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OF SHIBBOLETHS, SENSE AND CHANGING TRADITION—LAWYER ADVERTISING

INTRODUCTION

The subject of lawyer advertising stirs up a controversy which some people might consider unwarranted. However, when restrictions upon lawyer advertising are changed, tradition is challenged and therefore values are questioned. Contemporary American civilization has prompted individual attorneys and the organized bar to ponder an issue: have the traditional restrictions on advertising become an antiquated habit. This question must be deliberated if the intrinsic and timeless values of the tradition are to be retained while the traditional restrictions are changed to conform to the present.

Review and revision of restrictions on lawyer advertising were caused by the Supreme Court's decision in *Bates v. State Bar of Arizona* which held that the blanket suppression of such advertising violated the free speech clause of the first amendment. Within five weeks of the *Bates* decision, almost all of the states had begun to revise their ethical codes and a few states had even adopted interim rules. The Wisconsin Supreme Court issued an order adopting interim rules for lawyer advertising on December 23, 1977.

This comment will examine some of the traditional reasons for the prohibition against lawyer advertising. It will then consider alternative proposals for increasing lawyer exposure without lifting or modifying the ban on advertising by individual lawyers. The response of the bar to the need and demands for lawyer advertising and to the *Bates* decision will be discussed. Finally, the Wisconsin interim rules, several proposals for permanent rules and the problems of regulation and enforcement will be analyzed.

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2. *Id.* at 383. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The protection of free speech has been applied to the states through the fourteenth amendment. See, e.g., Spence v. Washington, 418 U.S. 405, 413 (1974) (per curiam); Gitlow v. New York, 268 U.S. 652, 666 (1925).
I. Historical Background and Development

While formal restrictions upon lawyer advertising are a relatively modern phenomenon, there is evidence that they evolved from social conceptions traceable to the Jacksonian Period, the English legal tradition, medieval times and even the ancient civilizations of Greece and Rome. Regulation of attorney conduct existed at an early date in this country through standards derived from the common law. Even before formal prohibitive rules were adopted, the profession traditionally abstained from advertising in order to protect the public from potential abuses such as barratry, maintenance, champerty, fraud and corruption.

Nevertheless, advertising by attorneys was a widespread practice during the last half of the nineteenth century, when "[t]here was a feeling that professions were undemocratic and un-American." Perhaps this break from tradition occurred because the concept of legal practice as a profession—with public service as its primary purpose, without the taint of competition for clients—reached a low point just after the Civil War.

Professionalism was revived, however, with the development of bar associations. Near the end of the nineteenth century, one state supreme court had taken the position that "[t]he ethics of the legal profession forbid that an attorney should advertise his talents or his skill, as a shopkeeper advertises his wares."

5. The first time a written prohibitory rule was applied over a wide geographic area was shortly after 1908 when the ABA adopted the Canons of Professional Ethics. See Am. JuR. 2d Desk Book 222 (1962).
7. Id. at 225.
8. "Barratry" is the "offense of frequently exciting and stirring up quarrels and suits." BLACK’s LAW DICTIONARY 190 (rev. 4th ed. 1968).
9. "Maintenance" is the unauthorized and officious interference in a suit in which the offender has no interest, by assisting a party with money or advice to prosecute or defend the action. Id. at 1106.
10. "Champerty" is a bargain by a stranger with a party to a suit, whereby the stranger undertakes the cost and risk of litigation, receiving part of the proceeds or subject sought to be recovered if the suit is successful. Id. at 292.
11. See Jeffers, Institute on Advertising Within the Legal Profession—Con, 29 OKLA. L. REV. 620, 620 (1976) [hereinafter cited as Jeffers].
13. Id. at 676-78, 691-92.
14. Id. at 692-93.
By the time *Semler v. Oregon State Board of Dental Examiners* was decided, the bar was fairly well organized. In that case, the Supreme Court discussed the interaction among public interest, professional interest and advertising: "[T]he community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous." This passage reflects the fact that when professional services are involved, advertising poses inherent risks. The reference to competition presaged similar views espoused by Dean Pound and others in later decades. Thus, the tradition against advertising was grounded upon the importance of public service as an essential element of professionalism and the protection of both the public and the profession.

Some authorities have also noted that restricting lawyer advertising within very narrow limits should prevent or diminish the temptation for lawyers to stir up litigation, to make unwarranted claims of quality and to hold out inducements for employment by giving illusory assurances of success or client satisfaction. In addition, the argument has been made that if advertising were allowed, the legal profession could suffer a loss of public respect due to the commercialization of the practice of law.

Finally, the tradition against advertising was reinforced by

16. 294 U.S. 608 (1935). *Semler*, decided prior to the recent trend of consumerism, upheld a statutory ban upon specific types of advertising by dentists.

17. Id. at 612.

18. See, e.g., *Report of Committee on Professional Ethics*, Wis. B. Bull., June 1956, at 66 (Opinion Number 8). The Wisconsin Ethics Committee interpreted number 29 of the Canons of Professional Ethics and quoted Canon 7 in part: "Efforts, direct or indirect, in any way to encroach upon the business of other lawyers are unworthy of those who should be brethren at the bar." Id. at 66. See also Comment, *Advertising, Solicitation and Prepaid Legal Services*, 40 Tenn. L. Rev. 439, 454 (1973) [hereinafter cited as Comment].


20. See Comment, supra note 18, at 452-54. For a thorough analysis defining "commercialization of the practice of law" and its effects, see B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS 150-69 (1970) [hereinafter cited as CHRISTENSEN]. The other possible consequences of advertising which are discussed in this book include misrepresentation, overreaching, provocation of litigation and the disruption of competitive advantage within the bar. Id. at 140-50.
other cultural values, such as the institutions of marriage and the family. These values were threatened by active solicitation of legal business. Advertising suggesting that divorce was readily available was held to be unethical in People v. Goodrich and In re Schnitzer. Both opinions clearly and correctly criticized the misleading nature of the ads. But one who reads the opinions is left with the distinct impression that any action which might encourage divorce must be considered intolerable. While these cases are additional authority for the ban on lawyer advertising, the attitude displayed in them is overprotective of the public.

This cultural attitude, as well as a concern for protecting both the bar and the public, eventually led to the codification of restrictions on legal advertising. As early as 1857 Alabama drafted a code of legal ethics which regulated, but did not prohibit, advertising. In 1908 the American Bar Association adopted the Canons of Professional Ethics which came close to banning advertising completely. Canon 27 prohibited all self-laudatory communication with the media, reflecting the belief that the tradition of law as a profession would be offended not only by misleading ads but also by indirect advertising. One court's interpretation of Canon 27 indicated that self-laudation may have puffery as its consequence with the result that ethical attorneys would suffer at the hands of unscrupulous braggarts.

