Bates[1] and Thereafter: A Progeny Analysis

I. Introduction

In the Summer of 1977 the United States Supreme Court undertook the resolution of a dispute[2] that eventually proved to be one of the most controversial ever encountered within the legal profession—the legitimacy of advertising by attorneys. *Bates v. State Bar of Arizona* served as the vehicle for adjudication.

Since *Bates* and the surrounding circumstances have been often commented upon in numerous other articles, comments, reviews, and studies, anything more than a capsule statement of the factual basis of the case would be redundant. Summarized briefly, the attorneys involved in that dispute (Bates and O'Steen), then operating what is commonly referred to as a legal clinic, required a substantial influx of clients on a daily basis, with no single case demanding an inordinate amount of time or expense. Volume and handling efficiency were obviously quite important.

Therefore, in their efforts to increase business, the attorneys advertised "legal services at very reasonable fees"[3] in a local newspaper, listing certain specific services and prices related thereto. As this conduct was in direct violation of the Arizona Disciplinary Rule [hereinafter referred to as DR] 2-101(B) then in effect,[4] the State Bar filed a complaint against Bates and O'Steen. After initial findings against said lawyers in lower court and bar proceedings, an appeal was made to the United States Supreme Court. There the appellants primarily argued 1) that the State Bar proscription of their advertisement violated §§ 1 and 2 of the Sherman Act due to its propensity to restrict competition and 2) that the rule infringed upon their freedom of speech rights afforded by the First

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1. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).
2. *Id.*
3. *Id.* at 385.
4. ARIZONA DISCIPLINARY RULE [hereinafter cited DR] 2-101(B) as follows: "A lawyer shall not publicize himself, 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 on his behalf." (Remaining portions of the Rule, largely irrelevant to the discussions herein, have been omited).

Amendment.

Much authority supports the conclusion that the ultimate holding in *Bates* was limited.[5] In fact, in the words of Justice Blackmun himself, "[t]he issue [then] before us [was] a narrow one."[6] Throughout the *Bates* majority opinion, authored by Justice Blackmun, one can see that while numerous sub-issues were recognized by the Court, these issues were not incorporated into the final holding of the case. Instead, Justice Blackmun stated that "many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved, and we expect that the bar will have a special role in assuring that advertising by attorneys flows both freely and cleanly."[7]

II. The Progeny Analysis

A. State Action Exemptions to the Sherman Act Regulations

In Part II of the majority opinion in *Bates*, the Court summarily (in comparison to the reasoning given in Part III) stated that the resolution of the issue by the Arizona Supreme Court was to be affirmed. The state court had determined that the advertising regulation then under review was not prohibited by the Sherman Act since that act exempts state action. In other words, since the related disciplinary rules were subject to periodic re-examination by the Arizona Supreme Court, the Court held that the rules were sufficiently analogous to general state governance for exemption from the Sherman Act provisions. In the earlier case of *Parker v. Brown*,[8] the Court had stated that "act[s] of government" were not prohibited by the Sherman Act.[9] And, inasmuch as "the regulation of the activities of the bar is at the core of the State's power to protect the public"[10] the *Bates* Court found that the Sherman Act claim had been properly barred in the state court proceedings.

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5. *See, e.g.*, Zunker, *Lawyer Advertising, Solicitation and Trade Names Since Bates*, 43 TEX. B.J. 321 (April 1980); Collie, *To Avoid "At Your Own Risk" Advertising*, 43 TEX. B.J. 328 (April 1980); Christensen, *Advertising by Lawyers*, 1978 UTAH. L. REV. 619.

6. 433 U.S. at 366.

7. *Id.* at 384.

8. 317 U.S. 341 (1943).

9. *Id.* at 352.

10. 433 U.S. at 361.

In *Foley v. Alabama State Bar*,[11] two Alabama attorneys challenged certain regulatory measures by the State Bar regarding various legal advertisements said attorneys chose to place in local newspapers. The arguments given by the appellant attorneys in that situation closely resembled those urged by Bates and O'Steen under earlier circumstances. And, as to the claims of the Sherman Act violations, the district court followed the precedent clearly established in *Bates*. The court held that "the [disciplinary] rules fall squarely within the state action exception to the Sherman Anti-Trust Act,"[12] since the said rules "are in effect rules of the Supreme Court of Alabama."[13]

B. Mail Solicitations

In Part III of the *Bates* decision, Justice Blackmun wrote a somewhat extended analysis of the various arguments made for and against advertising within the legal profession before delivering the final holding concerning First Amendment protections. The Court held that the "truthful advertisement concerning the availability and terms of routine legal services" could not be prevented.[14] However, the parameters of such a statement are practically nonexistent, and, as a result of such judicial brevity, a need exists for extensive "gap filling" through subsequent adjudications on the matter.

