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Attorney Advertising Over the Broadcast Media

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NOTES

Attorney Advertising Over the Broadcast Media

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I. INTRODUCTION

In *Bates v. State Bar*[1] the Supreme Court held that state regulations prohibiting the advertisement of routine legal services in newspapers violate consumers' first amendment right to the free flow of commercial information.[2] The Court concluded that individual and societal interests in facilitating informed and reliable decisionmaking with regard to attorney services outweigh both the

1. 433 U.S. 350 (1977).
2. *Id.* at 384.

state's concern for the dignity of the legal profession and the state's fear that attorney advertising might be inherently misleading.[3] Although the *Bates* Court proscribed total suppression of attorney advertising, it stated that reasonable restrictions on attorney advertising are constitutionally sanctioned.[4] The Court recognized that states could prohibit advertising that is false, deceptive, or misleading. The Court also noted that reasonable time, place, and manner regulations are permissible.[5]

While the *Bates* decision established that attorney advertising is entitled to some protection under the first amendment,[6] the extent to which it is protected remains unclear. In limiting first amendment protection to printed advertising of the availability and terms of routine services,[7] the *Bates* Court left many issues unresolved.[8] Perhaps the most conspicuous unresolved issue is whether the first amendment protects attorney advertising over the broadcast media.[9] The Court expressly reserved this question, stating only that the special problems associated with electronic media warrant special consideration.[10] Consequently, the bar and the lower courts must determine the extent to which states may regulate broadcast attorney advertising.

This Note will examine the first amendment issues that broadcast attorney advertising raises. The Note will begin with a general discussion of the analytical approach adopted by the Supreme Court in freedom of speech and commercial speech cases. Next, the Note will explore the "special problems" and unique characteristics of the broadcast media as they relate to the interests affected by broadcast attorney advertising, concluding that the benefits afforded to consumers outweigh the potential risks created by such advertising. The Note will also briefly consider various regulations on broadcast advertising adopted by the bar at both the state and federal level. Finally, the Note will examine the broader implications of broadcast advertising for the legal profession in general and for the bar as a self-regulatory entity.

3. *Id.* at 363-75.
4. *Id.* at 383.
5. *Id.* at 383-84.
6. *Id.* at 384.
7. *Id.*
8. *Id.*
9. For the purposes of this Note, the term "broadcast media" will refer to television and radio exclusively.
10. 433 U.S. at 384.

II. First Amendment Considerations

A. *The Analytical Framework for Free Speech Issues*

The first amendment expressly prohibits governmental abridgment of an individual's freedom of speech.[11] Government action can interfere with speech in two ways. First, abridgment occurs when governmental regulations aim at ideas or information, singled out for control because of the specific viewpoint expressed in the communication or because of the effects on the public produced by the information imparted. This form of abridgment encompasses government regulations that are content-oriented, those that are directed at the communicative impact of the expressive activity.[12] Second, without aiming at the content of communications, government may unconstitutionally inhibit the flow of information and ideas while pursuing legitimate goals. By imposing time, place, or manner restrictions on the exercise of free expression, government may incidentally discourage the communication of ideas or information. This form of government abridgment of speech is classified as content-neutral and encompasses government actions which, though aimed at the noncommunicative impact of a message, nonetheless restrict free speech.[13]

The Supreme Court has developed two distinct approaches to the adjudication of claims alleging governmental abridgment of free expression.[14] The approach used by the Court corresponds to the nature of the abridgment. If the challenged regulation is content-oriented and aimed at the communicative impact of an exercise of free speech, the Court employs an analysis under which a regulation is upheld only if the government shows that it is necessary to further "a compelling state interest," or that the speech being suppressed falls within the Court's traditional litany of unprotected speech.[15] Under this analysis, the Court requires a particularly close nexus between ends and means. A challenged statute must clearly be an efficacious means of achieving permissible objectives and must be narrowly drawn to avoid unnecessarily constricting the flow of information and ideas.[16] Furthermore, one commentator has noted that

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11. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

12. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

13. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949).

14. For an expanded discussion of the two approaches utilized by the court to resolve freedom of speech issues, see L. Tribe, American Constitutional Law 580-88 (1978).

15. *See* note 37 *infra*.

16. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 97 (1940).

governmental suppression is conclusively deemed unnecessary when "the harm feared could be averted by a further exchange of ideas."[17] In other words, whenever "more speech" could eliminate the potential injury the government is seeking to prevent, more speech is the constitutionally mandated remedy.[18] Finally, when the Court determines that challenged regulations are content-based, government may not justify such regulations by a claim that the content of the expression has been adequately voiced by other speakers or that the expression may be voiced in another place, at another time, or in another manner.[19] Second, if the challenged law is found to be content-neutral, the Court will weigh the relative values of freedom of expression and the government's regulatory interest at issue. Under less exacting scrutiny, a regulation reasonably prescribing time, place, or manner restrictions will withstand a first amendment challenge if it does not unjustifiably constrict the flow of information and ideas.[20]

B. *First Amendment Protection for Commercial Speech*

Until recently, commercial speech[21] was considered completely outside the scope of first amendment protection. This "commercial speech" exception originated in *Valentine v. Chrestensen*,[22] in which the Court upheld the enforcement of a city ordinance prohibiting distribution of commercial leaflets in the streets. The violator was a submarine exhibitor who had appended a protest message to handbills advertising his exhibition. The Supreme Court distinguished advertising from ideological expression and held that the first amendment imposes no restraint on a state's power to regulate purely commercial advertising.[23] In the *Chrestensen* decision the Court established a "primary purpose" test, which provided that if the motive for a communication is primarily profit-oriented then the speech is commercial and not protected by the first amendment.[24]

The unsatisfactory results worked by perfunctory application of the commercial speech exception soon became evident.[25] For exam-

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17. L. TRIBE, *supra* note 14, at 602-03.

18. *Id.*

19. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976).

20. L. TRIBE, *supra* note 14, at 582.

21. For purposes of this discussion, "commercial speech" is defined as speech of any form that advertises a product or service for profit or for business purposes.

22. 316 U.S. 52 (1942).

23. *Id.* at 54.

24. *Id.* at 55.

