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ATTORNEY ADVERTISING IN MARYLAND: A NEED FOR STRICTER CONTROL

After the United States Supreme Court's decision in Bates v. State Bar of Arizona, Maryland was forced to redraft its regulations on attorney advertising. Instead of adopting a strict, constitutionally acceptable standard promoting the informative purpose of advertising, the Court of Appeals of Maryland embraced a more lenient, less protective standard. This comment traces the origin and development of regulations governing attorney advertising and advocates the adoption of a more stringent standard.

I. INTRODUCTION

Only within the last seventy-five years has the legal profession felt the need to regulate the conduct of its members. Initially, regulations included a provision sanctioning advertising. Shortly thereafter, however, the American Bar Association (ABA) issued its Canons of Professional Ethics which included a ban on all attorney advertising. This ban has remained in effect until recently when the United States Supreme Court decreed that the information capable of being conveyed through advertising should be allowed to reach the consuming public. This information allows the public to compare the services offered by attorneys. Since this decision, states have been attempting to formulate satisfactory regulations of attorney advertising.

Because advertising is commercial speech, it may be more strictly regulated than other forms of speech. In addition, due to the sensitive nature of attorney advertising and the enhanced possibility of deception, advertising by attorneys may be even more strictly regulated than other forms of commercial speech. Maryland, however, has elected to disregard these inherent differences in favor of a bare, threshold standard above which all constitutional speech must rise. In so doing, Maryland has handicapped the very purpose which the advertising seeks to promote. Although attorney advertising is a valuable consumer resource, left unharnessed its informative purpose may be allowed to succumb to persuasion and gimmickry.

This comment discusses the purpose behind attorney advertising by analyzing its history. In light of this history and purpose, Maryland's regulations fall well short of the level needed to protect the informational purpose attorney advertising was designed to promote.

II. BACKGROUND

A. Advertising and the Legal Profession

Early English history is silent as to the regulation of attorney advertising. The practice of law was viewed as a form of public service rather than a means of earning a living. Since the profession was not

considered to be a form of commercial trade, attorney advertising was not common. The legal profession merely monitored itself according to "unwritten traditions, part social manners, part fraternal etiquette [and] part ethics proper."¹

In the United States, however, where the practice of law was viewed as a form of commerce, advertising by attorneys became more prevalent. As the nation expanded and the number of attorneys multiplied, there arose a need for a clear demarcation between ethical and unethical conduct.

In 1887, the Alabama State Bar Association adopted the first written Code of Ethics.² This Code contained the first regulation of attorney advertising. In particular, Canon 16 permitted advertising to the general public but warned that "special solicitation of particular individuals to become clients ought to be avoided."³ This regulation was the first to recognize a distinction between the presentation of information to the public and the use of persuasive techniques to attract individual clients.

Several years later, in 1908, the ABA published the Canons of Professional Ethics,⁴ which were eventually adopted by every state. These thirty-two canons provided general ethical concepts and guidelines by which each member of the legal profession was required to abide. With few exceptions, the ABA's canons mirrored those of the Alabama code. The most notable exception, however, was ABA Canon 27, which barred all attorney advertising, including that which was designed simply to inform the public about available services.⁵ The ABA reinforced its total ban on advertising by positing that "[t]he most worthy and effective advertisement possible . . . is the establishment of a well-merited reputation."⁶

B. Commercial Speech Doctrine as an Exception to the First Amendment

The prohibition on advertising was not limited to the legal field; indeed, other professions found themselves similarly situated.⁷ The judicial system offered little assistance to attorneys or other professionals

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1. J. LIEBERMAN, CRISIS AT THE BAR 41 (1978).
 2. ALA. CODE OF ETHICS (1887), *reprinted in* H. DRINKER, LEGAL ETHICS 352 (1953) [hereinafter cited as DRINKER].
 3. ALA. CODE OF ETHICS CANON 16 (1887), *reprinted in* DRINKER, *supra* note 2, at 356.
 4. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1907), *reprinted in* DRINKER, *supra* note 2, at 309.
 5. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 27 (1907), *reprinted in* DRINKER, *supra* note 2, at 316-18.
 6. ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 27 (1907), *reprinted in* DRINKER, *supra* note 2, at 316-18.
 7. *See, e.g.*, *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935).

who sought to advertise. For instance, in *Semler v. Oregon State Board of Dental Examiners*,⁸ a dentist challenged a local statute which listed advertising by a dentist as a ground for revocation of a professional license. The Supreme Court upheld the statute, stating that the legislature was entitled to regulate in any area it considered susceptible of fraud and deception.⁹ Neither the Court nor the parties perceived the first amendment to have any application to professional advertising. The Court's holding, however, was consistent with the then prevailing notion that advertising was firmly outside the protection of the first amendment.¹⁰

It was not until 1942 that the Supreme Court formally recognized this exclusion from first amendment protection by what has since come to be known as the commercial speech doctrine. In *Valentine v. Chrestensen*,¹¹ a distributor of handbills advertising the exhibition for profit of his submarine was warned by New York City police that this distribution violated the Sanitary Code.¹² This Code forbade the distribution in the streets of commercial and business advertising matter.¹³ The advertiser was further advised that handbills solely devoted to information or public protest might freely be distributed.¹⁴ In response, he had printed a double-faced handbill, one side displaying the commercial advertisement and the other side protesting the actions of the City Dock Department.¹⁵ He was, however, restrained by the police from distributing the handbills.¹⁶ In his suit against the police commissioner, the advertiser cited the first amendment to support his petition seeking to enjoin the police from enforcing the ordinance. Although the lower court issued the injunction,¹⁷ the Supreme Court later reversed, holding purely commercial speech to be outside the protection of the Constitution.¹⁸ The *Chrestensen* Court distinguished between communication of information and opinion, on the one hand, and purely commercial advertising¹⁹ on the other. The latter was believed

8. 294 U.S. 608 (1935).