Canon 27 was strictly enforced with respect to both indirect and misleading advertising. State v. Willenson involved a

21. 79 Ill. 148 (1875).
22. 33 Nev. 581, 112 P. 848 (1911).
23. Any relaxation of anti-advertising rules must recognize the potential client's freedom of choice. It is most unlikely that an ad stating "Divorce Cases Accepted" (which is otherwise neither false nor misleading) would, by itself, lead a rational individual to seek a divorce.
24. Francis & Johnson, supra note 6, at 226. In fact, the ABA Canons of Professional Ethics were based upon a code adopted by the Alabama State Bar Association in 1887. Preface to ABA CODE OF PROFESSIONAL RESPONSIBILITY at i (1976) [hereinafter cited as ABA CODE].
26. See ABA CANONS OF PROFESSIONAL ETHICS No. 27.
27. See In re Rothman, 12 N.J. 528, ___ , 97 A.2d 621, 628 (1953).
28. See generally O. MARU & R. CLOUGH, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1970). Formal opinions of the Wisconsin and Milwaukee Bar Associations, some of which concern incidents of advertising and solicitation by lawyers, are included in this digest. Id. at 520-23.
29. 20 Wis. 2d 519, 123 N.W.2d 452 (1963) (per curiam).
sign which hung in a window of an attorney's office adjacent to the window which displayed his shingle. The sign read "Income Tax" and publicized a tax preparation service performed by the attorney's wife who shared office space with him. This sharing of office space, together with the misleading advertising of the wife's sign, was held to be professional misconduct in violation of Canon 27. It has also been stated that as long as membership in the bar is maintained, a lawyer must continue to follow the anti-advertising rules regardless of any dual capacity or dual career.

The Canons of Professional Ethics were supplanted by the Code of Professional Responsibility in 1970. Every state has adopted some version of the Code. Wisconsin did so on December 16, 1969. The Code of Professional Responsibility consists of interrelated Canons, Ethical Considerations (EC) and Disciplinary Rules (DR). The Canons are general standards of professional conduct and the Ethical Considerations represent specific objectives toward which all lawyers should strive. The Disciplinary Rules, however, represent mandatory guidelines, the breach of which subjects lawyers to disciplinary action. Disciplinary Rule 2-101(A) states a general proscription of media advertising:

A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients; as used herein, "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

30. Id at 626-27, 123 N.W.2d at 455-57. See also In re Duffy, 19 App. Div. 2d 177, 242 N.Y.S.2d 665 (1963) (per curiam) (involving a rather large neon sign which did not qualify as a shingle).
32. The Code was adopted by the House of Delegates of the American Bar Association on August 12, 1969, to become effective on January 1, 1970. ABA Code, supra note 24, at ii. For a thorough discussion of the history and development of Canon 27 before it was superseded by the Code, see Francis & Johnson, supra note 6, at 226-28.
35. ABA Code, supra note 24, Preliminary Statement, at 1C.
36. ABA Code, supra note 24, DR 2-101(A). In addition, section (C) provides: "A
The exceptions to this rule did allow for dignified publicity of qualified legal assistance organizations, provided that no lawyer was identified by name. Identification of individual attorneys was restricted to a few situations where it would be of little value to a consumer seeking resolution of a particular legal problem.\(^{37}\)

These Disciplinary Rules like their predecessor, Canon 27, were strictly enforced even in recent years when there has been increasing pressure on the bar to relax its restrictions upon advertising.\(^{38}\) In 1971 an attorney mailed announcements to residents of an area publicizing the opening of his new branch office there. The new Disciplinary Rule permitted the mailing of private announcement cards only to lawyers, clients, former clients, personal friends and relatives.\(^{39}\) The attorney was censured because he did not have personal or professional relationships with all of the residents who received notices. The court also indicated that it would not allow the attorney to publish a professional announcement in a newspaper of general circulation.\(^{40}\)

Attorneys consulting more than just the Disciplinary Rules of the Code of Professional Responsibility for guidance in this area are faced with three types of conflict within the applicable

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\(^{37}\) See ABA Code, supra note 24, DR 2-101(B).


\(^{39}\) See ABA Code, supra note 24, DR 2-102(A)(2), codifying some of the principles behind former Canon 27.

\(^{40}\) In re Braun, 61 N.J. 119, _____, 293 A.2d 186, 188 (1972) (per curiam).
Code language. Canon 2, the axiomatic norm from which the Ethical Considerations and Disciplinary Rules concerning lawyer advertising are derived,\textsuperscript{41} states that: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available."\textsuperscript{42} But this important duty is necessarily restricted by the concomitant Disciplinary Rules, which are mandatory and which generally prohibit public advertising.\textsuperscript{43}

A second conflict exists between the Disciplinary Rules and the Ethical Considerations listed under Canon 2. For example, limitations upon lawyers' rights to advertise are inconsistent with the statement found in the Ethical Considerations that "important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."\textsuperscript{44}

Lastly, some Ethical Considerations conflict with others. For example, the goal of facilitating the "intelligent selection of lawyers" is at odds with the Ethical Consideration that "[i]n the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist," or even as the recipient of special training, in fields other than admiralty, trademark and patent law.\textsuperscript{45} Thus, the Code provides attorneys with anti-advertising Disciplinary Rules which contradict some of the aspirational Ethical Considerations. Consequently, the general duty in Canon 2 of assisting in making legal counsel fully available has become secondary in the minds of many lawyers.

The Code itself gives the following justification for the strict rules on advertising:

The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public

\textsuperscript{41} See ABA Code, supra note 24, Preliminary Statement, at 1C.
\textsuperscript{42} ABA Code, supra note 24, Canon 2.
\textsuperscript{43} See text accompanying notes 36-37 supra.
\textsuperscript{44} ABA Code, supra note 24, EC 2-1 (emphasis added) (footnote omitted).
\textsuperscript{45} Id. EC 2-14. However, specialization programs do exist in New York, Pennsylvania and Oregon. Lawyers Venture into Advertising Era with Caution and Questions, 63 A.B.A.J. 1065, 1069 (1977) [hereinafter cited as Lawyers Venture]. Specialization programs also exist in California, New Mexico, Florida, Arizona and Texas. Kindregan, Where Are We Going with Lawyer Advertising?, 62 Mass. L.Q. 41, 46-47 (1977) [hereinafter cited as Kindregan]. Such programs are also being considered in Colorado, Idaho, Minnesota and Nebraska. Id. at 46-47. In addition, some states have adopted self-designation programs. Steil, The Advertising Issue, Wis. B. Bull., Nov. 1977, at 7 [hereinafter cited as Steil].
interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistic expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.46

Recent developments will do much to change the traditional rules against lawyer advertising and may lessen, or even eliminate, the conflict between those rules and the other goals within the Code.