25. One member of the *Chrestensen* Court, Justice Douglas, later referred to the *Chrestensen* decision as "casual, almost offhand," and as one that "has not survived reflec-

ple, in a subsequent case the Court attempted to modify the harsh effect of *Chrestensen* by adopting a more restrictive test requiring that the *content* of the speech, as well as its purpose, must be commercial for the commercial speech exception to apply.[26] In another case, the Court denied protection, but avoided application of the commercial speech exception, basing its denial on the discriminatory nature of the challenged communication.[27]

The gradual retreat from the commercial speech exception was confirmed in *Bigelow v. Virginia*,[28] in which the Court struck down the enforcement of a state law prohibiting advertisement of abortion referral service information. Recognizing that commercial speech was entitled to *some* first amendment protection,[29] the Court balanced the state's justification for the ban against the public interest in the factual content of the advertisement to determine the extent of protection required.[30] Although the *Bigelow* decision unquestionably limited the *Chrestensen* commercial speech doctrine,[31] the public interest aspect of the advertisement and the Court's utilization of a balancing analysis left uncertain the degree of protection extended to commercial speech.[32]

Subsequently, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[33] the Court reevaluated the first amendment interest served by commercial speech and explicitly repudiated the commercial speech doctrine. Recognizing that both individual consumers and society as a whole have strong interests in the free flow of commercial information,[34] the Court held that drug price advertising by pharmacists, as purely commercial speech under both the purpose and content tests,[35] contained information valuable to consumers and was therefore entitled to protection

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tion." Commarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

26. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964).

27. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973). In *Pittsburgh Press* the Court described the newspaper employment listings classified by gender as "classic examples of commercial speech." *Id.* at 385. The Court nonetheless denied the listings first amendment protection, not on the basis of the commercial speech doctrine, but rather on the ground that they furthered sexual discrimination in hiring, an illegal activity. *Id.* at 388.

28. 421 U.S. 809 (1975).

29. *Id.* at 826.

30. *Id.* at 826-27.

31. The Court construed the *Chrestensen* decision as having established only that a state may reasonably regulate the manner, as distinguished from the content, of commercial advertising and not that commercial speech is "unprotected *per se.*" *Id.* at 819-20.

32. *See* Comment, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine,* 44 U. CHI. L. REV. 205, 218 n.87 (1976).

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

34. *Id.* at 770.

35. *Id.* at 760-61.

under the first amendment.[36]

The *Virginia Pharmacy* Court did not treat commercial advertising in the traditional categorical terms of protected and unprotected speech.[37] Instead, the Court employed a practical balancing test, weighing the countervailing interests of the consumer and the state to determine the degree of protection to be accorded purely commercial advertising. The Court concluded that the public's right to the free flow of commercial information outweighed the state's interest in maintaining the professionalism of licensed pharmacists.[38]

With the precedent established in *Virginia Pharmacy*, the extension of first amendment protection to attorney advertising in *Bates v. State Bar*[39] was foreseeable. Indeed, the majority in *Bates* viewed the decision as one flowing "a fortiori" from the decision in *Virginia Pharmacy*.[40] The Court began its analysis of the first amendment issue with the assumption that *Virginia Pharmacy* would control unless the respondent bar association could show that the differences between attorney service advertising and pharmacist product advertising brought different constitutional considerations into play.[41]

Emphasizing the diverse and highly individualized nature of legal services, the bar association contended that even the most routine legal problems raised questions unique to each case. Advertising prices for specific services would therefore be misleading, according to respondent, since the ultimate costs of the required legal services could not be ascertained accurately prior to consultation with the client.[42] The bar association also pointed out that predetermined fees would induce the performance of substandard legal services because attorneys would render a standardized package of services without regard to the particular needs of the client.[43] The Court, while recognizing that some legal services require specific tailoring

36. *Id.* at 762.

37. Traditionally, the Court has employed a rigid categorization analysis to adjudicate the constitutionality of regulations found to suppress free expression. Under this approach a regulation is upheld only if the suppressed speech is found to fall within one of several categories of unprotected speech recognized by the Supreme Court as being amenable to state regulation. These unprotected categories include speech classified as obscenity, libel, fighting words, and speech constituting a clear and present danger to the public. For a general discussion of the various categories of unprotected speech and a listing of cases decided under this analysis, see J. Nowak, R. Rotunda, & J. Young, Constitutional Law 728-37, 780-93, 831-47 (1978).

38. 425 U.S. at 770.

39. 433 U.S. 350 (1977).

40. *Id.* at 365.

41. *Id.*

42. *Id.* at 372.

43. *Id.* at 378.

to the needs of a client, nevertheless concluded that certain services are so markedly similar to other services and so routine that their prices may be advertised without being misleading.[44] The Court also noted that the bar may formulate guidelines as to what services must be included in a standardized package, and that any discrepancies in the expectations of the client and the attorney regarding the services included in a fixed-price package could be settled at the initial consultation.[45]

The bar association also asserted that, considering the size and multiplicity of the legal profession, and the varied nature of legal services, the difficulties of adequately policing the advertising community would be prohibitively difficult.[46] The Court dismissed this concern by stating that the argument denigrates the character and integrity of the individuals within the profession and implies that attorneys will take unscrupulous advantage of the opportunity to advertise.[47] The Court's response reflected its belief that most attorneys will advertise with careful regard for the truth, enabling state bars effectively to prevent misconduct.

Resurrecting arguments presented in *Virginia Pharmacy,* the bar association also cautioned that attorney advertising would commercialize the profession by undermining an attorney's sense of dignity and the service orientation of the profession.[48] In addition, the association argued that the overemphasis on profit would ultimately erode the client's trust in his attorney. The Court rejected these arguments, stating that they were founded on the fallacious notion that attorneys should not acknowledge that they earn their living by practicing law.[49] In response to the bar's additional contention that advertising would produce undesirable economic effects, the Court admitted that some costs would inevitably be passed to consumers, but noted that advertising might result in lower prices by stimulating competition.[50] The Court also rejected the bar's assertion that the cost of advertising would impede the entry of young lawyers into the legal market,[51] postulating that, in fact, advertising could be instrumental in helping them penetrate the field of established attorneys.[52] The majority also pointed out that advertising, by eliminating potential clients' fears of high costs and inability to

44. *Id.* at 372-74.
45. *Id.* at 373 n.28.
46. *Id.* at 379.
47. *Id.*
48. *Id.* at 368.
49. *Id.* at 368-69.
50. *Id.* at 377.
51. *Id.* at 377-78.
52. *Id.*

find qualified attorneys, would benefit the profession by increasing the utilization of legal services to pursue valid claims.[53]

The *Bates* Court's analysis was based on principles established in *Virginia Pharmacy*: that advertising is valuable in a free enterprise economy, serving both the individual consumer and society at large by providing information fostering proper allocation of resources and facilitating enlightened public decisionmaking;[54] that because it serves important first amendment interests, advertising should not be absolutely prohibited unless the dangers it creates are clearly greater than the harm caused by its prohibition;[55] and, that without a showing that the danger outweighs possible benefits, the first amendment forbids prohibition. Adopting the balancing approach used in *Virginia Pharmacy,* the Court examined the relative harms and benefits of the ban on attorney price advertising and the free flow of such commercial information.[56] The decision resulting from this balancing process reflected the Court's perception of the public's disillusionment with the profession and the growing sentiment that the prohibition of advertising not only impedes the efficient distribution of legal services, but does so without moral and public interest justification.[57] The Court's holding that the consumer's interest in the free flow of commercial information outweighed the interests of the state was based on empirical evidence[58] indicating that the restrained, truthful advertising of legal services would be more beneficial to individuals and to society at large than the state's absolute proscription against such advertising.