For example, concerning in-person solicitation, the *Bates* opinion merely stated that such conduct would not be "susceptible of measurement or verification,"[15] and for that reason, restraints thereon might be justified.[16] However, it was not until the two later companion cases of *In re Primus*[17] and *Ohralik v. Ohio State Bar*[18] were decided that the Supreme Court finally took a definitive stance regarding such activity. Direct in-person solicitation was determined to be unworthy of constitutional protection in the *Ohralik* circumstances. However, the *Primus* decision mandated

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11. 481 F. Supp. 1308 (N.D. Ala. 1979).
12. *Id.* at 1311. *See also* Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 715 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).
13. *Id.*
14. 433 U.S. at 384.
15. *Id.* at 383.
16. *Id.* at 384.
17. 436 U.S. 412 (1978).
18. 436 U.S. 447 (1978).

that an American Civil Liberties Union attorney's solicitation channeled through the mail and not conducted for pecuniary gain would be upheld as a constitutional right. Therefore, being faced with the certainty that in-person solicitation of clients would not be tolerated, one might well have pondered, at that time, the limitations likely to be imposed on mail solicitation. The questions have, to a degree, since been answered.

For example, in *Kentucky Bar Association v. Stuart,*[19] two attorneys mailed letters to various real estate agencies to solicit assorted legal business. The letters in controversy listed certain legal services being offered and enumerated specific prices. The Kentucky Supreme Court determined that the letters were a form of advertisement and were not in-person solicitation.[20] Therefore, as a result of *Bates,* they were entitled to constitutional protection. In another circumstance, where two attorneys mailed approximately 7500 letters to area homeowners (and several hundred additional letters to real estate brokers), seeking employment during closing of titles, it was initially determined that "the subject letters, addressed to a captive audience, constitute solicitation which may be properly proscribed."[21] However, on appeal,[22] the Court of Appeals of New York reversed the lower court finding, stating that a "[d]irect mail solicitation of potential clients by lawyers is constitutionally protected commercial speech which may be regulated but not proscribed."[23] In a different vein, when two attorneys wrote to an employer seeking to enter into a contract therewith for the provision of prepaid legal services, the Louisiana Supreme Court determined that such activity was a form of direct solicitation for pecuniary gain, and could therefore be prohibited as such.[24] Likewise, it has been deemed improper for an attorney to contact manufacturers, jobbers, and retailers by letter seeking employment as a collection attorney in connection with outstanding accounts receivable.[25]

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19. 568 S.W.2d 933 (Ky. 1978).

20. *Id.* at 934.

21. *In re* Kuffler, 70 A.D.2d 252, 420 N.Y.S.2d 560, (1979).

22. Koffler v. Joint Bar Ass'n, 51 N.Y.2d 140, 412 N.E.2d 927, 432 N.Y.S.2d 872 (1980).

23. *Id.* at ___, 412 N.E.2d at 929, 432 N.Y.S.2d at 873.

24. Allison v. Louisiana State Bar, 362 So. 2d 489 (La. 1978).

25. ABA Committee on Professional Ethics Informal Opinions [hereinafter referred to as Informal Opinions], No. 1436 (1979).