II. THE ARGUMENT FOR ALTERNATIVES

Short of eliminating the general ban on individual lawyer advertising, there are several other methods of publicizing the availability of legal services which should be considered. Three such methods exist at present: institutional advertising, referral services and legal service plans.

Institutional advertising provides the public with general information about the legal profession. Usually sponsored by local bar associations, such advertising has appeared in both print and electronic media. Institutional advertising has met with approval provided that it was dignified, educational and did not involve the identification of particular lawyers.47 In January of 1977 a three week informational advertising campaign utilizing newspapers, radio and television was conducted in Peoria County, Illinois.48 A study of the campaign found that it was successful in achieving high rates of message recall and

46. ABA Code, supra note 24, EC 2-9 (footnotes omitted).
47. ABA Comm. on Professional Ethics, Opinions, No. 307 (1962). The opinions probably have more historical than precedential value. When the old Canons gave way to revision, it was stated that “[b]ecause the opinions are necessarily interpretations of the existing Canons, they tend to support the Canons and are critical of them only in the most unusual case.” ABA Code, supra note 24, Preface, at i.
48. J.E. Haefner, Advertising Effectiveness Study Prepared for the Illinois Bar Association, A-2 (April 4, 1977). This information is included in materials provided for a Continuing Legal Education course, entitled Marketing Legal Services, which was held in Madison, Wisconsin on Feb. 20-21, 1978.
comprehension and in changing attitudes and intentions for future behavior. However, institutional advertising provides only a rather generalized form of exposure. Realistically, it can only be expected to provide the public with very basic, albeit useful, information and education. As a means of truly educating and informing prospective clients, such advertising has inherent limitations.

Lawyer referral services are a second alternative to individually sponsored lawyer advertising. These services try to match clients with participating attorneys who are available. They are usually run by local bar associations. The Wisconsin Bar has recently established a statewide lawyer referral program. It "is not intended to supplant or take over existing programs but, rather, recognizes the importance of making legal services available to as many consumers of legal services as possible by serving areas where no programs exist." Although it is arguable that advertising by individual attorneys will hinder the operation of referral programs, it is submitted that lawyer advertising will complement, and not supplant, referral programs. With respect to the goal mentioned above of making legal services available to as many consumers as possible, referral programs should still benefit the public especially when combined with institutional advertising efforts. On the other hand, were the proscription against lawyer advertising continued, referral programs would be inadequate to meet the profession's obligation to the public:

[I]t must be acknowledged that the [referral] plan has thus far failed to live up fully to its promise. This may be due in part to the attitude of the bar toward lawyer referral. Lawyers have been generally indifferent toward the program, and in many communities they have been actively hostile to elements of the plan that are crucial to its vitality.

49. Id. at A-17. See also Steil, supra note 45.
50. See Bar Restrictions, supra note 38, at 502.
51. See ABA DIRECTORY OF LAWYER REFERRAL SERVICES (1976). The basic operation, a description and an evaluation of lawyer referral services can be found in Christensen, supra note 20, at 173-204. See generally ABA HANDBOOK OF THE STANDING COMMITTEE ON LAWYER REFERRAL SERVICE (6th ed. 1968).
53. See Lawyers Venture, supra note 45, at 1069.
54. See Hobbs, supra note 38, at 736. See also Jeffers, supra note 11, at 623-24.
55. Christensen, supra note 20, at 173. Cf. ABA CODE, supra note 24, EC 2-15: "Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel."
These shortcomings have continued through the mid-1970's.\textsuperscript{58} Clearly, the referral concept cannot be used to justify restrictive rules against lawyer advertising.

A third method of aiding the public in the selection of legal services is through prepaid or group legal service plans,\textsuperscript{57} which have been recognized by both statutory and case law. Pursuant to federal statute\textsuperscript{58} the Office of Economic Opportunity established a program of legal services for low income groups in 1965. In a series of group legal service cases,\textsuperscript{59} the Supreme Court has upheld such plans, acknowledging that the first amendment protects collective activity which attempts to obtain meaningful access to the courts.\textsuperscript{60}

Section 256.294 of the Wisconsin Statutes\textsuperscript{61} specifically authorizes group legal services. It exempts participating attorneys from strict compliance with the rules of professional responsibility which deal with recommending professional employment and suggesting the need for legal services.\textsuperscript{62} In addition, statewide enrollment of lawyers has recently begun in Wisconsin for an open panel prepaid legal plan in which a type of legal insurance is provided to subscribers who have paid a specified premium to join the plan.\textsuperscript{63} The Wisconsin version is

\textsuperscript{56.} See Schuck, \textit{Consumer Ignorance in the Area of Legal Services}, 43 INS. COUNSEL J. 568, 569 (1976) [hereinafter cited as Schuck].

\textsuperscript{57.} For a thorough examination of the types of plans and their regulation, see \textit{LEGAL SERVICE PLANS} (W. Pfennigstorf & S. L. Kimball eds. 1977). \textit{See also} ABA REVISED HANDBOOK ON PREPAID LEGAL SERVICES (1972); CHRISTENSEN, supra note 20, at 225-51; Dunne, \textit{Prepaid Legal Services Have Arrived}, 4 HOFSTRA L. REV. 1 (1975) [hereinafter cited as Dunne].


\textsuperscript{60.} This fundamental right is reflected in the ABA Code, supra note 24, DR 2-103(C); DR 2-103(D); DR 2-104(A)(3). There are ethical limitations to the right, however. \textit{Id.} DR 2-103; DR 2-104. Additional limitations have been imposed by the courts. \textit{See}, e.g., Columbus Bar Ass'n v. Potts, 175 Ohio St. 101, 191 N.E.2d 728 (1963) (court approved of disciplinary action where the union intermediary who advertised the availability of a particular lawyer was involved in the referral for the purpose of private gain).

\textsuperscript{61.} Wis. STAT. § 256.294 (1975). This statute has been amended by court order. Wis. Sup. Ct. Order, 77 Wis. 2d ix (1977); Wis. Sup. Ct. Order, 79 Wis. 2d xi (1977).

\textsuperscript{62.} See Wis. Code of Professional Responsibility, DR 2-103(C); DR 2-104(A)(3) (1969). The Wisconsin Code can be found at 43 Wis. 2d lxxiv (1969).

