of the ad was about 2 1/4 inches by 6 1/4 inches. 433 U.S. 350, 385 (app.) (1977).

<sup>11</sup> *Id.* at 381-82.

<sup>12</sup> The Court's determinations as to the truthfulness and non-misleading nature of the ad were based upon an independent review of the record below. *Id.* See note 214 and text accompanying notes 214-215, *infra*.

<sup>13</sup> U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law...abridging the freedom of speech...or the right of the people... to petition the Government for a redress of grievances." These restrictions on governmental authority have been extended to the state governments by the absorption of the first amendment into the fourteenth amendment: "[No State shall] deprive any person of life, liberty, or property, without due process of law." See, *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>14</sup> The "state action" in *Bates* was the adoption and enforcement by the Arizona Supreme Court of DR 2-101(B) of that state's Code, a provision which the Oklahoma Supreme Court also had adopted and stood ready to enforce. See note 8, *supra*.

<sup>15</sup> See note 10, *supra*.

<sup>16</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977).

<sup>17</sup> The American Bar Association filed an *amicus curiae* brief in support of the Arizona Supreme Court's rule prohibiting all advertising. 63 A.B.A.J. 345 (1977).

<sup>18</sup> The ABA has a membership of approximately half (235,000) of the nation's lawyers. Letter of William Spann, President, ABA, to Members of ABA, Apr., 1978. More significantly, it promulgates the Model Code which all but a handful of state supreme courts have adopted as the basis for their regulation of the profession. See note 8, *supra*.

<sup>19</sup> Although the ABA's Model Code is not self-enforcing, it is influential in the states. See notes 8 and 18, *supra*.

tional absolute ban on advertising in 1975. In December of that year, far-reaching changes were recommended by the ABA's Standing Committee on Ethics and Professional Responsibility,<sup>20</sup> but opposition within the ABA prevented most of these proposals from being adopted by that organization's policy-setting House of Delegates.<sup>21</sup> In February of 1976, the House of Delegates agreed to recommend that the state supreme courts go no farther than to allow attorneys to place limited advertisements in the classified section of city telephone directories.<sup>22</sup> Yet, opposition of state bar associations to the concept of lawyer advertising prevented even this limited form of communication from being authorized in some states—including Oklahoma.<sup>23</sup>

This opposition reflected the historical reluctance of lawyers to have their occupational pursuits conceptualized in commercial terms.<sup>24</sup> Advertising, like other aspects of economic competition, has been viewed by the bar as simply inappropriate for those engaged in the noble pursuit of the practice of law, which has always been considered by lawyers to involve matters "above" the level of ordinary business transactions between sellers

<sup>20</sup> See 62 A.B.A.J. 53 (1976). See also, *Easing of Advertising Ban on Lawyers And Law Firms Is Proposed by ABA Unit*, Wall St. J., Dec. 8, 1975, at 14, col. 5 (Eastern ed.) The December 1975 proposals would have allowed attorneys to advertise in any manner they saw fit, so long as the ad contained no "false, fraudulent, misleading, deceptive or unfair statement or claim." 62 A.B.A.J. 53 (1976).

<sup>21</sup> Compare 62 A.B.A.J. 53 (1976) with 62 A.B.A.J. 309 (1976). See also, *Lawyers Ease Ban On Ads*, Washington Post, Feb. 18, 1976, at A1, col. 8 (city ed.); Wall St. J., Feb. 18, 1976, at 6, col. 1 (Eastern ed.).

<sup>22</sup> The February, 1976, Amendments to Canon 2 adopted by the ABA House of Delegates restricted "advertising" to law lists, legal directories, and telephone directory yellow pages. See Revised DR 2-102(A)(6), 62 A.B.A.J. 309-10 (1976). These amendments also expanded the kinds of information which lawyers could publish in these limited types of media. For the first time, limited fee information was allowed. *Id.* This liberalization was somewhat illusory, however, because American Telephone and Telegraph Company and its subsidiaries that publish the bulk of all city telephone directories refuse to publish price or fee information. See, *Lawyers Ease Ban on Ads*, Washington Post, Feb. 18, 1976, at A1, col. 8 (city ed.).

<sup>23</sup> Ten months after the ABA amendments were adopted, the Oklahoma Supreme Court adopted the recommendation of the Oklahoma Bar Association to make some modest changes in the Oklahoma Code's rules governing the contents of legal directories. See *In re Application for Amendments to the Code of Professional Responsibility of the Oklahoma Bar Association—Relating to Legal Directories*, 48 OKLA. B.A.J. 18 (1977). The Oklahoma amendments, in contrast to those adopted by the ABA (note 22 *supra*), continued to prohibit any mention of fees in a lawyer's or law firm's listing, although the listing could state "the availability upon request of an estimate of the fee to be charged for specific services." DR 2-102(A)(7)(a), *as amended*, Oklahoma Supreme Court Order, *supra* note 2.

<sup>24</sup> For example, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the organized bar (including the ABA as *amicus curiae*) contended (unsuccessfully) that lawyers are not engaged in trade or commerce and they should therefore be exempt from federal antitrust laws. See text accompanying notes 33-37, *infra*.

and buyers of services.<sup>25</sup> This attitude was articulated by the Arizona State Bar, which contended in *Bates* that advertising—particularly price advertising—properly should be prohibited because it “will bring about commercialization, which will undermine the attorney’s sense of dignity and self-worth.”<sup>26</sup> This feared threat to the “professionalism” of the bar was particularly troubling to Mr. Justice Powell, who, in his dissent to the majority’s holding in *Bates*, lamented that the *Bates* decision “will effect profound changes in the practice of law, viewed for centuries as a learned profession.”<sup>27</sup>

This argument that the advent of advertising would inevitably lead to a decline in the “professionalism” of the bar was found by the Court’s majority to be “severely strained.”<sup>28</sup> Observing that the argument seemed to rely on the presumption that advertising would cause the legal profession to lose not only self-respect, but public respect as well,<sup>29</sup> Justice Blackmun suggested that the converse to this argument was more probably true: Since there was evidence suggesting that the historical absence of advertising by lawyers had contributed to public cynicism toward the bar,<sup>30</sup> the status of the profession in the public’s eye might actually be enhanced by lawyer advertising.<sup>31</sup> In fact, Justice Blackmun wrote, “the belief that lawyers are somehow ‘above’ trade has become an anachronism....”<sup>32</sup>

Although he did not cite authority for this rather blunt statement, Mr. Justice Blackmun might well have been recalling the Supreme Court’s unanimous decision just two years earlier in *Goldfarb v. Virginia State Bar*.<sup>33</sup> Chief Justice Burger’s opinion in that case had observed that the

<sup>25</sup> “[I]t should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.” ABA CANONS OF PROFESSIONAL ETHICS No. 12 (1908). Other professional guidelines describe the relationship between lawyer and client in distinctly noncommercial terms. “[Lawyers should] impress upon the client...exact compliance with the strictest principles of moral law.” *Id.*, No. 32. See also ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8 (“In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.”); EC 2-16 (“[P]ersons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.”); EC 2-25 (“Every lawyer...should find time to participate in serving the disadvantaged.”).

<sup>26</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-69 (1977).

<sup>27</sup> *Id.* at 389. (Justice Powell previously served as President of the American Bar Association.)

<sup>28</sup> *Id.* at 368.

<sup>29</sup> *Id.* at 368-69.

<sup>30</sup> *Id.* at 370-71 n.21.

<sup>31</sup> *Id.* at 371-72.

<sup>32</sup> *Id.*

<sup>33</sup> 421 U.S. 773 (1975).

practice of law, for whatever else it might be, is essentially "the exchange of...a service for money,"<sup>34</sup> *i.e.*, "'commerce' in the most common usage of the word."<sup>35</sup> The *Goldfarb* Court had gone on to find that the Virginia Bar Association, which, like most organized bars, preferred to view itself as an association of "guardians of the law,"<sup>36</sup> had violated a federal antitrust statute, a law designed to govern *commercial* practices.<sup>37</sup> Thus, the *Bates* decision was not breaking new ground when the Court indicated that it is no longer useful (or possible) for attorneys to "conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."<sup>38</sup>

In recognizing that the practice of law is a business conducted for a profit, the Supreme Court—in both *Goldfarb* and *Bates*—made it clear that this observation should not be viewed as a disparagement of either the dignity or importance of the legal profession. In both cases, the Court found that the special place of lawyers in our legal system warrants some degree of special treatment for the profession. *Goldfarb* involved a test of the applicability to the legal profession of the Sherman Anti-Trust Act,<sup>39</sup> a law which was designed to govern economic competition in commerce. Recognizing that "the activities of lawyers play an important part in commercial intercourse,"<sup>40</sup> the Court found the practice there challenged<sup>41</sup> to

<sup>34</sup> *Id.* at 787.

<sup>35</sup> *Id.* Despite the ABA Model Code's gentle professional admonitions for lawyers not to conduct themselves as ordinary business people (see note 25 *supra*), lawyers in America have not been inclined to accept the selfless model suggested by the Code's Ethical Considerations. See Handler, Hollingsworth, Erlanger, & Landinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A.J. 1388 (1975). And despite the Oklahoma legislature's directive that lawyers have a duty "[n]ever to reject for any consideration personal to himself the cause of the defenseless or the oppressed," 5 OKLA. STAT. § 3 (1971), the more authoritative and binding Code of Professional Responsibility, 5 OKLA. STAT. ch. 1, app. 3 (1971 and Supp. 1977) and OBA HANDBOOK, *supra* note 2, contains no such enforceable duty. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-26 and 2-30. But see *id.*, EC 2-29. The Model Code's ultimate concession to the reality that lawyers practice law to earn a living is found in those provisions which authorize, albeit reluctantly, a lawyer to sue a client or assert a lien in order to collect a fee. *Id.*, EC 2-23, DR 5-103(A)(1). Indeed, lawyers are even permitted to reveal confidences and secrets of clients where necessary to establish and collect a fee. *Id.*, DR 4-101(C)(4).

<sup>36</sup> See Preamble, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY.

<sup>37</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-88 (1975).

<sup>38</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 368-69 (1977).

<sup>39</sup> "Every contract, combination,...or conspiracy in restraint of trade or commerce...is hereby declared to be illegal...." 15 U.S.C. § 1 (1970).

<sup>40</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975). The Sherman Act's prohibitions extend only to those restraints of trade which are in or affecting *interstate* commerce. Not all commercial activities of attorneys are in or affecting interstate commerce. *Id.* at 785-86.

<sup>41</sup> The local and state bar associations that were made defendants in *Goldfarb* had adopted and threatened to enforce a minimum fee schedule for standard legal services, such as real estate title examinations. The rules of the bar associations made it "unethical" and a subject for discipline for lawyers to charge less than the published minimum fee. Until the Supreme Court's decision in *Goldfarb*, minimum fee schedules were customary throughout the United States.

constitute a violation of this statute.<sup>42</sup> The Court went on to say, however, that it might be inappropriate to view “the practice of professions as interchangeable with other business activities.”<sup>43</sup> Recognizing that “lawyers are essential to the...function of administering justice,”<sup>44</sup> the Court thought that a state’s supreme court or legislature “may decide that ‘forms of competition usual in the business world may be demoralizing to the ethical standards of the professions’.”<sup>45</sup> When the state, through its highest court or its legislature, is involved in prescribing or proscribing lawyer’s conduct, even if the result of this state action resulted in a diminution of competition among lawyers, the *Goldfarb* Court thought that the imprimatur of the state should immunize the conduct from antitrust attack.<sup>46</sup> Hence, after *Goldfarb*, even though the Supreme Court had held that the business of lawyers is sufficiently commercial to warrant applying the antitrust laws to private anticompetitive arrangements among lawyers, the states remained free to regulate the practice of law through legislative acts or the adoption of rules by the state supreme courts, even if those rules had the effect of limiting competition among lawyers.<sup>47</sup>

When *Bates* came to the Supreme Court, the advertising attorneys attacked the blanket restriction of DR 2-101(B) on advertising on both antitrust and first amendment grounds. The antitrust theory was that the rule suppressing advertising had the effect of suppressing competition among attorneys because, for example, the rule prevented attorneys from making the public aware of their availability to perform routine legal services at fees below those prevailing in their area. The first amendment argument was that public announcements by attorneys, including commercial advertisements, could not be suppressed by a state government. The attorneys claimed that the first amendment guarantees them a right to say what ser-

<sup>42</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785-88 (1975).

<sup>43</sup> *Id.* at 788 n.17.

<sup>44</sup> *Id.* at 792.

<sup>45</sup> *Id.*, citing *United States v. Oregon State Medical Soc’y*, 343 U.S. 326, 336 (1952).

<sup>46</sup> *Id.* at 790-91, 793.

<sup>47</sup> *Id.* The “state action” defense to antitrust claims is available to other antitrust defendants besides lawyers; however, this defense has undergone some shrinkage since *Goldfarb* was decided in 1975. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). See also *Surety Title Ins. Co. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated and remanded for further proceedings*, 571 F.2d 205 (4th Cir. 1978). *pet. for cert.* The fact that governmental officers cooperate in the anticompetitive activities does not necessarily insulate the conduct from antitrust attacks. See *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123 (1978). Where the anticompetitive conduct is essentially private, the “professional” status of the perpetrators of that conduct will not necessarily entitle them to special treatment under antitrust analysis, notwithstanding *Goldfarb*’s intimation to the contrary in that opinion’s footnote 17 (see text accompanying note 42, *supra*). See *National Ass’n of Prof. Eng’rs v. United States*, 98 S.Ct. 1355 (1978). See note 164, *infra*.



vices they are willing to perform at what price, and the same amendment was thought to guarantee to the public a right to hear what the advertiser wants to say. The fact that DR 2-101(B) officially had been promulgated and enforced by a state supreme court prompted the Supreme Court in *Bates* to respond to the antitrust claim by invoking the "state action" defense that had been previewed, but not applied, in *Goldfarb*.<sup>48</sup> Hence, when the Court did strike down the advertising ban,<sup>49</sup> it was relying entirely on the first amendment argument. Even on the first amendment issue, however, the Court thought that the important relationship between lawyers and the somewhat mysterious legal system might warrant some state-imposed restrictions on commercial speech by lawyers.<sup>50</sup>

Thus, although *Bates* reaffirmed the view articulated in *Goldfarb* that lawyers are essentially "economic actors,"<sup>51</sup> the decision also reaffirmed the attitude expressed in *Goldfarb* concerning the special relationship between the legal profession and the administration of justice. The net effect of *Bates*, when read in light of *Goldfarb*, was to establish that the states may choose to restrain competition among lawyers in order to advance each state's view of the public interest, but they may not violate the United States Constitution in the process.

The posture of the *Bates* case in the Supreme Court did not require a statement concerning the maximum permissible state regulation of lawyer advertising. Nor was the Court called upon to decide how much or what kinds of advertising by lawyers would be desirable, appropriate, or necessary in the public interest. The majority found it necessary to go no farther on the first amendment question than to decide whether a rule which suppressed *all* advertising by attorneys could be tolerated under the Constitution, and none of the justifications<sup>52</sup> proffered by the Arizona State Bar (or *amici curiae*) was found to be sufficient to justify such a sweeping restraint on public communication. It was left to the state

<sup>48</sup> See text accompanying notes 45-47, *supra*.

<sup>49</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 362-82.

<sup>50</sup> See *id.* at 384 n.37. See also text accompanying notes 199-204, *infra*.

<sup>51</sup> This phrase was coined by Mr. Justice Stewart in an address discussing the implications of *Goldfarb*. Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 BUS. LAW. 463 (1975) [hereinafter cited as Stewart].

<sup>52</sup> Besides contending that advertising would have adverse effects on the professionalism of lawyers (see text accompanying notes 24-27, *supra*), the Arizona Bar argued that advertising by lawyers would be inherently misleading, would have adverse effects on the administration of justice, would have undesirable economic effects on the public and the profession, would have adverse effects on the quality of lawyers' services, and that it would be very difficult to police. *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-79 (1977).

supreme courts, in consultation with the organized bar,<sup>53</sup> to determine, within the broad and somewhat vague boundaries established by *Bates*,<sup>54</sup> how much advertising by lawyers would be permitted within their jurisdictions.

## II. *The Oklahoma Supreme Court's Response to Bates*

Because the Oklahoma Code of Professional Responsibility contained the very same provision held in *Bates* to violate the first amendment,<sup>55</sup> Oklahoma, like many states which had adopted the ABA's original Model Code,<sup>56</sup> was left without an enforceable rule against lawyer advertising. Soon after the June 27, 1977, decision in *Bates*, the Board of Governors of the Oklahoma Bar Association (OBA) appointed a special committee to prepare proposed amendments to Canon 2 pursuant to the mandate of *Bates*.<sup>57</sup> There is nothing on the public record to indicate whether this first step was initiated by the OBA Board of Governors or by the Oklahoma Supreme Court itself.<sup>58</sup> Nor does the public record reveal the names of the members of the committee, the times and places where meetings were held, proposals considered, or proposals adopted by the committee.<sup>59</sup> Four mon-

<sup>53</sup> Justice Blackmun wrote that the Court expected that "the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly." *Id.* at 380. He was referring to the common practice of the state supreme courts to ask for the advice and recommendations of the organized bar before adopting or amending the Code of Professional Responsibility. Part II, *infra*, describes the important role played by the Oklahoma Bar Association in contributing to the Oklahoma Supreme Court's response to the mandate of *Bates*. The Bar's input is technically advisory only; the ultimate responsibility for the rules contained in the Code rests solely with the highest state court. See notes 2, 7, *supra*. However, state supreme courts often accept verbatim the proposals of the organized bar. See, e.g., Order of the Oklahoma Supreme Court, *In re* Application for Amendments to the Code of Professional Responsibility of the Oklahoma Bar Association—Relating to Legal Directories, 48 OKLA. B.A.J. 18 (1977).

<sup>54</sup> The range of permissible regulation was not explicitly defined in *Bates*. See generally Part IV(A), *infra*.

<sup>55</sup> Code of Professional Responsibility, DR 2-101(B), 5 OKLA. STAT. ch. 1, app. 3 (Supp. 1977). The text of the rule is set out in note 8, *supra*.

<sup>56</sup> See note 8, *supra*.

<sup>57</sup> The committee was appointed in August of 1977. This was not the OBA's first response to *Bates*, however. The July 2, 1977, edition of the *Oklahoma Bar Associate Journal* contained an official notice over the signature of the OBA's President advising Oklahoma lawyers that the *Bates* decision "is not final and does not at this time change the Code of Professional Responsibility in Oklahoma which still prohibits advertising by lawyers." 48 OKLA. B.A.J. 1619 (1977).

<sup>58</sup> An October 1, 1977, report of the OBA President stated only that "[a] committee and the Board of Governors presently are working on this problem...." 48 OKLA. B.A.J. 2125 (1977). The same report reminded Oklahoma lawyers the Oklahoma Code had not yet been changed, and "UNTIL IT IS CHANGED, NO ADVERTISING IS PERMITTED." *Id.* (emphasis in original).

<sup>59</sup> After the committee had completed its work, it was revealed that Associate Dean David Swank of the University of Oklahoma College of Law had chaired the committee. See, *Bar Filled in on Ad Rules*, Daily Oklahoman, Dec. 4, 1977, at 37, col. 1; 49 OKLA. B.A.J. 185 (1978).

ths after the *Bates* decision was handed down, the Oklahoma Bar Association Board of Governors, which was on record as opposing the concept of any advertising by lawyers, *Bates* notwithstanding,<sup>60</sup> forwarded to the Oklahoma Supreme Court proposed amendments to Canon 2. There is nothing on the public record to indicate whether these proposed amendments were those recommended by the Oklahoma Bar Association Special Committee on Lawyer Advertising or a modified version thereof.<sup>61</sup>

The Board of Governors' official proposal to the Oklahoma Supreme Court was never made available to the public, or even to the members of the Oklahoma Bar Association,<sup>62</sup> but a summary was provided to the Bar:

Briefly, the recommended changes would permit advertising by lawyers or law firms in newspapers of general circulation in the area where the lawyer has an office or where a substantial part of his or her clientele resides. The ad could not be more than ten square inches. It could include the names of the lawyers; address; telephone number; availability of foreign languages; whether credit cards or other credit arrangements are accepted; office or other hours of availability; legal fee information as to initial consultation; availability upon request of a written schedule of fees or estimates of fees to be charged for a specific service; hourly rate with definite information as to what is included in the hourly rate; and fixed fees for specific legal services with a description of such services so that no misunderstanding can arise therefrom and is [*sic*] not deceptive.

The recommendation would prohibit the use of signs, symbols, or pictures.

The recommendation further provides that the ad cannot be deceptive or fraudulent in any manner, and the type size is regulated.

The recommendation does not include advertising by radio, TV, billboards, hand bills, or the yellow pages of the telephone directory.<sup>63</sup>

<sup>60</sup> "The Board of Governors... *reluctantly* has adopted a recommendation for modification of the Code of Professional Responsibility in relation to advertising." Wallace, *Board of Governors Forwards New Advertising Rules Recommendation to Supreme Court*, 48 OKLA. B.A.J. 2381 (1977) (emphasis added).

<sup>61</sup> Apparently, the Board of Governors amended the committee's recommendation by deleting the committee's proposal to allow display advertisements in the classified section of telephone directories. See *Summary of New Advertising Rules*, 49 OKLA. B.A.J. 185, 186 (1978).

<sup>62</sup> The Executive Director of the Oklahoma Bar Association told this writer the Board of Governors had not authorized release of its proposal. Telephone conversation with J. Dwain Schmidt, Oct. 1977. The Oklahoma Bar was given notice of a special meeting of the Board of Governors called for Oct. 20, 1977, to discuss modification of the Code with respect to lawyer advertising. 48 OKLA. B.A.J. 2265 (1977). The proposal adopted at that meeting was forwarded to the Oklahoma Supreme Court the next day, before its contents were circulated to the Bar's membership. Even after the Board's proposal had been presented to the court, the full text of the recommended amendments was not released.

<sup>63</sup> 48 OKLA. B.A.J. 2381 (1977). This summary was not published until after the Board's proposal had been submitted to the court.

On January 13, 1978, these proposals were discussed at a meeting between the members of the Oklahoma Supreme Court and an uncertain number of officers and governors of the Oklahoma Bar Association. The meeting had not been publicly announced; it was secret, and no transcript was made. Two weeks later, on January 27, 1978, the Oklahoma Supreme Court issued an order promulgating substantial revisions in Canon 2 of the Oklahoma Code of Professional Responsibility.<sup>64</sup> Because the OBA's complete proposal was never made public, one cannot say positively how closely the court's new rules tracked the Oklahoma Bar Association's recommendations. However, the chairman of the Oklahoma Bar Association's Special Committee on Lawyer Advertising, in a summary of the new rules prepared for publication in the *Oklahoma Bar Association Journal*,<sup>65</sup> said, "The court's order varies very little from the recommendations originally proposed to the OBA Board of Governors by the Special Committee on Lawyer Advertising...."<sup>66</sup> Apparently, the court's most significant departure from the OBA's official recommendation was its approval of display advertising in the classified section of telephone directories.<sup>67</sup> Still, the court's new rules restrict lawyer advertising to print media, as did the Bar Association's proposal.<sup>68</sup>

Like the Oklahoma Bar Association's proposal, the new rules prohibit "false, fraudulent, self-laudatory, or unfair statements."<sup>69</sup> The size of print ads is limited to ten square inches.<sup>70</sup> The placement of the print ads is restricted to publications "intended primarily for dissemination to the general public [and] which are distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides...."<sup>71</sup> The content of the ads may not include any signs, symbols, or pictures.<sup>72</sup> The types of factual information which may or may not be included in an attorney's or firm's ad are controlled by the court in elaborate detail in the new rules.<sup>73</sup> The list of per-

<sup>64</sup> Oklahoma Supreme Court Order, *supra* note 1.

<sup>65</sup> 49 OKLA. B.A.J. 185 (1978).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* Apparently, the Special Committee had recommended to the Board of Governors that both newspaper and telephone directory yellow page advertising should be allowed, the Board of Governors deleted the directory yellow pages proposal, and the supreme court reinserted it. Compare with Wallace, *Board of Governors Forwards New Advertising Rules Recommendation to Supreme Court*, 48 OKLA. B.A.J. 2381 (1977), and Oklahoma Supreme Court Order, note 1, *supra*.

<sup>68</sup> DR 2-101(B) *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>69</sup> *Id.*, DR 2-101(A).

<sup>70</sup> *Id.*, DR 2-101(G).

<sup>71</sup> *Id.*, DR 2-101(B).

<sup>72</sup> *Id.*, DR 2-101(I).

<sup>73</sup> *Id.*, DR 2-101(B)(1)-(8).

missible and impermissible subjects to be communicated in a lawyer's ad appears to be the same as was recommended by the OBA's Board of Governors.<sup>74</sup> Specifically forbidden are (a) statements as to fields of law in which a lawyer concentrates or limits his or her practice, (b) statements to the effect that the lawyer engages in "the general practice of law," (c) statements as to specific fields of law in which the lawyer or law firm does *not* practice, or (d) statements that the advertising lawyer or firm "specializes" in a particular field.<sup>75</sup> That information which *is* permitted to be published must be accurate, reliable, and truthful.<sup>76</sup> In particular, fee information published by a lawyer or firm is made binding on the advertising lawyer for explicit periods of time, depending on the frequency of publication of the medium in which the fee was advertised.<sup>77</sup> Finally, all ads must be displayed in a "professional and dignified manner."<sup>78</sup>

<sup>74</sup> Compare *id.* with the summary of the Board of Governors' proposal in text accompanying note 63, *supra*. The information now permitted to be published is as follows: (1) name, including name of law firm and names of lawyers therein; (2) addresses; (3) telephone numbers, office and residence; (4) foreign language availability; (5) a statement as to whether credit cards or other credit arrangements are accepted; (6) office and other hours of availability; (7) legal fee information limited to the following; (a) fees charged for an initial consultation; (b) the availability upon request of a written schedule of fees or an estimate of the fee to be charged for the specific service; (c) hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee likely to be charged. This information must be printed in print size at least equivalent to the largest print used in setting forth the hourly fee information; (d) fixed fees for specific legal services, the description of which service is not subject to misunderstanding or is not deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged. This information must be printed in a type size at least equivalent to the largest print used in setting forth the fixed fee information. *Id.*, DR 2-101(B)(1)-(7).