9. *Id.* at 611.

10. Comment, *Attorney Advertising is Commercial Speech Protected by the First Amendment: Bates v. State Bar*, 37 MD. L. REV. 350 (1977); Note, *Three Years Later: State Court Interpretations of the Attorney's Right to Advertise and the Public's Right to Information*, 45 MO. L. REV. 562 (1980).

11. 316 U.S. 52 (1942).

12. *Id.* at 53.

13. *Id.* n.l. "No person shall . . . distribute, or cause to be . . . distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever in or upon any street or public place . . . This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." *Id.*

14. *Id.* at 53.

15. *Id.*

16. *Id.*

17. *Valentine v. Chrestensen*, 34 F. Supp. 596 (S.D.N.Y. 1940).

18. *Chrestensen*, 316 U.S. 52 (1942), *rev'g* 34 F. Supp. 596 (S.D.N.Y. 1940).

19. *Chrestensen*, 316 U.S. at 54.

to be devoid of informational value and therefore without first amendment protection. The Court cited no authority for this proposition. In disposing of the advertiser's argument that his handbill was, in part, a protest and therefore constitutionally protected, the Court described the two-sided handbill as a pretext to validate a purely commercial advertisement.²⁰ Thus, with the birth of the commercial speech doctrine in *Chrestensen*, purely commercial speech was expressly held to be outside the scope of the first amendment. This form of speech was distinguished from constitutionally protected communications that conveyed information or rendered an opinion.

This artificial segregation of purely commercial speech from protected communications was compromised in the cases that followed *Chrestensen*. With one exception,²¹ the commercial speech doctrine was never employed by the Supreme Court as a basis for denying first amendment protection.²² The Court instead decided that the speech at issue was not purely commercial and therefore was not wholly outside the protection of the first amendment.²³

The *Chrestensen* holding, however, was expressly limited by the Supreme Court in *Bigelow v. Virginia*,²⁴ wherein the Court held that first amendment protection may not be denied to speech merely because it is presented in the form of a commercial advertisement.²⁵ In *Bigelow*, the advertisement at issue contravened a Virginia ordinance making it a misdemeanor to advertise, publish, or circulate a publication encouraging the procurement of an abortion.²⁶ The Supreme Court of Virginia, in affirming the conviction,²⁷ relied on the commer-

This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinions and that, though the states . . . may appropriately regulate the privilege in the public interest they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.

Id.

20. *Id.* at 55.

21. *Breard v. Alexandria*, 341 U.S. 622 (1951).

22. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976).

23. *See, e.g., New York v. Sullivan*, 376 U.S. 254, 266 (1964); *Thomas v. Collins*, 323 U.S. 516, 533 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943); *Jamison v. Texas*, 318 U.S. 413, 417 (1943).

24. 421 U.S. 809 (1975).

25. *Id.* at 818.

26. *Id.* at 812. "If any person, by publication, lecture, advertisement or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." *Id.* at 812-13. In *Bigelow*, the newspaper had published an advertisement of a New York City organization, The Women's Pavillion, announcing their services for women with unwanted pregnancies. The advertisement offered information and counseling and stated that abortions were legal in New York. *Id.* at 812.

27. *Bigelow*, 213 Va. 191, 191 S.E.2d 173 (1972).

cial speech doctrine when it stated that the first amendment guarantee of free speech was inapplicable to commercial advertisements.²⁸

The Supreme Court, in reversing the decision of the state court,²⁹ reinterpreted its holding in *Chrestensen*.³⁰ The Court suggested that "[t]he case obviously does not support any sweeping proposition that advertising is unprotected *per se*."³¹ The Court retreated from its previous strict classification analysis in favor of a less rigid balancing test. The *Bigelow* Court then determined that prior to classifying speech as purely commercial, a court must determine whether there are any communicative aspects to the advertisement. If found to be present, a court must then weigh those informational portions protected by the first amendment against the unprotected commercial speech. If the former outweigh the latter, the advertisement will be granted limited protection. In *Bigelow*, portions of the advertisement conveyed "information of potential interest and value to a diverse audience."³² The Supreme Court determined that this protected aspect of the newspaper advertisement outweighed the commercial portion and therefore brought the advertisement outside the classification of purely commercial speech. Further application of this balancing test by the Supreme Court was never required, however, for the commercial speech exception to the first amendment was expressly laid to rest the following Term.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,³³ the Court invalidated the premise that commercial speech contains no redeeming informational value. Speech that does no more than propose a purely commercial transaction — "I will sell you the X prescription drug at the Y price"³⁴ — was held not to be wholly outside the protection of the first amendment.³⁵ The *Virginia Pharmacy* Court declared that "[i]f there is a kind of commercial speech that lacks all First Amendment protection . . . it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject."³⁶ The Court again employed a balancing test, weighing a state's interest in suppression of the advertisement against the value of the prohibited information.³⁷ The

28. *Id.* at 195, 191 S.E.2d at 176.