\textsuperscript{63.} For a discussion of "open" and "closed" panels, see Dunne, supra note 57, at
similar to successful plans in Iowa, Arizona, Virginia, Oregon and New Mexico.\footnote{64}

As mentioned earlier,\footnote{65} the present Code allows qualified legal assistance organizations to publicize the nature and availability of their legal services provided that individual lawyers are not identified by name. It is submitted that this advertising is a primary reason for the significant social and economic impact\footnote{66} of prepaid and group legal service plans. However, it is difficult to conceive of the plans themselves as a bona fide alternative to advertising by individual attorneys.

In fact, all three alternatives to individual lawyer advertising (institutional advertising, referral services and prepaid or group plans) should be seen simply as additional methods by which the profession can fulfill its duty to make legal counsel available. If the legal profession is somehow seduced into analyzing the situation in terms of an either/or proposition, it may find itself straining without success to meet its obligations. Even with these alternative forms of lawyer publicity, the question still remains: what about the large majority of the public which does not participate in group plans, take advantage of referral services or buy "legal insurance."

III. THE SETTING FOR Bates

For those people who do not benefit from the alternatives above, it may be difficult to justify continued restraints upon the dissemination of information helpful in the selection of legal counsel. The public's attitude toward the bar may well be tainted by the profession's opposition to union controlled group legal services and closed panel plans, its support for minimum fee schedules and the "secret and toothless disciplinary mechanisms which the legal profession has set up to police itself."\footnote{67}

\footnote{22-32. Open panel plans allow members the option of choosing any lawyer. In closed panel plans, members must consult lawyers previously selected. \textit{Id.} at 22.}
\footnote{64. WISBAR Newsletter, Dec. 1977, at 3, \textit{reprinted in} \textit{Wis. B. Bull.}, Dec. 1977. For a detailed account of a successful experiment in the delivery of legal services, see F. Marks, R. Hallauer \& R. Clifton, \textit{The Shreveport Plan} (1974) (involving an insurance type plan designed for a labor union's local membership).}
\footnote{65. \textit{See generally} L. Deitch \& D. Weinstein, \textit{Prepaid Legal Services} (1976).}
\footnote{66. \textit{See generally} L. Deitch \& D. Weinstein, \textit{Prepaid Legal Services} (1976).}
\footnote{67. Schuck, \textit{supra} note 56, at 572. The inadequacies and weaknesses of the bar's disciplinary mechanisms were documented by the Clark Commission, and it is suggested that these mechanisms must be improved if legal advertising is to become a reality. \textit{Id.} It has been suggested that the ABA has been conservative in revising its
One authority has said, "While I appreciate the value of dignity in the profession, these statements . . . do not explain why it is undignified for a lawyer to advertise, or why a professional man may not advertise, while a business man may."88

A. Consumer Needs and the Legal Marketplace

Traditionally, a professional is considered to be a public servant. In order to serve the public, any profession, and the legal profession in particular, must be readily accessible. However, the bar has not always manifested an appropriate concern for this goal of availability. For example, with the increasing complexity of society, specialization has increased in the practice of law. Yet the advantages resulting from this trend have been severely limited because the "supply" of specialized legal services has not been clearly delineated for the benefit of those who "demand" them.69 It has been urged that, if individual lawyers are to have a significant role in contemporary urban society, "then the profession must stop thinking solely in terms of its own traditions and interests and begin to address itself to the needs and desires of the people it should be serving."70

Besides accessibility, the quality and cost of legal services also determine the "demand" for lawyers.71 According to ABA estimates, effective access to legal services is not available to at least seventy percent of the public.72 The cost of legal services is one cause of this lack of availability which might not be directly affected by an increase in lawyer advertising. However, studies by the bar have found that much of the problem is caused by the public's inability to identify which lawyers are competent to handle particular problems and its overestimation of the cost involved as well as the ineffectiveness of the bar's efforts to improve accessibility.73
B. The Response and Reforms of the Bar

Ethical codes of the legal profession must be amended periodically in order to adapt to changes in both the legal system and society. Sometimes this process takes many years. In response to the need for more effective consumer access to legal services, the ABA acted in 1976 to liberalize the Code to allow for increased information in the Yellow Pages listings of attorneys. The changes allowed an attorney to indicate office hours and other hours of availability, initial consultation fees, the availability of credit arrangements and that schedules or estimates of fees for specified services were available upon request, subject to regulation by the local bar. However, only a few states accepted these amendments during the sixteen month period between their adoption and the Bates decision. The amendments were thought by some to be insufficient. Others suggested that further study was needed to explore possible further liberalization in order to properly balance the public's right to information with the potential for abuse.

After Bates, the ABA has studied two new proposals, each representing a substantial departure from the former Disciplinary Rules and Ethical Considerations regarding publicity. Neither proposal, however, would allow person-to-person solicitation or the use of television (unless deemed necessary by the appropriate state authority). Proposal A closely regulates both the method and content of attorney advertisements, though it does allow for limited disclosure of fee information. It also provides for a system in which attorneys could receive rulings on the use of additional information in individual cases

Dunne, supra note 57, at 6-9; Meserve, Our Forgotten Client: The Average American, 57 A.B.A.J. 1092 (1971).

74. Although recommendations were made as early as 1928 to revise the Canons of Professional Ethics, the revision was not accomplished until 1970. ABA Code, supra note 24, Preface, at i.

75. ABA Code, supra note 24, DR 2-102(A)(5); DR 2-102(A)(6).

76. Id.

77. See Lawyers Venture, supra note 45, at 1069.

78. See, e.g., Hobbs, supra note 38.


80. For a description and the complete text of both proposals, see House of Delegates Adopts Advertising D.R. and Endorses a Package of Grand Jury Reforms, 63 A.B.A.J. 1234, 1234-37 (1977) [hereinafter cited as House of Delegates]. Both proposals were criticized by the Department of Justice. A.B.A. Approves, supra note 3, at 1178.
by applying to the appropriate state authorities. Lastly, it pre-
scribes the length of time for which attorneys would be bound
by representations concerning fees. Proposal B adopts a gen-
eral antifraud standard, lists the elements of prohibited false,
fraudulent, misleading or deceptive statements and specifies
improper forms of public communication. Members of the
ABA Task Force on Lawyer Advertising disagreed on which
proposal to recommend. One felt that only Proposal A would
be enforceable and provide a predictable standard for lawyers
who want to advertise. Another expressed his view that only
Proposal B is likely to free bar associations "from continuous
litigation on this subject." The ABA adopted Proposal A and
amended the Code, but it voted to circulate both proposals to
the states for consideration by local authorities. The ABA also
authorized the creation of a Commission on Advertising to
monitor developments and make recommendations for improv-
ing the ABA guidelines and a special committee to consider a
program of nationwide institutional advertising.

