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Constitutional Law: First Amendment Guarantees Lawyers Limited Right to Advertise Fees: *bates v. State Bar of Arizona*

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Abstract

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KEYWORDS: right, advertise, fees

Constitutional Law: First Amendment Guarantees Lawyers Limited Right to Advertise Fees: *Bates v. State Bar of Arizona*

The Supreme Court's ruling in the case of *Bates v. State Bar of Arizona*¹ involved the right of two young attorneys with impressive academic credentials² to advertise their legal services in a local newspaper.³ The attorneys had sought to create what they termed a "legal clinic" which was, in fact, a low-budgeted law office handling exclusively low-cost, non-litigable legal matters such as uncontested divorces, changes of name, and adoptions.⁴ Their objective was to provide such services to moderate-income clients for a comparatively low fee.⁵ By cultivating and reaching a high volume of clientele through advertising, the attor-

1. 97 S. Ct. 2691 (1977).

2. Attorney John R. Bates was named the outstanding student of his class by his law school faculty, and attorney Van O'Steen graduated *cum laude*. Both are graduates of the Arizona State University College of Law class of 1972. *Id.* at 2693 n.2.

3. *Id.* at 2694. The attorneys claimed in their advertisement that they provided "legal services at very reasonable fees," and went on to list their services as including:

- Divorce or legal separation—uncontested
(both spouses sign papers)
\$175.00 plus \$20.00 court filing fee
- Preparation of all court papers and instructions
on how to do your own simple uncontested divorce
\$100.00
- Adoption—uncontested severance proceeding
\$225.00 plus approximately \$10.00 publication cost
- Bankruptcy—non-business, no contested proceedings
Individual—\$250.00 plus \$55.00 court filing fee
Wife and Husband—\$300.00 plus \$110.00 court filing fee
- Change of name
\$95.00 plus \$20.00 court filing fee.

Id. at 2710 app.

4. *Id.* at 2694.

5. *Id.*

neys could service their clients with a minimum amount of expense due to the lack of research and preparation required to fulfill their needs.⁶

The lawyers' advertisement appeared in the *Arizona Republic* newspaper on February 22, 1976, and included the quotation of fees for specified services.⁷ As a result, an action was brought against them by the President of the Arizona State Bar⁸ for violating the A.B.A. Code of Professional Responsibility Disciplinary Rule 2-101(B) as incorporated by Rule 29(a) of the Supreme Court of Arizona.⁹ It was the decision of the Special Local Committee, which originally heard the matter;¹⁰ of the Board of Governors of the State Bar, which reviewed the bar committee's action;¹¹ and of the Arizona Supreme Court,¹² that the attorneys were in violation of that rule.¹³ The attorneys petitioned for a writ of certiorari in the United States Supreme Court,¹⁴ which reversed the decision of the Arizona Supreme Court¹⁵ and HELD that the first amendment guarantee of freedom of speech precluded the State Bar from banning the appellants' limited type of legal advertising.¹⁶

6. *Id.*

7. *Id.*

8. *Id.* at 2695.

9. 17A ARIZ. REV. STAT. (West Cum. Supp. 1977-78). The pertinent part of the rule provides 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.

10. At this hearing, pursuant to Arizona Supreme Court Rule 36, 17A ARIZ. REV. STAT. (West Cum. Supp. 1977-78), a three-member committee recommended that the attorneys be suspended from the practice of law for not less than six months. 97 S. Ct. at 2695.

11. The Board of Governors, upon review pursuant to Arizona Supreme Court Rule 36, 17A ARIZ. REV. STAT. (West Cum. Supp. 1977-78), reduced the committee-imposed sanction to a one-week suspension. 97 S. Ct. at 2695.