The Court thus concluded that the total ban on attorney advertising was violative of the first amendment. The Court explicitly stated, however, that certain restrictions on attorney advertising would be permissible.[59] False, deceptive, or misleading advertising may be proscribed and higher standards of truthfulness may be applied to commercial speech than to other forms.[60] Furthermore, the complexity of legal services and the public's lack of sophistication concerning legal services may warrant even higher standards to avoid misleading consumers.[61] The Court also noted that assertions

53. *Id.* at 376, 377 n.35.

54. *Compare id.* at 364-65 *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

55. *Compare* 433 U.S. at 379 *with* 425 U.S. at 770.

56. 433 U.S. at 368-79.

57. *Id.* at 370-71.

58. The Court relied heavily on the results of surveys and statistical reports in its evaluation of the potential harms and benefits of attorney advertising. *See, e.g., id.* at 370 nn. 22 & 23, 376 n.33.

59. *Id.* at 383.

60. *Id.*

61. *Id.*

not amenable to verification, such as claims concerning the quality of legal services, may be prohibited as misleading.[62] Advertising of illegal transactions may be totally prohibited.[63] And finally, the Court noted that reasonable time, place, and manner regulations were permissible.[64]

The Court limited the scope of its holding so that only the absolute prohibition of legal advertising was deemed unconstitutional and only a printed, truthful statement of the price of legal services was held to be constitutionally protected.[65] Whether the states will limit *Bates* to its narrow holding remains to be seen. One of the most conspicuous issues left unresolved by the *Bates* decision is whether attorney advertising over the broadcast media is entitled to first amendment protection. The Court, treading lightly on the issue, stated only that the special problems associated with electronic media advertising would warrant special consideration in the promulgation of regulations on attorney advertising.[66] Implicitly recognizing the issue as one appropriate for state regulation, the Court invited participation by the bar in the promulgation of rules "assuring that advertising by attorneys flows both freely and cleanly."[67]

C. The Unique Characteristics of the Broadcast Media—Their Impact on First Amendment Analysis

The Supreme Court in a recent opinion expressly acknowledged that, of all forms of communication, broadcasting has received the most limited first amendment protection.[68] Broadcast speech has been viewed as being especially amenable to governmental regulation in the public interest.[69] Various reasons exist for greater regulation of broadcasted speech than for other forms of speech. Traditionally, increased governmental regulation has been justified by the limited nature of the broadcast spectrum and the need to avoid congestion of the broadcast channels.[70] Public ownership of the airwaves has also been advanced as a rationale for the more limited protection accorded broadcasted speech.[71]

62. *Id.* at 383-84.
63. *Id.* at 384.
64. *Id.*
65. *Id.* at 384.
66. *Id.*
67. *Id.*
68. FCC v. Pacifica Foundation, 98 S. Ct. 3026, 3040 (1978).
69. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd sub nom.*, Capital Broadcasting Co. v. Acting Att'y Gen., 405 U.S. 1000 (1972).
70. *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); National Broadcasting Co. v. FCC, 516 F.2d 1101, 1112 (D.C. Cir. 1974).
71. *See* 5 OHIO N. U. L. REV. 153, 161 (1978).

Perhaps the strongest justification for subjecting broadcasted speech to more stringent regulation than other forms of communication, specifically printed communication, is that while printed messages must be read—an affirmative act—for the informational content of the communication to be conveyed, broadcast messages are "in the air" and thus require no active participation by the listener; indeed, the message can be conveyed subliminally.[72] The Supreme Court recently recognized the capabilities and powers of the electronic media, stating that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[73] Presumably, it is this characteristic of electronic communication that motivated the Court in *Virginia Pharmacy,* when extending first amendment protection to printed drug price information, to note that "the special problems of the electronic broadcast media" were not involved in that decision.[74] Thus the Court in *Bates* cautioned that the special problems associated with electronic media advertising would warrant special consideration in the promulgation of regulations on attorney advertising.[75]

In addition to the general characteristics of the broadcast media which render broadcasted speech especially amenable to regulation, there are several special problems that have been associated with attorney advertising over the broadcast media. These special problems include the inherent emphasis of style over substance of the message,[76] the transitory nature of the communication, the difficulty of monitoring the advertising activity and enforcing compliance with ethical standards, and the inadequacy of after-the-fact policing of broadcasted advertisements. Moreover, arguments can be made that broadcasted attorney advertising would be misleading to the public and would be detrimental to legal professionalism. The constitutional status of broadcasted attorney advertising, then, depends upon the degree to which the distinctive characteristics of the broadcast media, both those associated with the media in general and those associated with attorney advertising in particular, affect the balance of the interests at stake.

(1) Broadcast Attorney Advertising in the Balance

The Supreme Court has indicated in *Virginia Pharmacy* and

72. 333 F. Supp. at 586.

73. 98 S. Ct. at 3040.

74. 425 U.S. at 773.

75. 433 U.S. at 384.

76. *ABA Code of Professional Responsibility Amendments, Report to the Board of Governors of the Task Force on Lawyer Advertising,* 46 U.S.L.W. 1, 2 (August 23, 1977) [hereinafter cited as *Proposed Amendments*].

Bates that commercial speech issues are properly resolved by applying a balancing test in which the values of the competing interests are compared. While *Bates* and *Virginia Pharmacy* articulated the factors to be considered in determining the extent to which the first amendment protects printed commercial speech by professionals, advertising over the broadcast media raises new considerations that must be factored into the balance.

(a) The Case in Favor of Broadcast Attorney Advertising

The broadcast media have been recognized as the most effective and pervasive channels of mass communication. Referring to the broadcast media collectively, the court in *Business Executives' Move for Vietnam Peace v. FCC*[77] stated:

> [The broadcast media] function as both our foremost forum for public speech and our most important educator of an informed people. In a populous democracy, the only means of truly mass communication must play an absolutely crucial role in the processes of self-government and free expression, so central to the First Amendment.[78]

The superior communicative value of the broadcast media in general and of television in particular should be an important consideration in the Supreme Court's balancing of the interests affected by broadcast attorney advertising. The following data is illustrative of the results of studies examining the pervasiveness of television. In 1977 an estimated 98 percent of all households owned television sets, and February 1978 surveys indicated that the average television viewing time in these households was over seven hours per day.[79] Statistics also reveal that television is considered to be the most authoritative medium.[80] Furthermore, studies indicate that television is the most effective advertising medium. In an advertising effectiveness study conducted for the Illinois State Bar Association in 1977, an informational advertising campaign was run for three weeks in the newspaper and on radio and television. Subsequent samples of the population revealed that 71 percent of the persons contacted recalled seeing advertisements on television, but only 39 percent recalled seeing them in newspapers.[81] The demonstrated superior capacity of the broadcast media to disseminate important commercial information to the public should be a factor

77. 450 F.2d 642 (D.C. Cir. 1971), *rev'd on other grounds sub nom.*, Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

78. 450 F.2d at 653-55.