29. 421 U.S. 809 (1975), *rev'g* 213 Va. 191, 191 S.E.2d 173 (1972).

30. The commercial speech doctrine enunciated in *Chrestensen* had been criticized by members of the Court. Justice Douglas, who joined in the 1942 *Chrestensen* opinion, later commented "[t]he ruling was casual, almost offhand. And it had not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., dissenting).

31. *Bigelow v. Virginia*, 421 U.S. 809, 820 (1975).

32. *Id.* at 822.

33. 425 U.S. 748 (1976).

34. *Id.* at 761.

35. *Id.* at 762.

36. *Id.* at 761.

37. This balancing test differs from the *Bigelow* balancing test. The *Virginia Pharmacy* test begins with the premise that even pure commercial speech is protected

greater the societal interest in the communication, the lesser the state's ability to regulate it. After *Virginia Pharmacy*, all speech, including commercial speech, was presumed to be entitled to some first amendment protection.

In *Virginia Pharmacy*, the societal interests proffered focused on the informational value present even in the purest of commercial speech.³⁸ The Court reasoned that this information ensures that consumer decisions are made intelligently and, further, that these innumerable private economic decisions enable the free enterprise system to function properly.³⁹ On a more individual level, the *Virginia Pharmacy* Court suggested that those most injured by the silencing of drug price advertising were the aged, the poor, and the sick. Lifting the prohibition on this advertising would enable these consumers to locate the lowest market price for their needed medications.⁴⁰

Several justifications were offered for banning drug price advertising. First, the state has an interest in maintaining a high degree of professionalism on the part of licensed pharmacists.⁴¹ Second, consumers are better kept in ignorance because advertising would cause them to gravitate towards the lower priced pharmacists, thereby driving other pharmacists out of business.⁴² Third, advertising by individual pharmacists would cause the public to lose respect for the profession as a whole.⁴³ The Court referred to these state interests as "highly paternalistic"⁴⁴ and determined that they were greatly outweighed by the value to the public of the prohibited information. "[P]eople will perceive their own best interests if only they are well enough informed"⁴⁵

The *Virginia Pharmacy* Court, however, did not propose to make commercial speech indistinguishable from other forms of protected speech.⁴⁶ The Court noted two distinguishing factors.⁴⁷ First, commer-

by the first amendment. Therefore, unless the state can enunciate sufficient justification to ban a particular advertisement, it may not ban the advertisement. By contrast, the *Bigelow* test begins with the proposition that pure commercial speech is outside the protection of the first amendment. Thus, if the speech in question is purely commercial, the state is free to prohibit it.

38. Even pure commercial advertising disseminates information as to "who is producing and selling what product, for what reason, and at what price." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

39. *Id.*

40. *Id.* at 763-64.

41. *Id.* at 766.

42. *Id.* at 767-68.

43. *Id.* at 768.

44. *Id.* at 770. The state's arguments centered on the benefits to be gained by the professions in keeping consumers in ignorance. For example, the Court rejected arguments that pharmacists would be able to retain their customers by preventing access to information that would enable the customers to shop around.

45. *Id.*

46. While the Court noted that untruthful speech has never been protected by the first amendment regardless of whether it is classified as commercial or otherwise, it

cial speech is more easily capable of being verified by its originator.⁴⁸ Second, commercial speech is more "durable"⁴⁹ than other forms of speech, thereby lessening the chilling effect of regulations.⁵⁰ Therefore, the Court suggested a need for a different degree of regulation to ensure the unimpaired flow of truthful and legitimate commercial information.⁵¹

An issue deliberately left unresolved by the Court was the regulation of advertising by professions other than pharmacists.⁵² Whereas pharmacists offer standardized products, services advertised by other professionals, such as attorneys and physicians, are less tangible and more diversified. Justice Blackmun, the author of the *Virginia Pharmacy* opinion, stated that because of the enhanced opportunity for deception and misinformation, each profession must be considered separately within its own subset of factors.⁵³

C. *Attorney Advertising*—*Bates v. State Bar of Arizona*

The Supreme Court first addressed the issue of attorney advertising in the 1977 case of *Bates v. State Bar of Arizona*.⁵⁴ Specifically, the issue presented was whether lawyers have the constitutional right to advertise the availability of, and the prices at which, certain routine services could be performed.⁵⁵ *Bates* originated with a complaint filed by the State Bar of Arizona charging two attorneys with violating the disciplinary rules of the Arizona Code of Professional Responsibility.⁵⁶ The attorneys operated a legal clinic that accepted only routine cases which lended themselves to standardization. As a result, the attorneys were able to charge relatively low fees. To make this venture profitable, a high volume of business was required, and toward this end, an advertisement was placed in an Arizona newspaper informing the pub-

stated that "much commercial speech is not provable false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem." *Id.* at 771.

47. *Id.* at n.24.

48. *Id.*

49. The term "durable" was used by the Court to show that "[s]ince advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 773 n.25. The Court in *Virginia Pharmacy* stated 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." *Id.*

53. *Id.*

54. 433 U.S. 350 (1977).

55. *Id.* at 367-68.