12. *Matter of Bates*, 113 Ariz. 394, 555 P.2d 640 (1976), *rev'd sub nom.* *Bates v. State Bar of Arizona*, 97 S. Ct. 2691 (1977), where the court, pursuant to its rule 37, 17A ARIZ. REV. STAT. (West 1973), reviewed the Board of Governors' action. 97 S. Ct. at 2695. The court reduced the sanction to a censure "[b]ecause the court . . . felt that [the lawyers'] advertising 'was one in good faith to test the constitutionality of DR 2-101(B). . . .'" *Id.* at 2696.

13. *Id.* at 2695.

14. The Supreme Court noted probable jurisdiction in *Bates v. State Bar of Arizona*, 429 U.S. 813 (1976).

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

16. *Id.* at 2709.

Appellants' argument was based upon two contentions: (1) that the state court ruling violated the Sherman Act¹⁷ and (2) that the ruling infringed upon rights protected by the first amendment.¹⁸ The Court first considered, but rejected, the appellants' arguments—based on the Sherman Act—that they had a right to compete in the market place without undue governmental interference.¹⁹ In summarily dismissing this argument,²⁰ the Court upheld the lower court's ruling that “[t]he regulation of the State Bar . . . is an activity of the [state] acting as sovereign,”²¹ and is therefore exempt from the Sherman Act.²² In support of its ruling the Court cited the case of *Parker v. Brown*,²³ which held that the State of California could regulate competition among the state's raisin growers, as this regulation by the State, as sovereign, was a restraint “which the Sherman Act did not undertake to prohibit.”²⁴ In aligning itself with the *Parker* holding, the Court distinguished the case before it from previous cases in which provisions of the Sherman Act were determined to have been violated by the state.²⁵ Those cases

17. Sherman Antitrust Act of 1890, §§ 1 & 2, 15 U.S.C. §§ 1 & 2 (1976).

18. 97 S. Ct. at 2695, 2698.

19. Sections 1 & 2 of the Sherman Act provide:

§ 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sherman Antitrust Act, *supra* note 17.

20. 97 S. Ct. at 2696-98. The Court was in fact unanimous in its ruling on this aspect of the case, as all the dissenting opinions were directed at other issues. *Id.* at 2710 (Burger, C.J.); 2711-12 (Powell, Stewart, JJ.); 2719 (Rehnquist, J.).

21. *Matter of Bates*, 113 Ariz. 394, —, 555 P.2d 640, 643 (1976).

22. 97 S. Ct. at 2698.

23. 317 U.S. 341 (1943).

24. *Id.* at 352.

25. 97 S. Ct. at 2696.

involved either outright "price fixing" by the state²⁶ or instances where the state had no "independent regulatory interest" in the matters affected by state regulation; *i.e.*, the measures taken had not been based upon correcting "flaws in the competitive market," nor did they arise out of concerns about public health or safety.²⁷

Turning to the only other argument of the appellants, the Court, through the majority opinion of Mr. Justice Blackmun, ruled that the attorneys' rights of free speech under the first amendment were pre-eminent over the constraints imposed on them by the State Bar's Disciplinary Rule.²⁸ In so ruling, the Court analogized the present case to that of another, *Virginia Pharmacy Board v. Virginia Consumer Council*,²⁹ involving the right of a pharmacist to advertise the price of prescription drugs.³⁰ The Court recalled that in *Virginia Pharmacy* it had ruled that the first amendment guaranteed the pharmacist the right to advertise his wares, even though the advertisement had not reported "any particularly newsworthy fact" or commented upon "any cultural, philosophical or political subject."³¹ Such speech was deemed to be commercial in that its sole purpose was to attract business.³² The Court then cited a list of its prior analogous decisions holding this type of speech to be protected.³³ It continued that "such speech should not be withdrawn

26. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), involved a minimum fee schedule for attorneys that was enforced by the State Bar.

27. 97 S. Ct. at 2697. The case involved is *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), in which defendant, a private electric utility regulated by a state agency, distributed light bulbs to its customers as part of its service. The Court held that the mere fact that a state regulatory agency approved of such practice did not provide "a sufficient basis for implying an exemption from the federal antitrust laws for that program." *Id.* at 592-93, 598.

