

Lawyer Advertising and Specialty Certification

By Mortimer A. Rosecan

On June 27, 1977, the legal profession was stunned by the decision of the United States Supreme Court in *Bates v. State Bar of Arizona*.¹ As you undoubtedly know, this decision held that lawyer advertising in newspapers at the prices at which "routine" legal services would be performed was a form of commercial speech entitled to First Amendment protection and, therefore, could not be subjected to blanket suppression by the states. This case undoubtedly has forged a radically new ethical concept governing the practice of our profession. To put this concept into perspective, a short history of lawyer advertising may be helpful.

The prohibition against advertising began largely as a rule of etiquette dating back to the Inns of Court in London.² The young men who came to London in the early days to study at the Inns were generally the sons of well-to-do parents who did not need to earn a living and looked down upon the commercial practices of common tradesmen. They viewed themselves as an elite fraternity whose members participated in a profession - not a business - and they cherished this class distinction.³

In the newly established democratic nation across the Atlantic, where all men were deemed to be created equal, no form of class distinction was tolerated. For a long time, no bar associations were organized because it was feared that they might lead to the formation of a special class.⁴ In fact, in many states, the practice of law was not restricted to lawyers;⁵ and the right of anyone to do so was considered inalienable. It was in this atmosphere that Abraham Lincoln advertised his law practice in the newspapers in and around Springfield, Illinois, in 1838.⁶

The first legal Code of Ethics in this country was adopted by Alabama in 1887 and it became the model that was followed by the other states.⁷ The Alabama Code specifically provided that "[n]ewspaper advertisements, and circulars, . . . tendering professional services to the general public, are proper; but special solicitation of particular individuals to become clients ought to be avoided. . . ."⁸

In 1908, the American Bar Association promulgated its Canons of Professional Ethics. Canon 27, contrary to the Alabama Code, declared that solicitation of business by circulars or advertisements was unprofessional, defied the traditions, and was intolerable.⁹ If this seems to be a throwback to the etiquette of the Inns of Court, it may have been justified on the grounds that, in 1908, advertising was unnecessary inasmuch as most lawyers were general practitioners in small communities where people knew each other.¹⁰

In 1969, the ABA sought to update the ethical standards for lawyers when it adopted the Model Code of Professional Responsibility. Disciplinary Rule DR 2-101 of this Code absolutely banned virtually all forms of advertising and solicitation by lawyers.¹¹ With but a few insignificant variations, almost all American jurisdictions adopted the Model Code.

After the Court in *Bates* struck down the Model Code's blanket ban on advertising, an ABA Task Force advanced alternative Proposals A and B in an effort to bring the Code into compliance with that decision.¹²

Proposal B confined itself to a general prohibition of misleading advertisements without detailing specific items approved for advertising.¹³ Proposal A represented a more conservative approach and listed twenty-five items, commonly contained in "reputable" law lists, that an advertisement could include.¹⁴

Under both proposals, the gate to public advertising was opened, but in Proposal A its hinges were adjusted so as to regulate tightly both the kind and amount of information that was allowed to flow to the public.

The House of Delegates adopted Proposal A.¹⁵ It amended DR 2-101 to permit a lawyer to advertise one or more fields of law in which he practiced, or that his practice was limited to one or more fields of law, or that he specialized in a particular field of practice.¹⁶ But, a string was attached that tied what was permitted to what was authorized by section DR 2-105. Under its provisions, the fields of law an attorney could advertise were subject to the designations authorized and approved by the state agency having jurisdiction of the subject under the state law; and only lawyers who were certified as specialists in a particular field of law by the appropriate state authority could hold themselves out as such to the public.¹⁷

Thus, two novel and far-reaching concepts became a part of Codes of Ethics: field of practice ads were sanctioned; and the recognition of specialists was put under state control. As we shall see later on, these concepts have created more problems than they have solved.

Three years after *Bates*, the United States Supreme Court again dealt with state regulation of protected commercial speech in *Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n.*¹⁸ In that case, the Court established a four-part test for regulation of commercial speech. Pertinent to this discussion, the test included the requirement that state regulation be no more extensive than necessary to serve a substantial governmental interest.¹⁹

On the heels of *Central Hudson*, the Supreme Court decided the case of *R.M.J.*²⁰ This case involved a St. Louis lawyer who had been disciplined because his advertisements in telephone directories listed areas of practice in language different from that specified by the state authority.