<sup>75</sup> *Id.*, DR 2-101(B)(8).

<sup>76</sup> *Id.*, DR 2-101(B).

<sup>77</sup> *Id.*, DR 2-101(E), (F): "(E) If a lawyer renders legal service for which a fee has been advertised, the lawyer must render that service for no more than the advertised fee. The failure of the lawyer to perform an advertised service at the advertised fee shall be prima facie evidence of misleading advertising and deceptive practices. The lawyer is bound by the advertised fees for the time limits provided for in DR 2-101(F).

"(F) If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, such lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year."

<sup>78</sup> *Id.*, DR 2-101(B). This provision reads as follows: "(B) In order to promote the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish,

The Oklahoma Supreme Court's new rules on lawyer advertising are among the most restrictive adopted or being considered by any state supreme court since the *Bates* decision.<sup>79</sup> The Oklahoma approach is patterned after the amendments to the American Bar Association's Model Code adopted by the ABA House of Delegates in August of 1977.<sup>80</sup> However, the ABA's revised Canon 2 permits the use of radio and television advertising.<sup>81</sup> Moreover, when the ABA listed the categories of information lawyers should be permitted to communicate to the public, twenty-five topics were approved, only seven of which were acceptable to the Oklahoma Bar Association and the Oklahoma Supreme Court.<sup>82</sup> Other states following the approach recommended by the ABA have approved (or are considering approving) significantly more categories of information.<sup>83</sup> Some jurisdictions have gone far beyond even the ABA's recom-

---

subject to DR 2-103, the following information only in print media described in DR 2-101(C) and intended primarily for dissemination to the general public, which are distributed in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication is accurate, reliable, truthful and displayed in a professional and dignified manner...."

<sup>79</sup> "The Legal Profession and the Future File: After Lawyer Advertising, What?" Address by Joe Sims, Deputy Assistant Attorney General, Antitrust Division, United States Dep't of Justice, before Oklahoma City University School of Law's Program on "Changing Times for the Legal Profession" (Apr. 21, 1978) (distributed in conference materials prepared by Oklahoma City University School of Law), at 4-5. *But see* Order Approving Amendments to Code of Professional Responsibility of Mississippi (Sept. 19, 1977, Miss S. Ct.)

<sup>80</sup> Compare Oklahoma Supreme Court Order, *supra* note 1, with Aug. 1977 amendments to ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, 63 A.B.A.J. 1234 (1977)). The Special Committee on Advertising, the Board of Governors, and the Oklahoma Supreme Court seem to have started with a draft of the amendments adopted by the ABA House of Delegates in August of 1977, deleting those portions of the ABA amendments which the Oklahoma decision-makers could not accept. (All three Oklahoma representatives to the ABA House of Delegates had voted against the adoption of the ABA rules. 48 OKLA. B.A.J. 1937 (1977). One aspect of the ABA amendments not accepted in Oklahoma was the modernization of the term "layman" wherever it appeared in Canon 2 to be read as "layperson." Compare, e.g., ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY amended EC 2-2 with Code of Professional Responsibility, revised EC 2-2, Oklahoma Supreme Court Order, *supra* note 1, at 130.

<sup>81</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-101(B) *as amended*, Aug. 1977 and Aug. 1978, reported at 63 A.B.A.J. 1234-35 (1977) and Washington Post, Aug. 10, 1978, at A11, col. 1 (city ed.).

<sup>82</sup> Compare *id.*, DR 2-101(B)(1)-(25) with Oklahoma Code of Professional Responsibility, DR 2-101(B)(1)-(7), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>83</sup> The Iowa Supreme Court approved 19 topics. Iowa Code of Professional Responsibility, DR 2-101(B), *as amended* by order of Iowa Supreme Court. Feb. 17, 1978. IOWA CODE ANN. § 610, app. Canon 2. The Texas Supreme Court is considering a proposal of the Texas Bar Association to approve the publication of 16 topics of information. Memorandum of Travis D. Shelton, President, State Bar of Texas, to The Lawyers of Texas (Feb. 1978). The Georgia Supreme Court adopted the Georgia Bar Association's proposed list of 14 topics. Georgia Code of Professional Responsibility, DR 2-101(A), *as amended*, by order of Georgia Supreme Court; May 12, 1978, For the topics found unacceptable by the Oklahoma Bar and court, but accepted by the ABA and several other states, see text accompanying note 260, *infra*.

mendations. The Maryland Court of Appeals and the Wisconsin Supreme Court have each declined to restrict the types of communications media which attorneys may use to reach the public.<sup>84</sup> Nor has either of those courts attempted to regulate the content of attorneys' advertisements, except to prohibit false, fraudulent, misleading, or deceptive statements.<sup>85</sup>

The Oklahoma Supreme Court's amendments to Canon 2 differ from those being considered and implemented by other jurisdictions in another respect—the process by which the changes were adopted. Notwithstanding the significance of the issue and the high level of interest of the bar and general public<sup>86</sup> in its resolution, the deliberations of both the bench and bar in Oklahoma were highly secretive.<sup>87</sup> Other state supreme courts have made unprecedented efforts to obtain the input of all segments of the bar and the general public before making final decisions. For example, in Iowa, Wisconsin, and Maryland, the following steps were followed: First, the state bar's proposals were circulated to the entire bar and the public. Second, the controlling court's contemplated changes in the bar's proposals were circulated to the entire bar and the public. Third, all members of the bar were invited to present oral or written comments to the controlling court. Finally, the controlling courts scheduled public hearings to consider the proposals.<sup>88</sup> The openness of this process can be assumed to have contributed to the substantial modifications of the proposals of the Maryland and Wisconsin Bar Associations which were made by their respective controlling courts. The Maryland Bar Association had proposed changes in Canon 2 which were even more restrictive than those of the Oklahoma Bar Association. For example, the Maryland Bar would have

<sup>84</sup> *Wisconsin Supreme Court Order: Amendment to the Code of Professional Responsibility, Lawyer Advertising*, WIS. B. BULL. 22 (Jan. 1978); *Order of Court of Appeals of Maryland* (Mar. 8, 1978). See also *Maryland Court Sets Rules on Ads for Legal Service*, Washington Post, Jan. 13, 1978, at B1, col. 5 (city ed.).

<sup>85</sup> See sources cited in note 84, *supra*.

<sup>86</sup> The largest circulation newspaper in Oklahoma City devoted a full page to discussion regarding lawyer advertising in its Sunday edition. *Lawyer Advertising Controversial*, Sunday Oklahoman, Nov. 20, 1977, at 27, col. 1. The President of the United States has made a widely published statement criticizing the legal profession for, among other things, dragging its feet with respect to advertising. Wall St. J., May 5, 1978, at 19, col. 6 (Southwest ed.).

<sup>87</sup> See notes 58-66 and accompanying text, *supra*.

<sup>88</sup> See News Bulletin of the Iowa State Bar Ass'n (Dec. 1977), at 1; Letters of Ed Jones, Secretary of Iowa State Bar Association, to Members of the Iowa State Bar Association, Dec. 7, 1977 and Dec. 22, 1977; *Views of Lawyer Advertising Argued Before Maryland High Court*, Washington Post, Dec. 2, 1977, at C1 col. 1 (city ed.); WIS. B. BULL. 42 (Oct. 1977); *id.*, Nov., 1977, at 7; *id.*, Jan. 1978, at 22. (The Wisconsin Supreme Court went through each of the steps described in the text except publishing its proposed changes in the proposal of the Wisconsin Bar Association; however, the Wisconsin Supreme Court's rule permitting advertising lapses in December, 1978, and additional hearings are likely at that time to consider making the rule permanent.)

authorized lawyers to advertise only *maximum* fee information for specific legal services, and only print media would have been allowed.<sup>89</sup> The Wisconsin Bar's proposal was similar to that of the Oklahoma Bar. It would have authorized only print media advertising, and such ads would have had content limitations almost identical to those adopted in Oklahoma.<sup>90</sup> When the Maryland Court of Appeals held a public hearing on the bar's proposal, substantial criticism was voiced from within and without the bar.<sup>91</sup> The final rules adopted by both the Maryland and Wisconsin tribunals authorize the use of *any* advertising medium to make any statement, so long as it is not false, fraudulent, deceptive, or misleading.<sup>92</sup>

The more open and public approach being employed in many states seems entirely appropriate, if not necessary, given the nature of the question under consideration. It must be remembered that the courts are involved in rule making rather than adjudication when they are considering amending the Code of Professional Responsibility. This essentially is a legislative task, and it should be accompanied by the incidents of the legislative process.<sup>93</sup> While virtually every state administrative procedure statute exempts the state's judiciary from its coverage,<sup>94</sup> there is no

<sup>89</sup> *Strict Maryland Law Ad Rules Urged*, Washington Post, Nov. 10, 1977, at C1, col. 4 (city ed.). The Maryland Bar's proposal seemingly would have prohibited the very ad which the United States Supreme Court upheld in *Bates*. See Letter of John H. Shenefield, Assistant Attorney General in Charge of the Antitrust Division, United States Dep't of Justice, to Maryland Court of Appeals Standing Committee on Rules, Nov. 25, 1977.

<sup>90</sup> WIS. B. BULL. 42 (Oct. 1977).

<sup>91</sup> *Views of Lawyer Advertising Argued Before Maryland High Court*, Washington Post, Dec. 2, 1977, at C1, col. 1 (city ed.).

<sup>92</sup> *Maryland Court Sets Rules on Ads for Legal Services*, *supra* note 84, at 22. The rules adopted by the controlling courts in Maryland and Wisconsin are similar to those proposed (but not adopted) by the ABA's Standing Committee on Ethics and Professional Responsibility in December of 1975, *supra* note 20. When the ABA House of Delegates amended the Model Code in August of 1977, *supra* note 80, it voted to send to each state for its consideration a set of rules (denominated "Proposal B") similar to the December, 1975, proposal. 63 A.B.A.J. 1236 (1977). See note 178 *infra*.

The proposals of the Texas Bar Association to the Texas Supreme Court were also made public in TEX. B.J. (Jan. 1978), President's Page, and an interesting statutory provision in force in Texas will require the Texas Supreme Court's final proposed amendments to be approved by a referendum of the members of the state bar before the amendments become effective. *Id.* See 1A TEX. REV. CIV. STAT. art. 320a-1, § 4 (Vernon 1973). This plebiscite process raises serious questions as to the availability to the Texas Bar of the "state action" defense to antitrust claims brought against anticompetitive rules contained in the Texas Code. See notes 44-47 and accompanying text, *supra*. See *United States v. Texas State Board of Public Accountancy* (Civil No. A-76-CA-219) (filed Nov. 18, 1976).

<sup>93</sup> *Cf.* Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 778 (1975).

<sup>94</sup> See Uniform Revised Model State Administrative Procedure Act § 1(1); 75 OKLA. STAT.



statutory provision forbidding a state supreme court or state bar association from voluntarily choosing to employ procedures similar to those set out in an administrative procedure statute before exercising what is essentially administrative rule-making authority.<sup>95</sup> These procedures typically provide that all interested parties be given an opportunity to comment, at least in writing, on specific proposals being considered by the governmental decision-makers.<sup>96</sup> Because we assume the good faith motives of these decision-makers, this airing of public views is calculated to enhance the likelihood that the decisions reached will be fully informed, accurate, and fair.<sup>97</sup> The efforts taken by those state supreme courts which held public hearings on the lawyer advertising question concededly were unprecedented. However, by the time the Oklahoma Supreme Court met in secret with the leadership of the Oklahoma Bar Association, the court was aware that these "precedents" had been set.<sup>98</sup> Moreover, before the Oklahoma court announced its final decision on this matter, it may well have known that the public hearing process had resulted in at least one state court's substantial rejection of its bar association's recommendations.<sup>99</sup> Nonetheless, the Oklahoma justices declined to follow the other states' model.

While we can only speculate on the relationship between the relatively closed process employed in this matter by the Oklahoma Bar and the court and the relatively restrictive rules that resulted from that closed process, firmer conclusions and judgments can be made as to the necessity, legality, and wisdom of the Oklahoma Supreme Court's elaborate new rules on advertising. The remaining sections of this article will deal with these issues.

---

§ 301(1)(b) (1971); WIS. STAT. ANN. § 227.01(1)(19) (West); 4A MD. ANN. CODE art. 41, § 244(a) (1978 Replacement Vol.).

<sup>95</sup> Section 1(7) of the Uniform Revised Model State Administrative Procedure Act defines "rule" as an "agency statement of general applicability that implements, interprets, or prescribes law or policy.... The term includes the amendment or repeal of a prior rule...." The Oklahoma Administrative Procedure Act contains a similar definition. 75 OKLA. STAT. § 301(2) (1971).

<sup>96</sup> Uniform Revised Model State Administrative Procedure Act § 3; 75 OKLA. STAT. § 303 (1971).

<sup>97</sup> *Cf.* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 777-79 (1969) (Douglas, J., dissenting, "Rule making is no cureall; but it does force important issues into full public display and in that sense makes for more responsible administrative action."

<sup>98</sup> The Maryland and Wisconsin hearings were announced in November, 1977, and held in December, 1977, see note 88, *supra*, and the secret Oklahoma meeting was not held until January 13, 1978. In addition, an early draft of this article was sent to Chief Justice Hodges of the Oklahoma Supreme Court before the secret meeting. That draft described the Maryland experience recounted in the text accompanying notes 90-92, *supra*.

<sup>99</sup> See note 98, *supra*.

### III. *Are the Continued Restrictions Necessary to Achieve a Legitimate State Interest?*

The Oklahoma Supreme Court's order promulgating the new advertising rules contained no statement of findings, conclusions, reasons, or objectives.<sup>100</sup> It is therefore difficult to define with certainty the state interests which motivated the Oklahoma Supreme Court to impose the stringent restrictions which remain as to the permissible time, place, manner, and content of lawyer advertising. However, reasonable inferences as to the court's objectives can be drawn from its revisions to the Ethical Considerations which were promulgated in connection with the new Disciplinary Rules on advertising.<sup>101</sup>

Two dominant, related themes are revealed in these new Ethical Considerations. First, the Oklahoma Supreme Court recognized that there is a paramount public interest in seeing that laymen receive information to assist them in recognizing when they have a need for legal services and in selecting an attorney once the need for one has been determined.<sup>102</sup> This may be referred to as the public interest in the efficient delivery of legal services. Historically, Canon 2, as originally adopted by the Oklahoma Supreme Court,<sup>103</sup> had always paid lip service to this public interest,<sup>104</sup> but mandatory provisions in the Disciplinary Rules of Canon 2, such as the prohibition against advertising,<sup>105</sup> had been viewed by many as impeding the ability of attorneys to do all that they might to advance this goal.<sup>106</sup> The Oklahoma court's new Ethical Considerations reflect that court's current belief that lawyer advertising can indeed contribute to the advancement of the public interest in the efficient delivery of legal services. It was this belief

<sup>100</sup> The preamble to the 1978 amendments indicated only that the court had "carefully" considered the OBA's proposal and the *Bates* decision. Oklahoma Supreme Court Order, *supra* note 1, at 130.

<sup>101</sup> Ethical Considerations in the Code are "aspirational in character" and hence unenforceable. However, "[t]hey constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." ABA Model Code, Preliminary Statement. Disciplinary Rules in the Code are "mandatory in character." *Id.*

<sup>102</sup> Code of Professional Responsibility, Revised EC 2-2, 2-7, 2-8, 2-10, Oklahoma Supreme Court Order *supra* note 1, at 130-32.

<sup>103</sup> 5 OKLA. STAT. ch. 1, app. 3 (1971).

<sup>104</sup> See note 25, *supra*. See also the pre-*Bates* ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1, 2-2.

<sup>105</sup> This prohibition was contained in DR 2-101(B) of the pre-*Bates* Code, the language of which is set out in note 8, *supra*.

<sup>106</sup> See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 113-25 (1975); B. CHRISTENSEN, *LAWYERS FOR PEOPLE OF MODERATE MEANS* 128-35 (1970); Hobbs, *Lawyer Advertising: A Good Beginning But Not Enough*, 62 A.B.A.J. 735 (1976); Note, *Advertising, Solicitation and the Profession's Duty To Make Legal Counsel Available*, 81 YALE L.J. 1181 (1972); Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674 (1958).

that justified the court's basic decision to accept the concept of lawyer advertising.<sup>107</sup>

The second major public interest identified in the new Ethical Considerations was the public interest in protecting laymen from being deceived or misled by lawyer advertising.<sup>108</sup> It was this public interest which the Oklahoma court relied on to provide the rationale for the many restrictions which it imposed as to the scope of permissible lawyer advertising.<sup>109</sup> This aspect of the public interest, which may be referred to as the "consumer protection interest," is revealed in those Ethical Considerations which caution attorneys to advertise only that information which is truthful,<sup>110</sup> objective,<sup>111</sup> and understandable.<sup>112</sup>

The court also indicated that its restrictions on the permissible content of ads were intended to assure that information contained in lawyers' ads would be relevant to the promotion of the public interest in the efficient delivery of legal services. The court stressed that lawyers' ads should be relevant either to assisting the public in recognizing their legal problems<sup>113</sup> or in making informed selections from among available attorneys.<sup>114</sup> Rather than identifying a separate public interest, these relevancy restrictions suggest that the consumer protection interest and the delivery of legal services interest tended to merge in the Oklahoma court's view, because its relevancy restrictions appear to be premised on the presumption that information irrelevant to the efficient delivery of legal services would be misleading to the lay public.<sup>115</sup> In any event, the court's restrictions on the content of lawyers' ads and the time, place, and manner in which such ads may be placed must be evaluated with both of these public interest objectives in mind. It seems fair to conclude that the court wanted to prevent advertisements which would be confusing (intentionally or unintentionally) to the public, while at the same time encouraging ads which, in a nonconfusing manner, could be calculated to provide the

<sup>107</sup> "[There are] interests of the public in receiving relevant lawyer advertising." Oklahoma Code of Professional Responsibility, revised EC 2-2a, Oklahoma Supreme Court Order, *supra* note 1. "[D]isclosure of relevant information about the lawyer and his practice may be helpful [in the selection of attorneys by laymen]." *Id.*, EC 2-8.

<sup>108</sup> *Id.*, EC 2-9. "[S]pecial care [should] be taken by lawyers to avoid misleading the public...."

<sup>109</sup> *See id.*, EC 2-10.

<sup>110</sup> *Id.*, EC 2-9.

<sup>111</sup> *Id.*, EC 2-10.

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

<sup>113</sup> *Id.*, EC 2-2.

<sup>114</sup> *Id.*, EC 2-8.

<sup>115</sup> *See id.*, EC 2-9 and 2-10.

public with information relevant to the intelligent recognition of legal problems and the intelligent selection of counsel.

Significantly, other conceivable public interests, some of which were alluded to by the United States Supreme Court in *Bates*, went unnoted by the Oklahoma Supreme Court. For example, the Oklahoma court chose not to refer to the possibility that the public interest might be well served by increased economic competition among lawyers. Nor was there any indication that the Oklahoma Supreme Court considered economic competition among attorneys to be dangerous from the standpoint of the public interest. Even though the United States Supreme Court indicated in *Bates* that advertising is likely to foster greater competition in the legal profession, with likely salutary effects on public access to legal services,<sup>116</sup> the Oklahoma Supreme Court expressed neither approval nor disapproval for the concept of economic competition among lawyers.

Because the United States Supreme Court indicated in *Bates* that continued state restrictions on lawyer advertising may have to be shown to be the least restrictive way to accomplish a legitimate state interest,<sup>117</sup> it becomes a matter of some importance to determine whether the restrictions imposed by the Oklahoma court are indeed necessary to the realization of the objectives that motivated the court to impose its substantial restrictions on lawyer advertising.<sup>118</sup> This inquiry is also a practical one. If the rules are unnecessary in terms of the court's consumer protection objectives, they may actually be counterproductive in terms of the delivery of legal services objective. Also, unnecessary rules may result in unnecessary enforcement expense.<sup>119</sup>

One way to approach this "necessity" question is to consider the consequences which might follow the elimination of some of the advertising restrictions contained in the court's new rules. One answer to this question, suggested by a recent article in the *Oklahoma Bar Association Journal* by Michael Brady,<sup>120</sup> is that, even without the elaborate restrictions adopted by the Oklahoma Supreme Court in 1978, there are existing state statutes which would protect the public from being misled, deceived, or otherwise taken advantage of by lawyers. Brady pointed to the Oklahoma Consumer

<sup>116</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 nn. 34, 35 (1977). See also note 211, *infra*.

<sup>117</sup> See Part IV(A), *infra*.

<sup>118</sup> See text accompanying notes 103-115, *supra*.

<sup>119</sup> The Professional Responsibility Commission of the Oklahoma Bar Association, charged with enforcing the Oklahoma Code (OBA HANDBOOK, *supra* note 2, at 5), has an annual budget of only \$100,000. See text accompanying notes 330-332, *infra*.

<sup>120</sup> Brady, *From Client to Customer: The Hidden Impact of Bates v. Arizona*, 48 OKLA. B.A.J. 2601 (1977).

Protection Act<sup>121</sup> and Consumer Credit Code<sup>122</sup> as examples of statutory law designed to avoid abuses by advertisers. To the extent that Oklahoma attorneys are operating in or affecting interstate commerce,<sup>123</sup> their commercial activities would also be subject to Section 5 of the Federal Trade Commission Act, which declares unlawful "unfair or deceptive acts or practices in or affecting commerce,"<sup>124</sup> and the Federal Truth in Lending Act, which requires certain disclosures in credit transactions.<sup>125</sup> To the extent that these consumer protection statutes apply to the commercial activities of lawyers, then many of the Oklahoma Supreme Court's detailed restrictions on advertising may be superfluous.

However, Section 754(2) of the Oklahoma Consumer Protection Act<sup>126</sup> exempts "actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority of this state or the United States."<sup>127</sup> The possibility thus arises that this statute may not be counted on to regulate the conduct of attorneys. In considering the applicability of the Consumer Protection Act to attorneys, the question immediately arises: Is the Oklahoma Supreme Court a "regulatory body...acting under statutory authority of this state?" It would be difficult to conclude otherwise. The Oklahoma legislature has conferred upon the Oklahoma Supreme Court "the exclusive power and authority to discipline attorneys...."<sup>128</sup> In addition, the Oklahoma Supreme Court has itself asserted that it has inherent authority to regulate the practice of law in Oklahoma,<sup>129</sup> and that it has ex-

<sup>121</sup> 15 OKLA. STAT. §§ 751 *et seq.* (Supp. 1972).

<sup>122</sup> 14A OKLA. STAT. §§ 1-101 *et seq.* (1971, Supp. 1977).

<sup>123</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-85 (1975). See also note 40, *supra*.

<sup>124</sup> 15 U.S.C.A. § 45a (1976).

<sup>125</sup> 15 U.S.C.A. §§ 1601 *et seq.* (1976). The Truth in Lending Act is not restricted by an "interstate commerce" requirement. All credit transactions, with certain limited exceptions not relevant here, are covered by the Act. See E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 335 (1971) [hereinafter cited as KINTNER].

<sup>126</sup> 15 OKLA. STAT. §§ 751 *et seq.* (Supp. 1972).

<sup>127</sup> 15 OKLA. STAT. § 754(2) (Supp. 1972).

<sup>128</sup> 5 OKLA. STAT. § 13 (1971).

<sup>129</sup> *In re Integration of the State Bar*, 185 Okla. 505, 95 P.2d 113 (1939). This inherent authority is based on the provision in the Oklahoma constitution vesting the judicial power of the state in the supreme court and other inferior courts. *Id.*, 95 P.2d 113, *citing* OKLA. CONST. art. 7, § 1. See also note 2, *supra*. Conceivably, this assertion by the supreme court of "inherent" authority could be construed to defeat the application of the Section 754(2) exemption as the supreme court might contend that its authority is not "statutory." Nevertheless, for purposes of construing the legislature's own language in Section 754(2), it seems appropriate to recognize the legislature's own grant of authority to the supreme court, especially since no conflict with the supreme court's assertion of inherent authority would be created by doing so. We need not speculate here on the repercussions that would occur should the present agreement of viewpoints between the Oklahoma legislature and the state supreme court disappear.

clusive authority to discipline attorneys "for cause."<sup>130</sup> Yet, does this mean that attorneys are totally exempted from the Consumer Protection Act? Such an expansive construction of the statutory exemption would be unwarranted. In the realm of lawyer regulation, it is possible to construe the statutory exemption in the Act in a way that reconciles any potential conflicts in authority between it and the Code of Professional Responsibility.

First, it must be emphasized that the exemption itself is narrowly drafted, applying only to *actions* or *transactions* regulated by official regulatory bodies.<sup>131</sup> Second, where no directive of the supreme court is on point, neither the statutory exemption of the Consumer Protection Act nor the supreme court's inherent regulatory and disciplinary authority would be offended by enforcing the requirements of the Consumer Protection Act against attorneys. Third, even where the Oklahoma Supreme Court has issued a formal directive regarding a particular type of action or transaction, if the court's command and the command of the statute coincide, there would be no cause to apply the exemption. The exclusive power of the court to impose professional discipline would not be compromised by holding the attorney responsible under both the statute and the Code of Professional Responsibility nor would attorneys be subjected to conflicting directives.<sup>132</sup> It has never been asserted that the existence in the supreme

<sup>130</sup> See art. IX, intro, OBA HANDBOOK, *supra* note 2, at 7-8. The insertion of the modifying phrase "for cause" in the supreme court's assertion of authority suggests a restraint in this assertion of jurisdiction. We may assume that the court claims jurisdiction only over conduct that relates to an attorney's fitness to practice law. See Code of Professional Responsibility, DR 1-102(A)(6), 5 OKLA. STAT. ch. 1, app. 3 (1971). The essence of the court's concern here is that no other authority be allowed to impose professional discipline upon attorneys, for example, by suspension or disbarment. Thus viewed, this assertion of exclusive authority to discipline may be characterized as ancillary to the court's more obvious (and less controversial) assertion of exclusive authority to control admission to the bar.

<sup>131</sup> Exemptions such as this are commonplace in state and federal statutes because they are often necessary to avoid placing parties under conflicting or irreconcilable obligations. See, e.g., Clayton Antitrust Act, § 7, 15 U.S.C.A. § 18 (1976).