Occasions have arisen in which the issue of mail solicitation has been encountered in contexts somewhat different from those described above. For example, in one circumstance, when opening his law office practice, an attorney corresponded with various lawyers (instead of members of the law public) by mail to request referrals of overflow and other unwanted cases.[26] The Ethics Committee of the ABA stated that while communications concerning the opening of a law office, its address, and additions or deletions of personnel within the firm could be delivered,[27] requests for referrals from the recipients of such letters could not properly be made in light of the guidelines expressed in the ABA Code of Professional Responsibility.[28]

C. Electronic Broadcast Media; Handbills, Routine Legal Services

Other adjudications have been conducted in an attempt to settle various controversial issues surrounding other forms of attorney advertising. In an opinion styled *In re Petition for Rule of Court Governing Lawyer Advertising*,[29] the Tennessee Supreme Court squarely confronted several controversial aspects of advertising by lawyers and rendered rather surprisingly concise directives. For example, the court announced at one point that "advertising by use of electronic broadcast media" would be permitted.[30] In rendering such an allowance the court relied upon two separate justifications. First, since it had been stated that electronically broadcast legal advertising would result in the expenditure of approximately $250 million dollars annually,[31] the court could "think of no reason for discriminating against the electronic media."[32] Secondly, the court

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26. INFORMAL OPINIONS, No. 1456 (1980).

27. *Id. See also* INFORMAL OPINIONS, No. 1457.

28. INFORMAL OPINIONS, No. 1456 (1980). DR 2-103(C) states in part that a "[l]awyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm."

29. 365 S.W.2d 638 (Tenn. 1978).

30. *Id.* at 643. (Note that this decision was made against the advice of two members of the court who maintained that a resolution of the matter should be postponed pending further study and observation of dispositions thereof given by other states).

31. Wilson, *Madison Avenue, Meet the Bar*, 61 A.B.A.J. 586, 588 (1975).

32. 564 S.W.2d at 643.

reasoned that legal advertising conducted through electronic broadcast media would facilitate the dissemination of information concerning the prices and availability of legal services to those who are either illiterate or blind.[33] The court then stated that the Supreme Court of the United States had previously deemed lawyer advertising to be a form of constitutionally protected speech and that

> [t]his protection would be fragile indeed if it were only applied to certain media and not to others. Advertising is advertising irrespective of the devise or instrumentality employed. Restricting lawyer advertising to the print media would frustrate the only legitimate benefit flowing from advertising, i.e., the provision of legal services to the public based upon the knowledgeable selection of a lawyer.[34]

In re Petition for Rule of Court also addressed another controversial aspect of advertising by attorneys. The court stated that "advertising by the use of handbills, circulars, billboards, or by any other means, except the established and regularly circulated, or broadcast, media" was precluded.[35] Such a determination was made 1) because the use of such advertising techniques was deemed below the dignity of the profession and 2) because of the "insurmountable problems" associated with enforcement and regulation. The case of *Roemer v. Albany County Bar Ass'n* also addressed the issue of circular advertising of legal services. In that instance, the attorneys involved had entered into an agreement with certain chapters of the Civil Service Employees' Association, Inc., whereby the attorneys were to provide legal services for members of the chapters on a fixed fee schedule. The circular advertised the benefits of the plan and stated that the fees charged for the legal services were generally one-third to one-half less than those charged by other firms in the county for similar services. The plaintiff, Albany County Bar Association, initiated the disciplinary proceeding against the defendant attorneys alleging that, since there were no established current rates for legal fees in the involved county, defendants' claims that their fees were substantially less than other fees in the area could not be true. The attorneys had not assisted in the preparation of the circular nor were they

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33. *Id.* at 643-44.
34. *Id.* at 643.
35. *Id.* at 644.

aware of its contents prior to distribution. Nevertheless, the court determined that to allow the attorneys to avoid responsibility for the disputed advertisement would in effect permit them to do indirectly that which they could not do directly.[36] However, the court stated that in view of the circumstances, the attorneys should receive no disciplinary sanction other than a caution that they must ensure that *any* advertisements relating to their prepaid legal services plan are truthful and accurate. [37]

Finally, the court in *In re Petition for Rule of Court* addressed an additional issue of particular importance to the discussion herein. In its petition to the state supreme court for a modification of the Tennessee Code of Professional Responsibility in light of *Bates,* the Nashville Bar Association insisted that the phrase "routine legal services," as utilized in *Bates,* be adequately defined. The court replied that such language posed problems of relativity and therefore declined to render the requested definition. The court did, however, go one step further when it stated that it would permit "the advertisement of *any* legal service, [to be] restricted only by the guidelines and standards contained in the various portions of the Code."[38] (Emphasis added). The only concise limitation placed upon this unusually generous allowance (in view of *Bates*) required that a lawyer advertise only those areas of service in which he is *currently* competent.[39] A mere intent to become competent in a given field of service was deemed to be an insufficient justification for pre-market penetration publicity.

