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Supreme Court Decisions: Lawyer Advertising Given Go-Ahead

Glenn A. Jacobson

by returning the exam which he received from A well before taking the re-examination, B attempted to show good faith and lack of intent to gain an unfair advantage.

Without deciding all the issues presented to the Court by the prosecution and defense, the Court holds that the prosecution did not successfully meet its burden of proving beyond a reasonable doubt that B's conduct was dishonorable. Any presumption of dishonorable conduct was erased by B's unassailed testimony that he did not know of the Professor's restrictive policy as to availability of previous exams at the time of receiving the copy from A.

In conclusion, B was found not guilty of violating sec. 3.03 of the Code.

Supreme Court Decisions

Lawyer Advertising Given Go-Ahead

by Glenn A. Jacobson

Be it bane or godsend to the legal profession, the Supreme Court has given the green light to the formerly blasphemous practice of lawyers advertising their services. Self-regulation by member-run professional organizations was the traditional means of guaranteeing the public that they would receive good value for their money and quality work when they retained a lawyer. But, the exclusive watchdog function of these organizations has now been eroded by the wave of consumerism. The most recent example of this trend is the case of *Bates v. State Bar of Arizona*, 97 S.Ct. 2691 (1977).

In 1974, John R. Bates and Van O'Steen, having been members of the Arizona Bar for two years, opened a law practice in Phoenix, Arizona which they referred to as a "legal clinic." A major goal of this practice was "to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid." 97 S.Ct. at 2694.

The clinic accepted only routine matters such as uncontested separations and divorces, personal bankruptcies, name changes, and uncontested adoptions, making extensive use of paralegal assistants and standardized forms to facilitate a quick flow of business.

Two years later, "appellants concluded that their practice and clinical concept could not survive unless the availability of legal services at low cost was advertised and, in particular, fees were advertised." 97 S.Ct. at 2694. On February 22, 1976, Bates and O'Steen placed their advertisement in the *Arizona Republic*, a Phoenix daily newspaper, offering "legal services at very reasonable fees" and listing particular services and corresponding fees.

In response, the President of the Arizona State Bar initiated proceedings against Bates and O'Steen, alleging that their advertisement was in violation of Rule 29(a) of the Supreme Court of Arizona, 17 Arizona Stat. (1976 Supp.), p. 26. The disciplinary rule provides in part:

> "(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer through newspaper . . . advertisements. . . ."

A three member Special Local Administrative Committee held a hearing, pursuant to Arizona Supreme Court Rule 33, but declined to consider an attack on the valildity of the rule. However, the committee did recommend that both Bates and O'Steen be suspended from the practice of law for at least six months. Shortly thereafter, the Board of Governors of the Arizona State Bar, pursuant to Supreme Court Rule 36, reviewed the case and recommended one week suspensions to each appellant.

Bates and O'Steen sought review of the case in the Arizona Supreme Court alleging that the disciplinary rule they had ignored was both violative of the Sherman Anti-Trust Act and an infringement of their First Amendment rights. The Arizona Supreme Court rejected both claims, and the Supreme Court of the United States consented to hear the case. 429 U.S. 813 (1976).

The Supreme Court's decision in the *Bates* case focused on an analysis of the allegation that First Amendment Rights were being interfered with by the continued enforcement of Arizona Supreme Court Rule 20. This analysis is an extension of previous Supreme Court decisions acknowledging First Amendment protection for commercial speech. *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

In *Bigelow*, the managing editor of a Virginia newspaper was found guilty of

violating a state statute which prohibited the advertising of information which might ". . . encourage or prompt the procuring of abortion or miscarriage . . ." Va. Code Ann. 18.1-63 (1960). The Court stated:

> "The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form." 421 U.S. at 818.

The Supreme Court was willing to place commercial speech under the protection of the First Amendment because such communication may contain information of potential interest and value to the public.

In 1976, the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, expanded the doctrine. Here, the Court held that the advertising of drug prices by state licensed pharmacists was permissible and protected by the First Amendment. The Court reaffirmed its earlier position: ". . . speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisment of one form or another." 425 U.S. at 761.

In *Virginia State Board of Pharmacy,* an essential issue was whether an act prohibited by the regulating body of a profession could be classified under the doctrine of commercial free speech and consequently be afforded First Amendment protection. The Court expressed its belief that "the advertising ban does not directly affect professional standards one way or the other". 425 U.S. at 769.

In light of the *Bigelow* and *Virginia State Board of Pharmacy* cases, *Bates* v. *State Bar of Arizona* is a logical consequence of the elevation of commercial speech to constitutionally protected communication. Because the Bill of Rights prevailed over the commandment of a self-regulating professional organization, the public's right to be informed emerges as the champion in this case. The Court pointedly stated that they felt the Arizona disciplinary rule was violative of the First Amendment, ". . . the disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance." 97 S.Ct. at 2700.