<sup>132</sup> It could be argued that, even absent a conflict between the Consumer Protection Act and a provision in the Code, the attorney's conduct still should fall within the language of the statutory exemption because the state supreme court *could* adopt a conflicting regulation. The argument then would be that Section 754(2) was intended to avoid even potential conflicts in authority between two regulatory agencies. Cf. *United States v. National Ass'n of Securities Dealers* ("NASD"), 422 U.S. 694 (1975), holding that the existence of *unexercised* regulatory authority immunized private conduct from attack under the antitrust statutes, apparently in order to avoid even potential conflicts of authority. The regulatory statute in question did not contain an express exemption. This case represents something of a departure from previous cases applying the antitrust laws to private conduct which could have been (but was not) authorized by a governmental body. See Baker, *Antitrust Law and Policy in the Securities Industry: A Tale of Two Days in June*, 31 BUS. LAW. 743 (1976); Comment, *An Approach for Reconciling Antitrust Law and Securities Law: The Antitrust Immunity of the Securities Industry Reconsidered*, 65 NW. U.L. REV. 260, 298-336 (1970). The Supreme Court was careful not to overrule the earlier cases, suggesting that the *NASD* case must be confined to its rather peculiar and complex set of facts. Subse-

court of "inherent" authority to regulate admission to the bar and "exclusive" authority to discipline ("for cause") members of the bar immunized attorneys from liability under state statutes. Indeed, it is not uncommon for a state supreme court to discipline an attorney under the Code of Professional Responsibility for the very same conduct for which the attorney has had to answer under the routine administration of the criminal laws.<sup>133</sup> The fact that the state has enforced its criminal laws against an attorney, even in connection with a crime perpetrated against a client or through abuse of the legal process (matters particularly within the province of professional regulation), in no way jeopardizes the integrity of the court's professional regulatory system. The two schemes of regulation and discipline (statutes on the one hand, the Code on the other) are simply put on different planes.<sup>134</sup> Thus, where the two regulatory systems are not in conflict, to allow the applicability of one to oust entirely the other would frustrate the operation of the latter scheme without furthering the policies sought to be implemented by the former. In such circumstances, no useful purpose would be served by allowing one regulatory system to supersede the other.<sup>135</sup> This approach for reconciling professional regulation with a statutory system of regulation has long been followed in the case of criminal statutes,<sup>136</sup> and there is no reason why it should not also be followed in the case of consumer protection statutes.

It is thus possible to construe narrowly the exemption contained in Section 754(2) of the Consumer Protection Act without subverting its pur-

---

quent Supreme Court cases have held private concerns subject to antitrust attack even where there was ostensible "approval" by a regulatory agency. *See, e.g., Cantor v. Detroit Edison*, 428 U.S. 579 (1976). Lower courts have declined to read *NASD* as holding that the mere possibility of regulatory approval immunizes private concerns from antitrust attack. *See, e.g., United States v. A.T. & T.*, 427 F. Supp. 57 (D.D.C. 1976). While these cases deal primarily with *implied* exemptions to a statutory scheme, their approach to reconciling potential conflicts between two or more regulatory schemes is equally appropriate for construing *statutory* exemptions. After all, the *statutory* exemption in Section 754(2) is essentially the same in scope as the exemption to the antitrust laws which is sought to be *implied* in the cases cited in this footnote.

<sup>133</sup> *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3), providing that lawyers may be disciplined by a state supreme court for engaging in a "crime of moral turpitude."

<sup>134</sup> *See generally* V. COUNTRYMAN, T. FINMAN, & T. SCHNEIDER, *THE LAWYER IN MODERN SOCIETY* 854 (1976).

<sup>135</sup> *Compare* *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171, 189 (1968) (bank merger found violative of Bank Merger Act where competition would be adversely affected and these anticompetitive effects were found not to be offset by any benefits in terms of the ability of the merged entity to serve the convenience and needs of the community).

<sup>136</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(3). *See* text accompanying note 133, *supra*.

poses,<sup>137</sup> thereby allowing the substantive provisions of the consumer protection legislation to cover most attorney activities. Only where a statutory provision requires an attorney to do something a state supreme court says (in its Code) attorneys should not do (or vice versa)<sup>138</sup> would it be necessary to allow a Code provision to preempt the applicability of the Consumer Protection Act by invoking the Section 754(2) exemption. However, a brief examination of relevant statutory provisions in the Act will demonstrate that direct conflicts between the Code and consumer protection statutes in the area of advertising regulation are unlikely to arise.

One significant provision in the Oklahoma Consumer Protection Act prohibits the use of "bait and switch" advertising.<sup>139</sup> The statute contains descriptions of seven different types of bait and switch advertisements,<sup>140</sup> but the essential elements of a bait and switch scheme are (1) "an alluring but insincere offer to sell a product or service which the advertiser in truth

<sup>137</sup> The purpose is to avoid conflicts of authority. See note 131 *supra*.

<sup>138</sup> See, e.g., *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Onondaga County Ct.), *aff'd*, 50 App. Div. 2d 1088, 376 N.Y.S.2d 771 (1975), where the duty of an attorney under the New York Code to preserve the confidences and secrets of a client (DR 4-101(B)) was held to supersede the command of a state statute making it a misdemeanor for a citizen to fail to report the existence of an unburied dead body. Conflicts between the commands of the Code and state statutes are fairly rare. In fact, the two bodies of authority more often coincide. Compare, e.g., 21 OKLA. STAT. § 381 (1976) with Code of Professional Responsibility, DR 7-110(A), 5 OKLA. STAT. ch. 1, app. 3 (1971) (bribery).

Federal law, for example, the fourth, fifth and sixth amendments to the United States Constitution, may preempt either state statutory directives or the rules of a state supreme court—or both. See, e.g., *People v. Belge*, *supra* (fifth amendment and concomitant attorney-client privilege required attorney to disobey state statute regarding reporting unburied dead bodies). *Bates v. State Bar of Arizona*, 433 U.S. 350 (1970), may be cited for this same proposition (first amendment held to supersede a prohibition imposed by state supreme court).

<sup>139</sup> 15 OKLA. STAT. § 753-A(12) (Supp. 1972).

<sup>140</sup> *Id.* The section states that "bait and switch" advertising "consists of [1] an offer to sell the subject of a consumer transaction which the seller does not intend to sell [and, 2] one or more of the following practices:

- "a. refusal to show the subject of a consumer transaction advertised;
- "b. disparagement of the advertised subject of a consumer transaction or the terms of sale;
- "c. requiring undisclosed tie-in sales or other undisclosed conditions to be met prior to selling the advertised subject of a consumer transaction;
- "d. refusal to take orders for the subject of a consumer transaction advertised for delivery within a reasonable time;
- "e. showing or demonstrating defective subject of a consumer transaction which the seller knows is unusable or impracticable for the purpose set forth in the advertisement;
- "f. accepting a deposit for the subject of a consumer transaction and subsequently charging the buyer for a higher priced item; or
- "g. willful failure to make deliveries of the subject of a consumer transaction within a reasonable time or to make a refund therefor upon the request of the purchaser."

*Id.* "Consumer transaction" is defined very broadly, covering the advertisement or sale of products or services primarily for personal, family, or household use. *Id.*, § 752(B). This state statute thus does not reach lawyers catering to a business or corporate clientele. However, the



does not intend or want to sell,"<sup>141</sup> and then (2) discouraging the purchase of the advertised product or service in order to convince the customer that he or she needs a more expensive product or service.<sup>142</sup> It appears that some of the restrictions in the Oklahoma Supreme Court's new advertising rules were adopted because of the court's feeling that some regulatory measures are necessary to prevent attorneys from engaging in bait and switch advertising.<sup>143</sup> It should be noted, however, that even without the new restrictions in the amended Canon 2, an attorney who engages in one of the schemes described in the Act would violate not only the Oklahoma Consumer Protection Act, but the pre-*Bates* Code of Professional Responsibility as well. Disciplinary Rule 1-102(A)(4) provides that attorneys "shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."<sup>144</sup> Disciplinary Rule 5-101(A) states that attorneys "shall not accept employment [by a client] if the exercise of his professional judgment *on behalf of his client* will be or reasonably may be affected by his own financial... interests."<sup>145</sup> To agree to render a legal service for a client when the legal service is not appropriate for that client, without fully informing the client of this fact, would mean that the attorney is performing the service *primarily* for the attorney's own financial benefit.<sup>146</sup> Thus, saying that attorneys should not use bait and switch tactics on clients is really saying no more than that attorneys should not violate DR 1-102(A)(4) or DR 5-101(A). Consequently, when the Oklahoma Supreme Court decided to allow attorneys to advertise, it was not necessary for the court explicitly to prohibit bait and switch advertising tactics in order to deter attorneys from attempting such tactics or to provide a basis for professional discipline of the undeterred attorney. There would have been no conflict in invoking both the Consumer Protection Act

---

Federal Trade Commission Act, 15 U.S.C.A. § 45a (1976), which also prohibits bait and switch schemes and other unfair or deceptive trade practices, applies to the business lawyer as well as the family lawyer.

<sup>141</sup> The quoted language is taken from the Federal Trade Commission's definition, 16 C.F.R. 238.3 (1977). The Oklahoma statute does not define the term differently.

<sup>142</sup> *Id.*

<sup>143</sup> See amended DR 2-102(E) and (F), set out in note 77, *supra*.

<sup>144</sup> Code of Professional Responsibility, DR 1-102(A)(4), 5 OKLA. STAT. ch. 1, app. 3 (1971).

<sup>145</sup> *Id.*, DR 5-101(A) (emphasis added).

<sup>146</sup> A lawyer who failed to screen a prospective client before performing a service would be selling a service without knowing whether it was in the client's best interest. The lawyer could be said to be performing the service solely, or at least primarily, for the financial benefit which the lawyer will derive from performing the service. This would constitute a violation of DR 5-101(A), which states: "[A] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be...affected by his own financial, business, property, or personal interests." Code of Professional Responsibility, DR 5-101(A), 5 OKLA. STAT. ch. 1, app. 3 (1971).

and the pre-*Bates* Code of Professional Responsibility against such attorneys.<sup>147</sup>

Despite this obvious harmony between the Act and the Code on the subject of bait and switch advertising, Brady<sup>148</sup> suggests that the Consumer Protection Act's prohibition on bait and switch tactics conceivably could be interpreted so as to place some "limits on the scope of counseling,"<sup>149</sup> which an advertising attorney may offer to one who has responded to the lawyer's ad offering a particular, standardized transaction for a set fee. The inference is that the attorney should not inquire too deeply into the needs of a client who responds to an ad offering a particular, low-cost service, for if the lawyer ends up "selling" a more elaborate and complex service, the lawyer might be accused of having engaged in a bait and switch scheme. If the Act could indeed be interpreted in this manner, it is possible that the Oklahoma Supreme Court would want to attempt to supersede the Act by promulgating explicit rules such as the new DR 2-101(E) and (F),<sup>150</sup> in order to activate the exempting language of Section 754(2) of the Act.<sup>151</sup> Such a move is unnecessary, however, because it would constitute a serious misconstruction of the Act to interpret it as preventing legitimate client counseling. Even clients who have come to see an attorney directly in response to an ad offering a specific legal service for a specific fee are entitled to a minimum level of counseling.

Consider the attorney who runs an ad similar to the one which gave rise to the *Bates* case, in which certain routine, standardized legal services (such as an uncontested divorce or a name change) are offered for a set fee. A client responds to the ad. The lawyer, on interviewing the client, either personally or through a paralegal, discovers that, in the attorney's professional judgment, the client's interest would not be served by rendering the standardized, low-cost legal service the advertisement of which had attracted the client to the lawyer's office. The lawyer then explains why, in the attorney's honest and professional judgment, a more complicated (and more costly) transaction would better serve the client's interest. After this full disclosure and counseling, the client decides to retain the attorney to perform the more expensive transaction. Has the client been "baited and switched"? Has the client been overreached in any way? On the contrary, it seems clear that this client has been well served. It might be true that the lawyer literally "disparaged" the advertised service,<sup>152</sup> but none of the

<sup>147</sup> See text accompanying notes 132-136, *supra*.

<sup>148</sup> Brady, *supra* note 120.

<sup>149</sup> *Id.* at 2602. Brady is not the only person to advance this view. See Stamper, *Remarks at Panel on Advertising*, 49 OKLA. B.A.J. 459, 462 (1978).

<sup>150</sup> Amended DR 2-101(E), (F), set out in note 77, *supra*.

<sup>151</sup> See text accompanying notes 126-138, *supra*.

<sup>152</sup> 15 OKLA. STAT. § 763-A(12)(b) (Supp. 1972), set out at note 140, *supra*.

other elements essential to a bait and switch scheme are present in this fact pattern.<sup>153</sup> Most importantly, however, viewing the described circumstances from the standpoint of the Code, it would have been improper for the lawyer to have *failed* to “disparage” the advertised service. For the advertising attorney to fail to screen clients responding to ads in order to make sure that an advertised, fixed-fee transaction is appropriate for the particular client would constitute professional misconduct of the most egregious kind.

That lawyers are engaged in commerce when they enter into an employment contract with a client does not mean that the client must fend for himself according to the law of *caveat emptor*. Lawyers are subject to, and bound by, the Code of Professional Responsibility, which imposes fiduciary-type responsibilities upon the attorney *vis-a-vis* the client, responsibilities which are somewhat higher than what the law expects of an average business person.<sup>154</sup> Every client, regardless of the circumstances under which he or she is attracted to the lawyer’s office, is entitled to expect the attorney to provide services in conformity with the Code. This is true for the “cut-rate” lawyer, the “uptown” lawyer, or the *pro bono* lawyer. Repeatedly, the Code promises the consumer of legal services that the lawyer will always act so as to advance the *client’s* interest, even if doing so is not in the lawyer’s best interest.<sup>155</sup> At a minimum, this means attorneys are not to “sell” a service to a client that is inappropriate for that client. To live up to this fiduciary responsibility, an attorney must explore the needs and circumstances of the client. Failing to do so would result in violations of the lawyer’s duties of competency,<sup>156</sup> zealouslyness,<sup>157</sup> and in-

<sup>153</sup> The essential missing element is the intention not to sell the advertised service at the advertised price. See note 140 and text accompanying notes 141-142, *supra*.

<sup>154</sup> For example, no law or code of ethics requires department stores to segregate customer credit balances from the commercial enterprise’s own accounts, but the Code of Professional Responsibility requires lawyers to do so—to avoid even the appearance of impropriety. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(A). The safeguards against conflicts of interest found in Canon 5 of the Code have no parallel in the commercial world.

<sup>155</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A), 5-101(B), 5-102(A), 5-102(B), 5-104(A), 5-105(A); Code of Professional Responsibility, DR 5-101(A), 5-101(B), 5-102(A), 5-102(B), 5-104(A), 5-105(A), 5 OKLA. STAT. ch. 1, app. 3 (1971).

<sup>156</sup> *Id.*, DR 6-101(A)(2): “A lawyer shall not handle a legal matter without preparation adequate in the circumstances.” See also EC 6-1 of the ABA Model Code: “[A] lawyer should act with competence and care in representing clients.” At a minimum, compliance with the mandate of DR 6-101(A)(2) requires the lawyer to inquire into the client’s circumstances so that the client may receive the benefit of both the lawyer’s legal advice as to the proper course of conduct as well as the lawyer’s skill in advancing the client’s desired course of conduct. Compare ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 4.1. Tort liability for malpractice would be another possibility if a lawyer fails to screen clients adequately. Compare the medical doctor who performs an operation, skillfully and inexpensively, when the operation was contraindicated by the patient’s condition.

<sup>157</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101(A)(3); Code of Profes-

dependence.<sup>158</sup> It would be an absurd result to interpret the Consumer Protection Act in a manner that deprives consumers of the benefits of these significant provisions in the Code of Professional Responsibility.<sup>159</sup>

Although Mr. Brady is incorrect in assuming that "disparagement"—without more—would create a prima facie case of bait and switch,<sup>160</sup> legitimate conflicts between the Oklahoma Consumer Protection Act and the Code conceivably could arise.<sup>161</sup> When such conflicts do arise, it will be necessary to invoke the exempting language of Section 754(2). As the Supreme Court observed in *Goldfarb*,<sup>162</sup> even though it is clear that lawyers are engaged in commerce, the practice of law still may not be completely interchangeable with other businesses when it comes to applying laws intended to regulate commercial transactions.<sup>163</sup> This is not to say that lawyers should be absolutely immune from the enforcement of such laws; the point is that such laws must be interpreted with some sensitivity when authorities seek to apply them to lawyers for conduct done in their professional capacity.<sup>164</sup> To fail to recognize the existence of the directives of the Code when interpreting regulatory statutes could leave attorneys under

---

sional Responsibility, DR 7-101(A)(3), 5 OKLA. STAT. ch. 1, app. 3 (1971): "A lawyer shall not prejudice or damage his client during the course of the professional relationship." See also EC 7-8 of the ABA Model Code: "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate the decision-making process if the client does not do so."

<sup>158</sup> See note 146, *supra*.

<sup>159</sup> The United States Supreme Court indicated in *Bates* that lawyers who advertise standardized transactions would be expected to consult with clients responding to such ads to make certain that the standardized transaction is appropriate for each responding client. *Bates v. State Bar of Arizona*, 433 U.S. 350, 373 n.28 (1977). The Court's expectation that this counseling exercise would be performed was used to respond to the claim that lawyer advertising would be inherently misleading because of the lack of standardization in lawyers' services. The Court was satisfied that this counseling function would be a sufficient safeguard against any potential confusion among the lay public. *Id.* at 372.

<sup>160</sup> See note 53, *supra*. The new DR 2-101(E), set out at note 77, *supra*, seems to take the view suggested by Brady. Hopefully, the enforcers of the Code will at least recognize the conflicting duties of attorneys suggested in the text accompanying notes 154-159, *supra*, when this new Disciplinary Rule is applied.

<sup>161</sup> See discussion in note 138, *supra*.

<sup>162</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). See text accompanying notes 43-47, *supra*.

<sup>163</sup> *Id.* at 788 n.17.

<sup>164</sup> The scope of *Goldfarb*'s footnote 17 was substantially restricted in the Supreme Court's recent decision in *National Ass'n of Prof. Eng'rs v. United States*, 98 S.Ct. 1355 (1978). It is not the professional status of lawyers that warrants this special sensitivity when applying statutory prohibitions against lawyers; rather, it is the possibility of conflicting directives promulgated by state authorities under other regulatory programs designed to safeguard the public interest in the responsible conduct of the professions. Thus, the special treatment contemplated for the professions is no more or no less than the special treatment due any group under the "state action" doctrine. See text accompanying notes 43-47, *supra*.

precisely the kind of conflict of authority which Section 754(2) of the Consumer Protection Act was designed to prevent. Attorneys would have to decide which directive they would rather violate, the legislature's directive in the Consumer Protection Act, or the supreme court's directives in the Code. The legislature's decision to include the exempting language of Section 754(2) in the Act reflects a policy determination to have such conflicts of authority resolved by requiring the mandate of the Act to defer to the directives of state regulatory bodies operating under other regulatory schemes. Thus, in the case of true conflict between the duties imposed by the Act and the Code, the courts will have to treat conduct in conformity with an obligation imposed by the Code as involving an "action or transaction" exempted under Section 754(2) of the Consumer Protection Act.

Note that this proposed approach for interpreting the scope of the exemption provided in Section 754(2) of the Act does not require giving lawyers blanket immunity from the provisions of the statute in question. A case-by-case analysis is required, with immunity being appropriate only when an enforceable directive of the Code requires an attorney to perform in a manner contrary to the explicit directives of the statute. The exemption need apply only where necessary to prevent an actual conflict with the authority of the state supreme court. Such an interpretation allows the broad legislative mandate of the Consumer Protection Act to extend as far as possible while still honoring the obvious legislative intent to avoid offending the regulatory regime of any other agency of the state, including the state supreme court.<sup>165</sup> The crucial point for present purposes is that such an interpretation makes it unnecessary for the Oklahoma Supreme Court to attempt to preempt statutory advertising regulations simply to make sure that potentially conflicting provisions in the Code will not be superseded inappropriately.

The foregoing approach for reconciling the Act and the Code could be applied with respect to other state or federal statutes which might conflict with provisions of the Code of Professional Responsibility. The potential for such conflicts is greater now that "the belief that lawyers are somehow 'above' trade has become an anachronism."<sup>166</sup> Still, in most instances, the application of consumer protection-type statutes (including the Consumer Protection Act, the antitrust laws, the Uniform Consumer Credit Code, and many others) would pose no threat to the integrity and efficacy of a state supreme court's regulation of the bar through the Code

<sup>165</sup> State legislatures typically conceive of state supreme courts as regulatory agencies entrusted with the regulation of the legal profession. *See, e.g.*, 5 OKLA. STAT. §§ 12-13 (1971); 7A VA. STAT. §§ 54-48, 54-49 (1974 Replacement Vol.).

<sup>166</sup> *See* text accompanying note 32, *supra*.

of Professional Responsibility, because the statutory provisions rarely conflict with express directives of the Code.<sup>167</sup> No reason to exempt attorneys from such nonconflicting statutory provisions has been advanced. However, when a state supreme court has adopted a regulatory provision in the Code that does conflict directly with the provisions of a regulatory statute, such conflicts will have to be resolved, regardless of whether the conflicting statute contains an express exemption provision like Section 754(2) of the Act.<sup>168</sup> If the conflicting statute contains no express exemption covering the conflict situation, it will be necessary for the courts to imply one. Express or implied exemptions will have to be invoked whenever a state supreme court's scheme of regulation for attorneys would be frustrated or rendered nugatory by the application of a statutory provision to attorneys. The application or recognition of exemptions in such instances would be necessary in order to preserve the inherent and exclusive authority to control the bar which most state supreme courts have asserted.<sup>169</sup> Only by applying, or implying, exemptions in these circumstances will it be possible to avoid serious confrontations between two coequal branches of state government.

All of this analysis of potential conflicts between the Code and con-

<sup>167</sup> One section of the Code mentioned by Brady, *supra* note 120, as a possible stumbling block for attorneys is Section 753-A(12)(g), which imposes a strict penalty for "unreasonable delay" in delivery of a purchased good or service in a consumer transaction. Brady, *id.* at 2602. Here again the Code is not necessarily in conflict with the Act. DR 6-101 of the Code identifies three categories of attorney conduct which are defined as incompetent performance. One of those categories is "neglect" of a legal matter entrusted to the attorney. ABA Model Code and Oklahoma Code, DR 6-101(A)(3). Neglect has been defined consistently as "unreasonable delay" in advancing the client's cause. See, e.g., Oklahoma *ex rel.* Oklahoma Bar Ass'n v. Fore, 562 P.2d 511 (Okla. 1977). Thus, there is no *inherent* conflict between the Code of Professional Responsibility and the Consumer Protection Act in this area. As is true with the criminal laws (see note 133 and accompanying text, *supra*), the administration of this statutory provision need not interfere with the supreme court's administration of professional discipline under the Code. There is no reason to expect inconsistent results in the different actions, but should such inconsistencies occur, the various regulatory regimes would not be threatened. Just as there are "crimes" under the state statutes and "crimes of moral turpitude" under the Code, there may be "unreasonable delay" under the Act and "neglect" under the Code, and even if the two standards are not identical, the authority of neither regulatory scheme would be jeopardized by inconsistent results. Consequently, there would be no reason to require one regime to supersede the other. Nevertheless, both the statute and the Code must be interpreted to define "unreasonable delay" in the context of the circumstances of each individual case. The "unreasonable delay" section of the Consumer Protection Act would have to be interpreted unreasonably, so as to require that attorneys perform services more quickly than would be feasible or prudent in the circumstances, for a direct conflict in authority to arise. If the Act is interpreted reasonably, this type of conflict can be avoided. Nevertheless, should such a conflict present itself, it can be reconciled according to the Section 754(2) analysis by invoking the exemption of Section 754(2) and allowing the Code to take precedence. See text accompanying notes 162-164, *supra*.

<sup>168</sup> Cases dealing with the concept of "implied immunity" are discussed in note 132, *supra*.

<sup>169</sup> See, e.g., notes 129, 130, 138 and accompanying text, *supra*.

sumer protection statutes, and of ways to reconcile such conflicts when they arise, leads to the conclusion that the elaborate restrictions on the content of lawyer advertising imposed by the Oklahoma Supreme Court in its new rules are not necessary to protect the public from abuses by advertising lawyers. The Oklahoma Supreme Court seems to have been motivated by the fear that lawyers "will seize the opportunity [presented by advertising] to mislead and distort."<sup>170</sup> While a majority of the United States Supreme Court indicated that such an unflattering view of the bar was undeserved,<sup>171</sup> even if the Oklahoma court's fears concerning Oklahoma lawyers are well-founded, this section of this article has demonstrated that there are ample restrictions in applicable state and federal statutes and the pre-*Bates* Code to protect the public from abuses (and to provide a basis for discipline) without resorting to the elaborate set of restrictions which the court has promulgated in connection with its decision to authorize attorneys to advertise.

It is worth noting that lawyers could (and can) engage in bait and switch-type tactics without the use of advertising. Whenever a person walks in off the street and requests a routine legal service, such as a standard will, the lawyer is in a position to disparage the less expensive service and switch the client to a more expensive transaction than the client's needs require. Although the nonadvertising lawyer would not be liable under the Consumer Protection Act for this conduct, he or she clearly would be violating DR 1-102(A)(4), DR 5-101(A), DR 6-101(A)(2), and DR 7-101(A)(3) of the Code of Professional Responsibility.<sup>172</sup> Surely the Oklahoma Supreme Court does not view such behavior as unpunishable under the Code because it does not involve advertising.<sup>173</sup> This further illustrates why the detailed provision contained in the Oklahoma court's recent amendments to Canon 2 are unnecessary to deter or punish attorneys who would use the new opportunity to advertise as a vehicle for overreaching clients. The same pre-*Bates* Code provisions that were designed to

<sup>170</sup> The quoted language is from Justice Blackmun's characterization for the *Bates* majority of the consumer protection rationale asserted by the Arizona State Bar as a justification for the historical absolute ban on advertising. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977).

<sup>171</sup> *Id.*

<sup>172</sup> See notes 144, 156-158 and accompanying text, *supra*.