C. Decisions Leading Up To Bates

The Bates decision itself was decided only after several sig-
nificant developments in the areas of first amendment rights
and antitrust law. That the first amendment could limit the
power of the bar to restrict advertising was demonstrated in the
group legal services cases. However, commercial advertising
had been virtually excluded from first amendment protection
ever since the Supreme Court's decision of Valentine v.
Chrestensen in 1942. Chrestensen had upheld a municipal
ordinance prohibiting the distribution of commercial advertis-
ing matter in the streets of New York City.

The Chrestensen holding was rather broadly applied until
1975 and the case of Bigelow v. Virginia. In that case the
Supreme Court decided that Chrestensen should not be inter-

81. House of Delegates, supra note 80, at 1235-36.
82. Id. at 1236-37.
83. A.B.A. Approves, supra note 3, at 1178.
84. House of Delegates, supra note 80, at 1234.
85. Summary of Action Taken by the House of Delegates of the American Bar
Association 30 (Aug. 8-10, 1977).
86. See text accompanying note 59 supra.
87. 316 U.S. 52 (1942).
88. Id. at 54.
89. 421 U.S. 809 (1975).
interpreted to mean that "advertising is unprotected per se." The right of free speech could not be narrowed merely because commercial activity was involved. The Court adopted a balancing test to determine the constitutionality of a state law or local ordinance regulating commercial advertising. This test weighed the public interest allegedly protected by the regulation against the restriction of first amendment rights.

In *Bigelow* the defendant had been convicted of violating the Virginia anti-abortion statute because he had published an ad which offered to arrange for a legal abortion in another state. The Court applied the balancing test and reversed the conviction, noting that "the advertisement conveyed information of potential interest and value to a diverse audience." After *Bigelow*, commercial speech found to contain information of clear public interest could not constitutionally be prohibited absent a compelling state interest.

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* applied this rule for the first time to the regulation of professional conduct. It struck down a state statute prohibiting the advertisement of prescription drug prices by licensed pharmacists. The Court noted that, while subject to some forms of regulation, commercial speech was protected by the first amendment. However, the Court expressly recognized the difference between the statute in *Virginia Pharmacy* and other rules regulating professional conduct:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require

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90. Id. at 819-20 (footnote omitted).
91. Id. at 826-29.
92. Id. at 822.
93. Before *Bigelow*, whether or not particular types of advertisements were found to be "speech" entitled to constitutional protection apparently depended upon the extent to which the advertising was informative or purely competitive. See generally Annot., 37 L. Ed. 2d 1124 (1974). Compare *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (describing help-wanted ads as classic examples of commercial "speech") and *Rowan v. United States Post Office Dep't*, 300 F. Supp. 1036 (C.D. Cal. 1969), aff'd, 397 U.S. 728 (1970) (holding that a statute prohibiting pandering advertisements in the mails was constitutional) with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (finding that a paid political advertisement was not commercial "speech").
95. Id. at 761-70.
consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.96

In his concurring opinion, Chief Justice Burger pointed out that the states have broad powers of regulation over the practice of law.97 The Court did not want to consider the constitutionality of restrictions on individual lawyer advertising when the issue was not directly presented.

Meanwhile, the application of the general bar proscription against lawyer advertising was being successfully challenged in several cases involving fact situations which also did not directly raise the individual lawyer advertising issue. In Jacoby v. State Bar of California,98 attorneys who founded a low cost legal clinic were charged with violating the disciplinary rule against advertising and solicitation. They had cooperated with the news media in publicizing information about the clinic. Applying the Bigelow rationale, the California Supreme Court held that the disciplinary rule could not constitutionally be applied in this case, where the publicity was in reference to a newsworthy topic, even though the lawyers became subjects of the publicity.99

In another case, Consumers Union of the United States, Inc. v. ABA,100 a federal district court held that attorneys could not be disciplined for allowing the publication of a consumer law list101 containing information concerning their services. The list, compiled as an experiment by the Consumers Union, provided the names of attorneys practicing in Arlington County, Virginia, along with basic information about their initial consultation fees, clientele, experience in particular areas of law, fields of concentration and continuing legal education.102 The

96. Id. at 773 n.25 (emphasis in original).
97. Id. at 774.
99. Id. at ____, 562 P.2d at 1333-34, 1340, 138 Cal. Rptr. at 84-85, 91.
101. Traditionally law lists have been provided only for the benefit of other attorneys or for corporate clients. Bar Restrictions, supra note 38, at 501.
102. Under the temporary advertising guidelines proposed by the Board of Governors of the State Bar of Wisconsin, all of these items of information (with the possible
A more direct challenge to the bar’s power to restrict individual lawyers’ rights to advertise is presented in *Marine v. State Bar of Wisconsin.* The pleading alleged that the State Bar of Wisconsin had commenced an inquiry into the plaintiff-attorney’s newspaper advertisements publicizing his availability as a divorce lawyer. The federal district court denied an injunction against enforcement of the anti-advertising disciplinary rule and, as of this writing, has heard motions to dismiss the action.

Other challenges to bar restrictions on advertising have arisen in the antitrust field. Although the cases in this area deal with the application of the Sherman Antitrust Act, they involve some of the same considerations raised in the first amendment cases mentioned above. The threshold issue involved in the antitrust cases is whether the bar rules against advertising constitute “state action,” which is not subject to the provisions of the Sherman Act. This state action exemption was established in *Parker v. Brown* and was held to apply to all state officials acting under color of law. The exemption was later extended to include private conduct compelled by the action or direction of the state. Some writers have argued

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exception of continuing legal education courses, which are not specifically mentioned), along with many others, could be listed in approved legal directories. *Supreme Court Hearing: Amendment to the Code of Professional Responsibility, Wis. B. Bull.,* Oct. 1977, at 42 [hereinafter cited as *Supreme Court Hearing*] (reprinting the Board’s petition to the Wisconsin Supreme Court, including its proposed guidelines).

103. 427 F. Supp. at 523. The court noted that “[w]ith the exception of the use of specialization labels, there is very little nonfee information that can be justifiably prohibited.” *Id.* at 521-22.

104. No. 76-C-373 (E.D. Wis., filed May 28, 1976).

105. Letter from John B. McCarthy, Administrator of the Board of Attorneys Professional Responsibility, to Thomas E. Skowronski (Feb. 28, 1978). The Board was only recently established and operates under the auspices of the Supreme Court of Wisconsin. See *Wis. Sup. Ct. Order,* 74 Wis. 2d ix (1976). *See also* *Wis. Sup. Ct. Order,* 81 Wis. 2d xxi, xxiii (1977) (listing procedures for the Board).