In reversing the disciplinary sanction imposed on R.M.J., the Supreme Court reaffirmed that "truthful advertising related to lawful activities" is protected by the First Amendment; and left no doubt that *Central Hudson* applied to lawyer advertising when it emphasized that restrictions upon the advertising of professional services "may be no broader than reasonably necessary to prevent deception."²¹

Prior to delivery of this address, the Supreme Court had not again dealt directly with lawyer advertising.²² The guidelines set by the Supreme Court may be summarized as having established that:

1. Truthful advertising relating to lawful activities is entitled to First Amendment protection.
2. If the method or content of the advertising makes it inherently misleading, it may be restricted.
3. If otherwise truthful advertising proves itself misleading in fact, it too can be restricted.
4. Absolute prohibition may not be placed on material which can be presented in a truthful way.
5. Truthful advertising may be regulated if the state demonstrates a substantial state interest in the regulation, if the regulation furthers that interest, and is no more restrictive than is necessary to further that interest.²³

The decisions in *Central Hudson* and *R.M.J.* exposed the constitutional infirmity of the Model Code, even as revised by the provisions of Proposal A. Accordingly, in August 1983, the ABA adopted the Model Rules of Professional Conduct. Again, field of practice advertising is sanctioned, and a lawyer cannot advertise that he is a specialist except as provided by the proper state authority.²⁴

Lawyers in this country have always clothed themselves with a sort of de facto specialization. Professor Joiner of the University of Michigan observed 30 years ago: "[A]nybody can be a specialist. All he has to do is to say 'I am a specialist in some field of law' He doesn't have to know anything about that field Other lawyers and the public have no way of knowing whether or not he knows anything about that field."²⁵ Professor Joiner's remarks bring to mind Mark Twain's warning that: "It ain't what a man don't know that hurts. It's what he knows that ain't so."

The indiscriminate and unverifiable claims of specialization described by Professor Joiner influenced authentic specialists to form their own organizations that limited membership to persons of similar qualifications. These organizations established a de facto recognition of specialty in particular fields of practice that could be advertised within the bar and in approved legal directories, but not to the public.²⁶

Four such organizations in the field of trial advocacy are, in the order of their birth, the American College of Trial Lawyers (1950), our International Academy (1954), the American Board of Trial Advocates (1958), and the International Society of Barristers (1975). As the names of these organizations signify, they were formed specifically to promote and enhance trial advocacy. They admit to membership a limited number of lawyers, from both sides of the counsel table, who have demonstrated superior skill and recognized ability as trial lawyers. For convenience, I will refer to them as the "prestigious organizations."

As far back as 1954, the ABA recognized that certification of trial specialists on a national basis was a need whose time had come. A committee was appointed to survey the matter. It recommended a plan, but that plan met with opposition and no action was taken.²⁷ In 1961, another committee drafted a plan. It, too, met with opposition and no action was taken on it.²⁸ Still another committee was appointed in 1967; this time it was called a special committee. After much deliberation, it recommended that the ABA wait for the results of pilot programs submitted to the bars of a few states.²⁹ Two years later, the special committee was dissolved, and recognition of trial advocates on a national level lay dormant. Chief Justice Burger attempted to awaken it in these words:

"[S]ome system of certification for trial advocates is an imperative and a long overdue step.

[W]e are more casual about qualifying the people we allow to act as advocates in the courtroom than we are about licensing our electricians.

[And], there is no parallel in any other area of life's problems having serious consequences to our naive assumption that every graduate of a law school is, by virtue of that fact, qualified for the ultimate confrontation in a courtroom."³⁰

If the Chief justice was calling upon the ABA to take the "imperative and long overdue step" of certification of trial advocates, his call was not heard.

Having abdicated its responsibility for specialty recognition on a national basis, the ABA created the Standing Committee on Specialization to offer guidance to the states.³¹ This committee formulated a Model Plan that has two idealistic goals: (1) To increase access of the general public to qualified legal assistance; and (2) to improve the quality of specialized legal services by improving the skills of those who offer such services to the public. These goals are referred to as "access" and "competence."³²

Consistent with the provisions of post-Bates codes of ethics adopted by the ABA, the Model Plan calls for the supreme court of each state to establish a board of legal specialization with jurisdiction over all matters pertaining to the recognition and regulation of specialists.³³ The Plan sets out general minimum standards and leaves to the states the discretion to adopt more or less stringent ones.³⁴ Grandfathering is vigorously opposed.³⁵ The Special Committee lists 24 areas of practice concerning which it intends to publish guides specifically tailored to each.³⁶ Those of most concern to the members of the Academy are "Criminal Law," "Civil Trial Practice," and "Personal Injury and Property Damage" No guides have been formulated in any of these areas.

The Standing Committee is entitled to all praise for its valiant attempt to do what was predestined to fail and fail it has. When its parent was unable for 30 years to formulate an acceptable certification plan for trial advocates, perhaps too much has been asked of this committee.