<sup>173</sup> For that matter, false and misleading representations by sellers of goods and services are prohibited by the Oklahoma Consumer Protection Act and the Federal Trade Commission Act, even when the misrepresentation is made verbally rather than through an advertisement. Among the practices prohibited by the Oklahoma Consumer Protection Act is: "Knowingly mak[ing] a false representation as to the characteristics...uses, benefits... or quantities of the subject of a consumer sales transaction... ." 15 OKLA. STAT. § 753-A(5) (Supp. 1972).

The Federal Trade Commission Act's prohibition against unfair or deceptive trade practices, 15 U.S.C. § 45a (1976), is not confined to transactions which are the product of advertising. See KINTNER, *supra* note 125, at 15-17, 104-14.

prevent the nonadvertising attorney from overreaching clients are still available to be enforced against the unscrupulous attorney who advertises. Dishonesty, fraud, deceit, and misrepresentation have long been impermissible forms of conduct for attorneys in their relationship with clients.<sup>174</sup> If an attorney is inclined toward this type of conduct, he or she will find a way to do it with or without advertising.<sup>175</sup> The task for the state supreme courts, as well as the honorable element of the profession, is to see to it that all practicing attorneys are aware of the general restrictions contained in the Code of Professional Responsibility<sup>176</sup> and that they are aware that the Code, the Consumer Protection Act, and other consumer protection legislation will be enforced vigorously.<sup>177</sup>

In light of the foregoing analysis, it can be concluded that if the Oklahoma Supreme Court were absolutely silent on the content of permissible advertising, or if it simply proscribed "false, fraudulent, misleading, or deceptive advertisements," and said nothing more on the subject, the court could be confident that there would be adequate deterrents against advertising abuses by attorneys, as well as adequate grounds under the Code to impose professional sanctions against attorneys who use advertising as a means to take unfair advantage of clients. If the court felt compelled to give attorneys more precise guidance on advertising, it might attempt to publish a more specific list of the "deceptive or misleading acts or practices" it seeks to prevent attorneys from perpetrating through the use of advertising.<sup>178</sup> An added measure of protection could be insured by

<sup>174</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4).

<sup>175</sup> Justice Blackmun, writing for the majority in *Bates*, observed: "An attorney who is inclined to cut quality will do so regardless of the rule on advertising...." *Bates v. State Bar of Arizona*, 433 U.S. 350, 378 (1977).

<sup>176</sup> To aid in this task, state bar associations should consider the need for mandatory continuing legal education in professional responsibility. While virtually every law school has required law students graduating since 1975 to take a course in this area, education in professional responsibility was spotty before that time. Furthermore, many of those pre-1975 law school graduates who were exposed to a course in legal ethics may be unfamiliar with the Code of Professional Responsibility now in force in most states, since that Code was not adopted until 1969.

<sup>177</sup> As Justice Blackmun noted in *Bates*: "For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straight-forward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust." *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977). The creation of the new Professional Responsibility Commission of the Oklahoma State Bar seems to signal more vigorous enforcement of the Code. See 48 OKLA. B.A.J. 2377 (Oct. 29, 1977).

<sup>178</sup> This is the approach taken by the ABA's 1975 proposals (see note 20, *supra*), as well as the alternative "Proposal B" circulated after *Bates* by the ABA House of Delegates to the state bar association (see note 92, *supra*). This approach generally prohibits the use of "false, fraudulent, misleading or deceptive" statements or claims, and then becomes more specific: "Without limitation a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:



requiring a reasonable disclaimer to be published with any ad.<sup>179</sup> These approaches would allow the court to foster its consumer protection objectives without encumbering the profession with the detailed and sometimes arbitrary<sup>180</sup> restrictions contained in the court's 1978 amendments to Canon 2.

Another indication of the lack of necessity for the Oklahoma court's content restrictions is the realization that many of them appear directly to frustrate the accomplishment of the court's articulated public interest objective concerning the efficient delivery of legal services.<sup>181</sup> The most significant of the court's new rules carefully limit the contents of lawyer's ads.<sup>182</sup> It will be recalled that one of the court's concerns underlying these

"(1) Contains a material misrepresentation of fact;

"(2) Omits to state any material fact necessary to make the statement, in the light of all circumstances, not misleading;

"(3) Is intended or is likely to create an unjustified expectation;

"(4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by DR 2-105;

"(5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;

"(6) Relates to legal fees other than:

"(a) A statement of the fee for an initial consultation;

"(b) A statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

"(c) A statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

"(d) A statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter;

"(e) The availability of credit arrangements; and

"(f) A statement of the fees charged by a qualified legal assistance organization in which he participates for specific legal services the description of which would not be misunderstood or be deceptive; or

"(7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive." "Proposal B," DR 2-101(B), 63 A.B.A.J. 1236 (1977).

<sup>179</sup> "Proposal B's" DR 2-101(B)(7) contains a flexible disclaimer requirement. The Supreme Court's decision in *Bates* left the impression that a disclaimer requirement might be tolerated without offending the first amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977).

<sup>180</sup> There seems to be no inherent justification for the Oklahoma Supreme Court's absolute prohibition against print ads being larger than 10 square inches. Code of Professional Responsibility, DR 2-101(G), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 133. Also, the restriction that announcements concerning the opening of a law office or a change in a law firm's composition be limited to only three publications, Code of Professional Responsibility, DR 2-101(H), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 133-34, appears to be based on neither reason nor demonstrated need.

<sup>181</sup> See text accompanying notes 102-107, *supra*.

<sup>182</sup> Discussed at note 74, *supra*.

content restrictions was to assure that the public receive only information that is relevant to improving its ability to recognize when a lawyer is needed and to select one once the need is seen.<sup>183</sup> This relevancy restriction apparently was based largely on the court's judgment that information irrelevant to the delivery of legal services objective might be confusing and hence misleading to the layman.<sup>184</sup> Yet, the Oklahoma court's definition of relevancy was less than precise. The court made no finding that all types of information prohibited (or not permitted) by the new rules in fact would be irrelevant to the delivery of legal services objective. There are indications that the contrary is true. For example, the court explicitly permitted certain types of information that it had barred from commercial advertisements to be included in lawyer and law firm announcements placed in approved law lists and legal directories.<sup>185</sup> These approved law lists may be employed by members of the public to assist in the intelligent selection of counsel. It is difficult to see how the court could have thought that a given piece of information, for example, where the lawyer went to law school, would be relevant to the intelligent selection of counsel if it appeared in one place, but misleading or confusing to the public if it appeared elsewhere. Furthermore, one would think that those persons who do not have ready access to approved law lists would view as relevant to their selection of an attorney the same type of information deemed relevant by the law list readers. Moreover, the Oklahoma content restrictions prohibit a great deal of information which the ABA and other state supreme courts have found to be relevant to the intelligent selection of counsel.<sup>186</sup> Therefore, whether these

<sup>183</sup> See text accompanying notes 113-115, *supra*.

<sup>184</sup> "The lack of understanding on the part of many members of the public concerning legal services, and the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer." Revised EC 2-9, Oklahoma Supreme Court Order, *supra* note 1.

<sup>185</sup> Compare Code of Professional Responsibility, DR 2-101(B)(1)-(7), 5 OKLA. STAT. ch. 1, app. 3 (1971) with *id.*, DR 2-102(A)(5)(a)-(q), as amended, Oklahoma Supreme Court Order, *supra* note 1, at 132-35. Lawyers and law firms may place the following information in legal directories but not in advertisements: (a) date and place of birth; (b) schools attended with dates of graduation; degrees and other distinctions; (c) public or quasi-public offices; (d) date and place of admission to the bar by state and federal courts; (e) military service; (f) posts of honor; (g) legal authorships; (h) legal teaching positions; (i) memberships, offices, committee assignments, and section memberships in bar associations; (j) memberships and offices in legal fraternities and legal societies; (k) technical and professional licenses; (l) memberships in scientific, technical and professional associations and societies; (m) names and addresses of references; (n) with their written consent, names of clients regularly represented; (o) one or more fields of law in which the lawyer or law firm concentrates; (p) a statement that practice is limited to one or more fields of law; (q) a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4)-(5). *Id.*, DR 2-102(A)(5).

<sup>186</sup> See notes 82 and 83, *supra*.

content restrictions are premised on a strict relevancy standard, or on a misleading-because-irrelevant standard, they would appear to be both unnecessary and counterproductive in terms of both of the Oklahoma Supreme Court's objectives: efficient delivery of legal services and consumer protection.<sup>187</sup>

Besides content restrictions, the 1978 amendments impose many restrictions as to the permissible time, place, and manner for attorney advertising. The necessity for many of these restrictions is also questionable in terms of either of the court's public interest objectives. For example, the Oklahoma court made no finding that lawyers' advertising over radio or television would be inherently misleading or never relevant to improving the delivery of legal services, yet the court prohibited the use of electronic media by attorneys.<sup>188</sup> The court only noted that there are potential problems and questions about the use of the electronic broadcast media.<sup>189</sup> While the United States Supreme Court recognized in *Bates* that there are questions in this area,<sup>190</sup> the questions were left open with the expectation that they would be examined carefully by the state supreme courts.<sup>191</sup> The unsupported, inconclusive statements by the Oklahoma court in its new Ethical Consideration 2-2a<sup>192</sup> do nothing to demonstrate the necessity for the court's absolute ban on the use of these communications media, which are so important for such a large segment of the

<sup>187</sup> The discussion in the text accompanying notes 178-180, *supra*, suggests that less restrictive alternatives are available for accomplishing the Oklahoma Supreme Court's articulated objectives. To the extent this is true, the necessity for the court's restrictive rules is cast further in doubt.

<sup>188</sup> Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>189</sup> "There are special problems of advertising on the electronic broadcast media. These include, among other factors, the transitory nature of the communication, the inherent emphasis of style over substance, and the difficulty of monitoring and enforcing compliance with ethical standards...." Revised EC 2-2a, Oklahoma Supreme Court Order, *supra* note 1, at 130.

<sup>190</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977).

<sup>191</sup> The Supreme Court noted only that "the special problems of advertising on the electronic broadcast media will warrant special consideration." *Id.*

<sup>192</sup> See note 189, *supra*. Rather than making conclusions about the desirability or danger of electronic advertising, the Oklahoma justices took the position that: "If it can be demonstrated to the Oklahoma Supreme Court that the interests of the public in disseminating and receiving relevant lawyer advertising are not adequately served by print media advertising and that adequate safeguards to protect the public and the judicial system against the consequences of these types of problems can reasonably be formulated, electronic broadcast media advertising may be permitted in the future." Revised EC 2-2a, Oklahoma Supreme Court Order, *supra* note 1, at 130. Three justices of the Oklahoma Supreme Court, including the Chief Justice, dissented from the court's prohibition against electronic advertising. *Id.*

population.<sup>193</sup> Restrictions as to the size of print ads,<sup>194</sup> the use of symbols and pictures,<sup>195</sup> and the geographical distribution of ads<sup>196</sup> were similarly unsupported by the court. The next part of this article suggests that the Oklahoma Supreme Court may have committed constitutional error when it sought to shift to the proponents of advertising the burden of proving the necessity for *permitting* particular types of advertising.<sup>197</sup> As for the subject of this section, the necessity for the current restrictions has not been demonstrated.<sup>198</sup>

#### IV. *The Constitutionality of the New Advertising Rules: Bates Applied*

##### A. *The Constitutional Standard*

The Supreme Court's opinion in *Bates* did not define with precision the explicit constitutional standard that would be employed in analyzing future advertising restraints imposed by the state supreme courts. The opinion clearly held that the states could impose some restrictions without offending the first amendment. For example, the Court affirmatively authorized state prohibitions against "false, deceptive, or misleading,"<sup>199</sup> advertising, as well as "reasonable restrictions on the time, place, and manner of advertising."<sup>200</sup> In addition to these two types of clearly authorized restrictions, the Court speculated, but did not decide, that certain types of restrictions might be tolerated under the first amendment. The Court observed, as an example, that lawyers' claims as to the quality of their services "may be so likely to be misleading as to warrant restrictions."<sup>201</sup> Similarly, the Court thought states "might justify restraints on

<sup>193</sup> The electronic media are the primary source of information for many people, including particularly those who do not now have adequate access to legal services. See Statement of Mary Gardner Jones, former Federal Trade Commissioner, before ABA House of Delegates, reported in *Commercials for Lawyers May Be Barred From TV*, Washington Post, Aug. 6, 1977, at A 3, col. 4 (city ed.)

<sup>194</sup> Code of Professional Responsibility, DR 2-101(G), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 133.

<sup>195</sup> DR 2-101(I), *as amended, id.*, at 134.

<sup>196</sup> DR 2-101(B) *as amended, id.*, at 132.

<sup>197</sup> See, e.g., notes 221-244, 273, 286, and accompanying text, *infra*.

<sup>198</sup> The necessity for the Oklahoma Supreme Court's restrictions on advertising are discussed further in Part IV(B), *infra*.

<sup>199</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977).

<sup>200</sup> *Id.* at 384 (emphasis added).

<sup>201</sup> *Id.* (emphasis added). Justice Blackmun emphasized that the Court was expressing no opinion on this issue.

in-person solicitation.”<sup>202</sup> The Court did not “foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, *might* be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled.”<sup>203</sup> Finally, the Court gratuitously—and ambiguously—observed that “the special problems of advertising on the electronic broadcast media will warrant special consideration.”<sup>204</sup> Despite the concession that some states might attempt to justify future advertising restrictions on one or more of these grounds, the Court’s reservation of these questions does not necessarily mean that the Court is predisposed to tolerate any such restrictions.<sup>205</sup> Furthermore, the fact that these questions were reserved sheds little light on the constitutional standard which will be used to evaluate the Oklahoma Supreme Court’s new restrictions. Nonetheless, there are indications in *Bates* that the Court’s attitude toward future restrictions in the area of commercial speech will not be tolerant. The burden of persuasion appears to lie with the proponents of continued restrictions, rather than on the proponents of advertising, and that burden appears to be a fairly heavy one.

The Supreme Court’s antipathy toward the concept of advertising restraints is reflected throughout the *Bates* opinion. Speaking of the traditional absolute ban on all forms of advertising, the *Bates* Court held in no uncertain terms that, “*the historical foundation for the advertising restraint has crumbled.*”<sup>206</sup> This conclusion was based on the Court’s find-

<sup>202</sup> *Id.* (emphasis added). How far the states may go in this area is the subject of two cases recently decided by the Supreme Court. See *Ohralik v. Ohio State Bar Ass’n*, 98 S.Ct 1912 (1978); *In re Primus*, 98 S.Ct 1893 (1978).

<sup>203</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (emphasis added).

<sup>204</sup> *Id.*

<sup>205</sup> The *Bates* decision itself illustrates the danger of relying on the fact that questions are reserved in one opinion as an indication that the reserved question would be decided differently from the one being addressed in that opinion. The Arizona State Bar, defendant in *Bates*, sought solace from a footnote in an earlier Supreme Court decision applying the first amendment to commercial speech: “We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.” *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 793 n.25 (1976).

Chief Justice Burger wrote a concurring opinion in *Virginia Pharmacy* to emphasize his belief that the case reserved in footnote 25 should reach a different result than the one presented in that case. *Id.* at 773-75. Only a year later, when *Bates* reached the Supreme Court presenting the question reserved in *Virginia Pharmacy*’s footnote 25, that question did not receive the different answer which the Arizona State Bar, Chief Justice Burger, and Justices Powell and Stewart had anticipated. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 389-91 (1977) (Powell, J., dissenting). See Addendum.

<sup>206</sup> 433 U.S. 350, 372 (1977) (emphasis added).

ings that lawyers are engaged in a business,<sup>207</sup> that the prohibition on advertising has never been viewed or applied by the legal profession as a rule of "ethics,"<sup>208</sup> and if anything, the traditional advertising restrictions have been imposed as a rule of etiquette.<sup>209</sup> The Supreme Court could find absolutely no justification for the historical blanket prohibition against lawyer advertising.<sup>210</sup> While *Bates* required the Court to address only the issue of an absolute ban on lawyer advertising, these findings, coupled with the Court's recognition of the potential salutary effects of advertising on the well-documented maldistribution of legal services in America,<sup>211</sup> sug-

<sup>207</sup> *Id.* at 368-69.

<sup>208</sup> *Id.* at 371.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 368-79.

<sup>211</sup> *Id.* at nn.33, 34. Another salutary effect of advertising which the United States Supreme Court recognized was the increase in economic competition among lawyers which advertising promises to foster. *Id.* While lawyers tend to view the prospects of increased competition on the basis of price as undesirable (ostensibly from the standpoint of the public interest), *id.* at 375-77, the Court found the fears of undesirable economic effects of advertising to be unsupported and, therefore, "unpersuasive." *Id.* at 377-79. On the merits of the economic effects of advertising, the Court thought advertising was likely to be beneficial for both the public and the profession *because* of the increased competition that would ensue. *Id.* This conclusion was buttressed by an analysis which viewed advertising as an important mechanism (1) to create incentives for greater efficiency among competitors, and (2) to improve the general allocation of goods and services in the economy as a whole. For example, the Court noted that advertising provides consumers with highly relevant information which is necessary for rational economic decision making, both as to choices from among competing offerors of the same goods or services and as to choices from among various goods and services. *Id.* See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976), relied on by the *Bates* majority in its analysis of the economic effects of advertising. The Court viewed the increased competition which advertising would promote as desirable and beneficial for its ability to advance public policy in regard to *both* the distribution of legal services and the maintenance of competition in the economy. *Bates v. State Bar of Arizona*, 433 U.S. 350, 352 (1977). The Court observed that lawyers as well as the public might benefit from the "fresh air" of more open competition. *Id.* at n.35. Because the maldistribution of legal services in America is partly the result of undue limitations on competition among lawyers (producing higher costs and higher prices as well as public ignorance, see *id.* at 377-79) these two goals of public policy (expressed in Canon 2 of the Code of Professional Responsibility and the state and federal antitrust laws) are closely related. Advancement of one of these goals advances the other, but each may be viewed as an independent ground for the Court's decision in *Bates*.

Even if the Court is wrong in its analysis of the economic effects of advertising, the relevant question under the Court's first amendment analysis was whether the feared adverse economic effects of advertising justify depriving the public of the "right to know" which the first amendment guarantees. Since the opponents of advertising were unable to support their fears by evidence or analysis, *id.* at 377-79, this question could be answered in the negative without the need to demonstrate that advertising would actually have the *beneficial* effects which the Court foresaw. It is therefore unimportant whether the Oklahoma Supreme Court agrees with the judgment of the United States Supreme Court as to the possible beneficial effects of increased economic competition among lawyers (see text accompanying note 116, *supra*). The Supreme Court has ruled, as a constitutional matter, that fears of excessive economic competition among lawyers will not justify a blanket ban on advertising. It is difficult to see how this same discredited argument would fare

gest that continued advertising restraints will be greeted by the *Bates* majority with some suspicion. The Court treated lawyer advertising as desirable, something that should be allowed to flourish.

The Court's actual holding in *Bates* was narrow, but firm: A state may not "prevent the publication in a newspaper of...[a] truthful advertisement[s] concerning the availability and terms of legal services."<sup>212</sup> This statement, taken alone, would suggest that the Supreme Court has taken an absolutist position with respect to restrictions on the contents of advertisements: So long as a statement is true, it cannot be barred. However, such a reading would be too broad. First, the *Bates* holding only reached a particular type of advertising—that concerning "routine" legal services. Second, as we have already seen, the Court suggested that *some* restrictions might be placed even on truthful advertisements without violating the first amendment.<sup>213</sup> Nevertheless, it would be unwarranted to interpret these reservations as an open invitation for the state supreme courts to make unrealistic assumptions as to what kinds of ads would be misleading or otherwise detrimental to the public. This can be seen from the manner in which the Court dealt with Arizona's allegations that the ad under scrutiny in *Bates* was misleading. The Supreme Court independently evaluated each of the three specific allegations raised by Arizona.<sup>214</sup> Finding each of these allegations to be based on an unrealistically low estimate of the public's ability to evaluate truthful information, the Court rejected them all.<sup>215</sup> Moreover, the fervor with which the Supreme Court described the potential benefits of advertising<sup>216</sup> and the dispatch with which the Court dismissed the bar's arguments in defense of the absolute advertising ban<sup>217</sup> add additional support to the view that post-*Bates* restrictions

---

any better if it were being asserted as a justification for only a partial restraint on the communication of commercial information between sellers and potential buyers of legal services. *But See* Addendum.

<sup>212</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977).

<sup>213</sup> See text accompanying notes 199-204, *supra*.

<sup>214</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 381-82 (1977). The State Bar of Arizona argued that the ad in question (see note 10, *supra*) was misleading in three respects: "(a) the advertisement makes references to a 'legal clinic,' an allegedly undefined term; (b) the advertisement claims that appellants offer services at 'very reasonable' prices, and, at least with regard to an uncontested divorce, the advertised price is not a bargain; and (c) the advertisement does not inform the consumer that he may obtain a name change without the services of an attorney."

Interestingly, the fact that the ad in question contained a logo (the "Scales of Justice") was not challenged by the State Bar of Arizona.

<sup>215</sup> *Id.*

<sup>216</sup> See note 211 and accompanying text, *supra*.

<sup>217</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-79 (1977). The Court found in *Bates* that (1) advertising will not have adverse effects on "professionalism" *id.* at 8), (2) advertising will not have adverse effects on the administration of justice by "stirring up [unmeritorious] litigation" (*id.* at 367-73), advertising will not impose undesirable economic effects on the profession or the

arguably premised on one of the grounds for regulation left open in *Bates*<sup>218</sup> will not be upheld automatically.

Still, the Supreme Court did not articulate the standard which it would employ in deciding whether there was sufficient justification for a state's decision to ban a particular type of information from commercial advertisements. The clearest guidance provided by the Court was that, with respect to the contents of ads, "false, deceptive, and misleading" statements may be banned,<sup>219</sup> and, with respect to the "time, place, and manner" in which attorneys advertise, regulations must be "reasonable."<sup>220</sup> This meager guidance at least suggests that the Court perceives essentially two distinct categories of restraints: "content" restraints and "time, place, and manner" restraints. It is likely that a different constitutional standard will be employed for each category of restraint.

### *Content Restrictions*

It is submitted that the test for determining if a particular restriction concerning the *content* of lawyer advertising violates the first amendment is to ask whether the restraint is necessary, that is, the least restrictive way, to accomplish a legitimate state interest. Furthermore, the only legitimate concerns the Supreme Court indicated a willingness to recognize as an excuse for restricting the public's "right to hear"<sup>221</sup> truthful information are (1) protecting the public from being overreached by lawyers, and (2) protecting the judicial system from abuse.<sup>222</sup> Although this "least restrictive alternative" standard was not firmly articulated in *Bates*, this was the standard recently employed by the Supreme Court in overturning a Virginia statute prohibiting price advertising by pharmacists in *Virginia State Board of Pharmacy v. Virginia Citizens Council*.<sup>223</sup>

In *Virginia Pharmacy*, the state interest proffered by the state of Virginia as justifying this regulatory statute was the public interest in pro-

---

public (*id.* at 377-78), and advertising will not lead to abuses that will be difficult to enforce (*id.* at 373-77).

<sup>218</sup> See text accompanying notes 199-204, *supra*.

<sup>219</sup> See text accompanying note 199, *supra*.

<sup>220</sup> See text accompanying note 200, *supra*.

<sup>221</sup> This is the approach indicated in Part III.C. of the *Bates* opinion, in which the Court analyzed the alleged dangers of permitting the ad there in question to be disseminated to the public. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-80 (1977).

<sup>222</sup> *Id.* This seems to be the Supreme Court's orientation in listing questions it was leaving open in *Bates*.

<sup>223</sup> 425 U.S. 748 (1976). For first amendment purposes, a statute enacted by a state legislature or a rule promulgated by a state supreme court would be treated identically. See notes 13-14, *supra*.



protecting the public health and safety,<sup>224</sup> an argument which ordinarily justifies any rational exercise of a state's police power.<sup>225</sup> Virginia argued that the prohibition on prescription drug price advertising was rationally related to the state's concern for public health and safety because such advertising might lead to economic competition and pharmacists might then be enticed or pressured to cut their costs of operations by ignoring health, safety, and cleanliness standards, or otherwise cutting the quality of services rendered to their customers below minimal acceptable standards.<sup>226</sup> While the Court said that Virginia's justifications for its restrictions on pharmacists' advertising could not be discounted entirely,<sup>227</sup> it thought that such justifications were entitled to considerably less deference under first amendment analysis than would be true when state regulation is being attacked on due process or equal protection grounds.<sup>228</sup> The fact that this attack on the advertising restriction was based on the first rather than the fourteenth amendment called for a "close inspection"<sup>229</sup> of the proffered justifications in terms of the public interest objectives asserted by the state. Although the Court did not elaborate on the intensity of the constitutional review implicated by this "close inspection" standard, there can be little doubt that the Court was employing a "least restrictive alternative" analysis. On its independent analysis, the Court found there to be only a slight, indirect relationship between the asserted state interests and the statutory prohibition on price advertising.<sup>230</sup> The Court also found that there was another, less restrictive way for Virginia to assure that pharmacists in that state would not jeopardize the health and safety of their customers. The Court thought that this health and safety interest could be achieved adequately by maintaining and enforcing against careless or corner-cutting pharmacists minimum standards of safety and care.<sup>231</sup>

There is language in *Virginia Pharmacy* which suggests the constitutional standard concerning content restrictions for commercial advertising is even more stringent than the "least restrictive alternative" test. Speaking of whether Virginia's legislature might prudently follow the "minimum safety standard" approach rather than the "advertising prohibition" approach, the Court said:

<sup>224</sup> 425 U.S. 748, 766-68 (1976).

<sup>225</sup> *Id.* at 769, citing *Head v. New Mexico Board*, 374 U.S. 424 (1963), and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

<sup>226</sup> 425 U.S. 748, 766-68 (1976).

<sup>227</sup> *Id.* at 769.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 770.