79. The Television Bureau of Advertising, Report on the Scope and Dimensions of Television Today (1978) (copy on file with the *Vanderbilt Law Review*).

80. *Id.*

81. State Bar of California, Final Report and Recommendations of the Special Committee on Lawyer Advertising and Solicitation 17 (Nov. 1978) (copy on file with the *Vanderbilt Law Review*).

favoring a determination that attorney advertising over the broadcast media requires first amendment protection.

In assigning a value to the pervasiveness and effectiveness of the broadcast media, the Court should also consider the need for widespread dissemination of information pertaining to legal services. In 1974 a special committee of the American Bar Association (ABA) estimated that effective access to the judicial machinery was being denied to a vast majority of the population.[82] The underutilization of legal services has been attributed primarily to the public's ignorance of the nature and availability of legal services and the fear of prohibitively high cost for such services.[83] The public's need for information was strikingly confirmed in one study that revealed that middle-class consumers overestimated attorneys' fees by 91 percent for the drawing of a simple will, by 340 percent for reading and giving advice on a two-page installment sales contract, and by 123 percent for thirty minutes of consultation and general advice.[84] The data also disclosed that 75 percent of those sampled had not seen an attorney on any personal matter within the previous five years; and that 75 percent had signed an installment sales contract within the previous five years.[85] These results suggest that, while it is arguably difficult to establish accurate fixed prices for routine services, advertised price information would at least provide the consumer with a general indication of the costs, availability, and nature of legal services. Broadcast attorney advertising is the most effective means of disseminating such information.

In addition to expanding the general public's knowledge of the price and availability of legal services, broadcast attorney advertising provides the only means of protecting certain consumer's first amendment rights to receive commercial information. A significant segment of the population is functionally illiterate[86] and consequently depends upon the broadcast media as an important source of information. Use of the electronic media would ensure that individuals who do not normally read print media or who have print handicaps will be provided some means of receiving information regarding the nature, terms, and availability of legal services.

When determining the degree of protection to be accorded

82. Jackson, *A Brief Review of Existing Data on the Extent of Legal Needs Among Middle Income Americans*, in ABA NATIONAL CONFERENCE ON PREPAID LEGAL SERVICES, 8-18 (P. Murphy ed. 1974).

83. 433 U.S. at 376; *accord*, Frierson, *Legal Advertising*, 2 BARRISTER 6, 8 (Winter 1975).

84. 433 U.S. at 376.

85. *Id.*

86. "A 1975 report by the Department of Health, Education and Welfare indicates that approximately one-fifth of the adults in this nation are functionally incompetent in basic skills, including reading skills." *Proposed Amendments*, *supra* note 76, at 2 n.*.

broadcast attorney advertising, the Court should also consider the policies and principles established in a series of cases addressing group legal services. In *NAACP v. Button*[87] and several subsequent decisions,[88] the Court established that participation in the judicial system is a form of constitutionally protected expression essential to the first amendment guarantee for redress of grievances.[89] Implicit in these holdings is the Court's recognition of the constitutional significance of the right of access to the courts and the critical role that communications by lawyers to potential clients play in a judicial system that, in theory, is available to all. Underlying these decisions is a strong policy statement by the Court favoring the dissemination of information regarding the availability of legal services. Indeed, one commentator has noted that *Button* and its progeny represent the "adoption of the principle that actions which facilitate participation in the legal system are deserving of substantial first amendment protection."[90] Recognition of this principle favors protecting broadcast attorney advertising because of its capacity to facilitate participation in the legal system by communicating information on which individuals can base intelligent decisions about their legal rights and needs.

(b) The Case Against Broadcast Attorney Advertising

The broadcast media have been recognized as offering more opportunities for deceptive or misleading commercial practices than other channels of communication.[91] The increased potential for misleading advertising has been attributed to the ability of the broadcast media to transmit messages subliminally and the inherent emphasis on style over substance in broadcast communications.[92] Furthermore, misimpressions created by statements over the broadcast media may be more difficult to discern.[93] These considerations

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87. 371 U.S. 415, 428-31 (1963).

88. *See, e.g.*, United Transp. Union v. State Bar, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964).

89. *See* note 11 *supra*.

90. Note, *Don't Be Confused—We Don't Bait and Switch! A First Amendment Analysis of Lawyer Advertising*, 21 St. Louis U. L.J. 125, 130 (1977).

91. For a general discussion of the increased capability of televised advertising to deceive, see Elrod, *The Federal Trade Commission: Deceptive Advertising and the Colgate-Palmolive Company*, 12 Washburn L.J. 133 (1973).

92. *See generally* Reed, *The Psychological Impact of TV Advertising and the Need for FTC Regulation*, 13 Am. Bus. L.J. 171 (1975).

93. Brief for Petitioner [Massachusetts Bar Ass'n] at 5, in Support of its Petition To Adopt the Amendments to the Disciplinary Rules in the Code of Professional Responsibility as set forth in Supreme Judicial Court Rule 3:22 as Recommended by the Massachusetts Bar Association (April 12, 1978) (copy on file with the *Vanderbilt Law Review*).

may lead to the conclusion that attorney advertising over the broadcast media is inherently misleading or that the potential for misimpressions is so high that broadcast attorney advertising should be totally prohibited.[94]

An analogous situation exists at present in the controversy surrounding a Federal Trade Commission (FTC) proposal to limit and in some cases ban televised advertising aimed at children.[95] Among the arguments favoring such a proposal are the allegations that such advertising is misleading and unfair and therefore unprotected by the first amendment.[96] These allegations are based on the inability of young children to understand the actual intent of an advertisement and on their apparent inability to distinguish between commercial messages and noncommercial programming.[97] The FTC is currently holding hearings to inquire further into the potential dangers of product advertising directed toward children.[98]

Concededly, the interests implicated in the proposed prohibition against broadcast advertising aimed at children are distinguishable from those relevant to a proposed ban of attorney advertising over the broadcast media. Adult consumers, unlike young children, are capable of assessing the intent of commercial messages and can discriminate between commercial and noncommercial broadcast communications. Nonetheless, broadcast advertising to a public unsophisticated in matters relating to legal services may be as misleading as advertising directed to children. Advertising over the broadcast media is more likely to influence consumers who cannot read and those who have little or no understanding of the nature, terms, and availability of legal services. These consumers may have difficulty in evaluating an advertisement for legal services and in understanding the implications of any disclaimers or explanations qualifying the commercial. Moreover, in some cases the adult consumer may not recognize the commercial nature of the message, viewing it as a type of public service announcement.