28. 97 S. Ct. at 2698-709 (full discussion of first amendment claims).

29. 425 U.S. 748 (1976).

30. 97 S. Ct. at 2698. The pharmacist had been accused of "unprofessional conduct" in violation of a Virginia statute. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* *Buckley v. Valeo*, 424 U.S. 1 (1976) (Court struck down, on the basis of the first amendment, the portion of the Federal Election Campaign Act of 1971, as amended in 1974, which imposed a ceiling on expenditures by political candidates); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Court held, *inter alia*, that an expression did not lose constitutional protection, under the first amendment, because it appeared in the form of a paid advertisement); *Smith v. California*, 361 U.S. 147 (1959) (Court struck down a city ordinance which made a bookstore owner absolutely criminally liable for possessing material which was judicially determined to be obscene; the statute was held to violate the freedom of the press as guaranteed by the fourteenth amendment);

from protection merely because it proposed a mundane commercial transaction."³⁴

Aside from the right of the speaker to advertise for purely commercial purposes, the Court also found a concurrent first amendment right on the part of the public to be informed.³⁵ Just as with the pharmaceutical regulation statute contained in *Virginia Pharmacy*, the Court found that the Arizona disciplinary rule "serves to inhibit the free flow of commercial information and to keep the public in ignorance."³⁶ By upholding the right of the public to know, in addition to that of the lawyer to inform, the Court effectively disarmed the Bar's argument that the ban on lawyer advertising protected both the interests of the public and the image of the legal profession. The Bar contended that the public would lose respect for the legal profession, because if advertising were permitted the profession would appear over-commercialized.³⁷ The Court responded that the appellants were accomplishing the desire of the American Bar Association that attorneys should discuss fee arrangements with clients as a first order of business.³⁸ The Court added that since neither bankers nor engineers have suffered any discernible loss of dignity as a result of price advertising,³⁹ there seemed to be no valid reason why the legal profession should suffer. Moreover, the Court held that to "condemn the candid revelation of the same information" by an attorney to a prospective client before he enters his office that he would be ethically bound to give him afterwards is equally invalid.⁴⁰ Indeed, the Court expressed the view that the lack of information on the part of the public as to legal fees may actually deter people from

Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ordinance was struck down which required Jehovah's Witnesses to procure a city license before they could solicit people to purchase religious books and pamphlets); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (statute struck down which required a prior determination by the secretary of the public welfare council that people seeking to solicit support for their cause were truly representing a religious cause).

34. 97 S. Ct. at 2699.

35. *Id.*

36. *Id.* at 2700.

37. 97 S. Ct. at 2701.

38. *Id.* The Court stated: "[T]he American Bar Association advises that an attorney should reach 'a clear agreement with his client as to the basis of the fee charges to be made,' and that this is to be done '[a]s soon as feasible after a lawyer has been employed.' Code of Professional Responsibility, EC 2-19 (1976)."

39. 97 S. Ct. at 2701-2.

40. *Id.* at 2701.

seeking legal assistance out of fear that an exorbitant fee will be extracted from them.⁴¹

As to the Bar's contention that the advertising of a fee is misleading because fees are determined by the particular facts of each client's case, the Court held that those services advertised by the appellants were all routine matters and, therefore, subject to a set fee schedule which could be honestly advertised prior to individual consultation with a client.⁴² The Bar also argued that advertising would not advance the role of the attorney as a diagnostician;⁴³ that it would leave potential customers with a less than complete picture from which to choose a lawyer;⁴⁴ and that it would stir up fraudulent claims.⁴⁵ The Court, however, thought that the benefits of advertising outweighed whatever merit these arguments contained. It concluded that permitting a limited type of advertising, such as that put out by Bates and O'Steen, would serve to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."⁴⁶ Ironically, the Court took these very words directly from the American Bar Association's Code of Professional Responsibility.⁴⁷