But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists: it may subsidize them or protect them from competition in other ways....But it may not do so by keeping the public in ignorance of the entirely lawful [and truthful] terms that competing pharmacists are offering.<sup>232</sup>

This sounds very much like the absolutist statement which is the holding of *Bates*: A state may not "prevent the publication in a newspaper of...[a] truthful advertisement...."<sup>233</sup> But in neither opinion did this language mean that the states were prohibited from imposing *any* content restrictions on advertising. In each case, the Court said that states are free to regulate the contents of advertising by prohibiting the publication of false, deceptive, or misleading information.<sup>234</sup> This tends to demonstrate that the Court was applying, *sub silentio*, a "least restrictive alternative" test on the issue of content restrictions. The Court was recognizing that (1) there is a legitimate state interest in protecting consumers from being abused by sellers of goods and services, and (2) this obvious state interest might prompt a state to attempt to regulate advertising with this consumer protection objective in mind. Having recognized this legitimate state interest, however, the Court did not open the door for the states to advance that interest in any way they might deem to be rational. Instead, the Court observed that this state interest can be adequately protected simply by prohibiting false, deceptive, and misleading advertising. The implication—and it is only an implication—is that this is the *only* way the states may advance this interest because it is the least restrictive way the states can achieve their legitimate consumer protection interest while at the same time securing the zone of interests protected by the first amendment. This is the only way to reconcile (1) the Court's absolutist statements against any restraints on truthful advertising,<sup>235</sup> (2) the Court's language tolerating some consumer protection restrictions,<sup>236</sup> and (3) the Court's "close [and critical] inspection" of the consumer protection arguments raised by the states in both *Virginia Pharmacy*<sup>237</sup> and *Bates*.<sup>238</sup>

<sup>232</sup> *Id.*

<sup>233</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977).

<sup>234</sup> 433 U.S. 350, 380 (1977); 425 U.S. 748, 771 (1976).

<sup>235</sup> See text accompanying notes 232-233, *supra*.

<sup>236</sup> See note 234, *supra*, and accompanying text.

<sup>237</sup> 425 U.S. 748, 769-70 (1976).

<sup>238</sup> 433 U.S. 350, 367-81 (1977). Another leading Supreme Court opinion construing the first amendment in the context of state regulation of attorneys indicated that a "least restrictive

As another indication that the Supreme Court has been applying a "least restrictive alternative" standard with respect to advertising content restrictions, consider the guidance provided by the *Virginia Pharmacy* opinion as to how the states can effectively police deceptive and misleading statements without violating the first amendment. In a footnote to that opinion, Justice Blackmun observed that it may be appropriate for states "to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive."<sup>239</sup> While this statement may appear to open wide the door to content restrictions, under the guise of "necessary to prevent deception," it is clear that no such result was intended. First, the footnote suggested requiring *additional* information to be included in ads to prevent truthful information from potentially being misleading. There was no suggestion that truthful information could be *prohibited* by a state where a disclaimer would be adequate to avoid any possible deception.<sup>240</sup> Second, this same footnote reiterated that the first amendment, even in the realm of commercial speech, requires that "the flow of *truthful* and *legitimate* commercial information [be] unimpaired."<sup>241</sup> Third, the direct holding of *Virginia Pharmacy* was that states are not free to make ar-

---

alternative" analysis is appropriate in this sensitive area. In *Baird v. State Bar*, 401 U.S. 1 (1971), Justice Black, writing for a plurality, stated: "When a state seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest." *Id.* at 6. Justice Stewart's concurring opinion (the fifth vote for the plurality's result) did not disagree with this observation.

While it might be suggested that the Court's approach to the absolute advertising prohibition under challenge in *Bates* might have been stricter than it would be with respect to less sweeping content restraints, the manner in which the Court dealt with Arizona's allegations as to the presence of misleading statements in the *Bates* ad suggests this is not the case. Arizona alleged that there were three specific misleading statements contained in the *Bates* ad. *See* note 214 *supra*. On its own *de novo* analysis, the Court found that (1) the use of the term "legal clinic" by a law firm was not inherently misleading simply because it was an undefined term, (2) the labeling of certain fees as "very reasonable" was not so exaggerated as to be misleading, and (3) the offer to perform a name change application for a client was not misleading simply because the ad failed to inform the client that one need not retain an attorney to accomplish a name change. 433 U.S. 350, 379 (1977). At several points in the opinion, the Court indicated that it was inclined to give the public more credit than would the organized bar or state supreme courts when it comes to deciding what would and would not be misleading to the public, *e.g.*, *id.* at 371-72, and, therefore, what would or would not justify a state restriction on the contents of advertising. Justice Blackmun was thus demonstrating that even though care may be exercised by the states to deter misleading statements by attorneys in ads, restrictions designed to deter misleading statements must not be so broad as to deter true and desirable statements as well, unless no less restrictive regulation could be devised.

<sup>239</sup> 425 U.S. 748, 771-72 n.24 (1976).

<sup>240</sup> Again in *Bates*, the Supreme Court held that truthful advertisements could not be prohibited by the states, but disclaimers might be required in even truthful ads to diminish any possible public confusion. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977).

<sup>241</sup> This corresponds with the holding of *Bates*, *id.*

bitrary and artificial decisions as to what types of commercial information are "legitimate."<sup>242</sup> Thus, although the "compulsory disclaimer" exception authorized by the footnote<sup>243</sup> permits a type of restraint on the contents of speech that would not be tolerated in the noncommercial area,<sup>244</sup> the authorized exception seems to have been designed to be no broader than the Supreme Court thought would be *necessary* in order to allow the states to achieve their legitimate consumer protection interests. As for the reference in the *Virginia Pharmacy* footnote to "form" restraints, it seems preferable to construe this as addressing "time, place, and manner" restrictions rather than content restrictions.

### *Time, Place, and Manner Restrictions*

*Virginia Pharmacy* and *Bates* both recognized that states may regulate the "time, place, and manner" of advertising.<sup>245</sup> Except for the vague authorization for some types of "form" restraints found in the *Virginia Pharmacy* footnote and the statement in *Bates* that such restraints must be "reasonable,"<sup>246</sup> the opinions provide little guidance for deciding which restraints are reasonable. The only clue offered by Justice Blackmun in *Bates* was a citation<sup>247</sup> to the footnote in his *Virginia Pharmacy* opinion<sup>248</sup> and another passage in that opinion, where he said, "We have often approved restrictions of that kind [time, place, and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information."<sup>249</sup> This statement suggests a less stringent level of constitutional scrutiny may be applied to time, place, and manner restrictions, a standard which would be more deferential to the states than the least restrictive alternative test applied to content restrictions. This standard seems almost as deferential to the judgment of the states as is the standard applied when the rational basis test is used to evaluate the constitutionality of state economic regulation under the due process or equal protection clauses of the fourteenth amendment. Nevertheless, in view of the Supreme

<sup>242</sup> See text accompanying note 232, *supra*.

<sup>243</sup> See text accompanying note 239, *supra*.

<sup>244</sup> See, e.g., *New York Times v. Sullivan*, 376 U. S. 254 (1964).

<sup>245</sup> 425 U.S. 748, 771 (1976); 433 U.S. 350, 381 (1977).

<sup>246</sup> 433 U.S. 350, 381 (1977).

<sup>247</sup> *Id.*

<sup>248</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976). See text accompanying note 232, *supra*. Justice Blackmun wrote the Court's opinion in each case.

<sup>249</sup> *Id.*

Court's general hostility toward advertising restraints<sup>250</sup> and the Court's belief that lawyer advertising is desirable in terms of assisting the public to have meaningful access to the legal system,<sup>251</sup> it is likely that the constitutional standard for evaluating time, place, and manner restrictions is closer to the least restrictive alternative test that apparently applies to content restrictions<sup>252</sup> than it is to the rational basis test which applies to general health and safety legislation. Regrettably, the test has not yet been articulated by the Supreme Court. While there are weighty policy arguments which favor the least restrictive alternative test for time, place, and manner restraints as well as for content restraints,<sup>253</sup> the precise constitutional standard remains to be defined by the courts.

### B. *The Standard Applied to the Oklahoma Rules*

#### *Content Restrictions*

In Part III it was concluded that most of the restrictions on advertising imposed by the Oklahoma Supreme Court's new rules are premised on the Oklahoma court's desire to protect the public from being misled or overreached by lawyers' ads.<sup>254</sup> We have just seen, in Part IV(A), that, although the United States Supreme Court has acknowledged in *Bates* that this is a legitimate state interest,<sup>255</sup> at least when a state attempts to restrict the *contents* of commercial speech in order to promote this consumer protection objective, the restrictions should be no more restrictive than necessary to accomplish this public interest objective.<sup>256</sup> Applying this least restrictive alternative analysis to the new Oklahoma content restrictions, we must ask whether even such a patently legitimate state interest as consumer protection could be adequately (even optimally) achieved by less restrictive rules.

The advertising content restrictions are found in revised DR 2-101(B).<sup>257</sup> This rule strictly limits the list of permissible topics that may be communicated publicly by lawyers in their advertisements, and all in-

<sup>250</sup> See text accompanying notes 206-211, *supra*.

<sup>251</sup> See note 211 and accompanying text, *supra*.

<sup>252</sup> See text accompanying notes 221-244, *supra*.

<sup>253</sup> See Part III, *infra*. An earlier case raising somewhat different issues stands as precedent for the proposition that "time, place, and manner" restrictions are to be judged according to the "rational basis" test. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585 (D.D.C. 1971), *aff'd without op.*, 405 U.S. 1000 (1972) (statute prohibiting cigarette ads only from electronic media found to have a "reasonable basis"). See also Addendum.

<sup>254</sup> See text accompanying notes 108-112, *supra*.

<sup>255</sup> See text accompanying note 199, *supra*.

<sup>256</sup> See text accompanying notes 221-244, *supra*.

<sup>257</sup> Oklahoma Supreme Court Order, *supra* note 1, at 132-33.

formation not explicitly approved by the Oklahoma court is absolutely prohibited.<sup>258</sup> The restrictiveness of the Oklahoma rule is best appreciated when Oklahoma's list of permissible topics is compared with the list of topics which the ABA House of Delegates considers to be relevant to potential clients and capable of being advertised without misleading or deceiving the general public.<sup>259</sup> Among the topics of information approved by the ABA but disapproved by the Oklahoma Supreme Court are:

- statement of fields of law in which the lawyer or firm practices;
- date and place of birth;
- date and place of admission to the bar of state and federal courts;
- schools attended, with dates of graduation, degrees and other scholastic distinctions;
- public or quasi-public offices;
- military service;
- legal authorships;
- legal teaching positions;
- memberships, offices, and committee assignments, in bar associations;
- technical and professional licenses;
- with their written consent, names of clients regularly represented;
- prepaid or group legal services programs in which the lawyer participates;
- contingent fee rates, subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
- range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged....<sup>260</sup>

In the language of *Virginia Pharmacy*,<sup>261</sup> this is all "truthful and legitimate commercial information" which the Oklahoma Supreme Court is suppressing.

The approval of these topics by the ABA House of Delegates makes particularly difficult the task of the Oklahoma Supreme Court to demonstrate that the commercial advertisement of such information is likely to mislead the public.<sup>262</sup> No other justification for suppressing this

<sup>258</sup> See notes 73-74 and accompanying text, *supra*.

<sup>259</sup> See note 82 and accompanying text, *supra*.

<sup>260</sup> 63 A.B.A.J. 1234-35 (1977).

<sup>261</sup> See text accompanying note 232, *supra*.

<sup>262</sup> The response of other state supreme courts following the ABA approach has been to approve significantly more categories of information than the Oklahoma Supreme Court approved. See note 83 and accompanying text, *supra*. This further strains any claim that the Oklahoma rules are necessary to protect the public interest.

information has been offered. Moreover, the more complete list of topics approved by the ABA seems much more faithful than the Oklahoma list to the delivery of legal services objective which the Oklahoma Supreme Court represented itself as seeking to serve by the 1978 amendments.<sup>263</sup> For example, the "range of fees" topic might allow an attorney or firm to communicate to a previously uninformed public<sup>264</sup> the general range of fees charged for various services without committing the attorney to charge a set fee<sup>265</sup> and without misleading potential clients.<sup>266</sup> In view of the analysis in Part III, questioning the necessity for the Oklahoma content restrictions, it appears that there must be a less restrictive way to protect the public from being misled by lawyer advertising without jeopardizing the efficient delivery of legal services.<sup>267</sup> The approach that has been taken by the Maryland Court of Appeals and the Wisconsin Supreme Court demonstrates a less restrictive alternative for accomplishing the same goals that the Oklahoma Supreme Court has articulated. Their approach has been simply to prohibit false, fraudulent, deceptive, or misleading advertising.<sup>268</sup> There is no reason to assume such a rule to be inadequate. As Justice Blackmun observed for the *Bates* majority:

<sup>263</sup> See text accompanying notes 102-107, *supra*.

<sup>264</sup> The United States Supreme Court in *Bates* noted studies that indicated in the pre-advertising world of legal services there was a significant information gap (and much actual misinformation) encountered by the lay public. 433 U.S. 350, 370-71 nn. 22, 23 (1977).

<sup>265</sup> Under the Oklahoma Supreme Court Order, *supra* note 1, any fees advertised by lawyers must be fixed and firm. See *id.*, amended DR 2-101(B)(7)(a), (d) (set out in note 74, *supra*). The Oklahoma rules do permit attorneys to quote hourly rates (*id.*, amended DR 2-101(B)(7)(c), and to offer to furnish a written estimate of the fee for a specific service (*id.*, amended DR 2-101(B)(7)(b), and to offer to furnish a written estimate of the fee for a specific service (*Id.*, amended DR 2-101(B)(7)(b)), but neither of these devices allow attorneys to communicate the same kind of information that a "range of fees" statement would convey. This is precisely the kind of information that might address the misinformation which now characterizes the lay public's attitude regarding legal fees. See note 264, *supra*.

<sup>266</sup> Interestingly, most of the ABA-approved topics (see text accompanying note 260, *supra*) may be published in legal directories under the new Oklahoma rules. See text accompanying notes 185-186, *supra*.

<sup>267</sup> It was suggested previously that besides being unnecessary, the Oklahoma rules may indeed be counterproductive in terms of the delivery of legal services concern. See text accompanying notes 181-187, *supra*.

<sup>268</sup> See notes 84-85 and accompanying text, *supra*. Other approaches, also less restrictive than the Oklahoma approach, were suggested by the United State Supreme Court in *Bates*. For example, one way to make sure that lawyers' ads are not misleading would be for state bar associations to undertake institutional ads designed to diminish public naivete which might make ads appear to "say" what they were not intended to say. 433 U.S. 350, 381 (1977). Another alternative would be for a state supreme court to require lawyers' ads to contain a disclaimer of some sort to warn the potential client not to assume too much from the limited information that can be included in a commercial ad. *Id.* Such a warning should be sufficient to make many ads which might be potentially misleading acceptable for public dissemination. See text accompanying notes 178-180, *supra*.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.<sup>269</sup>

Another content restriction for which no showing of necessity has been offered is the prohibition in new DR 2-101(I) against the use of "any signs, symbols, or pictures."<sup>270</sup> This content restriction is extremely suspect after *Bates* because the ad studied and sustained in that case contained, as a logo, a graphic symbol of the "Scales of Justice."<sup>271</sup> The Oklahoma rules would thus appear to prohibit the very ad upheld by the Supreme Court in *Bates*. Here too, a less restrictive way for controlling abuses is available, *i.e.*, symbols which create a misleading impression may be banned.

Both of these content restrictions promulgated by the Oklahoma Supreme Court appear to violate the spirit of *Bates*, for DR 2-101(B) and 2-101(I) both "prevent the publication in a newspaper of...[a] truthful [nonmisleading] advertisement [by a lawyer]...."<sup>272</sup> Beyond this, the content restrictions appear to be based on a faulty constitutional premise. The Oklahoma court did not attempt to justify these *restrictions* as being necessary; rather, the court's view seems to have been that particular types of information would have to be shown to be necessary before their dissemination would be authorized. This shifting of the burden of persua-

<sup>269</sup> 433 U.S. 350, 379 (1977). The Wisconsin Supreme Court's Order is temporary, set to expire on Dec. 31, 1978. See note 88, *supra*. When that order is considered for renewal, the legal community will have an opportunity to determine whether stricter rules are necessary after all.

<sup>270</sup> Oklahoma Supreme Court Order, *supra* note 1, at 134.

<sup>271</sup> 433 U.S. 350, 386-87 (1977). See also note 10, *supra*. It was suggested earlier that the Supreme Court in *Bates* indicated that states might choose to limit lawyer advertising in order to guard against abuses of the *judicial system*, as well as potential abuses to consumers. See note 222 and accompanying text, *supra*. This concern may well underlie the Oklahoma Supreme Court's DR 2-101(I), which prohibits the use of signs, symbols, or pictures, since the justices might have thought that such devices might attract unmeritorious cases to lawyers or generally lead to a loss of respect for the legal system. Even if this were the court's motivation, this concern could be dealt with effectively without restoring to the absolute prohibition contained in the rule. DR 7-101(A)(1) prohibits attorneys from asserting unmeritorious positions. If this rule is inadequately enforced, restraints on attorney advertising are not likely to be successful in protecting the public interest in this regard. As for public perceptions, the *Bates* decision upheld an ad that contained a symbol. This indicates that a rule that prohibits the use of all symbols, even on this public image rationale, would be more restrictive than necessary.

<sup>272</sup> 433 U.S. 350, 381 (1977).



sion regarding the permissible content of lawyers' ads is inconsistent with the entire thrust of the *Bates* opinion. The presumption is that restrictions on the content of commercial speech are impermissible unless the state can demonstrate the necessity for the restriction.<sup>273</sup> On the basis of this analysis, it appears that the Oklahoma Supreme Court's new rules restricting the content of lawyers' ads, DR 2-101(B) and 2-101(I), may not be enforced constitutionally.

### *Time, Place, and Manner Restrictions*

As indicated in Part IV(A), the Supreme Court's allowance in *Bates* for "reasonable restrictions on the time, place, and manner of advertising"<sup>274</sup> suggests a less rigorous standard of constitutional analysis may govern time, place, and manner restrictions than is true for content restrictions. The Oklahoma Supreme Court's new rules contain many time, place, and manner restrictions. These include the confinement of lawyers' ads to print media only,<sup>275</sup> the restriction that print ads be no larger than ten square inches,<sup>276</sup> the requirement that ads be placed only in media distributed within "the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides,"<sup>277</sup> and the requirement that all ads be "displayed in a professional and dignified manner."<sup>278</sup>

While it may be fair to expect the Supreme Court to accord the states greater deference in the area of time, place, and manner regulations than it would for content restrictions, it must be remembered that the Supreme Court said in *Bates* that restrictions of this type must at least be "reasonable,"<sup>279</sup> even if it did not say they must be "necessary." Are Oklahoma's time, place, and manner restrictions reasonable? As we can only speculate about the Oklahoma court's reasons for imposing these restrictions,<sup>280</sup> so too can we only speculate on the question of their

<sup>273</sup> See text accompanying notes 221-244, *supra*. Cf. *Bigelow v. Virginia*, 421 U.S. 809 (1975) (state statute applied so as to restrain publication of information that might encourage or prompt the procuring of abortions held to violate the first amendment in view of Court's finding that the restraint was not necessary to accomplish any legitimate state interest).

<sup>274</sup> 433 U.S. 350, 381 (1977).

<sup>275</sup> Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>276</sup> DR 2-101(G), *as amended*, *id.* at 133.

<sup>277</sup> DR 2-101(B), *as amended*, *id.* at 132.

<sup>278</sup> *Id.*

<sup>279</sup> 433 U.S. 350, 381 (1977).

<sup>280</sup> See note 100 and accompanying text, *supra*. But see text accompanying notes 101-115, *supra*.

reasonableness. Still, weighty arguments can be lodged against the reasonableness of each of these restrictions.

*Print Media Restriction.* The Oklahoma Supreme Court's rules restrict ads to newspapers, legal directories, and telephone directories. Other media, including magazines, billboards, radio, and television, would be prohibited.<sup>281</sup> What evils are avoided by an absolute prohibition of these other media? Would a lawyer's ad in one of these media be inherently misleading? It seems that an ad can be broadcast on radio or television and still be neither false nor deceptive. Billions of dollars are spent each year for radio and television advertising, and each advertiser knows that any false or deceptive broadcast ad is illegal, and that cease and desist orders to prohibit them are not infrequent.<sup>282</sup> Furthermore, prohibiting lawyers' ads from being placed on radio or television creates a significant obstacle to the Oklahoma Supreme Court's objective of improving the delivery of legal services because a large portion of the public that does not now have effective access to legal services depends almost exclusively on the electronic media, rather than print media, for its access to information.<sup>283</sup> A rule which prevents even honest, nondeceptive lawyers' ads from reaching a significant portion of the public might well be described as "unreasonable" because it frustrates the delivery of legal services objective, which the Oklahoma court represented itself as seeking to further, without significantly contributing to the realization of the court's other primary objective of preventing consumers from being misled. Granted, the United States Supreme Court left open the question of broadcast advertising by lawyers. Significantly, however, the question left open was not whether the use of such media must be *permitted*, but, rather, whether it could be *prohibited* constitutionally.<sup>284</sup>

The state could argue that the media restrictions are reasonable because, in the words of *Virginia Pharmacy*, "they leave open ample alternative channels for communications of the [relevant, truthful] informa-

<sup>281</sup> Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>282</sup> See generally KINTNER, *supra* note 125.

<sup>283</sup> See note 193, *supra*.

<sup>284</sup> Furthermore, in many communities, the cost of radio advertising is less expensive than newspaper advertising. See Letter of John H. Shenefield, Assistant Attorney General, Antitrust Division, United States Dep't of Justice, to Maryland Court of Appeals Standing Comm. on Rules of Practice and Procedure, at 4, Nov. 23, 1977. Shall we prevent the lawyer with sufficient funds for radio but not newspaper ads from making the public aware of his or her presence in the community and the routine fees charged by such lawyer? Would it not be more reasonable—and equally effective in protecting the public—simply to tell such lawyers that they may advertise on the radio or TV so long as there is nothing false, deceptive, or misleading about what is said or done during the broadcast?

tion.”<sup>285</sup> However, under *Virginia Pharmacy*, this would not be sufficient to save the restrictions from constitutional challenge unless the restrictions are found to “serve a significant governmental interest.”<sup>286</sup> Because the burden is on the state to justify its restrictions on free speech, and because the Oklahoma Supreme Court has not identified any “significant governmental interest” served by the media restrictions, the rule fails to satisfy a reasonableness standard.<sup>287</sup>

The ABA House of Delegates has approved radio and television advertising.<sup>288</sup> A number of other states have approved radio and/or television advertising.<sup>289</sup> Three justices on the Oklahoma Supreme Court, including Chief Justice Hodges, voted to authorize the use of electronic media.<sup>290</sup> The Oklahoma court did not find electronic advertising to be inherently misleading. The restriction tends to interfere with the efficient delivery of legal services. In the face of all of these facts, and in the absence of any indications that public necessity requires the prohibition of electronic broadcast advertising,<sup>291</sup> the Oklahoma court’s decision to restrict lawyer advertising only to print media appears to be arbitrary and unreasonable, and hence, under *Bates*, unconstitutional.<sup>292</sup>

<sup>285</sup> 425 U.S. 748, 771 n.24 (1976). See text accompanying note 241, *supra*.

<sup>286</sup> *Id.* The constitutional test stated in *Virginia Pharmacy* (see text accompanying note 245, *supra*) has three requirements stated in the conjunctive, not the disjunctive.

<sup>287</sup> As was true for the Oklahoma Supreme Court’s approach to content restrictions, this media restriction appears to be based on the faulty constitutional premise that particular types of advertising must be shown to be *necessary* before they must be authorized by the states. See the Oklahoma Supreme Court’s statement in its new EC 2-2a regarding the use of electronic broadcast media, note 192, *supra*. This approach misses the whole point of *Bates*, which thrust upon the states the burden of demonstrating that particular advertising *restraints* are necessary before they can be tolerated under the first amendment. See note 273, *supra*.

<sup>288</sup> See note 81 and accompanying text, *supra*.

<sup>289</sup> See note 84 and accompanying text, *supra*.

<sup>290</sup> Oklahoma Supreme Court Order, *supra* note 1, at 130.

<sup>291</sup> For the possibility that the Oklahoma Supreme Court’s motive for banning broadcast advertising was a desire to maintain the integrity of the legal system, consider note 269, *supra*. Consider also Justice Blackmun’s observation in *Bates* that “cynicism with regard to the profession may be created by the fact that [the profession] has publicly eschewed advertising.” The same could be true if the profession now eschews electronic advertising.

<sup>292</sup> The opposition to allowing attorneys to use these more “commercial” types of media seems to be based largely on concerns of professionalism and dignity in the bar. See Address of Ralph Hodges, Chief Justice, Oklahoma Supreme Court, before Oklahoma City University School of Law’s Program on “Changing Times for the Legal Profession,” Apr. 21, 1978 (distributed by Oklahoma City University School of Law). Many fear that “unprofessional and undignified” ads would be launched by lawyers in avalanche proportions. It is interesting that other institutions desiring to portray a dignified image in order to evoke public respect and esteem customarily rely on the full range of “commercial” advertising. Banks, stockbrokers, and even churches advertise frequently, in both print and broadcast media. No “code of ethics” or enforceable rule of law is necessary to tell people in these “businesses” that their ads should be dignified. Prudent business judgment is sufficient to tell them that. They know that reckless claims

*Size Restrictions.* On what grounds does the Oklahoma court prohibit ads larger than ten square inches?<sup>293</sup> Is it because an ad larger than ten square inches is “unrestrained”?<sup>294</sup> Is a larger ad per se “unprofessional or undignified”?<sup>295</sup> Perhaps more to the point, is a rule restricting ads to no more than ten square inches reasonably likely to ensure that the public will not be misled or abused by lawyer advertising? Such a proposition is not, to say the least, self-evident. More must be known about an ad than its size in order to make a judgment as to whether it is likely to serve a salutary function (e.g., facilitating the delivery of legal services) or a destructive function (e.g., creating false, deceptive, or misleading expectations on the part of nonlawyers). Even if a legitimate state interest in maintaining respect for the legal system and preventing abuses of it is acknowledged,<sup>296</sup> the ten-square-inch rule seems only remotely related to such interests. Besides, the ten-square-inch restriction may prevent the dissemination of relevant information<sup>297</sup> to the public in a manner that can be expected to be seen, read, and understood. If this is true, then the rule is counterproductive from the standpoint of the delivery of legal services objective. Thus, under the reasonableness standard that applies to time, place, and manner restrictions, this rule appears to go so far in the direction of stultifying relevant, nondeleterious information without significantly advancing any competing state interest that we may conclude that the rule is arbitrary, hence unreasonable, and hence unconstitutional.<sup>298</sup>

*Geographic Restrictions.* Perhaps the starkest example of how the bar's judgment on the question of the appropriate scope of legal advertis-

---

or the like will not evoke the public confidence which success requires. Does the Oklahoma Supreme Court doubt that lawyers possess such prudence, such sound business judgment? Is the Oklahoma court, at the request of the Oklahoma Bar, not simply attempting to “legislate” that broadcast ads by lawyers inherently are in bad taste? Individual lawyers and law firms—and the public, which is being asked to respond to such ads—should dictate taste in this area. See Stewart, *supra* note 51.