The FTC's proposed ban on televised children's advertising is also relevant to the issue of broadcast attorney advertising because it indicates the Commission's willingness to treat the broadcast media differently from other media when it determines that the characteristics of the broadcast media pose dangers unique to that

94. *Id.* at 6.

95. BROADCASTING, Jan. 22, 1979, at 24.

96. *Id.* at 25. *See generally* Thain, *Suffer the Hucksters To Come Unto the Little Children? Possible Restrictions of Television Advertising to Children Under Section 5 of the Federal Trade Commission Act,* 56 B.U. L. REV. 651 (1976).

97. *See* Thain, *supra* note 96, at 674.

98. *See* BROADCASTING, *supra* note 95, at 25.

media. A similar position was adopted in *Capital Broadcasting Co. v. Mitchell*[99] in which the Supreme Court affirmed without opinion the district court's decision upholding a flat statutory ban on the advertising of cigarettes over any medium of electronic communications subject to Federal Communications Commission jurisdiction. While the value of *Capital Broadcasting* as precedent for analysis of first amendment issues has been diminished by the Court's repudiation of the *Chrestensen* commercial speech doctrine upon which the decision in *Capital Broadcasting* was based,[100] the ban on televised cigarette commercials is still in effect. There is some question, however, concerning its current validity under the first amendment. Indeed, Justice Rehnquist concluded in his dissent in *Virginia Pharmacy* that televised cigarette advertising may no longer be completely prohibited under the present treatment of commercial speech.[101] Nevertheless, despite the fact that the Court's approval of the disparate treatment of broadcast media was not based on first amendment considerations, the district court did articulate various characteristics of broadcast media that provided a rational basis for disparate treatment.[102] The court focused primarily on the potential of broadcast media to influence young people by persuading them to purchase and smoke cigarettes, an activity dangerous to their health.[103] Language in the case suggests, therefore, that even if a balancing test were applied to the cigarette ban issue, the interest of the government in protecting the welfare of the public may outweigh the first amendment interests in permitting the dissemination of certain information over broadcast media, which have unique capacities to mislead through persuasion.

Other objections to attorney advertising over broadcast media relate to the transitory nature of broadcast communications.[104] Because the broadcast audience is continuously tuning in and out, prior or subsequent warnings, disclaimers, or explanations may be ineffective to protect the consumer from being misled.[105] Similarly, the immediate effect of broadcast messages arguably may render after-the-fact policing inadequate to ensure compliance with the designated standards.

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99. 333 F. Supp. 582 (D.D.C. 1971), *aff'd sub nom.*, Capital Broadcasting Co. v. Acting Att'y Gen., 405 U.S. 1000 (1972).

100. *See* text accompanying notes 33-36 *supra*.

101. 425 U.S. at 781.

102. 333 F. Supp. at 585-86.

103. *Id.*

104. *See* Brief for Petitioner [Florida Bar Ass'n] at 13, in Support of its Petition To Adopt the Amendments to the Florida Bar Code of Professional Responsibility (Advertising) (1978) (copy on file with the *Vanderbilt Law Review*).

105. *Id.*

Another possible objection to broadcast attorney advertising is that such advertising will undermine the lawyer's sense of professionalism and the public's dignified image of lawyers. Broadcast advertising, through association with the hucksterism so prevalent on broadcast media, might result in over-commercialization of the practice of law. The service orientation of the legal profession would thus be underemphasized, while profit-seeking motives and the appearance of self-aggrandizement by members of the bar would be overemphasized.

Finally, the cost of advertising over the broadcast media may also warrant special consideration in the attorney advertising area.[106] Presumably, the high costs of broadcast advertising would ultimately be passed on to clients in the form of increased fees. Moreover, the high costs of broadcast advertising may create an additional impediment for the new attorney attempting to enter the legal market.

(c) Analysis

While the degree to which broadcast attorney advertising is entitled to first amendment protection has not been conclusively determined, a balancing of the relevant interests suggests that a total prohibition of attorney advertising over electronic media would have to overcome strong constitutional objections. The consumer's first amendment right to receive commercial information concerning legal services has been established by the Supreme Court. Furthermore, the public's need for information allowing for more enlightened decisionmaking with regard to the purchasing of attorney services is well-documented. Finally, broadcast media have demonstrated a unique capacity to disseminate information pervasively and effectively. These three factors weigh heavily in favor of according broadcast attorney advertising some first amendment protection, especially since the arguments against broadcast attorney advertising do not withstand close analysis.

First, the criticisms leveled at the transitory nature of broadcast communications and the inadequacy of after-the-fact policing are weakened in view of the fact that the predicted dangers may be averted by the promulgation of appropriate regulations. The danger that the consumer may lose the protection of any disclaimers or warnings may be avoided in television advertising, for example, by regulations requiring that the disclaimer appear on the screen

106. *See, e.g.*, Order of the Supreme Court of Appeals of the State of West Virginia, EC 2-2, Approval of Amendments, Additions and Deletions to the Code of Professional Responsibility Adopted by the Said State Bar at its Regular Annual Meeting on April 14, 1978 (Oct. 18, 1978) (copy on file with the *Vanderbilt Law Review*).

throughout the advertisement. Furthermore, the problems of after-the-fact policing could be significantly diminished, if not eliminated, by requiring that the commercial be prerecorded and one copy sent to a review committee of the governing bar association.[107]

Second, the Supreme Court in *Bates* stated that price advertising should have no adverse effects on the professionalism or dignity of practicing attorneys.[108] It is difficult to draw constitutional distinctions between dignified broadcast advertising and advertising of the same information in print. Significantly, the American Bar Association and various state and local bar associations use radio and television to advertise information regarding legal referral services through public service announcements.[109] In a similar vein, numerous experiments are in progress or have been proposed for direct coverage of judicial and legislative proceedings by electronic media.[110] Furthermore, "candidates for public office, including judges, attorneys general, and prosecuting attorneys, have used the electronic media with effectiveness and dignity."[111] Admittedly, broadcast advertising should not be used to present professional services advertisements in a manner similar to the presentation of advertisements for commercial products, which rely heavily upon dramatizations and jingles. Such practices arguably would have an adverse effect on the dignity of the profession. Nonetheless, restrictions short of a total ban could be promulgated restricting the manner in which information about attorney services may be presented. In addition, advertising over broadcast media may in fact improve the attitude of the public toward the profession by demonstrating the efforts of the bar to reach out to the population it ostensibly serves.