56. The Arizona Code of Professional Responsibility is incorporated in Rule 29(a) of the Supreme Court Rules of Arizona, ARIZ. REV. STAT. ANN. Sup. Ct. Rules, Code of Professional Responsibility, Rule 29(a) (Supp. 1983).

lic of the existence of the clinic. The advertisement violated Disciplinary Rule (DR) 2-101(B), which prohibited all advertising by attorneys.⁵⁷

Upon review by the Arizona Supreme Court, the regulation was upheld against claims that it violated the first amendment.⁵⁸ The court relied on the distinction drawn in *Virginia Pharmacy* between advertising by pharmacists and that of other professionals.⁵⁹ Special considerations, the state court reasoned, kept attorney advertising outside the newly recognized first amendment protection of commercial speech.⁶⁰ On appeal, the United States Supreme Court reversed and proclaimed that there could be no blanket suppression of advertising by attorneys.⁶¹

The Court considered six justifications for the advertising ban. The first was the adverse effect of advertising on professionalism.⁶² Three separate components were discussed. The first component suggested that advertising would be destructive to the attorney's self-esteem.⁶³ Advertising, it was argued, would subjugate the attorney's sense of duty in serving the public to the commercial aspects of rendering legal services. The second component intimated that advertising would undermine the assumption that attorneys are motivated solely by concern for their client's welfare.⁶⁴ The final component suggested that advertising would tarnish the dignified public image of the legal profession.⁶⁵ In rejecting the validity of these arguments, the Supreme Court indicated that few clients believe that attorneys perform services free of charge. The *Bates* Court held that publicizing this aspect of the attorney-client relationship would evoke little unfavorable response in the consumer of these services.⁶⁶

The Court next considered the State Bar's contention that attorney advertising is inherently misleading.⁶⁷ One aspect of this argument is that each case undertaken by an attorney is unique, making generalizations and comparisons difficult, if not deceptive.⁶⁸ The Court acknowledged the merit of this argument and therefore limited its holding to allow only advertisement of the prices charged for routine services.⁶⁹

57. *Id.*; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1976).

58. *In re Bates*, 113 Ariz. 394, 399, 555 P.2d 640, 645 (1976). The Supreme Court of Arizona also rejected the contention that the disciplinary rule violated sections 1 and 2 of the Sherman Act because of its tendency to limit competition.

59. *See supra* note 50.

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

61. *Bates*, 433 U.S. 350 (1977), *rev'g* 113 Ariz. 394, 555 P.2d 640 (1976).

62. *Bates*, 433 U.S. at 368-72.

63. *Id.* at 368.

64. *Id.*

65. *Id.*

66. *Id.* at 368-69.

67. *Id.* at 372-75.

68. *Id.* at 372-73.

69. The Court never fully defined a "routine" service. Rather, the Court merely ap-

Another aspect of this argument focuses on the concern that irrelevant information would be featured while relevant information, such as skill, would be omitted.⁷⁰ While conceding that advertising could not provide all the pertinent information required to intelligently select an attorney, the Court suggested that the alternative prohibition would prevent even this limited amount of valuable information from reaching the public. Limited access to truthful information, the Court determined, is preferable to total isolation from any information.⁷¹

The third argument propounded was the adverse impact advertising would have on the administration of justice.⁷² Advertising, the State Bar contended, had the undesirable effect of stirring up litigation. In dismissing this argument the Court rejected the idea that potential claims were better left unresolved than remedied through legal channels.⁷³ The *Bates* Court reinforced its position by stating that one of the express goals of the ABA's Model Code of Professional Responsibility (ABA Code) is to make "legal services fully available" to the public;⁷⁴ one method for making these services known to consumers is through advertising.⁷⁵

The fourth element, the undesirable economic effect of advertising,⁷⁶ presented the least obstacle for the Court. This argument consisted of two parts. The first component suggested that the additional cost of advertising would ultimately be borne by consumers of legal services.⁷⁷ The Court answered that the advertising ban itself keeps the cost of legal services artificially high by isolating attorneys from competition. Lifting the ban would place the various prices before the consuming public and thus allow for comparison.⁷⁸ The second component of the economic argument intimated that the cost of advertising would create an entry barrier giving established attorneys an additional advantage.⁷⁹ The *Bates* Court disagreed with this characterization, stating that absent advertising, attorneys must rely solely on reputation and referrals from other attorneys. Both require many years to cultivate, giving an advantage to more established attorneys. Advertising would reduce this advantage by allowing even newly admitted attorneys to place their names before the general public.⁸⁰

proved those services listed in the advertisement at issue: uncontested divorce, simple adoption, uncontested personal bankruptcy, and change of name. *Id.* at 372.

70. *Id.* at 374-75.

71. *Id.*

72. *Id.* at 375-77.

73. *Id.* at 376.

74. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1976).

75. *Bates*, 433 U.S. at 377.

76. *Id.* at 377-78.

77. *Id.* at 377.

78. *Id.*

79. *Id.* at 377-78.

80. *Id.* at 378.