109. *Id.* at 352.

that restrictions on lawyer advertising are likely to be within the state action exemption because the states have broad regulatory powers over the practice of law. Others argue persuasively that the antitrust laws should be applied to the legal profession, just as any other occupation, at least when the issue is advertising.

In *United States v. Gasoline Retailers Association* the Seventh Circuit held that agreements not to compete through price advertising are per se violations of the Sherman Act, but under circumstances distinguishable from the lawyer advertising situation. Products, not services, were involved in that case and the agreement was between several businesses and a labor union, not among members of a profession. These two distinctions have been recognized by the Supreme Court in the past. More recently, however, in *Goldfarb v. Virginia State Bar*, the Supreme Court struck down the learned profession doctrine, a supposed blanket immunity for professions from the Sherman Act. The Court did indicate, however, that professions may be treated differently under the Act. Moreover, the practice found to be an unreasonable restraint of trade in *Goldfarb* was the enforcement of a minimum fee schedule through disciplinary action, a fact situation not entirely analogous to the enforcement of anti-advertising rules.

The Justice Department is now challenging the American Bar Association's anti-advertising rules directly under the Sherman Act. The complaint alleges that the Code, by pro-

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112. See, e.g., Francis & Johnson, *supra* note 6, at 247-71. The balancing test approach to state action immunity is discussed in *Price Advertising, supra* note 107, at 692-701.
113. 285 F.2d 688 (7th Cir. 1961).
114. Id. at 691.
117. Id. at 787.
118. "We . . . recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.'" Id. at 792 (quoting *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 336 (1952)).
hibiting availability and price advertising, restricts competition and deprives consumers of information about legal services. However, the important issue of state action under the Sherman Act is not likely to be affected by the result in this case. Even if the Justice Department is successful, a judgment against the ABA would not be enforceable against state bar associations. However, the state exemption issue was directly presented in Bates, a case brought against the State Bar of Arizona.

IV. The Bates Decision

In 1976 John R. Bates and Van O'Steen were suspended from the bar for advertising the prices of various services at their legal clinic. They appealed arguing that DR 2-101(B), which had been adopted by the Arizona Supreme Court, violated the Sherman Act and the first amendment of the United States Constitution. The Arizona Supreme Court reduced the sanction to formal censure noting that Bates and O'Steen had advertised "in good faith to test the constitutionality of DR 2-101(B)," but it did not reverse the decision and the two attorneys appealed to the United States Supreme Court.

The issue presented was conceived by the majority of the Court to be a narrow one: "whether lawyers . . . may constitu-


122. See Price Advertising, supra note 107, at 696.

123. DR 2-101(B) reads in part:

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

ABA Code, supra note 24, DR 2-101(B) (footnotes omitted).

124. In re Bates, 113 Ariz. 394, 555 P.2d 640, 646, 648 (1976). The state bar had recommended a minimum six month suspension as punishment. This had been reduced to a one week suspension by the Board of Governors of the Arizona State Bar before the Arizona Supreme Court issued its decision prescribing censure. Id.

125. Widespread interest in the case was demonstrated by the large number of briefs amicus curiae which were submitted. In support of the Bates and O'Steen position, briefs were submitted by a council of lawyers, credit and consumer unions and the Justice Department. Various professional associations and numerous bar associations submitted opposing briefs. Sifkas, Supreme Court to Hear Oral Argument in Arizona Advertising Case, 65 Ill. B.J. 382 (1977).
tionally advertise the *prices* at which certain routine services will be performed." Thus, the Court did not deal with the
constitutionality of prohibiting claims regarding the quality of legal services or in-person solicitation and other forms of advertising which were not involved in the *Bates* case. The Court did hold that blanket suppression of individual lawyer advertising violated the free speech clause of the first amendment.

The Court did not grant relief on the antitrust claim, ruling that the regulation here was protected by the state action exemption. The opinion written by Justice Blackmun distinguished decisions, such as *Goldfarb* and *Cantor v. Detroit Edison Co.* which had held the exemption inapplicable. The minimum fee schedule in *Goldfarb* had not been an affirmative command of the state supreme court. *Cantor* had involved simply a state agency's acquiescence in an anticompetitive program of the private party against whom the claim had been directed. There was no independent state regulatory interest. On the other hand, *Bates* involved an affirmative regulation by a state supreme court and claims brought directly against an agent of that state. The *Bates* Court emphasized that state policy had been clearly and affirmatively expressed by the disciplinary rules and even re-examined by the supervising policy maker, in this case the Arizona Supreme Court. Thus, the promulgation of anti-advertising rules by bar organizations, without direct involvement by a court or other state agency, may be subject to the Sherman Act.

The basis of the *Bates* decision, however, was the first amendment of the United States Constitution. The Arizona Supreme Court had held it inapplicable, partly because it thought that *Bigelow* did not apply to the regulation of professionals. However, the United States Supreme Court cited *Bigelow* and *Virginia Pharmacy* when it noted that commercial speech can serve "individual and societal interests in assuring informed and reliable decisionmaking," thus playing an indis-

128. 433 U.S. at 359-63.
129. Id. at 362-63.
pensable role within a free enterprise system.\textsuperscript{132}

Justice Blackmun weighed these substantial interests in the free flow of commercial information against several proffered justifications for the advertising ban.\textsuperscript{133} The Court was reluctant to permit the suppression of information upon the basis of policy considerations which justify the restraints in only rather limited ways. For example, it noted that "the postulated connection between advertising and the erosion of true professionalism" was "severely strained."\textsuperscript{134} The Court also dismissed the contention that attorney advertising is inherently misleading, noting that only routine services lend themselves to advertising and that consumers now have the ability to identify general types of legal services, an ability that would be enhanced by advertising. Even if the public could be misled due to its own naivete, the proper response is for the bar to educate the public not to place undue emphasis upon advertised information.\textsuperscript{135} The Court also rejected the argument that the freedom to advertise should be restricted because of the possibility of increased overhead costs to the profession which would be passed on to consumers. The majority argued that these considerations were irrelevant to the application of the first amendment, noting also that restraints on advertising did not deter the rendition of services of poor quality.\textsuperscript{136} The last justification posed for the present rules was that regulation of advertising, other than by blanket restrictions, would create burdensome enforcement problems. In rejecting this contention, the Court indicated what was implicit throughout the \textit{Bates} opinion, namely, the Court's fundamental faith in the integrity of the vast majority of lawyers.\textsuperscript{137}

This faith was implicit in the only portion of the opinion in which the Court discussed possible future regulation of lawyer advertising: "Unethical lawyers and dishonest laymen are likely to meet even though restrictions on advertising exist.