The argument that the increased costs of broadcast advertising will produce undesirable economic effects on both clients and young attorneys is unpersuasive and is of little relevance to first amendment considerations. The Supreme Court has recognized that dissemination of price information tends to reduce prices through competition.[112] This belief has been a basic axiom of the American market system. Competitive price advertising should therefore produce lower prices in the legal market just as it has done in other markets.

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107. *See* text accompanying note 138 *infra*.

108. 433 U.S. at 368-72.

109. *See* Comments by Neal Van Ells, President of the Ohio Association of Broadcasters, on the Proposed Emergency Rules Relating to Lawyer Advertising as Recommended by the Ohio State Bar Association at 6 (Oct. 24, 1977) (copy on file with the *Vanderbilt Law Review*).

110. *Id.* at 5.

111. *Id.* at 6.

112. 433 U.S. at 377.

Furthermore, if a young attorney can expect a reasonable response by consumers to his broadcast advertisement, he presumably would consider the investment made in publicizing his new practice a sound one.

The assertion that broadcast attorney advertising should be banned because such advertising would be inherently misleading or because the potential for deception over the broadcast media is too pervasive to control appears to be the only contention presenting a sound basis for objection. Nonetheless, the increased tendency of broadcast advertising to deceive or mislead has occurred when broadcast media are used primarily as sources of persuasion and only secondarily as sources of information.[113] Attorney advertising presumably has the primary objective of informing consumers of the availability, nature, and cost of legal services. Any persuasive effects are or should be incidental and may be controlled reasonably by the bar's promulgation and strict enforcement of appropriate guidelines and regulations. For example, if a regulation provided that permissible televised attorney advertising was limited to the reading by an unseen announcer of a screened, printed commercial message, complete with any required disclaimers, broadcasted advertisements would seem to pose no greater potential for deception than authorized printed advertisements. Therefore, since the Court in *Bates* concluded that some services can be advertised in print without being misleading,[114] it would be consistent for the Court to find that some services can be broadcast without being misleading if restrictions appropriate to the media are imposed.[115]

In the absence of an authoritative ruling by the Supreme Court regarding the constitutional status of broadcast attorney advertising and until empirical data on the various effects of such advertising can be accumulated, the results of a balancing test to determine whether broadcast attorney advertising is protected by the first amendment must be speculative in nature. Examination of the competing interests suggests, however, that the individual's right and need to receive information concerning legal services and the superior capacity of the broadcast media to communicate such information to the consumer outweigh the potential dangers caused by broadcast attorney advertising. Unless or until actual danger is demonstrated, a ban on the dissemination of truthful information

113. *See* Elrod, *supra* note 91.

114. 433 U.S. at 372.

115. The Court in the *Bates* opinion stated: "We do not foreclose the possibility 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." *Id.* at 384.

about legal services over broadcast media should not withstand constitutional challenge.

III. State and Federal Bar Positions on Broadcast Attorney Advertising

A. *American Bar Association*

The Board of Governors of the American Bar Association (ABA) established a Task Force on Lawyer Advertising shortly before the *Bates* decision was handed down by the Supreme Court.[116] In response to the Court's directive in *Bates* that the bar ensure the free and clean flow of attorney advertising, the Task Force drafted two proposals for amendments to Canon Two of the ABA Code of Professional Responsibility, which refers to the lawyer's obligation to assist the legal profession in fulfilling its duty to make legal counsel available. Both of these proposals have been circulated for consideration among the highest courts of all the states and appropriate state regulatory agencies. The House of Delegates of the ABA has adopted the more restrictive set of proposed amendments.[117] The most important provisions in the adopted model are DR 2-101(A) and (B),[118] which specify the permissible content of an adver-

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116. *See Proposed Amendments, supra* note 76, at 1.

117. 46 U.S.L.W. 2089 (Aug. 23, 1977).

118. ABA Code of Professional Responsibility (as amended Aug. 1977). DR 2-101 provides in part:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over radio broadcasted in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

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

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

(3) Date and place of birth;

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

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Legal authorships;

(9) Legal teaching positions;

tisement, the media through which it may be disseminated, and the manner in which it may be presented. DR 2-101(A) proscribes, in general terms, the dissemination of false, fraudulent, misleading, deceptive, self-laudatory, or unfair statements or claims. DR 2-101(B) delineates the categories of information that a lawyer may permissibly publish. The unadopted proposal is less restrictive than the adopted model. Under the unadopted version all information that is not false, fraudulent, misleading, or deceptive would be authorized for publication.[119] Of particular relevance to the subject of this Note are the provisions in the amendments relating to the use of electronic media in attorney advertising. Both versions authorize dignified radio advertising but expressly prohibit the use of televised advertising in the absence of a determination by appropriate state authorities that televised advertising is necessary to provide adequate information to consumers of legal services.[120] The proposals disallow televised advertisements primarily because the Task Force claimed that when the model amendments were drafted, it

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

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

(12) Technical and professional licenses;

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

(14) Foreign language ability;

(15) Names and addresses of bank references;

(16) With their written consent, names of clients regularly represented;

(17) Prepaid or group legal services programs in which the lawyer participates;

(18) Whether credit cards or other credit arrangements are accepted;

(19) Office and telephone answering service hours;

(20) Fee for an initial consultation;

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged in print size at least equivalent to the largest print used in setting forth the fee information.

119. *See Proposed Amendments, supra* note 76, at 2.

120. *Id.*

lacked sufficient time and expertise to identify or fully evaluate all potential problems or to develop appropriate and adequate regulations.[121] It is significant, however, that the ABA has recognized that televised attorney advertising could be essential to the bar's goal of facilitating the dissemination of information relevant to the intelligent selection of counsel.

While an examination of the constitutional implications of the restrictions imposed by the ABA amendments upon attorney advertising in general is beyond the scope of this Note,[122] it is relevant for present purposes to inquire into the constitutional implications of the ABA's manner restrictions and its prohibition against televised advertising. While the *Bates* Court did note that attorney advertisements may be permissibly subjected to time, place, and manner regulations,[123] the regulations must not be designed to suppress speech of particular content.[124] The ABA's requirement that all advertisements, on radio and in print, must be presented in a dignified manner,[125] will withstand constitutional attack only if the purpose of the restriction is to prevent harm unrelated to the idea communicated. If the requirement that advertisements be dignified is interpreted to apply to the content of the advertisement and utilized to prevent certain ideas from being communicated, the regulation may be deemed an impermissible suppression of speech. If, on the other hand, the "dignified manner" restriction is found to be content-neutral and directed only at the manner in which the advertisement is presented, then the regulation may be upheld as a legitimate furtherance of the state's interest in preventing the commercialization of the profession and protecting consumer interests.