The Court also rejected the argument of the Bar that overhead expenses will necessarily rise to cover the added costs of advertising, resulting in higher legal fees for the consumer.⁴⁸ Instead, the Court opted for the counter-argument that a healthy competition for clients, increased by advertising fees, will probably lower legal fees and provide the public with the opportunity to compare advertised prices.⁴⁹

Regarding a possible second consequence of the added costs of advertising, the Court also disagreed with the argument that new attorneys would have an economically difficult time penetrating the estab-

41. *Id.* at 2702. The Court then referred to a footnote in a report which found that middle-class consumers have overestimated lawyers' fees for drawing up a simple will by 91%, for reading and advising on a two-page installment sales contract by 340%, and for a thirty-minute consultation by 123%. *Id.* at n.22.

42. *Id.* at 2703. The Court noted that the Arizona Bar itself sponsored a Legal Services Program in which participating attorneys performed services like those advertised by Bates and O'Steen at standardized rates. *Id.*

43. *Id.* at 2704.

44. *Id.*

45. *Id.* at 2704-5.

46. *Id.* at 2705.

47. EC 2-1 (1976).

48. 97 S. Ct. at 2705-6.

49. *Id.* at 2706.

lished market. The Court said, in fact, that advertising would probably serve to aid young lawyers who are seeking to make themselves known in the market place.⁵⁰

Finally, the Court considered and rejected arguments that the quality of legal services would decline⁵¹ and that enforcement difficulties would increase if any relaxation of the present advertising ban were allowed.⁵² The Court stated that “[r]estraints on advertising . . . are an ineffective way of deterring shoddy work.”⁵³ The Court refuted the Bar’s argument that “an attorney who advertises a standard fee will cut quality” by pointing out that the Bar itself had set standard fee schedules in its own Legal Services Program.⁵⁴ As to the enforcement problems, the Court indicated that it was confident most lawyers would continue to conduct themselves honorably.⁵⁵ For those who did not, the Court felt that the desire of the members of the legal profession, as a whole, to preserve their good name would cause them to join together in “weeding out those few who abuse their trust.”⁵⁶

Understandably, the Court sought to base its decision on the narrowest possible ground and to preserve partially the State Bar’s goal of preventing the defrauding of the public and the concomitant degradation of the legal profession. It was, therefore, carefully pointed out in the opinion that misstatements of fact, or deceptively-worded advertise-

50. *Id.* The Court compared the plight of a new attorney who would have to pay some additional advertisement costs to that of an attorney who would have to rely on the more traditional methods, such as contacts and social connections. It found that a ban on advertising would serve “to perpetuate the market position of established attorneys. Consideration of [market place] entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.” *Id.* The Court did not consider, on the other hand, the potentially negative impact of advertising upon those new attorneys who each year seek clerkships with established firms. Such positions, as a result of increased costs due to advertising, could become a luxury that law firms can no longer so easily afford.

51. *Id.* The Bar argued that advertising would cause the offering of a legal “package” at a set price, and that lawyers would “be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client’s needs.” *Id.*

52. *Id.* The Bar claimed that a public which “lacks sophistication in legal matters . . . may be particularly susceptible to misleading or deceptive advertising by lawyers.” It feared that no regulatory agency would be able to shoulder the burden of monitoring the advertised services and comparing them to those actually rendered. *Id.* at 2706-7.

53. *Id.* at 2706.

54. *Id.*

55. *Id.* at 2707.