The fifth argument the Court addressed was the adverse effect of advertising on the quality of services provided by attorneys.⁸¹ It was argued that to maintain the advertised price, attorneys would tailor every case to the specific package publicized. The Court responded that prohibiting advertising is an ineffective way to discourage defective work. Those attorneys who will compromise the quality of their work will do so regardless of the ban on advertising.⁸²

The final argument analyzed by the Court was the difficulty of enforcement.⁸³ Even should a clear definition be found of what constitutes an abuse, requiring an agency to scrutinize the media in an effort to locate abuses would be a sizeable task. Because consumers are not versed in legal matters, they would be unable to offer much assistance. Claims instituted after an abuse had occurred would not provide sufficient deterrence against future abuses. While the Court acknowledged the difficulties involved, it declared that lifting the ban on advertising would not change the ethics of the profession. Attorneys would act as they always had—within ethical bounds. Those who chose to do otherwise, as always, would be dealt with individually.⁸⁴

The *Bates* Court concluded that none of the proposed arguments was sufficient to justify the suppression of all advertising by attorneys.⁸⁵ The Court deemed the value of the information to the public to outweigh the difficulties of defining abuses and of establishing regulations. Therefore, the Court concluded that truthful advertising by attorneys would no longer be suppressed.⁸⁶

As with other forms of commercial speech, attorney advertising may be suppressed if it is false, deceptive, or misleading.⁸⁷ Reasonable restrictions will be allowed on time, place, and manner.⁸⁸ The Court, however, made clear that due to the durability of commercial speech, and the special considerations surrounding advertising by the legal profession, attorney advertising may still be subject to greater and stricter regulations than are appropriate for other forms of speech.⁸⁹ Since attorneys are practiced in the art of persuasion, consumers need protection from pressures, subtle or otherwise, that may be introduced into their decision making process. Moreover, it is difficult to describe precisely the product an attorney has to sell. Finally, widespread consumer ignorance regarding the legal profession requires that special care be taken to keep the flow of information especially pure. Questionable statements of slight informational value, that in other types of

81. *Id.* at 378-79.

82. *Id.* at 378.

83. *Id.* at 379.

84. *Id.*

85. *Id.*

86. *Id.* at 384.

87. *Id.* at 383.

88. *Id.* at 384.

89. *Id.* at 383-84.

advertising might be condoned may, therefore, be restricted in the sensitive area of attorney advertising.⁹⁰ In some situations supplementation, such as warnings and disclaimers, may be required.⁹¹ The Supreme Court, however, left to the individual states the task of establishing the specific regulations required to protect this informational purpose behind attorney advertising.

D. *The ABA's Response to Bates*

Shortly before the Supreme Court rendered its decision in *Bates*, the ABA Board of Governors established a task force to develop proposals on the subject of attorney advertising.⁹² Two proposals, designated A and B, were produced. They were carefully drafted to provide guidelines to prevent abuse of this newly found freedom. Both proposals were designed to promote the informed selection of attorneys by consumers of legal services through the dissemination of pertinent and truthful information.

Proposal A enumerates specifically the types of factual information that may be employed in an advertisement.⁹³ By doing so, consumers of legal services are given the means to compare intelligently

90. *Id.* at 383.

91. *Id.* at 384.

92. Report to the Board of Governors of the Task Force on Lawyer Advertising, 46 U.S.L.W. 1 (Aug. 23, 1977) [hereinafter cited as Report].

93. *Id.* at 3-9.

DR 2-101 Publicity

(A) A lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast . . . the following information . . . provided that the information disclosed by the lawyer . . . complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name . . . ;

(2) One or more fields of law in which the lawyer . . . practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer . . . specializes in a particular field of law practice, to the extent authorized under DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended . . . ;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

(10) Memberships, offices, and committee assignments, in bar associations;

(11) Membership and offices in legal fraternities and legal societies;

(12) Technical and professional licenses;

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

the services offered by advertising attorneys. This approved list was subject to two conditions. First, the advertisement had to be presented in a dignified manner.⁹⁴ Second, the advertisement could not contain a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement or claim.⁹⁵

Although Proposal B employs a different approach, its objective is the same. Proposal B states: "The attorney-client relationship . . . should not be established as a result of pressures or deceptions Only unambiguous information relevant to a layperson's decision regarding his legal rights or his selection of counsel . . . is appropriate" ⁹⁶ It is only when viewed against this background that the ABA's Proposal B may be understood. The proposal begins: "A lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading or deceptive statement or claim."⁹⁷

The objective of Proposal B is further highlighted by the limita-

- (14) Foreign language ability;
- (15) Names and addresses of bank references;
- (16) With their written consent, names of clients regularly represented;
- (17) Prepaid or group legal services programs in which the lawyer participates;
- (18) Whether credit cards or other credit arrangements are accepted;
- (19) Office and telephone answering service hours;
- (20) Fee for an initial consultation;
- (21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
- (22) Contingent fee rates . . . provided that the statement discloses whether percentages are computed before or after deduction of costs;
- (23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
- (24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
- (25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information. . . .

Id. at 5.

94. *Id.* DR 2-101(B).

95. *Id.* DR 2-101(A).

96. *Id.* EC 2-9.

97. *Id.* DR 2-101(A).

tions which follow this broad directive.⁹⁸ One such limitation states: "A lawyer shall not . . . use any form of public communication which . . . is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jin-

98. DR 2-101 of Proposal B continues:

(B) Without limitation a false, fraudulent, misleading or deceptive statement or claim includes a statement or claim which:

(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 . . . ;

(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 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.