For each state to adopt standards for specialty recognition is not an easy task. Hard choices need to be made between sharply conflicting interests if the goals of access and competence are to be met. If standards are tilted too far towards access, they are opposed by those who would emphasize competence, and vice-versa.

Almost every qualification an applicant must meet invites disagreement. For example, what percent of an applicant's practice in a given field, and over how many years, should be required? How much and what kind of continuing legal education is required of an applicant both before and during the period of certification? Of course, different standards need to be tailored for each specialty.³⁷

It is no wonder that so many state boards are overwhelmed and bogged down in disagreement and inertia. Some boards have given up when their recommendations have been rejected. In quite a few states, their boards have been dormant for years.³⁸ In others, the board has been dissolved. A few states have a plan under submission, but the prospects of it being adopted are dim. The supreme courts and bar associations in a number of states believe there are too few lawyers in their states to justify the cost. In 1982, the Florida designation plan cost \$112,000; California's certification plan for 4 specialties ran to \$265,000.³⁹

Still another deterrent to state action comes from the decision in *Consumers Union v. Virginia State Bar*.⁴⁰ In that case, the Consumers Union attempted to gather and publish information about lawyers practicing in Arlington County. The publication of some of the information it sought was banned by Virginia's ethical code as "advertising." The Consumers Union filed a § 1983 civil rights action against the state, its supreme court justices, and integrated bar seeking a declaratory judgment and

injunction.⁴¹ Tried first before a three-judge district court, the case went to the United States Supreme Court, then back to another three-judge district court⁴² and, finally, to the Court of Appeals for the Fourth Circuit, which awarded the victorious Consumers Union its costs and attorneys' fees covering the entire litigation.⁴³ Since that case was filed, similar suits involving lawyer advertising have been brought under § 1983 and, in all of them, attorneys' fees and costs have been awarded.⁴⁴ The threat of such suits is another factor that has influenced state supreme courts to stay out of the thicket.

In the Special Committee's score sheet of the states, issued last month, I find no instance of a state adopting the Model Plan for the recognition of trial specialists; and not many more than a handful of states have adopted the plan as a guide for recognition of specialty in any field.

There is one national organization that has done what the ABA has failed to do. The National Board of Trial Advocates has successfully formulated and administered a program for certification of civil and criminal trial specialists. Established in 1977 by the American Trial Lawyers Association, it is governed by an independent board of the highest calibre. This board is comprised of 21 fellows of our Academy, including 3 of its past presidents; 8 past presidents of ATLA; 3 deans of law schools; 4 former or present state supreme court judges; and 2 United States court of appeals and 4 district court judges. Other members include 8 former or present law professors, and presidents of state and local trial lawyers associations.

The requirements set by the NBTA for certification of trial advocates are far more stringent and exacting than those of the ABA Model Standards and give much greater assurance of competency.

In general, an applicant for certification as a civil trial specialist must have devoted at least 30% of his practice to civil litigation during the preceding 5 years; have been lead counsel in at least 15 civil jury trials to verdict; pass a written examination and, if the board desires, an oral exam. Lastly, an applicant must submit a copy of a substantial trial brief he wrote which sets out facts and arguments of law.

Is certification of trial specialists alive and well? Unlike Jacques Brel, it is not. New Jersey and Texas have adopted their own plan.⁴⁵ Florida, Connecticut and Minnesota have approved NBTA certification for civil trial specialists.⁴⁶ Thus, 45 states have not adopted any plan for recognition of trial specialists. I am told that the Supreme Courts of Georgia and Alabama are considering the approval of NBTA certification.

The Supreme Court has not dealt with or mentioned specialist advertising.⁴⁷ In what may come close to it, the Bates court said: "[A]dvertising claims as to the quality of services - a matter we do not address today - are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction."⁴⁸ The comment under Rule 7.4 of the newly adopted Rules equates advertising claims of the quality of legal services with claims of specializations.⁴⁹

With the help of some law students at St. Louis University, we made a survey which, while not "scientific," I believe to be surely accurate enough to support its findings. Our survey began with listing the names of the lawyers who advertised in the yellow section of the telephone directories of Atlanta, Chicago, St. Louis, and San Francisco. The ads ranged in size from 1/2 page to block ads of 1 x 2 inches. Many were in color. I emphasize that we selected only those ads wherein the lawyer either heralded that he was a trial lawyer, or confined his practice to handling cases of injury due to medical malpractice, or product defects, or negligence, or several of those areas. There were 267 such advertisers. We checked each one against the membership rosters of all four prestigious organizations. There were only 9. That means 96% of these advertisers had not been elected into any of the prestigious organizations.