After *In re Petition for Rule of Court* was decided, the Arizona Supreme Court, having dealt with the *Bates* controversy only two years earlier, encountered a dispute involving the advertising of attorney services through the use of the electronic broadcast media. In the case of *In re Carroll,*[40] after an unusually severe gas explosion, an independent private investigator travelled to the area of the accident and began doing investigative research work on the incident. The investigator's stated objective in performing such preliminary inquiries was that he wished to be hired by either plaintiffs or defendants likely to be involved in upcoming litiga-

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36. 71 A.D.2d 967, 419 N.Y.S.2d 790 (1979).

37. *Id.* at ___, 419 N.Y.S.2d at 791. *See also In re* Anonymous, 62 A.D.2d 1188, *appeal dismissed* 45 N.Y.2d 754, 380 N.E.2d 331, 408 N.Y.S.2d 505 (1978).

38. 564 S.W.2d at 644.

39. *Id.*

40. 124 Ariz. 80, 602 P.2d 461 (1979).

tions concerning the accident. After meeting with potential plaintiffs in the controversy and suggesting that they employ the services of respondent Carroll, the investigator advertised the following on a local radio station: "on behalf of a Phoenix law firm . . . free transportation by air to members of the families of men . . ." injured in the aforementioned explosion.[41] The said advertisement was paid for and instigated without the prior consent or knowledge of the involved attorney.

The Arizona Supreme Court criticized the avoidance of this issue by the United States Court in its interpretation of *Bates*, and then explained as follows:

> There may be serious question whether the conduct involved in this radio broadcast meets the test set forth in *Bates*, but there was no specific outline of what was approved after the rule was struck down. We are therefore unwilling to find a violation of the code of ethics from the activities connected with the radio broadcast.[42]

It should be noted that while Carroll escaped disciplinary sanction for the placing of the radio advertisements, he was ultimately suspended from the practice of law in Arizona for a period of one year 1) as a result of his taking advantage of the solicitous conduct of the independent investigator and 2) due to his unethical expense advances made to potential clients.

Insomuch as *Bates* failed to explain or outline any explicit guidelines concerning the possible constitutional protections associated with electronically broadcast legal advertising, many courts have been slow to allow that form of publicity for use by members of the bar.[43]

D. Telephone Directories

In Part III of the majority opinion of *Bates*, Justice Blackmun approached an additional issue relating to legal advertising but

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41. *Id.* at ___, 602 P.2d at 463, n.1.

42. *Id.* at ___, 602 P.2d at 466.

43. *See, e.g.*, Rules Governing the Conduct of Lawyers in Alabama, DR 2-101(B) which states in part that "[a] lawyer shall not publicize himself . . . as a lawyer through . . . radio or television announcements . . . except as permitted under DR 2-104." (DR 2-104 makes no mention of such form of advertisement). *See also In re* Mountain Bell Directory Advertising, 604 P.2d 760 (Mont. 1979) and *In re* Petition for Rule of Court, 564 S.W.2d at 646.

then quickly moved on to the general theme of the central opinion. He stated that:

> [W]e note that appellee's [the Arizona State Bar's] criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney's name, address, and telephone number, office hours and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information and more in the classified section of the telephone directory. (Footnote omitted). We recongize, however, that an advertising diet limited to such spartan fare would provide scant nourishment.[44]

Like most other aspects of advertising by attorneys, the problems associated with advertisements in telephone directories have arisen in various circumstances subsequent to the *Bates* decision. For example, in the case of *Princeton Community Phone Book, Inc. v. Bate*,[45] the plaintiff, Princeton, challenged an opinion of the New Jersey Ethics Advisory Committee which prohibited members of the New Jersey bar from paying for the publication of their names, addresses, and phone numbers in the classified section of the telephone directory. Prior to 1973, plaintiff had published listings of professionals without charge. However, in the 1974 and 1975 editions of the directory, only paid listings of lawyers were printed. As a result, the Advisory Committee on Professional Ethics issued an opinion explaining that the purchase of a classified listing in an advertising directory was ethically unacceptable. Approximately a year-and-a-half after the opinion, the Advisory Committee suspended said opinion pending a possible revision of the New Jersey Disciplinary Rules. However, even with the suspension, plaintiff was unable to convince lawyers to purchase listings in its upcoming directory. Therefore, it continued offering free classified listings to lawyers and instigated the related suit.