(C) A lawyer shall not . . . use or participate in the use of any form of public communication which:

(1) Is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) Contains statistical data or other information based on past performance or prediction of future success;

(3) Contains a testimonial about or endorsement of a lawyer;

(4) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;

(5) Appeals primarily to a layperson's fear, greed, desire for revenge, or similar emotion; or

(6) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garish or sensational language or format; or

(7) Utilizes television until [the agency having jurisdiction under state law] shall have determined that the use of such media is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services.

gles or garish or sensational language or format.”⁹⁹ By negative implication, this suggests that only data which are factually verifiable by consumers, such as that enumerated in Proposal A, be employed so as to enable consumers to compare attorney services through the information presented in their advertisements. Another possible inference from the language of Proposal B is that the advertising must be presented in a dignified, professional manner.¹⁰⁰

Another of the proposed limitations contained in Proposal B would ban “statements of opinion as to the quality of the services . . . which [are] not susceptible of reasonable verification by the public.”¹⁰¹ As quality is a spectral concept and seldom verifiable, statements such as these would provide no assistance to the consuming public. Also suggested is a ban on the use of “statistical data or other information based on past performance or prediction of future success.”¹⁰² These types of data are of little informational value and would only focus attention on irrelevant factors which would be highly prejudicial.

These limitations mirror those set forth in Proposal A. In total, they also suggest that the information be presented in a dignified manner and that the advertisement not contain a false, fraudulent, or misleading representation. The purpose and direction of the second proposal is achieved only through these and the remaining limitations. Without them, Proposal B does no more than restate the obvious: that commercial speech which is false, fraudulent, misleading, or deceptive is outside the protection of the first amendment.¹⁰³

After *Bates*, the ABA adopted Proposal A and incorporated it as part of its new Model Code of Professional Responsibility.¹⁰⁴ Since both proposals were circulated among the states, each state could select the one most suited to its interpretation of *Bates*.

III. MARYLAND'S RESPONSE TO *BATES*

Prior to *Bates*, Maryland Rules prohibited an attorney from “publiciz[ing] himself . . . as a lawyer.”¹⁰⁵ Because *Bates* rendered this prohibition unconstitutional, the Maryland Standing Committee on Rules of Practice and Procedure (Rules Committee) submitted to the Court of Appeals of Maryland its recommended rule changes which included

99. Report, *supra* note 92, at 11; DR 2-101(c)(6).

100. Although the *Bates* Court rejected the suggestion that advertising would tarnish the image of the profession as being an insufficient justification for proscribing attorney advertising altogether, it is a permissible “manner” restriction once the proscription is eliminated.

101. Report, *supra* note 92, at 11; DR 2-101(a)(4).

102. Report, *supra* note 92, at 11; DR 2-101(c)(2).

103. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976).

104. 46 U.S.L.W. 2089 (Aug. 23, 1977).

105. DR 2-101(B), MD. R.P. APPENDIX F, CODE OF PROFESSIONAL RESPONSIBILITY (1983).

portions of both Proposals A and B.¹⁰⁶

The Court of Appeals of Maryland, on its own motion, submitted rule changes in place of those recommended by the Rules Committee.¹⁰⁷ The court of appeals employed the concept of ABA Proposal B, but retained only the bare "false, fraudulent and misleading" standard. The court's version read:

A lawyer shall not prepare . . . any *advertisement* which:

1. contains a misstatement of fact;
2. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;
3. is intended or is likely to create false or unjustified expectations of favorable results;

106. After stating the following, the Rules Committee listed 14 specifics as to the information allowed to be incorporated in an advertisement:

(A) In order to facilitate the process of informed selection of a lawyer by potential clients, a lawyer may publish . . . the following information in newspapers or periodicals, provided that the information disclosed by the lawyer in such publication complies with DR 2-101(B), and is presented in a dignified manner.

It then continued:

(B) Although a lawyer may publish the information permitted by DR 2-101(A) and DR 2-102, a lawyer shall not . . . use or participate in the use of, any form of advertising which:

(1) Contains any representation that is false, deceptive or misleading, or omits a material fact necessary to make the representation not misleading, in light of the circumstances;

(2) Contains biographical or fee information other than that authorized by DR 2-101(A), or any representation as to the quality of legal services offered;

(3) Contains any promise, guarantee or assurance of success in achieving a desired result or of the likelihood of success, or a statement of the result in any prior or pending legal proceeding;

(4) Generates the impression that it is not an advertisement by the lawyer; or contains any implication that the communication or the offer made by it is officially approved, or that the lawyer is in a position improperly to influence any court, tribunal, or other public body or official;

(5) Contains any offer of a fee arrangement rendered illegal by statute or by the Code of Professional Responsibility;

(6) Contains any contract form contemplating execution by the recipient or offers of discount coupons, bonuses, premiums, bargains, and seasonal or temporary rates;

(7) Contains information the primary purpose of which is to solicit or obtain professional employment by a particular person or organization or for a specific matter, occurrence or transaction;

(8) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, or garish or sensational language or format; or is intended or likely to appeal primarily to fear, greed, or desire for revenge, or similar emotions;

(9) Contains any fee information which does not include a statement to the effect that a client must pay all expenses of litigation. . . .

4 Md. Admin. Reg. 1723-24 (1977).

107. 1 Md. R.P. 88 (Court of Appeals of Maryland Orders Adopting Rules of Procedure and Practice) (1983).