<sup>293</sup> Code of Professional Responsibility DR 2-101(G), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 133.

<sup>294</sup> The *Bates* majority was careful to describe the type of lawyer advertising it was authorizing as “restrained.” See, e.g., 433 U.S. 350, — (1977). The constitutional significance of this adjective is not clear, however, see text accompanying notes 312-316, *infra*.

<sup>295</sup> See Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132.

<sup>296</sup> See notes 269 and 291, *supra*.

<sup>297</sup> Consider the ABA's list of information that may be relevant to consumers of legal services, found in the text accompanying note 260, *supra*. Could this be legibly displayed in a 10-square-inch ad?

<sup>298</sup> In terms of *Virginia Pharmacy's* test (see text accompanying note 245, *supra*), this rule neither leaves open “ample alternative channels for communication of the [relevant, truthful] information,” nor does it serve a “significant governmental interest.” Therefore, the rule is unreasonable under even the more relaxed standard for “time, place, and manner” restraints.

ing is affected by its self-interest appears in the proposal to restrict permissible ads geographically. Virtually every bar-sponsored proposal, including the one adopted by the Oklahoma Supreme Court, limits lawyer advertising to "newspapers of general circulation in the area where the lawyer has his or her office or where a substantial portion of his or her clientele resides."<sup>299</sup> A more blatant restraint on competition among lawyers has not been publicly visible since minimum fee schedules were struck down under the federal antitrust laws in *Goldfarb*.<sup>300</sup> This proposal has the obvious effect of protecting the status quo concerning the distribution of legal business among a state's existing lawyers. It says, "Keep the big city lawyers from stealing the small town lawyers' business."<sup>301</sup> The use of advertising to expand one's clientele into a previously unserved area would appear to be prohibited unless the advertising attorney opened an office in the new community sought to be served.<sup>302</sup> How does this protect the public? Does it help the layman to be kept in the dark concerning the availability of competent legal services at competitive prices? Does it inspire public confidence in the legal system? Why should not the small town

<sup>299</sup> Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1, at 132; ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Revised DR 2-101(B), 63 A.B.A.J. 1235 (1977).

<sup>300</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>301</sup> It is more than likely that the small town car dealer or banker would like to be able to restrict the big city, big volume car dealers or big city, full service banks from advertising in the small towns. But if the Oklahoma Automobile Retailers Association or Oklahoma Bankers Association agreed to adopt such a restriction, it would not be long before each organization's members found themselves defending an antitrust suit for restraining competition among themselves. It should be of some encouragement to small town lawyers that small town car dealers and bankers have survived without restraints on competition from out-of-towners. (However, branch banking restrictions in some states, including Oklahoma, give some insulation to small town bankers.) Presumably they have done this by offering quality and service to local customers, and, occasionally, even by competing successfully on the basis of price. Perhaps the big city potential competitors simply find it too difficult to compete for customers in unfamiliar communities where people tend to trust people whom they know. While it is understandable that lawyers are reluctant to usher in an age of competition, it can be expected that the small town lawyer, too, will be able to compete effectively with larger, perhaps better-financed law firms from the bigger cities. And if they cannot successfully compete on the merits, it is not clear why they should be protected from competition. The practice of law does not appear to exhibit any of the indicia of natural monopoly. There is no reason to expect competition to leave any community with inadequate legal services or only those provided by a monopolist. See I A. KAHN, *THE ECONOMICS OF REGULATION* 11-12 (1970); C. PHILLIPS, *THE ECONOMICS OF REGULATION* 21 (1969).

<sup>302</sup> Difficult questions of enforcement of the Oklahoma rule are sure to arise by virtue of the fact that the largest circulation daily newspaper in the state's largest city, Oklahoma City, is also the largest circulation daily newspaper in smaller communities throughout the state. Would an ad purchased in this newspaper by an Oklahoma City attorney violate the geographic restriction of DR 2-101(B)? Would such an attorney have to request the newspaper to delete the ad from the statewide edition? Could an attorney in a smaller town choose to use this Oklahoma City newspaper to reach residents of that small town?

resident be allowed to make an informed decision as to where to turn with his or her legal affairs?<sup>303</sup> In what sense does such a geographical restriction protect the layman from being misled? While the Oklahoma Supreme Court was silent on the possible benefits or detriments flowing from increased economic competition among lawyers,<sup>304</sup> the United States Supreme Court made it clear that it thought such competition would be beneficial.<sup>305</sup> The United States Supreme Court also made it clear that a state's desire to suppress competition among lawyers would not constitute a constitutionally sufficient justification for a total prohibition against advertising.<sup>306</sup> The Oklahoma rule imposes an absolute ban on intercity competition through advertising. Under the guidelines of *Virginia Pharmacy*, the geographic advertising restriction fails to "leave open ample alternative channels for the communication of the [truthful and relevant] information."<sup>307</sup> This, coupled with the fact that the suppression of geographic competition frustrates the efficient allocation of legal services, would support an argument that these restrictions are arbitrary and unreasonable. They promote no identified legitimate public interest, and they frustrate a significant public interest.<sup>308</sup> Hence, this restriction appears to be unconstitutional under the guidelines of *Bates* and *Virginia Pharmacy*.

*"Professional and Dignified" Restriction.* The Oklahoma Supreme Court's new DR 2-101(B) requires that lawyers' ads be "displayed in a professional and dignified manner."<sup>309</sup> This restriction raises legitimate questions on a "void for vagueness" theory. However, the void for vagueness theory has not been a significant obstacle for professional discipline of the bar. Some very broad language in the Code of Professional Responsibility,

<sup>303</sup> It seems that the very fact that citizens throughout the state rely on the Oklahoma City newspaper for their news and commercial information gives testimony to the desirability (perhaps necessity) of allowing attorneys in Oklahoma City or Tulsa to inform the citizens of other communities as to the terms on which they will perform legal services.

<sup>304</sup> See text accompanying note 116, *supra*.

<sup>305</sup> *Id.* See also text accompanying notes 210-211, *supra*.

<sup>306</sup> 433 U.S. 350, 372 (1977).

<sup>307</sup> 425 U.S. 748, 771 (1976).

<sup>308</sup> By inhibiting intercity competition among lawyers, this rule inhibits the efficient delivery of legal services. *Cf. Bates v. State Bar of Arizona*, 433 U.S. 350, 372 nn.34, 35 (1977) (absolute prohibition on advertising restricts competition among lawyers, thus tending to keep fees for legal services higher than they might otherwise be and, therefore, beyond the reach of a significant segment of the population). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 754 n.11 (1976).

<sup>309</sup> Code of Professional Responsibility DR 2-101(B), *as amended*, Oklahoma Supreme Court Order, *supra* note 1.

capable of being abused, has been upheld under constitutional attack,<sup>310</sup> and the Supreme Court in *Bates* specifically declined to apply the overbreadth doctrine to old DR 2-101(B) and its total ban on lawyer advertising.<sup>311</sup> In addition, the Supreme Court in *Bates* exhibited a preference for "restrained" advertising.<sup>312</sup> Thus, it is possible that the Supreme Court might view this restriction to be a reasonable one. This provision could be said to "leave open ample alternative channels for communication of...information."<sup>313</sup> It could also be said that this rule serves the "significant governmental interest"<sup>314</sup> of maintaining respect for lawyers and the legal system.<sup>315</sup> Nevertheless, the Court's references in *Bates* to "restrained" ads probably only indicated a predilection against gaudiness, and predilections must take a back seat when it comes to the Constitution, as the Court itself recognized in its admiring review of Justice Holohan's dissent to the Arizona Supreme Court's opinion in *Bates*.<sup>316</sup>

Concepts of "dignity" and "professionalism" are so inherently subjective that they are not suitable as enforceable standards. At bottom, this restriction seems designed primarily to impose upon society the view of one segment of the bar as to what is dignified conduct. Whenever a governmental authority (be it a legislature or a court) gets into the business of attempting to legislate taste, it exceeds its legitimate powers. It is therefore somewhat disturbing that it is the legal profession which is advocating that the state government, through its supreme court, adopt such a measure. In a post-*Bates* world in which state courts are theoretically attempting to foster lawyer advertising rather than ban it, the chilling effect of this "professional and dignified" requirement makes its reasonableness

<sup>310</sup> See, e.g., *In re Bithoney*, 486 F.2d 319 (1st Cir. 1973) (terms "demean [him]-self...uprightly and according to law," and "conduct unbecoming a member of the bar" not unconstitutionally vague). See also *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring) ("good moral character" requirement for admission to state bar unquestioned on due process grounds).

<sup>311</sup> 433 U.S. 350, 379-80 (1977).

<sup>312</sup> *Id.* at 372.

<sup>313</sup> This language is from the test articulated in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). See text accompanying note 249, *supra*.

<sup>314</sup> *Id.*

<sup>315</sup> The Oklahoma Supreme Court did not explain its reason for this restriction. However, provisions in the pre-*Bates* Code suggest that the "respect for lawyers" theme is frequently considered by the justices. See, e.g., ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble, EC 1-5, 9-1, 9-2, as adopted by the Oklahoma Supreme Court, OBA HANDBOOK, *supra* note 2.

<sup>316</sup> 433 U.S. 350, 358-60 (1977). Justice Holohan had dissented to the Arizona Supreme Court's enforcement of the pre-*Bates* DR 2-101(B), finding the rule unconstitutional, "despite his 'personal dislike of the concept of advertising by attorneys.'" *Id.* See also text accompanying note 405, *infra*.

Elsewhere, the *Bates* majority observed, "But habit and tradition are not in themselves an adequate answer to a constitutional challenge." *Id.* at 358-60.

suspect. At a minimum we can say that this restriction will be viewed as reasonable only so long as it is enforced reasonably.<sup>317</sup>

*V. The Policy Issues: The Case for a Limited Role for  
State Supreme Courts in Regulating Lawyer Advertising*

As noted in Part I, the Oklahoma Supreme Court's rules on advertising are among the most restrictive adopted or being considered by any other state court.<sup>318</sup> A few jurisdictions have gone much farther to open up advertising, authorizing any type of advertising lawyers might choose to employ, so long as the ad is neither false, fraudulent, deceptive, nor misleading.<sup>319</sup> Other states are considering rules which, although more detailed than the "false, deceptive, or misleading" approach, seek to permit as much information as possible to be communicated, introducing modest restrictions only where there seems to be some real danger that the layman would be misled or overreached, or that the legal system would be abused. Even where such courts see a need for some restrictions, their proposals abjure absolute prohibitions, opting instead for disclaimers that are designed to prevent statements from being unintentionally misleading.<sup>320</sup>

In most states, the controlling court is responding to the recommendations of the organized bar under its jurisdiction. Some bar associations have recommended positions that seem designed to allow the least possible

<sup>317</sup> See cases cited in note 310, *supra*. In addition, we should consider whether the danger to society from tolerating the folly of the reckless lawyer-advertiser is so great as to warrant making a rule—and trying to enforce it consistently with due process of law—outlawing "undignified or unprofessional" ads? Why isn't the market place an adequate regulator of "dignity and professionalism" in advertising? If such ads are so unworthy, what client would be attracted by them? Compare Stewart, *supra* note 51. See also note 336 and accompanying text, *infra*.

<sup>318</sup> See note 79 and accompanying text, *supra*.

<sup>319</sup> See notes 84-85 and accompanying text, *supra*.

<sup>320</sup> For example, the Iowa Bar Association's proposal contained a provision authorizing lawyers to give a potential client a "specific estimate of the fees likely to be charged" for the services required by that client. Proposal, DR 2-101(C)(4)(b), found at page 3 of the attachment to the Dec. 6, 1971, Letter of Philip J. Willson, President, Iowa State Bar Ass'n, to The Honorable Chief Justice and Justices of the Iowa Supreme Court. On its own motion, the Iowa Supreme Court amended the proposed DR 2-101(C)(4)(b) to require that any such estimate of fees must be in writing. See Iowa Supreme Court Order calling for hearing, *In re: Amendments to the Iowa Code of Professional Responsibility for Lawyers*, Dec. 22, 1977, at page 5 of attachment. The court's change was incorporated in the amendments when they were formally adopted. Iowa Supreme Court Order, *In re: The Iowa Code of Professional Responsibility*, Feb. 17, 1978, at page 5 of attachment. (All of the Iowa Supreme Court's modifications of the Iowa Bar's proposals could not be described as "liberalizing." For example, the Iowa Bar had proposed to authorize radio advertising, but this was deleted by the Iowa Supreme Court. Compare Iowa Bar Proposed DR 2-101(B), *supra*, with Iowa Supreme Court Orders of Dec. 22, 1977, and Feb. 17, 1978, *supra*).



amount of information to reach the public.<sup>321</sup> Such proposals appear to invite new lawsuits to discover just how much regulation is still permissible under the first amendment after *Bates*.<sup>322</sup> Even without making firm conclusions as to the constitutionality of each and every restriction that has been adopted by the state supreme courts, bar officials and state supreme court justices should consider two strong policy arguments which should push them in the direction of allowing more advertising rather than less, and fewer restrictions rather than more. This pro-advertising posture can be assumed without jeopardizing any of the legitimate state interests which have been asserted by some concerned lawyers and jurists who are reluctant to endorse advertising. Indeed, some important public interests may require the profession to embrace the concept of lawyer advertising.

*A. Policy of Avoiding Unnecessary Regulation When Other Sources of Control Are Adequate*

It is now acknowledged that lawyers are engaged in trade or commerce, and, consequently, they are subject to a wide range of consumer protection statutes—from the antitrust laws to truth in lending laws.<sup>323</sup> Only where these laws conflict with a specific directive of a state supreme court or some other, higher authority (*e.g.*, the United States Constitution)<sup>324</sup> are lawyers entitled to immunity from the requirements imposed by these consumer protection statutes.<sup>325</sup> Virtually every feared abuse by lawyers who advertise improperly could subject the abusing attorney to a disciplinary action under long-standing rules contained in the

<sup>321</sup> The Maryland Bar Association proposed rules that would have authorized attorneys to advertise only maximum fee information for specific legal services. *Strict Maryland Law Ad Rules Urged*, Washington Post, Nov. 10, 1977, at C1, col. 4 (city ed.) Oklahoma's 10-square-inch, print-media-only, approach seems to fall in this restrictive category. However, the Mississippi rules appear to offer the paradigm in restrictiveness, authorizing only "truthful advertisement[s] concerning the availability and terms of routine legal services." See Order of Mississippi Supreme Court, note 79 *supra*, at revised EC 2-10.

<sup>322</sup> See Letter of John H. Shenefield, Assistant Attorney General, Antitrust Division, United States Dep't of Justice, to Maryland Court of Appeals Standing Committee on Rules, Nov. 23, 1977. See also *Oklahoma Legal Clinic of Haynes & Blaylock v. Oklahoma Bar Ass'n*, No. 78-0366-E (W.D. Okla., filed Apr. 21, 1978). This suit was filed to seek an injunction against the enforcement of the Oklahoma Supreme Court's new rules against plaintiff for running ads similar to the one upheld in *Bates*. The Oklahoma Bar Association had written to plaintiff, requesting that its ads be withdrawn or modified to conform with the Oklahoma rules. *Bar Curbs Law Clinic Advertising*, Daily Oklahoman, Apr. 20, 1978, at 20, col. 1. Apparently, the Bar Association's main complaint was based on the inclusion in the ads of a logo, which was comprised of the letters "OLC" for Oklahoma Legal Clinic in script.

<sup>323</sup> See Parts I and III, *supra*.

<sup>324</sup> See note 138, *supra*.

<sup>325</sup> The immunity may come from applying an express exemption in a statute or by way of implication. See text accompanying notes 168-169, *supra*.

Code of Professional Responsibility, rules which are not directly addressed or limited to advertising problems.<sup>326</sup> For example, a stance of vigorous enforcement of the existing DR 1-102(A)(4)<sup>327</sup> in the Code should provide a significant deterrent and disciplinary device for the unscrupulous element of the bar, if there be such an element.<sup>328</sup> It should also be noted that the law of tort liability may effectively regulate the conduct of lawyers in many areas. The torts of fraudulent misrepresentation, deceit, and even professional malpractice create a potential liability for unethical lawyers who would overreach clients through the use of misleading or deceptive advertising schemes. This potential liability should deter the unethical attorney and promote care on the part of the well-intentioned attorney-advertiser. The result is that lawyers are potentially subject to three schemes of regulation: statutes, the Code, and common law. These "regulatory systems" frequently are mutually reinforcing; only rarely do they conflict with one another, and when they do conflict, they can be reconciled in a manner that does not sacrifice the goal of consumer protection.<sup>329</sup> In view of the existence of these three thorough regulatory systems, strict, detailed restrictions on the time, manner, place, and content of advertising are unnecessary.

It should be remembered that the more elaborate the advertising regulations, the more costly and cumbersome enforcement problems are likely to be. The Oklahoma Bar Association has allocated a \$100,000 budget to its new Professional Responsibility Commission for its enforcement of the Code.<sup>330</sup> These resources should be conserved to deal with violations that threaten or actually result in abuses of clients. If lawyers conduct themselves with the sense of professionalism that makes them chafe at the idea of commercial advertising,<sup>331</sup> few enforcement problems should arise in the advertising area.<sup>332</sup> It is difficult to see why the language of DR 1-102(A)(4)<sup>333</sup> in the Code of Professional Responsibility would not

<sup>326</sup> See text accompanying notes 144-145, *supra*.

<sup>327</sup> "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Code of Professional Responsibility DR 1-102(A)(4), 5 OKLA. STAT. ch. 1, app. 3 (1971).

<sup>328</sup> Recall Justice Blackmun's incredulity expressed in response to the suggestion that lawyers might be expected to attempt to mislead and distort the public through advertising (see text accompanying note 269, *supra*).

<sup>329</sup> See text accompanying note 165, *supra*.

<sup>330</sup> 48 OKLA. B.A.J. 2821 (Dec. 31, 1977).

<sup>331</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 367-73 (1977).

<sup>332</sup> This was Justice Blackmun's point in the passage quoted in the text accompanying note 269, *supra*. A recent survey conducted for the ABA reportedly revealed that 89% of all attorneys plan "absolutely" not to advertise, no matter how liberal the rules are which regulate attorney advertising. Wall St. J., May 23, 1978, at 1, col. 5 (Southwest ed.). This further demonstrates that detailed regulation by the bar may be unnecessarily expensive.

<sup>333</sup> See note 327, *supra*.

be adequate to deal with problem attorneys. It should be sufficient for a state to prohibit false, deceptive, and misleading advertisements, reasonably define the concepts of "deceptive and misleading" in this area,<sup>334</sup> and make the sponsor of such advertisements liable to professional discipline.<sup>335</sup>

Besides the needless expense of administering unnecessary regulations, truly unnecessary restrictions are also to be avoided because of the possible "chilling effect" they might have by deterring the scrupulous attorney from making legitimate communications,<sup>336</sup> communications which would advance the public interest in improving the delivery of legal services.<sup>337</sup>

### *B. Policy of Demonstrating the "Good Citizenship" of the Bar*

The other policy argument in behalf of a generally permissive attitude toward lawyer advertising after *Bates* is based upon the important role of lawyers in our legal system. It is customary for lawyers to think of their profession as something special. Being a lawyer is thought of as involving more than just "earning a living"; many consider the practice of law to involve a "higher calling." The Preamble to the Code of Professional Responsibility captures this feeling by referring to lawyers as "guardians of the law." If the American people are to accept such a noble view of the legal profession<sup>338</sup> (and it is important for systemic reasons that they

<sup>334</sup> This is the approach followed in "Proposal B" circulated by the ABA House of Delegates in August of 1977. See note 178, *supra*.

<sup>335</sup> Stricter enforcement of all rules designed to protect clients from overreaching by lawyers and to protect the legal system from being abused by lawyers is one way the profession can make sure the advent of advertising will not result in a lowering of standards by lawyers or a loss of public esteem for the profession. As the Court said in *Bates*: "The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity." 433 U.S. 350, 375 n. 31 (1977).

<sup>336</sup> Although the Supreme Court disclaimed the all or nothing "overbreadth" approach in dealing with first amendment problems in the professional advertising area, *id.* at 379-83, Justice Blackmun's opinion shows very little tolerance for regulations that are so broad that they do inhibit legitimate communications. Consider, *e.g.*, Justice Blackmun's analysis of the arguments concerning the allegedly misleading nature of the ad under scrutiny in *Bates*. *Id.* at 379-81. See notes 214-215 and accompanying text, *supra*.

<sup>337</sup> This public interest was one recognized by the Oklahoma Supreme Court when it promulgated its 1978 amendments to the Code. See text accompanying notes 102-107, *supra*.

<sup>338</sup> Current indications are that the public is not yet ready to accept such a flattering view of the profession. A recent public opinion poll showed that the public has little confidence in the honesty and ethical standards of lawyers. Only 25 per cent of those polled thought lawyers had high standards, while medical doctors scored over twice as high in public opinion. *High Rating Given to Doctors in Poll*, N.Y. Times, Aug. 22, 1976, at § 1, 32, col. 6. "One 1978 Harris poll rating public confidence in 16 institutions found law firms at the bottom along with Congress, organized labor and advertising agencies." TIME, Apr. 10, 1978, at 56.

do so),<sup>339</sup> lawyers must conduct themselves responsibly, both individually and collectively.<sup>340</sup> The rather thorough press coverage (locally and nationally) of post-*Bates* developments on lawyer advertising indicates that there is a good deal of public interest in the actions of the organized bar and the state supreme courts in this area.<sup>341</sup> There could be no more fitting test of the collective responsibility of the legal profession than to examine how it responds to an unpopular judicial decision affecting the self-interest of the profession.

There is no question that the United States Supreme Court's opinion in *Bates* was controversial and unwanted as far as the organized bar is concerned.<sup>342</sup> As one observer noted, "every jurisdiction [has always] had the power to authorize legal advertising [but] none chose to sanction it."<sup>343</sup> The President of the Oklahoma Bar Association at the time *Bates* was handed down said that the policy-making Board of Governors of the Bar Association had "reluctantly" proposed amendments to Canon 2 to the state supreme court, adding that, "none of the members of the Board of Governors of the Oklahoma Bar Association believes in advertising by lawyers...."<sup>344</sup> Few jurisdictions have officially embraced *Bates*.<sup>345</sup> Perhaps the closeness of the vote in the Supreme Court in *Bates* (it was a 5-4 opinion) encourages continued resistance by bar leaders to the advent of adver-

<sup>339</sup> There is a close connection between the public's respect for the legal profession and its respect for law and the legal system. See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preamble, EC 8-1, EC 9-2. This thought is explored more fully in text accompanying notes 367-373, *infra*.

<sup>340</sup> See note 339, *supra*.

<sup>341</sup> See note 86, *supra*.

<sup>342</sup> The reaction of both the President and General Counsel of the Oklahoma Bar Association was typical of organized bar leaders around the country. Oklahoma Bar Association President Wilson Wallace wrote to Oklahoma's lawyers that he "personally regrets" that Oklahoma's Code will have to be modified, adding that he "personally...disagrees with the majority opinion in... *Bates*...." Wallace, *Your President Reports*, 48 OKLA. B.A.J. 2125 (Oct. 1, 1977). General Counsel John Amick indicated his disappointment with the mandate of *Bates*, saying, "I would have preferred that we would have abided by tradition." *Lawyer Advertising Controversial*, Sunday Oklahoman, Nov. 20, 1977, at 27, cols. 1, 3. In his year-end message to the Bar, President Wallace observed that, "The great majority of lawyers in Oklahoma are unquestionably against any type of advertising by individual lawyers or law firms." Wallace, *Your President Reports*, 48 OKLA. B.A.J. 2834 (Dec. 31, 1977). But see, *New Lawyer Leader Sees No Bar to Ads*, Daily Oklahoman, Jan. 6, 1978, at N13, col. 3: "The new president of the Oklahoma Bar Association [William H. Bell] does not object to advertising by lawyers...."

<sup>343</sup> Brady, *supra* note 120, at 2603.

<sup>344</sup> Wallace, *Board of Governors Forwards New Advertising Rules Recommendation to Supreme Court*, 48 OKLA. B.A.J. 2381 (Oct. 29, 1977).

<sup>345</sup> The generous responses of the Maryland Court of Appeals and the Wisconsin Supreme Court were mentioned in the text accompanying notes 84-85, *supra*. In addition, the District of Columbia Bar Association's proposed amendments seem to go further than most observers believe *Bates* requires. See Letter of John H. Shenefield, *supra* note 322, at 7.

tising.<sup>346</sup> Despite Justice Blackmun's careful and well-supported opinion for the majority in *Bates*, the debate over the wisdom, desirability, and dangers of lawyer advertising persists. Some proposed responses to *Bates* seem designed more to thwart advertising by lawyers than to permit it.<sup>347</sup> However, despite the lack of popular support within the bar for the concept of lawyer advertising, it must be remembered that the issue has been decided by the United States Supreme Court, and the majority of the Court in *Bates* was in no way reluctant or embarrassed about its result. The thorough documentation contained in the majority's opinion supported the idea that advertising by lawyers is not simply an unpleasant necessity wrought by a quirk in the modern line of cases extending the protections of the first amendment into the realm of "commercial speech." A fair reading of *Bates* leaves one with the unmistakable impression that the Supreme Court believes advertising by lawyers will be advantageous both for the public<sup>348</sup> and for the profession.<sup>349</sup>

It need not follow from the acknowledgment that lawyers are engaged in commerce that the practice of law is a less honored or less important calling.<sup>350</sup> Actually, the contrary is true. It was partly because the Supreme Court recognized the importance of the services offered by lawyers that the Court found it necessary to elevate the right of attorneys to advertise to the level of first amendment protection.<sup>351</sup> Thus, the important role of lawyers in the functioning of the American legal system was vindicated, not deprecated, in *Bates*.<sup>352</sup> The point being made here is that lawyers do occupy a crucial position in our legal system, and this very fact makes it important for the legal profession to accept the mandate of *Bates* rather than resist it.