For a double check, we took the names of the lawyers who paid to be listed in the "Attorney Guide" of the Los Angeles telephone directory under one or more of the headings: "Personal Injury Law," "Product Liability Law," "Trial Practice," and "Malpractice Law." Omitting law firms, there were 344 lawyers who listed under one or more of these headings. Thirteen were members of a prestigious organization. Again, 96% were not. There is no reason to believe that the result would be substantially different if, a similar survey was done in every major city.

Depending upon the city, a half-page ad in the yellow section ranges from \$1,150 to \$1,543 per month; and a quarter page ad runs in the range of \$780 per month. If the ad has red ink, as many do, the cost is higher.

Do these ads pay for themselves? A spot check shows that about 90% have been repeated over the last 3 years. One such repeater is a St. Louis lawyer whose ad reads:

"An experienced, qualified Trial Lawyer. Practice limited to Malpractice, Personal injury, Workers Compensation."

Since I did not recognize the name, I checked Martindale-Hubbell. When he began to run this ad, he had been out of law school five years, three of which he spent as an assistant prosecuting attorney handling misdemeanors.

The Tennessee Supreme Court said this about field of practice ads: "Such statements are calculated to convey to the lay public the impression that the lawyer is a specialist and, therefore, possesses particular expertise in the advertised field."⁵⁰ Judge Boyle of the United States District Court in Rhode Island put it this way:

"The 'laundry list' type of ad stating without explanation areas of law practice is misleading. A lay reader and even experts in other professions are expected to conclude that the attorney is especially qualified in the areas of law mentioned."⁵¹

Advertising experts will tell you that an ad which lists only two or three kindred areas of practice is far more likely to convey to the public an impression of expertise in those areas than the 'laundry list' referred to by Judge Boyle.⁵²

Frequently, in those ads upon which our survey focused, the advertiser's practice is described as having "emphasis in" or being "concentrated in" or "limited to" the fields of practice stated. Depending upon the ethical code of a given state, the use of these or similar terms may or may not be permitted. Even when they are prohibited, some unscrupulous lawyers take advantage of a state's flaccid enforcement. The comment under Rule 7.4 states that these terms have acquired a secondary meaning implying formal recognition as a specialist and are misleading.

Many of the field of practice ads are embellished with the flair of a carnival huckster. In addition to trumpeting that the advertiser is a trial lawyer experienced in handling personal injury cases, they tell the reader things like this:

"We win substantial out-of-court settlements for over 90% of our clients."

"No fee unless the case is successfully concluded."

"Get the best lawyer for the best result."

"An established reputation for effective, aggressive, trial court representation regardless of complexity, or adverse evidence."

"Medical care arranged on credit."

"Accident litigation specialists for the injured."

"Personal Injury victims - talk to us first."

My knowledge of radio advertising is limited to my city of St. Louis. You probably have some idea of what is going on in your own communities. *R.M.J.* attests that Missouri takes a narrow view of lawyer advertising, but it has been unable to control the radio ads in St. Louis. I can tell you that lawyers bordering on incompetence are all but promising the injured multi-million dollar results.

Up to now, I have attempted to review the history and nature of lawyer advertising side-by-side with the governing codes of ethics and the revisions of the codes to comply with Supreme Court decisions. I have touched upon the origin and growth of prestigious organizations that limit membership to authentic de facto trial specialists, and I have recounted the failures to give these specialists de jure recognition. Lastly, and most important of all, I have given you some idea of the deceptive ness of field of practice advertising as it is presently conducted.

The linch-pin upon which the *Bates* decision is rested is the case of *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, decided the term before.⁵³ There, for the first time, the Court held that the First Amendment precludes certain forms of regulation of even purely commercial speech. In that case, a pharmacist advertised the prices at which he offered to sell certain standardized prescription drugs. The parties stipulated that about 95% of all prescriptions were filled with dosage forms prepared by the manufacturer.⁵⁴

In holding that such price advertisements came under the protection of the First Amendment, the Court pointed out that the protection was to be enjoyed both by the advertiser and the consumer of prescription drugs.⁵⁵ Apprehension that First Amendment protection for advertising on the part of members of a state-regulated profession might be extended into the legal

profession was seemingly allayed when the Court stressed that its opinion did not reach other professions: "Physicians and lawyers, for example, do not dispense standardized products; they render personal services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."⁵⁶

Then came *Bates* - and with it came lawyer advertising of so-called routine legal services.⁵⁷ The 5 to 4 majority decision defined routine services in these words: "The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like. . . ."⁵⁸

The majority believed the case was controlled by the Court's decision in *Pharmacy* "because the conclusion that Arizona's disciplinary rule is violative of the First Amendment might be said to flow a fortiori from it."⁵⁹