\textsuperscript{132} 433 U.S. at 364.
\textsuperscript{133} \textit{Id.} at 368-79.
\textsuperscript{134} \textit{Id.} at 368.
\textsuperscript{135} \textit{Id.} at 373-75. Justice Powell objected to the majority's "facile assumptions that legal services can be classified into the routine and the unique," \textit{Id.} at 392. Chief Justice Burger argued that without a definition of routine services, "enormous new regulatory burdens [would be imposed] . . . on the presently deficient machinery of the bar and courts . . . ." \textit{Id.} at 387.
\textsuperscript{136} \textit{Id.} at 378-79.
\textsuperscript{137} \textit{Id.} at 379.
The appropriate response to fraud is a sanction addressed to that problem alone, not a sanction that unduly burdens a legitimate activity. Otherwise the Court went no further than to hold that lawyer advertising is constitutionally protected free speech. On the other hand, the Court did "not hold that advertising by attorneys may not be regulated in any way." Therefore, the profession must develop new regulatory guidelines which are consistent with the Bates decision.

V. THE WISCONSIN INTERIM RULES AND PROPOSALS FOR SUPPLEMENTARY GUIDELINES

On December 23, 1977, the Wisconsin Supreme Court adopted the following interim rules by court order:

1. For a one year period beginning January 1, 1978, a lawyer may advertise the lawyer's availability to provide legal services. It is professional misconduct for a lawyer to use any advertisement which is false, misleading, or deceptive.
2. Any provision of the Code of Professional Responsibility to the extent that it conflicts with this order is suspended.
3. Section 256.295 is not suspended by this order and a violation of that section is professional misconduct.

In adopting these rules the court chose to follow the more liberal proposals urged by the Center for Public Representation and other free-speech advocates and declined to follow the more restrictive guidelines suggested by the Governors of the State Bar of Wisconsin. A general antifraud standard was

138. Id. at 375 n.31. See also id. at 373 n.28.
139. Bates and O'Steen had demonstrated that their specific conduct was constitutionally protected. Thus, the Court did not have to rely upon the first amendment overbreadth doctrine, which has been used to invalidate other regulations which have a chilling effect on protected free speech. Id. at 379-82. Justice Rehnquist, who regarded the free speech clause "as a sanctuary for expressions of public importance or intellectual interest," would not allow it to reach advertisements of goods and services. Id. at 404 (dissenting opinion).
140. Id. at 383.
141. Wis. Sup. Ct. Order, 82 Wis. 2d xxvii (1977). This comment will not deal with proposed revisions of Canon 2 of the Code of Professional Responsibility. For two such proposals see Freedman, supra note 38, at 198-203; Note, Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available, 81 YALE L.J. 1181, 1191-1201 (1972) [hereinafter cited as Advertising]. Both proposals are similar to Wisconsin's interim approach except that the range of permissible conduct is explained in greater detail.
142. The guidelines proposed by the Center for Public Representation provided as follows:
employed in lieu of the restrictive disciplinary rules of Canon 2. Even though the barratry statute is retained, written solicitation announcing availability or fee information should be permitted, provided the communication meets the antifraud standard of the guideline and contains only such information as is permissible in an advertisement.

This open approach under the interim rules offers a standard which is less predictable than the former disciplinary rules, yet clearly consistent with the spirit of Bates. At present there is little reason to suspect that either Bates or Wisconsin's interim rules will present serious problems. While one post-Bates advertiser claimed to be the "World's Most Creative

Section 1. No lawyer, legal firm, legal corporation or legal association, or agent or employee thereof, shall cause to advertise any announcement, statement, representation or statement of fact which is untrue, deceptive or misleading.

Section 2. In-person solicitation which does not violate the provisions of Wisconsin Statute 256.295 is permitted.

Section 3. The charge and method of charging for professional services may be advertised. In addition, a lawyer may advertise the availability of fee information and whether credit cards or other credit arrangements are accepted.

Section 4. Unless permitted by the Wisconsin Supreme Court, no claims of expertise in any particular field or area of law shall be made. A lawyer or firm may advertise that his/her or its practice is concentrated in certain fields or areas of practice.

Section 5. Any particular field or area of the law which a lawyer or firm does not wish to undertake may be specified.

Section 6. Lawyer or law firm, as used herein, means a lawyer, legal firm, legal association or legal corporation.

Petition to the Wis. Sup. Ct. (presented Nov. 28, 1977).

The alternative proposal of the Board of Governors of the State Bar of Wisconsin is reprinted in Supreme Court Hearing, supra note 102, at 42.

143. Barratry. (1) Soliciting Legal Business. It shall be unlawful for any person to solicit legal matters or a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services.

(2) Solicitation of a Retainer for an Attorney. It shall be unlawful for any person to communicate directly or indirectly with any attorney or person acting in his behalf for the purpose of aiding, assisting or abetting such attorney in the solicitation of legal matters or the procurement through solicitation of a retainer, written or oral, or any agreement authorizing the attorney to perform or render legal services.

(3) Employment by Attorney of Person to Solicit Legal Matters. It shall be unlawful for an attorney to employ any person for the purpose of soliciting legal matters or the procurement through solicitation of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services.

(4) Penalty. Any person guilty of any violation of this section shall be imprisoned not more than 6 months or fined not exceeding $500.

Lawyer," bar officials in most parts of the country report no complaints about the small number of ads they have seen. Although enforcement problems are possible, there is no reason to assume that more than a very small percentage of attorneys will be indiscreet, misleading or deceptive in their advertising. Furthermore, Wisconsin already has several other laws regulating advertising in general which could be applied to the advertising practices of attorneys. Should more detailed guidelines defining examples of false, misleading or deceptive conduct prove to be necessary in the future, the Wisconsin Supreme Court can always incorporate more explicit provisions into the interim rules at that time.

However, there is a need for two additional guidelines in the Wisconsin interim rules to guard against possible abuses of the right to advertise and to guarantee that the new rules accurately reflect the liberal spirit of the Bates decision. Though the majority in Bates preferred to construe the issue narrowly as applying only to price advertising, the decision was based upon the broad first amendment protection of all commercial speech in which the public has an interest. The Court stated that "people will perceive their own best interests if only they are