4. contains any other statement that is intended or likely to cause a reasonable person to misunderstand or be deceived; or
5. constitutes, is part of, or is a device for carrying out, an otherwise unlawful act.¹⁰⁸

Recognizing the need for further elaboration and restriction so as to comport with the guidelines established in the ABA proposals, the Rules Committee suggested the addition of several limitations. In pertinent part, these limitations prohibited advertising by lawyers which:

6. is intended or is likely to result in a legal action or a legal position being asserted merely to harass or maliciously injure another;
7. contains a testimonial about or endorsement of a lawyer;
8. contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public;
9. appeals primarily to fear, greed, desire for revenge, or similar emotion;
10. generates the impression that it is not an advertisement by the lawyer;
11. contains any implication that the communication or the offer made by it is officially approved; or 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 official¹⁰⁹

The above guidelines were intended to add flesh and contour to the skeletal frame proposed by the court. The court, however, declined to incorporate these suggestions and, instead, adopted the bare standard which it had originally proposed.¹¹⁰

In his dissent to the adoption of the rules, Chief Judge Murphy declared that this barren regulation "falls woefully short" of that required in the field of attorney advertising.¹¹¹ He further explained that the regulation as adopted is so "loose and lacking in necessary specific restraints as to be plainly antithetical to the public interest and to the interest of the legal profession."¹¹² Chief Judge Murphy stated that the

108. 5 Md. Admin. Reg. 56 (1978) (emphasis in original).

109. 1 Md. R.P. 90 (Court of Appeals of Maryland Orders Adopting Rules of Procedure and Practice) (1983) (Murphy, C.J., dissenting).

110. Judges Smith, Digges, Levine, Eldridge, and Orth comprised the majority needed to adopt the bare standard. Chief Judge Murphy and Judge Cole dissented, suggesting that the court instead adopt the more elaborate standard of the Rules Committee.

111. 1 Md. R.P. 89 (Court of Appeals of Maryland Adopting Rules of Procedure and Practice) (1983).

112. *Id.*

suggestions of the Rules Committee are "essential to the meaningful and effective regulation of lawyer advertising."¹¹³ Without these suggestions, advertising of legal services is left indistinguishable from advertising of consumer products.¹¹⁴

IV. ANALYSIS

The major rationale behind both the demise of the commercial speech doctrine and the lifting of restrictions on attorney advertising is to provide consumers with the facts and information necessary to make informed decisions. Maryland's adoption of the bare antifraud standard, devoid of the guidelines and limitations which give it substance and dimension, emasculates this laudable purpose.

The *Virginia Pharmacy* decision acknowledged that states have authority to promulgate stricter regulations for commercial speech than for ordinary speech. Thereafter, the *Bates* Court, after weighing the special circumstances surrounding attorney advertising, recognized that this advertising may be even more strictly regulated than other forms of commercial speech. Maryland, at least from the skeletal language adopted in the regulation, apparently does not differentiate between attorney advertising and other forms of commercial speech. Although the ethical considerations of the Maryland Code of Professional Responsibility (Maryland Code) clearly enunciate an attempt to conform to the strictest level of regulation, these ethical considerations are only aspirational.¹¹⁵ The disciplinary rules, which are mandatory in character, have been stripped of their effectiveness and thus set only a minimum standard which all advertising must satisfy. Had the ABA intended to limit Proposal B to this minimum standard, it would have been a needless exercise. All advertising, be it for fungible products or intangible services, must be truthful to meet this basic standard. The ABA's Proposal B was designed to accomplish much more. Its purpose, as indicated by accompanying qualifications and limitations, was to require attorneys who advertise to conform to a more exacting standard, one which would require that they provide only factual information for consumers to digest and compare. Specifically, attorney advertisements may not persuade through gimmickery or device but may only present pertinent information to the consumers of legal services. Without mandatory limitations, Maryland attorneys need not aspire to conform to this more stringent standard.

Little decisional law can be found in Maryland since the 1978 revision of Canon 2. The decisional law that has evolved indicates a willingness by the court of appeals to protect the rationale behind, not

113. *Id.* at 90.

114. *Id.*

115. MODEL CODE OF PROFESSIONAL RESPONSIBILITY preamble and preliminary statement (1969).

merely the express language of, the regulation.¹¹⁶ For example, in *In re Petition for Certificate of Authorization for Corporate Name—Oldtowne Legal Clinic, P.A.*,¹¹⁷ the Court of Appeals of Maryland recognized that it is the informational value of the speech that is protected, not the speech itself.¹¹⁸ Although not directly dealing with attorney advertising, the case illustrates the court's willingness to protect consumers of legal services. In *Oldtowne*, a professional corporation sought to use Oldtowne Legal Clinic as the corporate name. Disciplinary Rule 2-102(A) of the Maryland Code, however, prohibits the use of trade names.¹¹⁹ Citing *Bates* and *Virginia Pharmacy*, the incorporators contended that their trade name was a form of commercial speech and was not inherently deceptive; therefore, they argued its use could not be prohibited.¹²⁰ The court disagreed, stating that a trade name has no intrinsic meaning as did the statements about the products and the services advertised in *Bates* and *Virginia Pharmacy*.¹²¹ A trade name, the court determined, acquires a secondary meaning in the mind of the public and becomes associated with some standard of price and quality. Because this can be easily manipulated, it creates a fertile ground for abuse.¹²² Although the use of a trade name is prohibited, attorneys remain free to communicate the factual information which could have been conveyed by the trade name, such as the type and price of services offered and the nature of the practice. The court stated that this type of "informational advertising" was protected by *Bates* and *Virginia Pharmacy*.¹²³

In 1982, the court of appeals in *Barnett v. Maryland State Board of Dental Examiners*¹²⁴ reinforced the notion that the information the speech conveys is itself protected. The *Barnett* court held that to protect the informational function of advertising, a state could prohibit communications of questionable informational value.¹²⁵ The communication at issue was a word, "polydantics," coined by the dentist to convey his belief that the services he offered were more comprehensive than those offered by other dentists.¹²⁶ The word appeared in several

116. See, e.g., *Barnett v. Maryland State Bd. of Dental Examiners*, 293 Md. 361, 444 A.2d 1013 (1982); *In re Petition for Certificate of Authorization for Corporate Name—Oldtowne Legal Clinic, P.A.*, 285 Md. 132, 400 A.2d 1111 (1979).