The *Bates* Court did not break with respected tradition for the benefit alone of lawyers who wanted to advertise. Its primary objective was to provide the public with enough accurate information to make an intelligent decision in the selection of a lawyer. The Court's opinion is sprinkled with quotations from *Pharmacy* which underlie the rationale of both cases, e.g. "assuring informed and reliable decision making";⁶⁰ people will perceive their own best interest if only they are well enough informed";⁶¹ and "the preferred remedy is more disclosure, rather than less."⁶² Here too, as in *Pharmacy*, the effect of suppression of advertising on the consumer was an important consideration.⁶³

The majority opinion met with vigorous dissents by the Chief justice and by Justice Powell with whom Justice Stewart joined.⁶⁴ The dissenters tried to warn the majority that there was no white line dividing "routine" from "unique" legal services.⁶⁵ They emphasized that price advertising would not give the public an accurate picture upon which to base the selection of an attorney because both lawyers and clients can rarely know in advance the nature and scope of the problems that may be encountered even in the handling of matters that the majority deemed "routine."⁶⁶

Chief Justice Burger believed that, in the context of legal services, price advertising "could become a trap for the unwary"⁶⁷ and Justice Powell noted: "It has long been thought that price advertising of legal services inevitably will be misleading. . . ."⁶⁸

Justice Powell feared that selfish lawyers would engage in competitive advertising of a nature that may victimize some members of the public;⁶⁹ and the Chief Justice warned that the public would need protection from "the unscrupulous or incompetent practitioner anxious to prey on the uninformed."⁷⁰

Lastly, Justice Powell underscored that "the very reasons that tend to make price advertising of services inherently deceptive makes its policing wholly impractical."⁷¹ The Chief Justice disputed the Court's "unsupported assumption", that price advertising would be confined to "routine" services or that the bar and the courts will be able to protect the public when "the existing administrative machinery...has proved wholly inadequate to police the profession effectively."⁷²

These Cassandra-like prophecies of the *Bates* dissenters have been fulfilled with a vengeance! The field of practice advertising I have described could not be farther from the advertising of "routine" legal services; and, for one or another of the reasons to which I have alluded, the bar and the courts have not protected the public from the unscrupulous practitioner anxious to prey on the uninformed." What a sorry state of things we tolerate when those whose claims constitute the bulk of civil litigation are allowed to be lured into the hands of lesser competent lawyers by ads that carry the seeds of deception.

I suggest that the Supreme Court of the United States has not directly sanctioned field of practice advertising. Unfortunately, some careless observers have misread *Bates* as requiring states to permit it.⁷³ But a careful reading of that case shows that the Court specifically stated that the only "services that lend themselves to advertising are the routine ones."⁷⁴ The white line separating "routine" from unique legal services is plainly visible when the skill required to prove liability and damage is compared with the skill required to handle matters such as "the uncontested divorce, the simple adoption and the like." Moreover, field of practice advertising was given birth after *Bates* was decided when the ABA adopted proposal A and revised the Model Code to include it.⁷⁵ The lawyers who drafted this Code, and its successor, would have been well advised to consult with advertising experts who would have told them that an advertisement limited to one particular area of practice negated the injunction against advertising that implies specialization or expertise.

I suggest also that *R.M.J.* did not sanction the kind of field of practice advertising covered in our survey. In that case, the Court had before it an ad that listed 23 areas of law ranging from adoption to zoning. There was no contention that such an ad had a potential to mislead the public, and, of course, the Court did not address that non-existent issue. The only issue before the Court

was that Missouri acted arbitrarily in insisting that R.M.J. use its precise terminology when listing these areas of law. I emphasize that Missouri had sanctioned the advertising of areas of law when it adopted the Model Code and the *R.M.J.* Court was neither requested to nor could it declare that a state may not constitutionally do so. I submit that *R.M.J.* did not reach the question whether a state must sanction field of practice advertising.⁷⁶

Those observers who would read *Bates* and *R.M.J.* as requiring states to permit field of practice advertising take an Olympian leap from the fungible unit price advertising of *Pharmacy*, through the price advertising of routine legal services in *Bates*, to advertising whose sole purpose is to cause the consumer to believe that the advertiser is a specialist in a given area of the law. These observers forget that, in both *Pharmacy* and *Bates*, providing consumers with accurate and useful information was the *raison detre* for extending First Amendment protection to purely commercial speech. Those decisions cannot be read to stretch the shade of the First Amendment to cover the field of practice advertising shown in our survey of telephone directories. Consumer disinformation in the name of a lawyer's right to puff his own abilities is the polar opposite of the *Pharmacy*, *Bates*, and *R.M.J.* rationales and defies the repeated admonition of those cases that "advertising that is false, deceptive, or misleading of course is subject to restraint."