144. See Lawyers Venture, supra note 45, at 1066.
145. See Wis. STAT. §§ 100.18, 100.20 (1975) (dealing with fraudulent advertising and methods of competition and trade practices respectively. Section 100.18 expressly applies to advertisement of services. Both statutes are drafted in rather general terms and would seem to be applicable to the learned professions. It is also possible that the Department of Agriculture, Trade and Consumer Protection, to which the state legislature has delegated the authority to enforce these statutes, would have concurrent authority with the Wisconsin Supreme Court in the regulation of lawyer advertising. However, "as a matter of policy, . . . and in recognition of the traditional role of the supreme court, . . . [the Department] would normally plan on referring routine problems and complaints concerning lawyer advertising and conduct to the state bar . . . ." Letter from Attorney James K. Matson to Ms. Linda Berler of the Center for Public Representation (Dec. 20, 1977).
146. See, e.g., House of Delegates, supra note 80, ABA Proposal B; DR 2-101(B), DR 2-101(C), at 1236. Standards for lawyer advertising might also be developed from the opinions of the Federal Trade Commission, which has ruled on a wide variety of deceptive advertising cases since 1914. Advertising, supra note 141, at 1197. See also Developments in the Law—Deceptive Advertising, 80 HARV. L. REV. 1005, 1019-27, 1038-63 (1967).
147. The Wisconsin Supreme Court has the authority to adopt Disciplinary Rules for the legal profession as part of its implied power to regulate attorneys. See Wis. CONSTR. art. VII, §§ 2, 3; In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932). The court has recently issued procedures for the Board of Attorneys Professional Responsibility. See Wis. SUP. CT. ORDER, 81 Wis. 2d xxi. The Wisconsin courts also have the authority to preside over disciplinary actions brought against lawyers. See Wis. STAT. §§ 256.283, 256.29(2) (1975).
well enough informed, and . . . the best means to that end is
to open the channels of communication rather than to close
them." For the most part, the Wisconsin interim rules are in
line with this policy of unhampered communication, but the
third paragraph of the rules could be interpreted to unduly
restrict the free flow of information. To eliminate the possi-
blity that the anti-barratry statute be used to defeat the purpose
of the liberalized rules, the following guideline is suggested:

To the extent that the communication is not false, mislead-
ing, or deceptive, a lawyer may distribute or mail written
announcements of availability or fee information unless or
until the recipient thereof notifies the lawyer that receipt
of such information is not desired.

Oral solicitation is not included in the proposed supplementary
guideline on the theory that communications of this nature,
which are not recorded in any manner, are more likely to in-
volve the problems of deception and frivolous claims of decep-
tion.

This expansion of protection to virtually all written commu-
nications is warranted by the Bates decision despite its ostensi-
bly narrow holding. In dissent in that case Justice Powell noted
that "today's decision cannot be confined on a principled basis
to price advertisements in newspapers. No distinction can be
drawn between newspapers and a rather broad spectrum of
other means—for example, magazines, signs in buses and sub-
ways, posters, handbills, and mail circulations." Applying
this reasoning to the Wisconsin rules, section 256.295 of the
Wisconsin Statutes should not be used to prohibit the distribu-
tion of information which would be permitted in public adver-
tisements simply because it is intended to be directed to an
individual member of that public.

In order to ensure the integrity of information that does
reach the public, a second specific guideline relating to publi-
cized fees should also be included in the Wisconsin interim
rules. Under the present rules a lawyer can advertise a specific
fee for a "routine service," without a disclaimer, only to raise
the fee during the initial consultation.

148. 433 U.S. at 365 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens
Consumer Council, Inc., 425 U.S. 748, 770 (1976)).
149. For a discussion of the notice requirement, see Freedman, supra note 38, at
195-97.
150. 433 U.S. at 402 n.12.
Such an advertisement is misleading in the first instance. However, the lawyer may well escape liability for a "misleading" advertisement under the present rule by claiming that the service provided in a particular case was not "routine." This situation under the present rules does not serve the public's interest in accurate information on the one hand and creates burdensome enforcement problems on the other. The following more specific guideline would operate to reduce both problems:

Unless otherwise specified in the advertisement: if a lawyer publishes any fee information in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than thirty days after such publication; if a lawyer publishes any fee information in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue; if a lawyer publishes any fee information in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication, said period to be at least six months long.

Unless otherwise specified, if a lawyer broadcasts any fee information, the lawyer shall be bound by any representation made therein for a period of not less than thirty days after such broadcast. 151

It is submitted that this guideline will present little or no burden to the advertising lawyer, who has the option of "specifying otherwise" in the ad if he thinks it necessary or desirable to do so. On the other hand, this proposal offers the public a specific and enforceable safeguard against false or misleading price advertising.

Even without changes, the interim rules are a significant improvement over the prior rules. Electronic as well as print media can now be used, thereby increasing the size of the target audience. Consumers who require the services of a specialist152 are now more likely to locate lawyers who concentrate in the appropriate area of the law. Moreover, public competition may

151. Adapted from House of Delegates, supra note 80, ABA Proposal A, DR 2-101(F), DR 2-101(G), at 1235.
152. See text accompanying note 45 supra.
make lower prices available to consumers. In short, the open approach to lawyer advertising might well result in the greater availability of legal services, with consequent economic benefit to both the bar and the public through the fostering of free enterprise. 153

CONCLUSION

This comment began with an allusion to the fact that the controversy over lawyer advertising may be unwarranted. The fears engendered by the Bates decision may well turn out to be groundless in the face of experience under the new permissive rules on lawyer advertising. Private conscience and peer pressure154 still constitute very significant constraints upon individual lawyers seeking to advertise. All that the Bates decision did was to guarantee de jure first amendment protection to attorneys deciding to publicize the availability of their services.

The Bates decision was premised upon the assumption that the vast majority of lawyers will choose to be honest and discreet and will not abuse the newly acquired freedom to advertise. Given this reasonable assumption the argument that blanket prohibition of lawyer advertising is necessary to avoid burdensome enforcement problems falls of its own weight.

More fundamentally, however, the very concerns for professionalism and public service, which were responsible for the adoption of anti-advertising rules in the first place, now call for the abolition or modification of these once progressive rules. Gone are the days when individual consumers of legal services can be expected to acquire by word of mouth knowledge sufficient to make informed decisions in the expanding and increasingly sophisticated legal marketplace. Characteristically, the new Wisconsin interim rules constitute a modern progressive attempt to adapt the old tradition of professionalism to the contemporary situation. Perhaps under the new rules on advertising, with revisions as necessary, 155 and with the aid of institu-

153. See Christensen, supra note 20, at 137-40.
154. See Let Lawyers Advertise, U.S. NEWS & WORLD REPORT, Feb. 28, 1977, at 39 (where a proponent of increased lawyer advertising reports that several attorneys have told her that "[p]rivately I'm with you, but I'd be hung if I said that in an open meeting. My colleagues would have a fit.").
155. Cf. Kindregan, supra note 45. "[T]he profession should not now be stampeded into creating bad 'reforms' because of the admitted 'hard case' being presented against lawyers by consumer advocates." Id. at 42.
ational advertising, referral services and legal service plans, the bar will be able to fulfill its heretofore obscured duty of Canon 2 "to Make Legal Counsel Available."

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