56. *Id.*

ments, could in no way be sanctioned by the Court's ruling.⁵⁷ As the Court concluded:

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.⁵⁸

In separate dissenting opinions, both Mr. Chief Justice Burger and Mr. Justice Powell⁵⁹ agreed that the price of certain routine legal matters may safely be advertised without foreseeable detriment. Nevertheless, they found that the majority had failed to define adequately what type of legal services could be considered routine. Specifically, the Chief Justice took the majority to task for failing to acknowledge that an uncontested divorce, which was one of the advertised items involved in this case, could easily cost a great deal more than the \$195 (\$175 fee plus \$20 court cost) claimed by the attorneys-appellants in their newspaper advertisement.⁶⁰ As the Chief Justice explained, the cost of a divorce could vary drastically depending upon whether alimony, child support, or a property settlement were involved.⁶¹ For this reason, Mr. Chief Justice Burger found that the task of enforcing the ruling of the Court permitting certain unspecified types of legal advertising is an impossible one to perform.⁶² As a corrective measure, the Chief Justice would have required qualifying statements in legal advertisements to the effect that fees for such non-litigable matters could vary over a broad range, depending upon individual circumstances, so as to "insure that the expectations of clients are not unduly inflated."⁶³

The dissent of Mr. Justice Powell echoed the Chief Justice's concern that the parameters of legitimate legal advertising, based on routineness, were ambiguous and arbitrary. Mr. Justice Powell felt that if lawyers were to be allowed to advertise their services and prices, "the

57. *Id.* at 2709.

58. *Id.*

59. The latter was joined in his opinion by Mr. Justice Stewart.

60. 97 S. Ct. at 2710.

61. *Id.*

62. *Id.* at 2711.

63. *Id.*

public interest [would] require the most particularized regulation.”⁶⁴ He hinted at the danger that attorneys would view the decision as conferring a license to wage a potentially deceiving campaign for clients. He envisioned that the majority’s opinion would result in lawyers using such adjectives as “fair,” “moderate,” “low-cost,” or “lowest in town.” He also feared that the Court’s failure to pronounce more definitive guidelines would unduly inhibit states from carrying out their proper function of regulating legal advertising.⁶⁵

Nor did Mr. Justice Powell agree with the Court’s primary assumption that the Arizona disciplinary rule and rules similar to it from other states are inconsistent with first amendment guarantees. He distinguished away the Court’s finding in *Virginia Pharmacy*, as did the Chief Justice, that the ban on advertising of a pharmaceutical product is unconstitutional.⁶⁶ The distinction between pharmaceutical products and legal services is significant to Mr. Justice Powell for two reasons: first, there is a greater risk of deception in the selling of a service; and, second, there is a much greater difficulty in monitoring and regulating the sale of a service which is required by the public interest.⁶⁷

The proposition that there is no constitutional right to advertise a legal service was picked up by Mr. Justice Rehnquist in his separate dissent, in which he described the free-speech provision of the first amendment as “a sanctuary for expressions of public importance or intellectual interest.”⁶⁸ Not even the advertisement of goods should be included in its protection, let alone that of services, according to Mr. Justice Rehnquist, for to invoke the first amendment on those grounds is to demean its very importance.⁶⁹ He considered the majority opinion in the instant case, following *Virginia Pharmacy* by only a year, as a further step down a “slippery slope,” which he viewed as threatening dire consequences for the sanctity of the first amendment itself.⁷⁰

64. *Id.* at 2718.

65. *Id.* at 2715. Mr. Justice Powell wrote: “The Court seriously understates the difficulties, and overestimates the capabilities of the Bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both *unrestrained and truthful*.” *Id.* at 2715 (emphasis added).

66. *Id.* at 2712-13.

67. *Id.* at 2713.

68. *Id.* at 2719.

69. *Id.*

70. *Id.* at 2719-20.