B. *State Bar Associations*

As a result of the *Bates* decision state bar associations have also been faced with the tremendous challenge of formulating effective rules and standards to protect the public from false or deceptive attorney advertisements, while ensuring the free flow of truthful information regarding legal services. Most state bar associations have used the ABA proposals as guidelines and have amended their own codes of professional responsibility to bring them into compliance with the Court's directive in *Bates*.[126] Although the states gen-

121. *Id.*

122. For a general discussion of the constitutional implications of the ABA Proposed Amendments, see 37 MD. L. REV. 350, 371-79 (1977).

123. 433 U.S. at 384.

124. *See* text accompanying notes 11-19 *supra*.

125. *See* note 118 *supra*.

126. In October 1978, the author of this Note wrote letters to the bar associations of every state requesting information concerning the position taken by that particular state with

erally appear to have adopted one or the other of the proposals with only minor modifications, substantial departures have been made from the ABA's position with regard to electronic media advertising. A survey canvassing the positions taken by each of the state bar associations on the issue of television and radio advertising[127] yielded the following results: out of forty-six states for which information was available, only four had not amended the provisions dealing with attorney advertising in their respective codes of professional ethics since the *Bates* decision.[128] The survey also disclosed that only six states have adopted the ABA's position with regard to electronic media advertising and thus allow radio advertising but prohibit televised attorney advertising.[129] Consequently, eighty percent of the states, on either a permanent or an interim basis, have proposed to modify or already have modified the ABA's proposed revisions of Canon Two pertaining to electronic media advertising, with nineteen states allowing, or proposing to allow, advertising on both radio and television,[130] and seventeen prohibiting attorney advertising on the broadcast media entirely.[131]

The disparate treatment of radio and broadcast advertising indicates that despite the Court's attempt to fashion a narrow decision in *Bates*, substantial discord remains as to the scope of the holding. The interpretation ultimately adopted may hinge upon a comparative analysis of the effects of the three different positions adopted by the states: (1) a total ban on broadcast advertising; (2) a partial ban under which only radio advertising is allowed; or (3) the complete removal of a ban on attorney advertising over both radio and television. It is unlikely that the Supreme Court will render an authoritative decision or that the FTC will promulgate a ruling absolutely prohibiting broadcast attorney advertising before some sort of empirical evidence is available demonstrating the rela-

regard to the ABA's Proposed Amendments on attorney advertising. Specific inquiry was made as to the state's position on advertising over the broadcast media. Thirty-nine state bar associations responded. The data in this portion of the Note was compiled from the results of this survey and the results of a survey by Daniel P. Hanley. *See* Hanley, *Lawyer's Quirky Ads Leave ABA With an Ethical Pain*, NAT'L L.J., Nov. 13, 1978, at 19, col. 1.

127. *See* note 126 *supra*.

128. These states are Alabama, Hawaii, South Carolina, and South Dakota.

129. The states adopting the ABA's position are Indiana, Montana, Nebraska, New Jersey, Pennsylvania, and Wyoming.

130. The states allowing attorney advertising on both radio and television are as follows: Arizona, Arkansas, California, Colorado, Georgia, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Ohio, Tennessee, Washington D.C., and Wisconsin.

131. The states absolutely prohibiting broadcast attorney advertising include the following: Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, and West Virginia.

tive benefits and harms produced by attorney broadcast advertising.

Two of the factors that will probably be most determinative of the ultimate effect of broadcast attorney advertising in those jurisdictions permitting such advertising are the nature and efficacy of the restrictions specifying the manner in which broadcast advertisements must be presented. While many of the "manner" restrictions have been promulgated by the states on an interim or temporary basis, there is a wide disparity among the states in the degree of restrictiveness of the regulations. For example, in Tennessee, where attorney advertising is allowed over both television and radio, several restrictions have been adopted by the state bar to supplement the radio broadcast regulations proposed by the ABA. In Tennessee advertising over the broadcast media is limited to the reading of a prepared text by an announcer.[132] Television commercials, specifically, are to consist solely of a slide presentation accompanied by dignified announcements.[133] The use of music or lyrics is strictly prohibited.[134] Under no circumstances is any lawyer to appear personally on the broadcast media in connection with any commercial advertising, nor may his photograph appear.[135] In North Carolina a broadcast advertisement may not feature the lawyer's voice or portrait and "illustrations, animations, portrayals, dramatizations, slogans, music, lyrics and pictures" are expressly prohibited.[136] The Georgia State Bar Association has issued a regulation requiring that a broadcast advertisement be identified as a paid advertisement.[137] Moreover, to facilitate enforcement of the regulatory scheme, an advertising attorney is also required to send an audio tape recording of the advertisement to the general counsel of the State Bar of Georgia.[138]

In other states permitting lawyer advertising over radio and television, little, if any, "special consideration" by way of supplementing the restrictions proposed by the ABA has been given to the "special problems" of advertising over the broadcast media. Within these jurisdictions, the type of advertisements feared by opponents

132. *Amendments to Code of Professional Responsibility*, 14 TENN. B.J. 47, 51-52 (May 1978).

133. *Id.*

134. *Id.*

135. *Id.*

136. Amendments to DR 2-101(B), Art. X, Canon 2, The Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of the North Carolina State Bar (1978) (copy on file with the *Vanderbilt Law Review*).

137. Amendments to the Rules and Regulations for the Organization and Government of the State Bar of Georgia, by Order of the Supreme Court of Georgia (May 12, 1978) (copy on file with the *Vanderbilt Law Review*).

138. *Id.*

of attorney advertising has surfaced—those that tend to attract the consumer's attention by use of showmanship, self-laudation, or hucksterism, typically by use of dramatizations, slogans, jingles, or other sensational language or format.[139] While these practices are deplored by a large segment of the profession, their disentitlement to constitutional protection has not been established. The ultimate constitutional status of regulations on broadcast attorney advertising promulgated by the bar at the state level will depend upon the relative weight of the interests at issue. The regulations that have been formulated represent efforts by the bar to protect the consumer and maintain the dignity of the profession, while satisfying the requirements of the first amendment. Although it is still too early to quantify the benefits or the harms of attorney broadcast advertising, developments at the state level should be carefully monitored for they may ultimately provide the indicia necessary to determine the extent to which broadcast attorney advertising requires first amendment protection.