The Federal district court cited *Bates v. State Bar of Arizona* as the controlling precedent and said that the listing in *Princeton* contained more information than did the advertisement in *Bates* and thus displayed no potential for deceptive or misleading communications. The Princeton Directory listings were more of a form

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44. 433 U.S. at 366-67.

45. 582 F.2d 706 (3d Cir. 1978), *cert. denied*, 439 U.S. 966 (1978).

of protected speech than were the advertisements in *Bates*. The court also remarked that while the advertisements in *Bates* were published in a newspaper, the listings then in dispute were published in a phone directory. While this distinction was drawn, the court stated that it attached no significance thereto, and then decided that "a listing placed in a book or directory such as we are presented with here is entitled to the same protection as an advertisement placed in a newspaper."[46]

In the subsequent case of *In re Mountain Bell Directory Advertising*,[47] Mountain States Telephone and Telegraph Company (Mountain Bell) sought to publish a Lawyers Guide in the next issue of its telephone directories. The "Guide" would list some thirty-three categories of legal practice with cross-references. In addition, on each page of the proposed Guide, Mountain Bell planned to print a caveat explaining generally that the listing of a lawyer's name or firm name within a given category simply indicated that he or the firm would accept employment within that field of law; inclusion of the personal name or firm name within a given category would not indicate that the lawyer or firm specialized.[48] The Montana Supreme Court refused to permit the form of advertising requested, since "lawyers who listed themselves in the yellow pages under the branches of practice proposed by Mountain Bell would indeed be holding themselves out to the public as having special expertise in such branches."[49] The court reasoned that an implication of specialized expertise was misleading as a general matter.[50] Additionally, listings such as the one proposed simply were not then necessary in Montana, as it was predominately a rural state in which the "great majority" of the bar was composed of general practitioners.[51] Specialization was cited as being "develop-

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46. *Id.* at 710-11 (footnote omitted).

47. 604 P.2d 706 (Mont. 1979).

48. Note that the provision of the caveat is somewhat analogous to that portion of the *Bates* majority opinion which explained that "some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled." 433 U.S. at 384.

49. 604 P.2d at 763. (Note that DR 2-105 of the ABA Code mandates that "[a] lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law, or as limiting his practice except as permitted under DR 2-102(A(6))." (irrelevant exceptions omitted)).

50. 604 P.2d at 764.

51. *Id.*

ing" in the state rather than developed.[52]

E. Quality of Legal Services

Twice within the majority opinion in *Bates*, Justice Blackmun mentioned the problems associated with advertising the quality of legal services and then reminded the reader that said issue was not then being addressed.[53] However, the Justice did explain that, due to the difficulty of measuring and verifying claims as to the quality of services advertised, such assertions may be subject to restriction.[54]

Only a limited number of opinions have since confronted and discussed the issues surrounding legal advertising which seeks to describe the quality of legal services. And even then, the matter is sometimes not directly addressed. For example, an advisory opinion given by the New York State Bar Association (hereinafter referred to as NYSBA) after the *Bates* adjudication stated that a lawyer may properly advertise or display either his JD or his LLB degree, but not both.[55] The opinion explained that if attorneys were allowed to publicize simultaneously both degrees, an illusion of higher qualifications, not in fact existent, might be presented to the consuming public. The Committee sought to avoid the possible puffing of one's wares which, while acceptable to some degree in other areas of merchandising, would tend to demean the professional dignity associated with the practice of law.

In another circumstance indirectly related to the quality aspect of legal advertising, the same Committee on Professional Ethics of the NYSBA determined that an adveritsing attorney could publicize truthful statements concerning his experience.[56] However, in order for such information to be legitimately communicated, the experience must have been both *frequent* and *substantial* throughout the period represented.[57] The Committee reasoned that the provision of such information would be "relevant to the

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52. *Id.*

53. 433 U.S. at 366, 383.

54. 433 U.S. at 38, 84.

55. NEW YORK STATE BAR ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS ON FORMAL OPINIONS [hereinafter referred to as NYSBA FORMAL OPINIONS], No. 488.