What can we do about this intolerable state of lawyer advertising? The decision of the Court in *R.M.J.* delivered by Justice Powell, contains a footnote which states:

"The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be 'inherently' misleading, the Court must take such experience into account."⁷⁷

Thus, we are told the status quo will be changed if empirical experience shows the need to do so.

No one seriously doubts that the public turns mostly to the telephone directory for assistance in selecting a lawyer. It is easy to use, accessible to everyone, and a virtual necessity if a lawyer is to be called either for inquiry or appointment. And it is a fact that field of practice ads in the area of personal injury far exceed the aggregate of all the other directory ads.

Reliable studies should be made to gauge the extent to which such field of practice advertising influences the public in selecting an attorney. Empirical evidence should be gathered of the degree to which field of practice ads lead the public to believe that the advertiser is a specialist or is uniquely qualified. Research should be done to measure the qualifications, or experience, of the field of practice advertisers. As many of these things should be done, and probably more, as resources will permit.

While this address was in the draft stage, I learned that the Missouri Bar, in conjunction with the University of Missouri School of journalism, is planning a study to measure the cost effectiveness of telephone directory advertising. If it is done, it will, of course, be confined to Missouri. No other bar association, including the ABA, has undertaken a survey of lawyer advertising.⁷⁸

Our Academy sponsored the IATL Foundation, and gave it its name, anticipating and hoping that it would someday be able to initiate a project that would render a sorely needed service to our profession and to the public. So far, it has lacked the wherewithal to launch such a meaningful project. But what a glorious beginning it would be for the Foundation to initiate and fund a survey of lawyer advertising such as I have mentioned. If your Foundation can take the leadership in such an acutely needed project, the resultant armament of statistics would be of immeasurable service to courts and bar committees when dealing with lawyer advertising.

My hope is that such empirical evidence would be used someday to convince the United State Supreme Court: that all lawyer advertising carries within it the seeds of deception; that it should reverse the one-vote majority in *Bates*; and that it should return to lawyers and judges of each state the right to decide whether to permit advertising at all. The overruling of *Bates* would reverse the downhill slide of the practice of law toward commercialism, begin the climb back up to professionalism, and burnish both our self-esteem and public image.

But even if this personal hope is not shared by all, or is unattainable, objective proof that field of practice advertising inevitably misleads the public would, at the very least, provide courts and bar associations with a potent weapon to end this evil and protect the injured from the "incompetent practitioner anxious to prey on the uninformed."

I respectfully submit that the yellow pages of telephone directories in every city stand mute witness to the fact that the injured obtain less competent representation as a result of the deception inherent in field of practice advertising. Empirical evidence of experience with such advertising will give voice to this deception. In the words of justice Powell, "the Court must take such experience into account."

If we do not protect the injured, who will? The challenge is ours for the taking.

FOOTNOTES

1. 433 U.S. 350 (1977).
2. Andrews BIRTH OF SALESMAN: LAW ADVERTISING AND SOLICITATION⁸⁵ (1981). *See generally* DRINKER, LEGAL ETHICS¹¹ -19 (1953) (for a general description of the early bar in England)
3. DRINKER, LEGAL ETHICS at 210.
4. *Id.* at 20-21.
5. *Id.* at 20.
6. ANDREWS, *supra* note 2, at 1.
7. DRINKER, *supra* note 2, at 23.
8. Alabama State Bar Association, Code of Ethics § 16 (1887,1899), *reprinted in* DRINKER, *supra* note 2, at 356.
9. Canons of Professional Ethics, Canon 27. Although the Canon was amended throughout the years, this concept was maintained.
10. ANDREWS, *supra* note 2, at 1.
11. "Model Code of Professional Responsibility DR 2-101 (1969).
12. Report to the Board of Governors of the Task Force on Lawyer Advertising, *reprinted in* ANDREWS, *supra* note 2, at 91-134 (1981).
13. *Ibid.*
14. *Ibid.*
15. Proceedings of the 1977 Annual Meeting of the House of Delegates, 102 Reports of the American Bar Association 546 (1977).
16. Model Code of Professional Responsibility DR 2-101 (1981).
17. Model Code of Professional Responsibility DR 2-105 (1981).
18. 447 U.S. 557 (1980).
19. *Id.* at 566. *See also* Andrews, *Lawyer Advertising and the First Amendment*, 1981 -985 (discussing the *Central Hudson* case). Am. B. FOUNDATION RESEARCH J. 967, 982

20. In re *R. M.J.*, 455 U.S. 191 (1982).

21. *Id.* at 203.

22. On May 28, 1985, the United States Supreme Court handed down its decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587. Attorney Zauderer was disciplined by Ohio on account of two different newspaper advertisements.