It is important to note that the decisions in both *Pharmacy* and *Bates* will relate to the advertising of prices. Only routine legal services lend themselves to advertising: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, and the change of name—the types of services advertised by the appellants. The Court later eliminated any question as to the scope of permissible advertising by indicating that advertisements which are false, deceptive, or misleading are subject to restraint as are advertised claims concerning the quality of the services to be performed. "In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course do not hold that advertising by attorneys may not be regulated in any way." 97 S.Ct. at 2708.

The heart of the commercial free speech issue appears to be the public's right to information which will enable each consumer to make informed and reliable decisions. "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." 97 S.Ct. at 2699.

The *Bates* decision should act as a catalyst for the open and reliable dissemination of information at a time when the stature of many professionals, especially attorneys, is diminishing. A well informed marketplace can facilitate the extension of services to those who need them but are unsure of their availability.

However, notice of the availability of services through price advertising does not eradicate the important question of quality and appropriateness of service. The Supreme Court's decision in *Bates,* while opening up many new doors, may also serve to add new clouds of uncertainty to confuse those who were to have been helped. Mr. Chief Justice Berger, concurring in part and dissenting in part, warned:

> "Because legal services can rarely, if ever be 'standardized' and because potential clients rarely know in advance

'What are you trying to do—ruin the mumbo-jumbo racket?

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what services they do in fact need, price advertising can never give the public an accurate picture on which to base the selection of an attorney. Indeed, in the context of legal services, such incompleted information could be worse than no information at all. It could be a trap for the unwary." 97 S.Ct. at 2710.

Unquestionably, the Supreme Court's decision in *Bates* will have a far reaching effect on the professionals's relationship with those who need unique services. The consumer has now the opportunity to select an attorney based on the cost of the services provided. Now the question must be whether the legal profession will support or reject the Court's belief that dissemination of limited information, so long as it is accurate, is better than continued public ignorance and professional secrecy.

Bates: A Local Response

by Carol A. Robertson

On June 27, 1977 the Supreme Court of the United States decided the case of *Bates v. State Bar of Arizona*, 97 S.Ct. 2691 (1977), regarding legal advertising. Those who thought the controversy over advertising in the legal profession would be settled by this decision were very much mistaken.

On July 8, 1977 the Annapolis law firm of LEGUM, COCHRAN & CHARTRAND, P.A. ran ad "A" in *The Evening Capital*.

This so-called advertisement merely announced the addition of a new associate to the firm. Maryland is one of relatively few jurisdictions which still prohibits such announcements in newspapers. Despite Maryland's minority stance on announcement type ads the members of the firm felt confident that their ad would be above reproach. They regarded the ad as entirely within the *Bates* decision on the theory that permitting advertisement of prices of routine legal services presumes advertisement of existence. Confident in their position, the young associates innocently bantered among themselves of possible adverse Bar Association reaction. Imagine their consternation when they received a letter from the Attorney Grievance Commission of Maryland instructing them that they were believed to be in violation of the Code of Professional Responsibility and commanding them to cease and desist such action or suffer untold consequences. The Commission did not choose to enlighten the attorneys as to exactly how they were violating the Code. A formal grievance was not at that time filed.

Legum, Cochran & Chartrand responded that they would not discontinue publication of their announcement and

[A]

LEGUM, COCHRAN & CHARTRAND, P.A.

ANNOUNCE THAT

MARTHA WYATT

IS NOW ASSOCIATED WITH THE FIRM
IN THE PRACTICE OF LAW

ALAN HILLIARD LEGUM
GILL COCHRAN
GEORGE J. CHARTRAND

MARTHA WYATT

208 DUKE OF GLOUCESTER ST.
ANNAPOLIS, MD. 21401
301 263-3001

JULY 1, 1977

[B]

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LEGAL SERVICES AT REASONABLE FEES

Simple Uncomplicated Will (No Trust Provisions)	$ 35.00
Uncontested Divorce (No Dispute Concerning Grounds for Divorce)	250.00
Simple Separation Agreement (Without Negotiation)	100.00
Simple Power of Attorney	25.00
Preparation of Real Estate Sales Contract	25.00
Preparation of Simple Deed	15.00
Brankruptcy Preceedings—Individual—Nonbusiness, Uncontested Proceedings	350.00
Change of Name (Uncontested)	75.00
Adoption (Uncontested)	250.00

The fee charges in other types of cases and in contested cases will depend on and vary according to the individual circumstances of that case. The above fees are in addition to court costs as assessed by the Clerk of Court.

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