117. 285 Md. 132, 400 A.2d 1111 (1979).

118. *Id.* at 139-40, 400 A.2d at 1116.

119. DR 2-102(A) states: "A lawyer in private practice shall not practice under a trade name"

120. *Oldtowne*, 285 Md. at 135-36, 400 A.2d at 1114.

121. *Id.* at 139, 400 A.2d at 1116 (quoting *Friedman v. Rogers*, 440 U.S. 1, 12-13 (1979)).

122. *Oldtowne*, 285 Md. at 139, 400 A.2d at 1116.

123. *Id.* After reciting at length the facts and holding of *Friedman*, the *Oldtowne* court adopted the Supreme Court's rationale.

124. 293 Md. 361, 444 A.2d 1013 (1982).

125. *Id.* at 367, 444 A.2d at 1016.

126. *Id.* at 364, 444 A.2d at 1014.

advertisements with a legend defining it.¹²⁷ The Board of Dental Examiners believed the term to be misleading and charged him with violating a state law¹²⁸ that defines dishonorable or unprofessional conduct of a dentist as "making use of any advertising statements of a character tending to deceive or mislead the public."¹²⁹ After a hearing, the Board found the dentist guilty of deceptive advertising.¹³⁰

In his argument before the court of appeals, the dentist contended that his first amendment right of free speech had been abridged because the advertisement was commercial speech and therefore constitutionally protected.¹³¹ While the court agreed that commercial speech enjoys limited constitutional protection, it announced that this protection is "based on the informational function of advertising."¹³² Despite the legend supplied by the dentist in his advertisements, the court found that the term "polydotics" was capable of leading consumers to believe that he was a specialist and thus in possession of a greater amount of knowledge than the average dentist.¹³³ The *Barnett* court determined that this deceptive tendency outweighed the informational value to the public. Thus, as in *Oldtowne*, a professional advertiser is not entitled to use whatever language he desires in communicating his message. To ensure that only factual information is presented, courts will carefully scrutinize both the message and the methods used.

Despite the ineffective guidance the Maryland regulation gives to attorneys who advertise, it appears that Maryland courts will resort not only to the express language of the regulation, but also to the purpose for which it was intended to accomplish. Although encouraging, this case-by-case regulation is not sufficient. New guidelines must be developed so that attorneys are aware of the standard under which their advertisements will be judged. The Maryland regulation of attorney advertising, DR 2-101, should be amended to conform to the stricter and more concrete standards enunciated in ABA Proposal B.¹³⁴ Through these and similar limitations may be gleaned the true purpose

127. A different legend was used in each of the three advertisements. They read: (1) "A word we created for the Individualized, Comprehensive, Preventive, and Corrective care for adults and children in all areas of general dentistry . . ."; (2) "A word we created for comprehensive care of the patient with multiple dental problems"; and (3) "A word that we have created to stand for individualized care, diagnostic, therapeutic and preventive for the patient with multiple kinds of dental problems." *Id.* at 371, 444 A.2d at 1018.

128. *Id.* at 363, 444 A.2d at 1014. Article 32 was repealed by 1981 MD. LAW 8, effective July 1, 1981. The current provisions concerning dentistry are contained at MD. HEALTH OCC. CODE ANN. §§ 4-101 to -702 (1981).

129. MD. ANN. CODE art. 32, § 11(k)(1) (1976).

130. *Barnett v. Maryland State Bd. of Dental Examiners*, 293 Md. 361, 365, 444 A.2d 1013, 1015 (1982).

131. *Id.* at 366, 444 A.2d at 1015.

132. *Id.* (quoting from *Central Hudson Gas & Elec. Corp. v. Public Serv. Communications of New York*, 447 U.S. 557, 563 (1980)).

133. *Barnett*, 293 Md. at 376, 444 A.2d at 1020.

134. *See supra* note 97.

behind the lifting of barriers behind attorney advertising. Without them, regulations on attorney advertising are left indistinguishable from those pertaining to all other forms of speech, and the courts are left with a task which should have been resolved by regulations.

V. CONCLUSION

Properly regulated attorney advertising is a valuable resource for consumers of legal services. Maryland consumers, however, have been deprived of the full utility of this advertising. Current Maryland regulations do not provide attorneys with incentive to conform to the informational purpose behind the allowance of attorney advertising. Maryland attorneys have been given the freedom to incorporate persuasive language and techniques into their advertisements; this same freedom effectively negates the informational purpose of advertising. For Maryland to bring its attorney advertising in line with that intended by the Supreme Court in *Bates*, stricter regulations need to be adopted. Only through the enforcement of carefully drafted regulations can attorney advertising fulfill its purpose—to inform.

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