This is, of course, in direct opposition to the majority view that *Virginia Pharmacy* is controlling. Although a distinction can be made on the grounds that *Virginia Pharmacy* involved the sale of goods and the instant case the sale of services, the Court held the distinction to be superficial, in view of the fact that the services in question were routine and readily identifiable.⁷¹ The Court, taking the stance that routine legal services can be freely advertised in the market place, apparently perceives that they can be judged and evaluated by the consuming public as easily as can a tangible product, with the result that inaccurate or misleading statements will be discovered and dealt with accordingly.⁷²

In an effort to carry out the subtle mandate of the Court,⁷³ the House of Delegates of the American Bar Association has adopted a recommendation⁷⁴ to allow radio and print advertising of twenty-five enumerated facts⁷⁵ which pertain to an attorney's professional back-

71. *Id.* at 2703.

72. *Id.* at 2699. The Court reviewed its opinion in *Virginia Pharmacy*, where it had closely examined the question as to whether a state necessarily furthers its goal of maintaining high professional standards by prohibiting advertising. It found a potent alternative to this "highly paternalistic" approach: "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.*, quoting from *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770 (1976).

73. 97 S. Ct. at 2709.

74. The recommendation, proposed by ABA President-Elect S. Shepard Tate's ABA Task Force on Lawyer Advertising, was adopted at the 1977 Annual Meeting of the House of Delegates in Chicago. 63 A.B.A. J. 1410 (Oct. 1977).

75. 46 U.S.L.W. 5 (Aug. 23, 1977). Those facts which may be advertised in a "dignified manner" under DR 2-101 are (Proposal A):

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm 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, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching position;

ground and current legal practices. The ABA points out that it is improper for an attorney to imply through advertising that “the ingenuity or prior record of a lawyer rather than the justice of the claim are the

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- (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;
 - (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 for a written schedule of fees and/or an estimate of the fee to be charged for specific services;
 - (22) Contingent fee rates subject to DR2-106(C) 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 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,¹ 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:
 1. The agency having jurisdiction under state law may desire to issue appropriate guidelines defining “specific legal services.”

Id.

John H. Shenefield, assistant attorney general for the Antitrust Division in the Department of Justice, however, has called these recommendations “narrow changes” which “fail to meet the needs of the public and the dictates of the Supreme Court.” He has described the Bar’s response to *Bates* as one of “fatuous debate, endless word games, and glacial change.” 63 A.B.A. J. 1703 (Dec. 1977).

principal factors likely to determine the result.”⁷⁶ Nor may the attorney advertise as a specialist in fields other than admiralty, trademark, and patent law where, the ABA contends, “holding out as a specialist historically has been permitted.”⁷⁷

Although permitting radio broadcasts after a thorough screening by the attorney, the ABA does not intend to make any change in its Code of Professional Responsibility’s ban against television advertising.⁷⁸ Of course the Bar is under no obligation to make any such change, as the Court’s ruling considered only newspaper advertising. This is further evidence that the ABA will revise its Code only to the extent absolutely necessary to comply with the Court’s ruling.

Despite these attempts to establish guidelines, it remains to be seen whether the Court is correct in its assumption that so-called routine legal services can be advertised at a particular price without misleading the public and without further eroding public confidence in the legal profession. If the minority is correct, and there is no effective way to regulate the advertisement of legal fee requirements, due to the myriad of unforeseeable factors involved in every legal transaction, then a damaging blow will have been dealt to the profession at a time when it has already suffered a marked decline in public approbation. On the other hand, if the practitioners in the profession accept their new-found liberty responsibly, it is entirely possible that the legal community will be greatly benefited. This will result not only in increased public esteem for lawyers, but—more important—in greater opportunities to provide better and more diversified legal services to the American public.

Gary E. Guy

76. 46 U.S.L.W. 4 (Aug. 23, 1977).

77. *Id.* at 5. See also DR 2-105, 46 U.S.L.W. at 7.

78. 46 U.S.L.W. 2 (Aug. 23, 1977). The stated reason for this ABA policy is that “[t]he problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media.” *Id.* at 3. However, the new code provisions go on to state that “[i]f the interests of laypersons in receiving relevant lawyer advertising are not adequately secured by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.” *Id.*