The advertisement of most concern to this discussion publicized the attorney's willingness to represent women who had suffered injuries as a result of their use of the Dalkon Shield Intrauterine Device. This ad featured a line drawing of the Device with the question "Did you use this IUD?" This was followed with a long array of diseases and symptoms that the Device is "alleged to have caused." The readers were advised not to assume that their claims were time-barred, and that "our law firm" was currently handling such cases "on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." The ad concluded with the name of the law firm, its address, and a phone number that the reader might call for "free information." Zauderer filed 106 lawsuits on behalf of the women who contacted him as a result of the ad. It was stipulated that the advertisement's information and advice concerning the Dalkon Shield was neither false nor deceptive, and was entirely accurate.

Ohio's Disciplinary Rule prohibited an attorney who has given unsolicited advice to a layman from accepting employment resulting from that advice. Ohio also contended that the ad was "deceptive" in that it failed to inform clients that they would be liable for costs (as opposed to fees) even if their claims were unsuccessful.

With respect to accepting employment resulting from unsolicited advice to a layman, the Court distinguished "print" solicitation of legal business from the in-person solicitation dealt with in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978), where it was determined that in-person solicitation by a lawyer "was a practice rife with possibilities for overreaching, invasion of privacy, the exertion of undue influence, and outright fraud." Accordingly, the *Zauderer* Court held: "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients."

53 U.S.L.W. at 4593. This portion of the opinion will require mass revision of state codes.

The Court also found that the use of illustrations or pictures in advertisements was entitled to First Amendment protection; and restrictions on such use had to survive scrutiny under the *Central Hudson* test. Finding that Ohio had not shown that the drawing of the IUD ran afoul of an important state interest, its disciplinary action was reversed. 53 U.S.L.W. 4594.

On the other hand, the Court did recognize that the ad's silence as to the client's responsibility for costs could be misleading, and allowed the state court's reprimand to stand. 53 U.S.L.W. 4594-95.

See n. 76 *infra*.

23. These guidelines were not changed by *Zauderer*; if anything, some of them were reinforced.

24. Model Rules of Professional Conduct, Rule 7.4.

25. Joiner, *Specialization in the Law - Control It or It Will Destroy the Profession*, 41 ABA J. 1105 (1955).

26. *Id.* at 1170: "Today's specialists and general practitioners advertise in law directories. This should be sufficient."

27. Standing Committee on Specialization, American Bar Association, *Handbook on Specialization 7* (1982); joiner, *supra* note 25, at 1171.

28. Report of the Special Committee on Recognition and Regulation of Specialization in Law Practice, 87 REP. Am. B. A. 361, 800 (1962); Proceedings of the House of Delegates at the 1962 Annual Meeting, 87 REP. Am. B. A. 426, 452-54.

29. Standing Committee on Specialization, *supra* note 27, at 7.
30. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice*, 42 FORDHAM L. REV. 227, 230-31 (1973).
31. See ABA Standing Committee on Specialization, Informational Bulletin #9, 1-10 (1983) (Describing the activities of the committee)
32. ABA Model Plan of specialization § I (adopted Aug. 15, 1979).
33. *Id.* at §§ 2-3.
34. *Id.* at § 8-11.
35. Handbook on Specialization, *supra* note 27, at 20-21.
36. *Id.* at A-11 through A-15.
37. *These questions* have been asked for years. E.g., Anderson, *Law Practice Issues and Developments in Utah: Status Report on Lawyer Specialization*, 1978 UTAH L. REV. 681, 690
38. See ABA Report: Specialization Plans-State Status Report (March 1985), listing Delaware, Georgia, Hawaii, Mississippi, Vermont, and Wyoming as having inactive specialization committees and many other states as having no committees. The list also indicates those states which have adopted and rejected specialization plans.
39. See Handbook on Specialization, *supra* note 31, at 24.
40. 688 F.2d 218 (4th Cir. 1982).
41. *Id.* at 219.
42. *Id.* at 219-20. The prior cases were 427 F. Supp. 506 (E.D. Va. 1976), 433 U.S. 917 (1977), 470 F Supp. 1055 (E.D. Va. 1979), 446 U.S. 719 (1980), and 505 F. Supp. 822 (E.D. Va. 1981).
43. 688 F.2d at 222.
44. E.g., Bishop v. Committee on Professional Ethics & Conduct, 521 F. Supp. 1219 (S.D.Iowa 1981); Lovett & Linder, Ltd. v. Carter, 523 F. Supp. 903 (D.R.I. 1981); Durham V.Brock, 498 F. Supp. 213 (M.D. Tenn. 1980).
45. The New Jersey plan covers civil and criminal trial attorneys. A.B.A. Rep. Specialization Plans-St. Status Rep. Texas includes trial practice as one of the specialties recognized in that state. Anderson, *supra* note 37, at 682 n.4.
46. Haaglund & Birnbaum, *Legal Specialization: The Need for Uniformity* 67 JUD. 436, 440, 444 (1984). In Minnesota, this approval was made by court decision. See "Specialization and Advertising" insert, *id.* at 443-44 (discussing *In re: R.W. Johnson*, 341 N.W. 2d 282 (Minn. 1983)).
47. Except for *dicta* by Justice White in a footnote to the recent *Zauderer* decision, *supra* note 26, 53 U.S.L.W. at 4591 n.9. See note 76 *infra*.
48. 433 U.S. at 383-84.