If Justice Blackmun was right in suggesting that the historic prohibitions on advertising have contributed to public cynicism toward lawyers and the legal system,<sup>353</sup> it follows that continued resistance by the bar and lower courts to legitimate forms of advertising can only exacerbate that cynicism. The public may well perceive a mere grudging acquiescence to

<sup>346</sup> Cf., Wallace, *Your President Reports*, 48 OKLA. B.A.J. 2125 (Oct. 1, 1977): "Since the United States Supreme Court—or at least five members thereof—told the Arizona State Bar Association that it could not discipline lawyers for running a set type ad in a newspaper...."

<sup>347</sup> See note 321, *supra*.

<sup>348</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 370 n.21, 376 n.32, 377-79 (1977).

<sup>349</sup> *Id.*, 370 nn.22, 23.

<sup>350</sup> See text accompanying note 51, *supra*.

<sup>351</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 370 nn.32, 33 (1977); Brady, *supra* note 120, at 2601.

<sup>352</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 368 (1977): "We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated."

<sup>353</sup> See note 30 and accompanying text, *supra*.

the most limited kinds of advertising as yet another indication that the organized bar is most concerned with stifling healthy competition within the legal profession—competition which could produce higher quality legal services for all segments of society at more affordable costs—and least concerned about fulfilling its self-proclaimed responsibility “to educate laymen to recognize their [legal] problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.”<sup>354</sup>

If we simply pause to ask why lawyers view themselves as “guardians of the law,” or why they think of their profession as a “higher calling,” it should become clear, now that *Bates* has been decided, that those who have the highest regard for the role of lawyers in society should also demonstrate the greatest support for liberalized rules on advertising. Let us examine this proposition.

The first paragraph of the Preamble to the Code of Professional Responsibility suggests what is expected of those who would be “guardians of the law.” There the view is expressed that an essential role of lawyers is to foster respect for “the rule of law.”<sup>355</sup> Much depends upon the success of lawyers in performing this function. It may be no overstatement when the Code says that the preservation of a free and democratic society ultimately is at stake.<sup>356</sup> Two types of conduct are required of lawyers if they are to fulfill this important role. First, there is conduct that inspires respect for and confidence in the rule of law as an abstract proposition. We may refer to this as an “inspirational responsibility.” Second, there is conduct that affirmatively seeks to assure that the laws society is asked to respect actually contribute to our national concept of a just society, one which seeks to enhance the dignity of the individual, restrain the power of the state, and foster the concept of enlightened self-government.<sup>357</sup> This may be referred to as a “law improvement responsibility.” These two themes are elaborated throughout the body of the Code.

The “inspirational responsibility” is alluded to in Canon 9 of the Code. There, lawyers are admonished to “avoid even the appearance of professional impropriety” because “[p]ublic confidence *in law and lawyers* may be eroded by irresponsible or improper conduct of a lawyer.”<sup>358</sup> This would be undesirable because “[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have

<sup>354</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1.

<sup>355</sup> *Id.*, Preamble.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*, EC 9-2 (emphasis added).

faith that justice can be obtained through our legal system.”<sup>359</sup> Ethical Consideration 9-6 sums up this theme by stating, “Every lawyer owes a solemn duty to uphold...respect for the law and for the courts and the judges thereof....”<sup>360</sup> The point of Canon 9 is that lawyers can and should promote public confidence in our legal system by promoting confidence in the legal profession and *its* respect for the rule of law.<sup>361</sup>

The other aspect of the relationship between lawyers and the public’s respect for the rule of law—the “law improvement responsibility”—is expressed in the Ethical Considerations under Canon 8 in the Code, a Canon which calls upon all lawyers to “[a]ssist in improving the legal system.”<sup>362</sup> The relationship between what lawyers do in this regard and public respect for the rule of law is explained in EC 8-9: “The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly change; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.”<sup>363</sup> Other Ethical Considerations in Canon 8 remind lawyers that the “orderly changes” which they work for should enhance the development of just legal institutions, so that the system will deserve the respect of the public at large: “Rules of law are deficient if they are not just... and responsive to the needs of society.”<sup>364</sup> The Ethical Considerations go on to suggest that the legal system cannot work justly if “[m]embers of the public [are not] educated to recognize the existence of legal problems and the resultant need for legal services, and [if they are not] provided [with] methods for intelligent selection of counsel.”<sup>365</sup> The Code clearly contemplates the need for affirmative actions by lawyers in this regard: “[L]awyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting...programs to improve the system....”<sup>366</sup>

Inevitably, there is a close relationship between the “inspirational” and “law improvement” responsibilities of the legal profession. It is difficult to fulfill either responsibility while ignoring the other. If we combine the themes of Canon 8<sup>367</sup> and Canon 9<sup>368</sup> and read them in the light of the

<sup>359</sup> *Id.*, EC 9-1.

<sup>360</sup> *Id.*, EC 9-6.

<sup>361</sup> *See id.*, EC 9-1.

<sup>362</sup> *Id.*, Canon 8.

<sup>363</sup> *Id.*, EC 8-9.

<sup>364</sup> *Id.*, EC 8-2.

<sup>365</sup> *Id.*, EC 8-3.

<sup>366</sup> *Id.*, EC 8-1.

<sup>367</sup> See text accompanying notes 358-361, *supra*.

<sup>368</sup> See text accompanying notes 362-366, *supra*.

Code's Preamble,<sup>369</sup> the message is unmistakable: Lawyers have a responsibility to take affirmative actions which will contribute to public respect for the rule of law. If respect for the rule of law is to be assured, the profession actively should foster law reform efforts, take actions which assist laymen in obtaining legal counsel when they need it,<sup>370</sup> and seek to eliminate institutional barriers which prevent laymen from recognizing their legal problems or finding affordable legal counsel when a problem is perceived.<sup>371</sup> The corollary to these propositions is that lawyers must not engage in conduct which undermines public respect for the rule of law, either by eroding faith in the integrity of the legal system<sup>372</sup> or by contributing to the maintenance of barriers to the efficient delivery of legal services.<sup>373</sup>

How do these considerations relate to the profession's response to the Supreme Court's decision in *Bates*? At a minimum, the bar should endeavor to induce the state supreme courts to comply with the letter of the Court's holding. *Bates*, especially when read in light of *Virginia Pharmacy*,<sup>374</sup> can be interpreted as holding that states violate the first amendment rights of their citizens when they limit the content of lawyer's newspaper advertisements concerning the availability of "routine" legal services restrictions beyond prohibiting "false, deceptive, or misleading" statements.<sup>375</sup> When a bar association proposes elaborate content restrictions, such as those proposed by the Oklahoma and Maryland Bar Associations,<sup>376</sup> it is encouraging its state's highest court to violate the United States Constitution. This flouting of a binding precedent of the United States Supreme Court is antithetical to both the "inspirational responsibility"<sup>377</sup> and the "law improvement responsibility"<sup>378</sup> of lawyers—individually and collectively.

When the less clear aspects of the *Bates* opinion are examined in the realm of "time, place, and manner" restrictions,<sup>379</sup> these same professional responsibilities should guide the bar to resist the inclination to seek to im-

<sup>369</sup> See text accompanying notes 355-357, *supra*.

<sup>370</sup> Compare ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-3, 9-1.

<sup>371</sup> Compare *id.*, EC 8-2, 8-9, 8-1.

<sup>372</sup> Compare *id.* EC 9-2, 9-6, DR 8-102.

<sup>373</sup> Compare *id.* EC 8-3, 9-1, 2-1, 2-2.

<sup>374</sup> See text accompanying notes 223-244, *supra*.

<sup>375</sup> See text accompanying notes 254-273, *supra*.

<sup>376</sup> The Oklahoma Bar Association's proposals were summarized in the text accompanying note 63, *supra*. The Maryland Bar Association's proposal was highlighted in notes 89 and 321, *supra*.

<sup>377</sup> See text accompanying notes 358-361, *supra*.

<sup>378</sup> See text accompanying notes 362-366, *supra*.

<sup>379</sup> See text accompanying notes 245-253, *supra*.



pede the use of advertising by those lawyers who wish to do so.<sup>380</sup> Lawyers must learn to appreciate the crucial relationship which the United States Supreme Court saw between the elimination of blanket prohibitions on lawyer advertising and meaningful public access to the legal system. The Court observed:

The absence of [lawyer] advertising may be seen to reflect the [legal] profession's failure to reach out and serve the community: studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.<sup>381</sup>

Elsewhere, the *Bates* majority indicated lawyer advertising could be expected to enhance access to the legal system significantly for the majority of Americans.<sup>382</sup> The Court thought advertising would contribute to improved access to lawyers in two ways: (1) by improving the level of public information about legal problems,<sup>383</sup> and (2) by stimulating price competition among lawyers and thus leading to a lowering of the median fee charged for routine legal services.<sup>384</sup> Thus, the Court thought that the use of advertising would assist the profession in fulfilling its two-pronged responsibility of "improving" the legal system in a manner which "inspires" respect for law. "A rule allowing restrained advertising would be in accord with the bar's *obligation* to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available'. "<sup>385</sup> In short, *Bates* encourages the organized bar and the state supreme courts to work for increased advertising by lawyers, not against it. Despite its recognition

<sup>380</sup> Any private efforts by lawyers to inhibit the use of advertising by competing attorneys would raise a question of antitrust liability. See *United States v. American Bar Association*, No. 76-C-3475 (N.D. Ill.); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961).

<sup>381</sup> 433 U.S. 350, 370 (1977).

<sup>382</sup> *Id.* at 370 n.23.

<sup>383</sup> *Id.*, nn.22, 23.

<sup>384</sup> Compare *id.* at 364. "[Advertising] serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." And see *id.* at 376-77. These judicial observations appear to be more than abstract economic theory: "There are indications already that advertising has helped lower legal costs. In New York, for instance, some lawyers' fees for uncontested divorces have gone down from more than \$750 to between \$150 and \$250 since the Supreme Court ruled that lawyers could advertise." *Maryland Lawyers*, *Washington Post*, Nov. 26, 1977, at 4, col. 1 (city ed.). There are no indications that the quality of services performed by the lawyers who have lowered their fees has been compromised. The result would appear to be a net improvement in the availability of legal services.

<sup>385</sup> 433 U.S. 350, 377 (1977) (emphasis added). It is not clear just what the Supreme Court meant by "restrained." The context suggests "dignified." It would be nonsensical to interpret this undefined adjective as an invitation to suppress the dissemination of relevant, truthful, non-misleading information. See note 316 and accompanying text, *supra*.

that states might constitutionally impose some restrictions concerning the "time, place, and manner" of advertising,<sup>386</sup> it seems fair to say that the attitude of the Supreme Court was warmly supportive of the concept of some form of "restrained" advertising by lawyers.

Now it may well be true that "the great majority of the lawyers in Oklahoma are unquestionably against any type of advertising by individual lawyers or law firms,"<sup>387</sup> and it may be, although there is some evidence to the contrary,<sup>388</sup> that the economic well-being of some lawyers—perhaps the entire profession—will be adversely affected by the increased price competition for routine legal services that liberalized advertising will foster.<sup>389</sup> Consequently, it is understandable that lawyers by and large are not anxious to allow advertising within the profession, and that bar-sponsored proposals for modifications in Canon 2 have seldom gone beyond, and sometimes not even as far as, the minimum that *Bates* requires.<sup>390</sup> To be sure, given all of the questions left unanswered by *Bates*,<sup>391</sup> the profession (with the acquiescence of the state supreme courts)<sup>392</sup> could delay for some time the ultimate liberalization of advertising rules. A state court could modify its rules just to fit the narrow holding of *Bates* and await some brave attorney's federal court test for each grudging amendment to see if the rules go as far as the Constitution requires.<sup>393</sup> The recent history of the opposition of the organized bar and state supreme courts to the development of group legal services offers an unflattering example of how the bar can interpret Supreme Court opinions unduly narrowly.<sup>394</sup>

<sup>386</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). See text accompanying notes 245-253, *supra*.

<sup>387</sup> Wallace, *Your President Reports*, 48 OKLA. B.A.J. 2833, 2834 (Dec. 31, 1977). See also Stamper, *supra* note 149.

<sup>388</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 377 n.35 (1977).

<sup>389</sup> See *id.*, n.34.

<sup>390</sup> See note 376, *supra*.

<sup>391</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977) summarized in text accompanying notes 201-204, *supra*.

<sup>392</sup> See notes 2, 45-47, *supra*. Although committees of the state bar association are customarily asked to propose changes in the Code to the state supreme courts, final authority to draft and promulgate such changes is held by the state supreme courts.

<sup>393</sup> See note 322, *supra*.

<sup>394</sup> It took a series of four Supreme Court cases over an eight-year period to convince the organized bar and the state supreme courts that the United States Constitution prohibits official state acts which unduly interfere with the access of individuals to the legal assistance that is so essential to access to the legal system. See *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *UMW v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). Even though the facts of each of the four cases presented a slightly different issue, each time the Supreme Court found the earlier cases clearly to have implicated the results in the next case in the series. See M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 121-23 (1975). Unsatisfactory compliance with these precedents apparently has provoked the Federal Trade Com-

If an attorney were representing a private client that had just lost a case in the Supreme Court, he or she would certainly be entitled to represent the client in pursuing the self-interested course of interpreting the holding of the case as narrowly as possible.<sup>395</sup> However, in view of the important role of lawyers in fostering respect for the rule of law,<sup>396</sup> such a recalcitrant approach to lawyer advertising after *Bates* would be dangerous and ill-advised. Both the "inspirational responsibility" and the "law improvement responsibility" which characterize the special relationship between the legal profession and society's respect for the rule of law require the bar to respond to *Bates* in a more statesmanlike way, especially when the profession faces up to the thorough documentation as to how the public has been ill-served by the traditional prohibitions against lawyer advertising.<sup>397</sup>

Focusing on the aspect of the special relationship between the bar and the public respect for the rule of law, the "law improvement responsibility," only intensifies the need for a pro-advertising stance on the part of the bar. We have seen that lawyers have a commitment to work affirmatively toward improvements in the laws which will contribute to our national concept of a just society.<sup>398</sup> Both the Supreme Court in *Bates* and the Code of Professional Responsibility describe a direct relationship between improved access to the legal system and the development of a just society with

---

mission to initiate an investigation of bar efforts to impede the development of group legal assistance programs. See Wall Street J., Dec. 22, 1977, at 10, col. 5; FTC Release, Dec. 21, 1977, 4 TRADE REG. REP. (CCH) ¶ 10,198.

<sup>395</sup> Compare ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-101(A), EC 7-5, 7-6. But see, *id.*, EC 7-8, 7-9, indicating an attorney at least should counsel against client tactics primarily intended to delay implementation of a decided case before agreeing to represent a client in advocating in litigation that the decided case does not require the client to do what a fair reading of the precedent would suggest the client should do. See also *id.* DR 7-102(A)(1), 7-102(A)(2).

<sup>396</sup> See text accompanying notes 358-373, *supra*.

<sup>397</sup> The Supreme Court observed in *Bates*: "[T]he bar acknowledges [that] 'the middle 70% of our population is not being reached or served adequately by the legal profession.'" 433 U.S. 350, 376 (1977). See also *id.* at 370 nn. 22, 23. Such recalcitrance surely will be perceived as conduct based predominantly on the self-interest of the bar, which may lead to a loss of respect (1) for the legal profession, and hence (2) for our legal system, and hence (3) for the rule of law. What else might the public conclude when, after *Bates*, disciplinary measures are threatened against attorneys who utilize ads essentially identical to the one held to be constitutionally protected in *Bates*? See note 322, *supra*. What else is the public to think when the leader of the state bar announces publicly that the United States Supreme Court decision in *Bates* has no effect in his state? See Wallace, *Your President Reports*, 48 OKLA. B.A.J. 2125 (Oct. 1, 1977). Is the public not entitled to conclude that the bar is mainly concerned with limiting the price competition for legal services that advertising is necessary to develop?

<sup>398</sup> See text accompanying notes 363-366, *supra*. Universal notions of "justice" under the American legal system are expressed in the Preamble to the Code, discussed in text accompanying notes 355-357, *supra*.

just legal institutions.<sup>399</sup> The ideal expressed in the Code is that lawyers should be actively working for the improved access that increased lawyer advertising promises.<sup>400</sup> Such conduct would engender enhanced public respect for law simply because the resulting real improvements in access to the legal system would make the legal system more worthy of respect. After *Bates*, the legal system, access to which is controlled by lawyers, will surely suffer a loss of public confidence if bar leaders persist in their attempts to maintain strict restrictions on advertising by lawyers, thereby impeding the optimal distribution of legal services.

The state supreme courts ought to be able to face up to the question of lawyer advertising with a more detached view than can be expected from the bar itself. To put the point in the context of the Code of Professional Responsibility, the organized bar has a conflict of interest in advocating *any* position on the advertising issue. The bar's "financial, business, property, [and] personal interest[s]"<sup>401</sup> will all be affected by the state courts' responses to *Bates*. Such a conflict ordinarily prevents a lawyer from participating in a matter, unless the client consents after full disclosure.<sup>402</sup> Because there is no way for the "client" to consent in these circumstances, the "client" being the public at large, the obvious conflict of interest which might be affecting the bar's judgment on the issue requires the state supreme courts to look upon the bar's recommendations with less deference than would ordinarily be appropriate. The justices of the state supreme courts must realize that the United States Supreme Court was speaking directly to them in *Bates*. All of the policy arguments, as well as the actual holding of the *Bates* opinion, should be considered carefully by each controlling court.<sup>403</sup> Each justice on each state court must decide how sympathetic to the thrust of the majority's opinion in *Bates* his or her interpretation will be. This section of this article has sought to demonstrate that a sympathetic interpretation of *Bates* by the state courts is important because of the deleterious impact a less than enthusiastic reading of that opinion would have on public access to, and confidence in, the legal system.

This writer does not intend to impugn the integrity and motives of the organized bar in this controversy. If the self-interest of the bar in this area

<sup>399</sup> See text accompanying notes 367-373, *supra*.

<sup>400</sup> See text accompanying note 373, *supra*.

<sup>401</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY. DR 5-101(A). See also *id.*, EC 5-1, 5-2.

<sup>402</sup> ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY. DR 5-101(A). See also *id.*, EC 5-1, 5-2.

<sup>403</sup> If no one appears to present the more expansive interpretation which the *Bates* decision allows, the state courts may be deciding a vital public issue in a vacuum. See text accompanying notes 86-99, *supra*.

is obvious, it is no less understandable.<sup>404</sup> This article has been concerned more with the effects of advertising on public perceptions than it has with lawyer intentions. All that has been said about the likely public cynicism which would greet restrictive responses to *Bates* is intended to impress upon the justices of the state supreme courts why they must be careful not to become unintentional collaborators in a proposal that will unnecessarily restrict competition within the legal profession, thereby unnecessarily restricting public access to the legal system. It is essential that the state court justices bring to this task the independence of judgment that practicing lawyers cannot establish, despite most honorable intentions, because of the inherent conflict of interest just described. What is needed is the kind of statesmanship exhibited by the dissenting justice of the Arizona Supreme Court in *Bates*, whose courage and foresight were acknowledged and applauded by the United States Supreme Court's majority:

Of particular interest...is the opinion of [Arizona's] Mr. Justice Holohan in dissent [to the Arizona Supreme Court's enforcement of the absolute ban on advertising]. In his view, 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..." rather than as one involving merely the regulation of a profession. Observed in this light, he felt the rule performed a substantial disservice to the public....Although [he] acknowledged that some types of advertising might cause confusion and deception, he felt that the remedy was to ban that form, rather than all advertising. Thus, despite his "personal dislike of the concept of advertising by attorneys,"...he found the ban unconstitutional.<sup>405</sup>

### *Conclusion*

It is hoped that this article is not viewed as being antilawyer. The premise here is that liberalized advertising by lawyers is in the interest of both the public and the profession, largely because the increased competition which advertising will engender will improve the delivery of legal services for the public and make the legal profession able to deliver legal services more efficiently and more consistently in tune with the high and laudable principles of the Code of Professional Responsibility. In an era when lawyers are concerned about the rising number of new entrants to the legal profession, it is natural to fear the impact of increased competition—particularly on a fee basis—on one's own livelihood. Abstract notions of the efficient allocation of resources in a complex society do not go very far in justifying what may seem to the individual lawyer a *kamikaze*

<sup>404</sup> See text accompanying notes 387-389, *supra*.

<sup>405</sup> 433 U.S. 350, 358 (1977).

path. For the understandably worried lawyer, comfort may be drawn from the Supreme Court's observation in *Bates*: "Even if advertising causes fees to drop, it is by no means clear that a loss of income to lawyers will result. The increased volume of business generated by advertising might more than compensate for the reduced profit per case." [Citations omitted.]<sup>406</sup> These optimistic notes should also provide significant comfort for the concerned state supreme court justices pondering this issue, even though they, unlike the bar, must be expected to approach the issue less from the standpoint of the economic well-being of the legal profession, and more from the standpoints of efficient allocation of resources, restrained state interference in the first amendment area, and the vital need for significant improvements in the delivery of legal services to all elements of our society. Careful reflection on the first paragraph of the Preamble to the Code of Professional Responsibility, adopted by most state supreme courts, counsels for a bold response to the mandate of *Bates*.

The continued existence of a free and democratic society depends upon the recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

This article has attempted to make clear the close relationship between advertising, the delivery of legal services, and the accomplishment of the goals set forth in the Code's Preamble. In view of the abysmal failure of the bar voluntarily to facilitate the efficient delivery of legal services,<sup>407</sup> it is up to the state supreme courts to seize the initiative and take the bold steps necessary to move the bar forward in this crucial task. There is little risk of abuse,<sup>408</sup> and there are ample mechanisms for controlling it should it occur.<sup>409</sup>

#### *Addendum: The Impact of the "Lawyer Solicitation" Cases*

Two recent opinions of the United States Supreme Court serve to em-

<sup>406</sup> *Id.* at 377 n.35.

<sup>407</sup> *Compare id.*, at 376.

<sup>408</sup> *Compare id.*, at 379: "We suspect that, with advertising, most lawyers will behave as they always have: they will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust."

<sup>409</sup> *Id.* See also Part III, *supra*.

phasize the relatively relaxed constitutional standard which will be used to evaluate advertising restraints that arguably can be classified as "time, place, and manner" restrictions. In addition, these cases, which involved communications by attorneys, raise the possibility that states may successfully impose restrictions on the *content* of purely commercial speech through the device of broad "time, place, and manner" restrictions.

Both of these lawyer-related cases involved attorneys who had been disciplined by a state supreme court for having personally solicited the case of an individual client, an activity of commercial speech that traditionally has been banned.<sup>410</sup> *Ohralik v. Ohio State Bar Association*<sup>411</sup> presented an attorney who had, through aggressive and generally overbearing tactics,<sup>412</sup> solicited a fee-generating retainer from two plaintiffs in a personal injury action.<sup>413</sup> *In re Primus*<sup>414</sup> involved a volunteer attorney affiliated with the American Civil Liberties Union (ACLU) who had personally advised a lay person of her legal rights and subsequently written the woman to inform her "that free legal assistance [was] available from a nonprofit organization with which the lawyer and her associates [were] affiliated."<sup>415</sup> Treating these as companion cases, the Supreme Court used the contrasting fact situations to reestablish for first amendment purposes the traditional dichotomy between commercial and noncommercial speech which *Bates*,<sup>416</sup> *Virginia Pharmacy*,<sup>417</sup> and *Bigelow v. Virginia*<sup>418</sup> had blurred.

The majority opinion in both *Ohralik* and *In re Primus* was written by Mr. Justice Powell, who had written the most impassioned dissent in *Bates*.<sup>419</sup> Now speaking for six Justices (including the draftsman of the majority opinion in *Bates*, Mr. Justice Blackmun), Justice Powell read *Bates* as narrowly as that year-old opinion would allow, emphasizing that only *blanket* prohibitions against truthful advertising concerning *routine* legal services had been held to be protected by the first amendment.<sup>420</sup> The *Ohralik* opinion went on to make it absolutely clear that *commercial*

<sup>410</sup> See ABA, CANONS OF PROFESSIONAL ETHICS, No. 28 (1908); ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A), 2-104 (1969). See note 430 *infra*.

<sup>411</sup> 98 S.Ct. 1912 (1978).

<sup>412</sup> *Id.* at 1915-17.

<sup>413</sup> *Id.*

<sup>414</sup> 98 S.Ct. 1893 (1978).

<sup>415</sup> *Id.* at 1895.

<sup>416</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>417</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>418</sup> 421 U.S. 809 (1975) (a state may not prohibit the publication of information concerning the availability of abortions).

<sup>419</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 389 (1977). See, *e.g.*, text accompanying note 27, *supra*.

<sup>420</sup> 98 S.Ct. 1912, 1915 (1978).

speech, (*i.e.*, speech motivated by a quest for financial gain) had thus far been afforded only "a limited measure of protection"<sup>421</sup> under the first and fourteenth amendments, and the Court refused to extend that limited zone of protection in a case such as this, which involved unseemly aspects popularly characterized as "ambulance chasing."<sup>422</sup> In *Primus*, however, the same six-member majority emphasized the noncommercial, *i.e.*, nonremunerative motives of the lawyer's speech, characterized the penalized communications as incidental to "associational" behavior, and found such "associational speech" to be entitled to a greater degree of protection under the first amendment than had been extended to the "purely commercial" speech involved in *Ohralik*.<sup>423</sup> The direct holding of *Ohralik* was that "the States may vindicate legitimate regulatory interests through proscriptions, in certain circumstances, of in-person solicitation by lawyers who seek to communicate purely commercial offers of legal assistance to lay persons."<sup>424</sup> The Court's majority seemed to be using the facts presented in *Primus* to establish a specific exception to *Ohralik*'s statement of the general rule<sup>425</sup>: Speech "undertaken to express personal political beliefs and to advance [associational] objectives" is entitled to greater protection than speech made with "pecuniary [or] financial gain" in mind.<sup>426</sup>

Although the personal solicitation sought to be regulated by the states in *Ohralik* and *Primus* was found to involve substantially greater dangers of public injury than the printed announcement of the availability of

<sup>421</sup> *Id.* at 1918.