56. NYSBA FORMAL OPINIONS, No. 487 (1978).

57. *Id.*

selection of the most appropriate counsel."[58]

Finally, the quality issue was discussed by the Tennessee Supreme Court in *In re Petition for Rule of Court Governing Lawyer Advertising.*[59] The court displayed an awareness and concern over the ever increasing trend toward specialization within the legal profession and announced its intent to appoint a Committee on Specialization to assist in the formulation of a voluntary plan of attorney certification.[60] The court acknowledged the existence of a "*de facto*"[61] specialization and therefore concluded that attempts to resolve future problems concerning advertising of quality or specialized legal services ought to be currently made.

F. Newspaper Advertisements

The controversy in *Bates* arose after the publication in a Phoenix newspaper of the advertisement for the Bates and O'Steen Legal Clinic. And, upon the issue of legal advertising in the newspaper media, the Supreme Court provided that "the publication in a newspaper of . . . truthful advertisement[s] concerning the availability and terms of routine legal services" could not be restrained.[62]

Nearly all adjudications encountered concerning disputed legal advertisements have been instigated or at least participated in by the state and/or local bar ethics committees. However, in a recent Louisiana opinion styled *Reed v. Allison & Perrone,*[63] suit was brought by private plaintiffs (attorneys themselves) to enjoin the defendants from advertising their legal clinic in local newspapers. The plaintiffs alleged that the advertisements in controversy were "misleading, confusing, and deceptive."[64] The plaintiffs also claimed that the defendants' advertisements had caused them to suffer irreparable injury to their livelihood and professional reputation within the community.

The *Reed* court reviewed the remedy of injunctive relief and explained that it was only available in those circumstances in

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58. *Id.*
59. 564 S.W.2d at 645.
60. *Id.*
61. *Id.*
62. 433 U.S. at 384.
63. 376 So. 2d 1067 (La. 1979).
64. *Id.* at 1068.

which a remedy was not provided by law or where irreparable injuries or losses would occur without the injunction. Additionally, various qualifications were given as to what actually constitutes an irreparable injury. The court ultimately held, however, that the plaintiffs had failed to prove that they had no adequate remedy in damages or that the disputed advertisements had caused them any harm at all, much less an irreparable harm. Therefore, the decision of the lower court in favor of the defendants was upheld. The private plaintiffs were deemed not to be entitled in that circumstance to enjoin the defendants' newspaper advertisements.

In the later case of *Foley v. Alabama State Bar*,[65] two attorneys ran an advertisement in a Huntsville newspaper listing the prices of certain services offered by their legal clinic. Subsequent to the publication of the said advertisement, the Alabama State Bar served upon the said attorneys a summons and petition for disciplinary action. However, the plaintiff attorneys then filed suit against the State Bar, seeking a preliminary injunction against further prosecution of disciplinary proceedings. Plaintiffs alleged within their complaint that the acts of the State Bar 1) violated the Sherman Act provisions (discussed earlier) and 2) infringed upon their rights to free speech. As to the latter portion of the complaint, the plaintiffs attacked the validity of DR 2-102(A)(7)(e) of the Alabama Code of Professional Responsibility, which provided that:

> A true copy of [any] advertisement shall be delivered or mailed to the Grievance Committee of the Board of Commissioners of the Alabama State Bar at its then current office headquarters within three (3) days of the date on which any such advertisement is first published; the contemplated duration thereof, and the identity of the publisher of such advertisement either within the advertisement or by separate communication accompanying said advertisement, shall be stated.[66]

Chief Judge McFadden, presiding over the *Foley* litigations on appeal, reviewed the final holding in *Bates* and restated that the Supreme Court had overruled the blanket suppression of all advertising by attorneys but had also limited its holding by providing that misleading advertisements could be prohibited and that reasonable restraints upon legal advertising could be maintained. In

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65. 481 F. Supp. 1308 (N.D. Ala. 1979).
66. *Id.* at 1311. DR 2-102(A)(7)(e).

light of such provisions, McFadden determined that "the requirement of subsequent submission of the advertisement to the State Bar [was] a reasonable restriction on the manner of advertising designed to enable the State Bar to determine which advertising is false and misleading."[67] Therefore, while *Bates* somewhat broadly explained that attorney advertising could no longer be absolutely suppressed and prohibited, *Foley* readdressed the issue and determined in that instance that DR 2-102(A)(7)(e) was a reasonable restraint on advertising.