IV. EFFECT OF BROADCAST ATTORNEY ADVERTISING ON THE LEGAL PROFESSION

A. *Regulation of Attorney Advertising by the FTC*

The FTC has been authorized by section five of the Federal Trade Commission Act[140] to regulate commercial activity to protect the consumer from unfair or deceptive acts or practices. When the ban on attorney advertising was removed and lawyers began advertising, the organized bar, traditionally a self-regulating entity, became potentially subject to the regulatory powers of the FTC. While no cases have addressed the extent to which the FTC has jurisdiction over the commercial practices of the bar, precedent indicates that the FTC would have jurisdiction under sections four and five of the FTC Act. Section four enumerates the entities that may be regulated by the FTC, including any association "organized to carry on business for its own profit or that of its members."[141] Section five requires that the acts or practices regulated be "in or affecting commerce."[142]

The Supreme Court in *Goldfarb v. Virginia State Bar*[143] determined that certain attorney activities may affect interstate commerce so as to bring regulation of the legal profession, at least in

139. For an example of attorney advertising of this nature, see Hanley, *supra* note 126.
140. 15 U.S.C. §§ 41-58 (1976 & Supp. 1978).
141. *Id.* § 44 (1976).
142. *Id.* § 45(a)(1) (Supp. 1978).
143. 421 U.S. 773 (1975).

part, within the FTC's jurisdiction through the Sherman Act.[144] In recognizing the FTC's jurisdiction over the anti-competitive practice of setting minimum fee schedules for title-searching services provided by attorneys, the Court noted that frequently the practice of law entails the making of decisions in one state that significantly affect commercial transactions in others.[145] That the FTC is ready to assert authority over advertising practices of professionals is suggested by the decision in *The American Medical Association,*[146] in which a FTC administrative law judge held that restrictions on physician advertising appearing in the ethical codes of several medical associations constitute unfair methods of competition and unfair acts or practices violative of section five of the FTC Act.[147] The judge in that case rejected the contention that the FTC lacked jurisdiction over medical associations, finding that the associations were a "company . . . or association . . . organized to carry on business for its own profits or that of its members" as required by section four of the act.[148] Moreover, he found the associations' acts or practices to be "in or affecting commerce" as required by section five.[149] Two conclusions flowing almost inexorably from this decision are that the FTC also may assert jurisdiction over the commercial practices of the legal profession and may prescribe regulations identifying the types of attorney advertising that will be permitted under section five of the act.

The body of law established by the FTC has been developed to regulate product advertising in a commercial setting in which the sale of that product represents the entirety of the transaction between the advertiser and the consumer. Legal service advertising introduces many new considerations, different in both nature and degree from product advertising. For example, in legal advertising the ultimate purpose of a commercial is not the initial contact between the consumer and the advertising attorney, but rather is the development of an ensuing attorney-client relationship. Furthermore, because the public lacks sophistication regarding the purchase of legal services, different standards and regulations would need to be formulated to prevent misunderstanding and deception. In addition, satisfactory rendition of an advertised service is more difficult to test than is the performance of an advertised product.

144. 15 U.S.C. §§ 1-7 (1976 & Supp. 1978).

145. 421 U.S. at 783-84.

146. The American Medical Association, 3 TRADE REG. REP. (CCH) ¶ 21,491 (Nov. 13, 1978).

147. *Id.*

148. *Id.*

149. *Id.*

New methods of detection of fraud or deception by advertising attorneys would inevitably be necessitated. These and the many other problems presented by an attempt to regulate attorney advertising may discourage the FTC from actively asserting authority over the commercial practices of the legal profession at present. The goal of the organized bar and that of the FTC is the same—the dissemination of information to the public without deception. If the organized bar can achieve those goals effectively through self-regulation, then the FTC may prefer to leave the regulation of attorney advertising in the hands of the bar.

B. *General Implications*

Broadcast attorney advertising is too recent a phenomenon for the legal profession to have felt its impact to any significant degree, yet speculation is possible as to the ultimate effects broadcast advertising will have on the legal services industry. Among the salutary effects that broadcast attorney advertising may be expected to have for the profession is an increase in demand for routine legal services.[150] Surveys have indicated that the judicial machinery remains underutilized by large segments of the population.[151] This underutilization of legal services has been attributed to the consumer's inability to find qualified attorneys and the fear of prohibitively high costs.[152] Price advertising by attorneys should promote the utilization of legal services by encouraging the assertion of valid claims. One of the most remarkable manifestations of the effect of advertising is the widespread development of legal clinics.[153] Advertising has allowed a restructuring of the traditional method of rendering legal services. The increase in demand for routine legal services brought about by advertising has allowed attorneys to provide legal services in volume and at lower rates. The benefits of advertising thus inure to both the consumer, who is able to obtain legal services at lower rates, and to the attorney, whose business is enhanced. In addition, broadcast advertising may facilitate the new lawyer's entry into an established legal market.[154]

Another beneficial effect of broadcast price advertising is that it is likely to reduce the public's disillusionment with the profes-

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150. This possible effect is recognized by the Supreme Court in *Bates*. *See* 433 U.S. at 377 n.35.

151. *See* text accompanying note 82 *supra*.

152. *See* text accompanying notes 83-85 *supra*.

153. *See* Roberts, *A New Breed of Lawyer Born of Advertisements*, N.Y. Times, Nov. 26, 1978, at 26, col. 2.

154. *See* 433 U.S. at 378.

sion.[155] Much of the public's antipathy toward the bar stems from the bar's failure to reach out to those whom they purport to serve. Price advertising would at least demonstrate that attorneys are more concerned with the delivery of their services than with preventing competition within the profession.

Whether broadcast attorney advertising will commercialize the profession to its detriment remains to be seen, and whether the risk of overreaching and misrepresentation by unscrupulous attorneys outweighs the benefit of the communication of truthful information regarding legal services can only be determined with time. Only one conclusion can at present be made with certainty: broadcast attorney advertising will accelerate any impact to be felt by the profession as a result of legal service advertising.

V. CONCLUSION

In the wake of the limited constitutional holding in *Bates,* state courts must determine for themselves the degree of first amendment protection to be accorded broadcast attorney advertising. Many state bar associations, state regulatory authorities, and individual members of the bar maintain that advertisement over the electronic media should not be considered a constitutional right. Conversely, others contend that to prohibit the transmission of legal service information over the broadcast media is effectively to deny a significant portion of the public their first amendment right to receive information pertaining to their personal welfare.

Although a state by virtue of its police power may place various restrictions on commercial speech, in order to do so it must be able to demonstrate an interest outweighing the advertisement's contribution to the public welfare. The public's strong first amendment interest in and right to information regarding the acquisition of legal services and the broadcast media's demonstrated superiority in communicating information to the public should ultimately be found to outweigh the state's interest in preserving the dignity of the profession and in preventing speculative harm to the public by misrepresentation caused by broadcast advertising. The state's interest in a total ban on attorney advertising over the broadcast media is diminished in view of the existing laws against fraud and malpractice and the ethical rules prohibiting an attorney from taking a case in which he cannot do a competent job. Furthermore, reasonable regulations of commercial speech are constitutionally sanctioned and can be formulated to protect the public from potential harm by

155. Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of* Goldfarb, 24 U.C.L.A. L. REV. 475, 516-17 (1977).

broadcast advertising. In balance, the public's right to receive information relevant to the nature, terms, and availability of legal services requires extension of constitutional protection to attorney advertising over the most effective and pervasive communication media—the broadcast media.

I. Terry Currie