<sup>422</sup> See *In re Primus*, 98 S.Ct. 1893, 1909 (1978).

<sup>423</sup> *Id.* at 1904-1905. The more favored treatment for "associational speech" was based on the long line of cases holding that states may not interfere with lawyers' efforts to assist groups of individuals to obtain meaningful access to the legal system. See note 394, *supra*. The *Primus* majority observed that "associational conduct [is] at the core of the First Amendment's protective ambit," *id.* at 1900, and "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). See *Bates v. State Bar of Arizona*, 433 U.S. 350, 376, n.32 (1977)." *Id.* at 1901.

<sup>424</sup> 98 S.Ct. 1893, 1899 (1978) (emphasis added).

<sup>425</sup> See Part II of Justice Powell's opinion in *Primus*, *id.*

<sup>426</sup> *Id.* at 1900. It will be left to other commentators to discuss whether the distinction between the "speech" involved in the *Ohralik* and *Primus* cases, based primarily on the speaker's motive, is a meaningful or workable one. Mr. Justice Rehnquist, the lone dissenter in *Primus*, found the distinction less than compelling since the two categories of speech (one motivated by a desire for pecuniary gain and the other motivated by a desire to advance political or associational objectives) are not necessarily mutually exclusive. *Id.* at 1909-12. This type of distinction seems to invite the courts to make subjective judgments about the value of particular thoughts sought to be communicated (see text accompanying note 448, *infra*), or the legitimacy of the motives of particular communications. However awkward it might seem for courts to make the kinds of judgments that such distinctions require, the fact remains that these cases require the distinction to be drawn. See *id.* at 1899-1900.



routine legal services involved in *Bates*,<sup>427</sup> it must be recognized that the printed advertisement and the spoken word are simply two different ways in which even identical information may be communicated by a lawyer to a potential client.<sup>428</sup> It must also be recognized that most lawyer advertising—including the ad in question in *Bates*—is employed in pursuit of “pecuniary or financial gain.”<sup>429</sup> Consequently, since the Supreme Court held in *Ohralik* that “in-person offers of legal assistance to lay persons” may be substantially regulated (indeed, prohibited!)<sup>430</sup> by the states when the offer is motivated by the desire for financial gain, it would appear that substantial regulation of print and broadcast advertisements placed primarily for pecuniary gain may also be tolerated under the first amendment. In short, for the kinds of advertisements with which this article has been primarily concerned—advertisements addressed to the public at large or an identifiable segment thereof, as opposed to a specific individual—*Ohralik* suggests that the pecuniary motivation of such ads may limit the protection available from the first amendment. Furthermore, even though the Supreme Court in *Ohralik* and *Primus* considered itself concerned with the Code of Professional Responsibility rules that could better be described as “time, place, and manner” restraints rather than “content” restrictions,<sup>431</sup> the lower level of protection applicable when pecuniary gain is involved may actually expose the content as well as the “time, place, and manner” of lawyers’ ads to rather extensive state regula-

<sup>427</sup> *Id.* at 1912, 1917-18.

<sup>428</sup> See address of the Hon. Joe Sims, note 79, *supra*.

<sup>429</sup> Financial gain may not always be the sole motive of advertising lawyers. The for-profit “legal clinic,” such as the one that ran the ad that resulted in the *Bates* opinion, is a relatively new phenomenon in which lawyers seek to earn a living by assisting people of moderate means (who have normally gone without legal assistance, see *Bates v. State Bar of Arizona*, 433 U.S. 350, 376-77 (1977)) obtain legal services at an economically efficient price. The ads of such lawyers thus pursue the dual motives of (1) earning a living for the attorney, and (2) furthering the “political” view that all individuals should have meaningful access to the legal system. See Justice Rehnquist’s dissent in *Primus*, 98 S. Ct. 1893, 1909 (1978). Cf. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2 (“A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.”).

<sup>430</sup> 98 S.Ct. 1893, 1899 (1978). Disciplinary Rule 2-104(A) of the ABA (and Oklahoma) codes prohibits an attorney from accepting employment resulting from the attorney’s unsolicited in-person advice to a layman that he should obtain legal counsel. There are only a few specific exceptions to this prohibition. See DR 2-104(A)(1)-(5).

<sup>431</sup> See, e.g. *In re Primus*, 98 S.Ct. 1893, 1908 (1978). Much was made of the in-person nature (“place and manner”) of the communication punished in *Ohralik*. see 98 S.Ct. 1912, 1918 (1978), and it is by no means certain that the same communication made through the medium of a commercial advertisement, or even a letter, see 98 S.Ct. 1893, 1904 (1978), could be punished by a state without violating the first amendment. The content of Mr. Ohralik’s soliciting statements simply was not put in question by the Disciplinary Rule in question: “The rule does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice.” 98 S.Ct. 1912, 1918 (1978).

tion. Simply by prohibiting the making of particular statements or the discussion of certain subjects in the "place or manner" of a commercial advertisement, a state could effectively regulate the content of the ad. The lower level of scrutiny for the "place or manner" restriction might mean that this backhanded content restriction could effectively prevent relevant, truthful information from reaching the public, yet the restriction would be insulated from effective constitutional attack.<sup>432</sup> An examination of the "lawyer solicitation" cases is in order to determine whether they actually establish a constitutional standard for evaluating commercial speech problems that is substantially more relaxed than was advanced in Part IV of this article.

The starting point in *Ohralik* was to characterize the speech involved as incidental to a business transaction in which a state may perceive a legitimate regulatory interest.<sup>433</sup> This fact alone served to "lower...the level

<sup>432</sup> It would be possible, for example, to characterize Oklahoma's content restrictions in revised DR 2-101(B) (discussed in Part IV(A) as "mere" "time, place, and manner" restrictions, because most of the information which the Oklahoma Supreme Court has banned from newspapers and yellow pages may be published in another "place," *i.e.*, in qualified legal directories. See note 185 and accompanying text, *supra*. See also note 266, *supra*. Another very recent Supreme Court opinion implies that it may indeed be constitutional for the government, state or federal, to control the content of public speech through the use of rules or regulations which purport only to regulate the "time, place, or manner" of the communication; the only limitation on such regulation may be that such rules must further some "legitimate governmental interests"—as those interests are defined by the governmental agency concerned. In *FCC v. Pacifica Foundation*, 98 S.Ct. 3026 (1978), the Supreme Court upheld the efforts of the Federal Communications Commission to regulate the broadcasting of a phonograph record by a licensed radio station when the record contained "indecent," but not necessarily obscene, language. The Court emphasized that the FCC had not absolutely prohibited the broadcasting of such language; rather, the Commission had taken its adverse action against the radio station largely because of the *time* of the broadcast, taking account of the likely audience at that time of day. The Court suggested that a different result might have been reached if the FCC had attempted to ban the controversial record absolutely, rather than leaving open the possibility that it could be broadcast at another, more obscure time.

For our purposes, the *Pacifica* case is most significant for its demonstration of the Supreme Court's willingness to accept a governmental agency's identification of regulatory objectives that might justify official limitations on the time or place of public communications, even if those limitations effectively prohibit the communication of a particular thought or piece of information to the audience for which the communicator intended it. Thus, with respect to the information banned from newspaper ads but permitted in qualified legal directories, the Court might conclude that the Oklahoma Supreme Court was serving a "legitimate governmental interest" when it limited the "place" in which such information may be published. The Oklahoma court could defend its restrictions as rationally related to a consumer protection objective, contending that false and misleading information can be controlled more effectively by the publishers of legal directories than by publishers of newspapers. The fact that the general public does not have meaningful access to legal directories and the information confined to that medium could thus be construed as an unfortunate by-product of a legitimate regulation, rather than a *prima facie* demonstration of a constitutional flaw.

<sup>433</sup> 98 S.Ct. 1912, 1918 (1978).

of appropriate judicial scrutiny.”<sup>434</sup> Just what the appropriate level of judicial scrutiny is, however, remains unclear. There are elements of the *Ohralik* opinion that suggest a “rational basis” analysis,<sup>435</sup> a “balancing” analysis,<sup>436</sup> and even a “least restrictive alternative” analysis.<sup>437</sup> When *Ohralik* is read with *Primus*, however, it seems clear that it was the middle-of-the-road, “balancing” analysis upon which the Court primarily relied. But rather than the traditional balance between the interests of the individual and those of the state, the Court seemed to be trading off two potentially competing state interests—the interest, recognized in *Bates* and *Virginia Pharmacy*, in assuring the free flow of commercial information, and the interest in protecting potential clients from what the state perceives to be a potentially injurious situation (*i.e.*, a consumer protection interest).<sup>438</sup> The Court found that any adverse effects on the flow of relevant consumer information resulting from the enforcement of the antisolicitation rule in this patently commercial context would be *de minimus*,<sup>439</sup> while the state’s justifications for its rule prohibiting the speech involved in in-person solicitation were found to be “particularly strong.”<sup>440</sup> This characterization of the competing interests led the Court to conclude that Ohio’s enforcement of a prophylactic rule (which was not as narrowly drawn as it might have been) was “not unreasonable.”<sup>441</sup>

It is noteworthy that in addition to the obvious consumer protection-type interests to which a state might point to justify a restriction concerning a commercial transaction, the *Ohralik* Court recognized the state’s in-

<sup>434</sup> *Id.* at 1919.

<sup>435</sup> “It...is not *unreasonable*, or violative of the Constitution, for a state to respond [to a legitimate interest in protecting potential clients from being overreached by attorneys] with what in effect is a prophylactic rule.” *Id.* at 1923-24.

<sup>436</sup> “The balance struck in *Bates* [between “society’s interest...in assuring the free flow of commercial information” and the state’s alleged justifications for prohibiting the type of communication in question] does not predetermine the outcome in this case. The entitlement of in-person solicitation of clients to the protection of the First Amendment differs from that of the kind of advertising approved in *Bates*, as does the strength of the State’s countervailing interest in prohibition.” *Id.* at 1918.

<sup>437</sup> “The facts in this case...demonstrate the *need* for prophylactic regulation in furtherance of the State’s interest in protecting the lay public.” *Id.* at 1925 (emphasis added).

<sup>438</sup> See note 436, *supra*.

<sup>439</sup> *Ohralik v. Ohio State Bar Ass’n*, 98 S.Ct. 1912, 1918 (1978).

<sup>440</sup> *Id.* These justifications included the likelihood that in-person solicitation would result in overreaching of clients, the difficulty in protecting the public from such abuses in the absence of an absolute prohibition of the conduct which created the opportunity for the abuses, and the need to maintain high standards of “professionalism” among lawyers. *Id.* at 1923. See also *In re Primus*, 98 S.Ct. 1893, 1908 (1978).

<sup>441</sup> *Ohralik v. Ohio State Bar Ass’n*, 98 S. Ct. 1912, 1924 (1978). It is not clear whether the Court independently balanced the competing factors or took the more superficial route of asking merely whether the state’s balancing of the factors was within the range of reasonableness. See text accompanying notes 444-446, *infra*.

terest in “maintaining high standards among licensed professionals” as a potential justification for “time, place, and manner” restrictions on speech of a primarily commercial character.<sup>442</sup> Such a justification would surely be asserted in defense of the “print media restrictions,” the “size restrictions,” and the “professional and dignified restrictions,” discussed in Part IV(B) *supra*. Whether such a justification, standing alone, would be sufficient to counterbalance the impediments to the free flow of relevant consumer information which such restrictions would tend to impose remains an open question.<sup>443</sup> If the Supreme Court independently balances the effects of such restrictions, it is likely that the negative impact on the free flow of information would be viewed as a more serious concern than the negative effects on professionalism speculatively asserted.<sup>444</sup> However, if the Supreme Court merely asks whether the state supreme court’s trade-off of these effects was “unreasonable,”<sup>445</sup> more deference to the state’s rules can be expected. The contrasting holdings in *Ohralik* and *Primus* suggest that the Supreme Court currently is disposed to have the federal judiciary perform the balancing analysis *de novo*.<sup>446</sup>

In *Primus*, although the Court purported to be employing a stricter level of judicial scrutiny than was used in *Ohralik*,<sup>447</sup> it appears that *Ohralik*’s “balancing” analysis was actually employed, only this time with a different result. The intrinsic value of the communication in question—in terms of society’s interest in the free flow of information that assists in providing meaningful access to the courts—was given significantly greater weight than had been true for the communication involved in *Ohralik*; meanwhile, the stated justifications for enforcing the state’s prophylactic rule were deemed by the Supreme Court to be less weighty here, largely because the nonpecuniary nature of the attorney’s participation in the matter rendered the state’s assumptions regarding the dangers of overreaching in the context of in-person solicitation unrealistic.<sup>448</sup>

Where does this leave general commercial advertising of truthful, nonmisleading information, concerning the public’s legal rights, which

<sup>442</sup> *Id.* at 1920.

<sup>443</sup> See Part IV(B), *supra*.

<sup>444</sup> This observation is based on the general thrust of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), and *Bigelow v. Virginia*, 421 U.S. 809 (1975), as well as the line of group legal services cases in which *Primus* stands. See note 423, *supra*, and notes 454-455, *infra*.

<sup>445</sup> See notes 435 and 441, *supra*.

<sup>446</sup> *But see* *FCC v. Pacifica Foundation*, 98 S.Ct. 3026 (1978). See also text accompanying note 448, *infra*.

<sup>447</sup> *In re Primus*, 98 S.Ct. 1893, 1906 (1978).

<sup>448</sup> *Id.* at 1908. *Primus* did not hold the antisolicitation rule void on its face; only its enforcement in the context of this case was held to be a violation of the first and fourteenth amendments.

results in pecuniary gain for the lawyer because of the response of laymen to the lawyer's ad? Are the states free to adopt extensive regulations such as those promulgated by the Oklahoma Supreme Court<sup>449</sup> on the theory that such rules are prophylactic in nature, preventing the erosion of public confidence in the bar and, hence, the legal system, preventing potentially misleading statements, and preventing the "overcommercialization" of a "learned profession" that might result in the deterioration in professional standards? While *Ohralik* and *Primus* invite such an argument, they do not compel such a result—a result which would have the effect of allowing the states to limit permissible lawyer advertising to the exact type of ad involved in *Bates*. Those who favor greater use of lawyer advertising as a means for improving the delivery of legal services in America can find within the *Ohralik* and *Primus* opinions a basis for arguing that it is *Ohralik*, not *Bates*, that should be confined to its facts.

The companion cases of *Ohralik* and *Primus* hold only that "under certain circumstances...a State may regulate in a prophylactic fashion...solicitation activities of lawyers because there may be some potential for overreaching, conflict of interest, or other substantive evils...."<sup>450</sup> The emphasis must be on the "certain circumstances" that can justify a prophylactic regulatory approach for conduct arguably protected by the first amendment. The Supreme Court seemed to view the circumstances involved in in-person solicitation of laymen by lawyers as inherently dangerous for the public, as well as difficult to police.<sup>451</sup> The facts presented in *Ohralik*, fraught with abuses by the attorney, were well-suited to illustrate the reality of these dangers.<sup>452</sup> It is all the more significant, therefore, that even in this inherently dangerous area, the Supreme Court found it necessary in *Primus* to carve out an exception to *Ohralik*'s upholding of the general constitutionality of the prophylactically oriented antisolicitation rule. "[I]n the context of political expression and association," the Court held in *Primus*, "a State must regulate with significantly greater precision [than when these values are not at stake.]"<sup>453</sup> Thus, it was Ms. Primus' relationship to political and associational activities, rather than the *pro bono* nature of her representation which the Court stressed in distinguishing her case from Mr. Ohralik's. Ms. Primus' activities in cooperation with the ACLU were viewed as being within the zone of "associational freedoms" which a solid line of earlier cases had identified

<sup>449</sup> See Part II, *supra*.

<sup>450</sup> *Ohralik v. Ohio State Bar Ass'n*, 98 S.Ct. 1908 (1978); *In re Primus*, 98 S. Ct. 1893 (1978). No one contested the states' authority to punish substantive abuses after they had been perpetrated.

<sup>451</sup> *Id.* at 1917-18, 98 S.Ct. at 1905-1907.

<sup>452</sup> *Id.* at 1915.

<sup>453</sup> *Id.* at 1908.

as being especially protected by the first amendment.<sup>454</sup> But that same line, involving various types of group legal services, had also established that “collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.”<sup>455</sup> Since most lawyer advertising is likely to be placed by individual lawyers or law firms, as opposed to organized groups or associations, an interesting question remains as to whether the Court considered it significant for distinguishing *Ohralik* and *Primus* that Ms. Primus was advancing political ideas through a group or association (the ACLU) rather than as an individual. An affirmative answer to this question might mean that the states may regulate the ads of individual lawyers and law firms much more drastically than ads sponsored by bona fide political action groups or other types of associations.<sup>456</sup> To answer this question, it is necessary to read the “lawyer solicitation” cases in the light of *Bates*. Thus, the “certain circumstances” that distinguished *Ohralik* from *Primus* could be described as evidence that the soliciting attorney was motivated *solely* by pecuniary motives or, as Justice Marshall suggested in his concurring opinion,<sup>456</sup> as evidence that the solicitation was actually accompanied by affirmative misconduct that could fairly be described as overreaching by the attorney.

In approving limited forms of lawyer advertising in *Bates*, the Supreme Court recognized that individual activity undertaken by a lawyer or law firm to assist laymen—unaffiliated with any particular group—to achieve meaningful and efficient access to the courts and the legal system

<sup>454</sup> “[H]er actions were undertaken to express personal political beliefs and to advance the civil liberties objectives of the ACLU...” *Id.* at 1899. The Court relied on *NAACP v. Button*, 371 U.S. 415 (1963) and *UMW v. Illinois State Bar Ass’n*, 389 U.S. 217 (1967), for the preferred position in which “association freedoms” have been placed. See *In re Primus*, 98 S.Ct. 1893, 1908 (1978).

<sup>455</sup> *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). This passage was cited with approval in *Primus*, 98 S.Ct. at 1901.

<sup>456</sup> The facts of the two cases confronting the Court did not invite a resolution of this question. However, Mr. Justice Marshall, in a concurring opinion to *Ohralik* and *Primus*, suggested that the only important facts distinguishing the two cases were the presence of affirmative misconduct in connection with the solicitation in *Ohralik* and the absence of any such misconduct in *Primus*. 98 S.Ct. 1912, 1925 (1978). Mr. Justice Marshall viewed the holding of *Ohralik* as being narrower than some of the Court’s broader language might suggest. Justice Marshall considers still open the question of whether a state could prohibit even pure commercial in-person solicitation which was unaccompanied by any of the incidents of fraud, deceit, misrepresentation, or undue influence which accompanied Mr. Ohralik’s solicitation of clients. *Id.* at 1926. While the majority’s opinion appears to leave little doubt as to the permissibility of such a prohibition in the in-person solicitation area, when questions are addressed to the grayer area of “time, place and manner” restraints on commercial advertising by attorneys, the courts would be true to the holdings of *Bates*, *Primus* and the earlier group legal services cases if they heeded Justice Marshall’s admonition “that disciplinary rules [should] not be utilized to obstruct the distribution of legal services to all those in need of them.” *Id.* at 1925.

serves important first amendment functions.<sup>457</sup> *Ohralik* reemphasized this point.<sup>458</sup> In short, individuals as well as groups and associations require effective access to legal services in order to enjoy the full range of first amendment values, including, for example, "the right of the people...to petition the Government for a redress of grievances." It was the *Bates* majority's view that lawyer advertising would result in improved delivery of legal services, and this led the Court to treat communications related to the public's access to the legal system as being within the domain of conduct entitled to at least some protection from the first amendment. This treatment of lawyer advertising places it arguably within the same category of activity as political expression or associational conduct which *Primus* and the earlier group legal services cases have held to be especially protected by the first amendment. In short, the similarity in the treatment accorded to lawyer advertising in *Bates* and to associational conduct in *Primus*, *Button*, *Mineworkers*, and *United Transportation Union*<sup>459</sup> leads one to suggest that the level of scrutiny applied to state restrictions on advertising should be closer to the "exacting scrutiny" employed in *Primus* than it would be to the "lower level of judicial scrutiny" employed in the "purely commercial" setting of *Ohralik*. This argument may be stated in terms of the balancing analysis which appears to have been employed in *Bates*, *Ohralik*, and *Primus*: both printed or broadcast "solicitations" by attorneys carry with them greater benefits in terms of public access to the legal system, than was found in *Ohralik* to be true of in-person solicitations, while printed or broadcast "solicitation" presents fewer and less weighty justifications for state regulation than *Ohralik* found in the realm of in-person solicitation. The net effect of this balancing analysis cannot, of course, be predicted with precision, but a reading of *Bates*, *Ohralik*, and *Primus* in light of the other first amendment commercial speech cases of *Bigelow* and *Virginia Pharmacy* supports a synthesis that emphasizes the delivery of legal services benefits of lawyer advertising, rather than the fact that much of this advertising is motivated by a desire on the part of the advertising attorneys to earn a living. There are several reasons why the balance should fall this way. In the first place, despite the absolute dichotomy between commercial and noncommercial activity which the *Ohralik-Primus* opinions seem to establish, it may be argued that there are some financially motivated activities of attorneys which are more intrinsically "commercial" than others. The *Ohralik* Court described the business transaction being regulated these by the state of Ohio as "in-

<sup>457</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

<sup>458</sup> *Ohralik v. Ohio State Bar Ass'n*, 98 S.Ct. 1902 (1978).

<sup>459</sup> See notes 423, 454-455, *supra*.

person solicitation by a lawyer of remunerative employment...in which speech is an essential but subordinate component.”<sup>460</sup> In other words, the Court found it impossible to separate the solicitor’s speech from the business transaction (and actual misconduct) being regulated. The same is not necessarily true with respect to a standard commercial advertisement by a lawyer. Even though an ad may result in a commercial transaction from which the lawyer reaps financial gain, the advertisement is not intrinsically a part of the commercial transaction between the lawyer and the client. Indeed, common law traditionally treats an advertisement as an invitation to tender an offer with respect to a commercial transaction; the advertisement itself is not necessarily a part of the contract eventually agreed to by the seller and the buyer of the service.<sup>461</sup> Thus, if a lawyer’s ad is false or misleading, it is quite feasible to discipline the lawyer, even if no client has been injured. The same cannot be confidently said if the false or misleading statement is said orally in the context of in-person solicitation.

Second, the justifications accepted in *Ohralik* as adequate to support the conclusion that a prophylactic rule was “not unreasonable”<sup>462</sup> do not necessarily fit the general type of advertisement with which this article has been concerned. Experience has not demonstrated the same level of substantive evils accompanying lawyer advertising that the *Ohralik* Court found with respect to in-person solicitation. The difficulties in identifying and policing abusive in-person solicitation are not found with respect to public advertisements. The relationship between standard advertising and high professional standards was found in *Virginia Pharmacy* to be only indirect.<sup>463</sup> Also, the “commercialization” that unimpeded in-person solicitation might introduce to the legal profession is more likely to be viewed subjectively (by the public at least) as “undue,”<sup>464</sup> than would be true with respect to the increased use of commercial advertising by lawyers as a mechanism for informing laymen of their legal rights and assisting them to vindicate those rights.

Third, *Bates* recognized—and *Primus* reaffirmed—that activity which improves the public’s access to the legal system is within the zone of interests protected by the first amendment,<sup>465</sup> and advertising is more obviously such an activity than is in-person solicitation. In sum, there is a stronger public interest in the free flow of commercial advertising by lawyers than is true for in-person solicitation; this, and there are fewer and

<sup>460</sup> 98 S.Ct. 1902, 1919 (1978).

<sup>461</sup> J. CALAMARI & J. PERILLO, *CONTRACTS* § 2-8 (1977).

<sup>462</sup> See note 441, *supra*.

<sup>463</sup> See text accompanying notes 224-231, *supra*.

<sup>464</sup> See *In re Primus*, 98 S.Ct. 1893, 1907 (1978).

<sup>465</sup> See text accompanying notes 206-211, 429, *supra*. See also *id.* at 1901.



less weighty justifications to support a state's use of prophylactic rules in the area of advertising than *Ohralik* found with respect to in-person solicitation. This is but to say that, in the long run, it is the holding of *Primus*, not *Ohralik*, which must be treated as the general rule pronounced by these companion cases, a rule which retains a generous measure of protection for attorney conduct which is closely related to first amendment freedoms—whether those freedoms are being exercised by or for an individual, or by or for a group. By emphasizing the “certain circumstances” involved in *Ohralik*, the impact of that opinion may be limited to the recognition of a special exception to the broad grant of protection extended by *Primus* to communications connected with political or associational conduct.

In conclusion, the lawyer solicitation cases do not compel an alteration of the analysis presented in Part IV of this article, although they do render even more tentative those views that were expressed tentatively originally. The lower level of judicial scrutiny for “time, place, and manner” restrictions has been confirmed, but the appropriate intensity of scrutiny in this more deferential area remains undefined. This makes conclusions about the constitutionality of Oklahoma's new advertising rules all the more difficult to draw with strong conviction. Most troubling in this pursuit is the relatively uncamouflaged willingness of the Supreme Court to allow subjective judgments concerning the desirability of particular forms of lawyer behavior to influence the result in first amendment cases. It is unclear whether the controlling subjective judgments are those of the Supreme Court's majority or rather of the state supreme courts which drafted the rules subjected to first amendment challenge.<sup>466</sup> While it appears that the Supreme Court stands willing to perform the above-described balancing analysis *de novo* when a state enforces a rule in a patently indefensible manner, as was true in *Primus*, it is difficult to come away from a reading of *Ohralik* without a feeling that the Court is inclined to extend substantial deference to the states in regulating commercial speech after *Bates*. In the end, the lawyer solicitation cases provide little more guidance than was provided in *Virginia Pharmacy*: “Time, place, and manner” restrictions may be tolerated “provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the

<sup>466</sup> See text accompanying notes 444-446, *supra*.

information.”<sup>467</sup> This makes the policy considerations presented in Part V of this article all the more significant for those involved in the regulatory process.

<sup>467</sup> *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976). It should be noted that *FCC v. Pacifica Foundation*, 98 S.Ct. 3026, (1978), represents a “time” restraint upheld by the Supreme Court despite the restraint’s failure to satisfy the *Virginia Pharmacy* formula.