49. Model Rules of Professional Conduct Rule 7.4, Comment 1: "[S]tating that the lawyer is a 'specialist' or that the lawyer's practice 'is limited to' or 'concentrated in' particular fields is not permitted. These terms have acquired a secondary meaning implying formal recognition as a specialist

50. In re Petition for Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638, 645 (Tenn. 1978).

51. Lovett & Linder Ltd. v Carter, supra note 44, at 911.

52. See generally ANDREWS, supra note 2, at 1000

53. 425 U.S. 748 (1976).

54. This was emphasized by the Chief justice in his separate concurring opinion; "In dispensing these *pre-packaged* items, the pharmacist performs largely a packaging rather than a compounding function of former times. Our decision, today, therefore, deals largely with the States power to prohibit pharmacists from advertising the retail price of *pre-packaged* drugs." Id. at 773-74 (Emphasis in original.).

55. The Court was concerned that those whom the suppression of prescription drug price information would hit the hardest were the poor, the sick, and particularly the aged who "are least able to learn ... where their scarce dollars are best spent."

56. Id. at 773 n.25.

57. The advertisement before the Court was run in a Phoenix newspaper by the "Legal Clinic of Bates & O'Steen," who offered its services 'At Very Reasonable Fees' for uncontested divorce, adoption, bankruptcy, and change of name. The amount of fee and costs were listed alongside each service.

58. 433 U.S. at 372 (Emphasis added.).

59. Id. at 365. The Chief justice sharply disagreed: I had thought that we made it most explicit that our holding there rested on the fact that the advertisement of standardized, pre-packaged, name-brand drugs was at issue." Id. at 386.

60. Id. at 365.

61. Id. at 365 (quoting from *Virginia Pharmacy Board v. Virginia Consumer Council*, supra note 53, at 770.)

62. Id. at 375.

63. "Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared prices of services or because of an inability to locate a competent attorney." Id. at 370. See note 55 supra.

64. Justice Rehnquist would not have extended First Amendment protection to purely commercial speech. Id. at 404-405.

65. Id. at 391-95 (Powell, J., dissenting); id. at 387 (Burger, CJ., dissenting).

66. Id. at 386 (Burger, CJ., dissenting); id. at 392 (Powell, J., dissenting).

67. Id. at 386.

68. Id. at 391

69. Id. at 403-404,

70. Id. at 388.

71. Id. at 395-97.

72. Id. at 387.

73. "The Bates case has been generally accepted as a statement by the Supreme Court that lawyers cannot be prohibited from advertising the fact that they do or do not practice in areas of the law - so-called field advertising." ABA Standing Committee on Specialization, Informational Bulletin #9, supra note 31, at 15.

74. 433 U.S. at 372.

75. See P. 2-3, supra

76. In a totally gratuitous footnote aside to his *Zauderer* opinion, Justice White inaccurately opines that: "[O]ur decisions ... do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas. See *In re R.M.J.*, 455 U.S. 191, 203-205 (1982)." 53 *U.S.L.W.* 4591 n.9. The language in *R.M.J.* referred to is: "[T]he States may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information also may be presented in a way that is not deceptive." 455 U.S. at 203.

Whether field of practice advertising is so inherently misleading as to justify its outright prohibition by states was no more at issue in *R. M.J.* than it was in *Zauderer*. See text accompanying n.20 supra. Oddly, the *Zauderer* majority may inadvertently have handed the states a tool which allows them substantially to lessen the number of lawyers engaging in advertising those fields of practice that are usually contracted on a contingent fee basis. *Zauderer* specifically allowed Ohio to require that ads trumpeting free services where no money is collected must inform the consumer he will still be liable for costs. 53 *U.S.L.W.* at 4594. moreover, it appears that a state may require "that the attorney's contingent fee rate must be disclosed, . . ." 53 *U.S.L.W.* at 4594-95 n.15. Some attorneys may not wish to be so candid, and others may curtail or eliminate such ads because of the added cost this may impose - especially those with a "sliding scale" type of fee structure.

77. 455 U.S. at 200 n.11.

78. Mo.B.Bull.2 (March 1985)