G. Business Cards and Letterheads

Although the *Bates* holding addressed a very narrow range of advertising issues, it spawned much controversy concerning other aspects of legal advertisements. For example, advertising conducted through the use of business cards and letterheads emerged as one form of legal advertising not addressed in *Bates* which required subsequent adjudications to resolve some of the problems and questions that have arisen on the matter.

When an attorney questioned whether or not he could include on his business card all three addresses of the law firm with which he was associated (two of the three were out of state), the ABA Committee on Ethics and Professional Responsibility determined that all three addresses could properly be shown on the card.[68] However, the Committee required the attorney to ensure that no ambiguity exist as to the fact that the involved attorney was licensed to practice only in the state wherein his home office was located.

In another circumstance, it was determined that the business card or letterhead of an attorney could indicate that the attorney was licensed also as a certified public accountant.[69] It was claimed that this would aid in the selection of the appropriate counsel by the lay public. However, this is in conflict with DR 2-102(E) of the ABA Code, which states that "a lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign or professional business card . . ."[70]

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67. 481 F. Supp. at 1312.
68. INFORMAL OPINIONS, No. 1408 (1978).
69. NYSBA FORMAL OPINIONS, No. 494 (1978).
70. ABA CODE, DR 2-102(E).

Finally, the NYSBA has held that the letterhead of a law firm may list thereon non-lawyer employees of the firm, provided such persons are clearly identified as non-lawyers.[71]

H. Miscellaneous Forms of Attorney Advertising

There are other areas of doubt concerning advertising by attorneys. For example, a recent ABA opinion addressed the question of whether or not a practicing lawyer could advertise his professional qualifications as a lawyer and experienced social worker in the field of marital relations and divorce.[72] Also, in one version of his requested advertisement, the attorney sought to include his wife's name, identity and qualifications as a clinical social worker. The Committee determined that, since the Code contained no prohibitions against the use of lay assistants by a lawyer, it would be proper for the attorney to include the information (i.e., job description and academic degrees obtained) about his non-lawyer wife in his proposed advertisement.

In another circumstance, it was determined that a lawyer could refer to his inclusion in *Who's Who In American Law* within the biographical section of a law listing, such as the Martindale-Hubbell Law Directory.[73] However, the propriety of making reference to such recognitions in biographical publications "must be viewed in accordance with the restrictions contained in DR 2-101(A), which proscribes self-laudatory statements."[74]

Finally, the ABA has stated that an announcement by lawyers of the formation of a partnership is included within the information that the Code permits for public dissemination.[75] Therefore, there were no ethical reasons why the *American Bar Association Journal* could not, if it chose to do so, accept an advertisement concerning the formation of the law partnership.

III. Conclusion

As alluded to throughout the course of this comment, the definitive holding in *Bates v. State Bar of Arizona* sadly lacked any

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71. NYSBA FORMAL OPINIONS, No. 500 (1978). *But see* INFORMAL OPINIONS No. 1437 and INFORMAL OPINIONS, No. 1367 (1976).

72. INFORMAL OPINIONS, No. 1437 (1979).

73. INFORMAL OPINIONS, No. 1415 (1978).

74. *Id.*

75. INFORMAL OPINIONS, No. 1406 (1977).

great degree of guidance on the overall issue of attorney advertising. Instead, the ambiguities and questions created by the decision prompted other courts to analyze individual aspects of legal advertising in their quest to settle possible breaches of disciplinary requirements mandated within the various state codes of ethics. Indeed, even the Supreme Court found it necessary to readjudicate issues that had been alluded to in *Bates* when the *Primus* and *Ohralik* controversies were presented.

At this time, almost four years after the *Bates* decision was handed down, it can now be observed that many of the uncertainties once surrounding the concept of attorney advertising are gradually being replaced with judicial and organized bar opinions. Though members of the profession may earnestly desire *the* absolute definitive guidance from the courts concerning what will and what will not be tolerated in the advertising of legal services, such a result may prove to be elusive and ethereal. Legal advertising is not now and never shall be a totally quantifiable subject. However, we might sometimes tend to forget that law, as an overall subject matter, was never really amenable to any sweeping generalizations. Therefore, perhaps the courts are supplying us with regulations of attorney advertising that are as definite and explicit as is possible.

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