Hammers, Switchblades and Law Hawks:

Lawyer Advertising under the First Amendment

BY JASON H. BEEHLER

My high school social studies teacher, Mr. Morton, had this famous quote from Voltaire hand-painted on the front wall of his classroom:

> I wholly disagree with what you say — and I will defend to the death your right to say it.[1]

That sentiment encapsulates the U.S. Supreme Court's First Amendment cases about attorney advertising. Much of lawyer advertising is terrible, but we tolerate it in the name of free speech.

This was not always so.

For much of America's history, lawyer advertising was forbidden. America inherited not only England's legal system, but also its attitude toward advertising legal services. Eighteenth-century English barristers found advertising vulgar and tasteless: "Advertising, it was believed, would be beneath their dignity. Since barristers were few and clients plentiful, there was no need for Madison Avenue."[2]

That attitude persisted in America through the nineteenth century, although there were exceptions (like in 1859 when Abraham Lincoln advertised his law practice in the newspaper[3]). In 1908, the ABA adopted its first Canons of Ethics.[4] Under the Canons, business cards and "law lists" were acceptable, but it was unprofessional to solicit business through, "circulars, advertisements, or by personal communications or interviews not warranted by personal relations." It was downright wicked to procure business, "by indirection through touters of any kind." And the ABA proclaimed "self-laudation" to be "intolerable," because such activity was said to "defy the traditions and lower the tone of our high calling."

Lawyer advertising in the U.S. is now a billion-dollar industry[5] that has spawned the likes of Jim "the Hammer" Shapiro ("You call, I hammer!"), Marco Palumbo ("The California Switchblade"), and Bryan Wilson, the now infamous Texas Law Hawk.

How did we get here?

A little more than 60 years after the ABA Canons, two Arizona lawyers—John Bates and Van O'Steen—opened a law office in Phoenix to serve people who had little money but did not qualify for legal aid.[6] At the time, lawyer advertising was banned in all 50 states.[7] In February 1976, Bates and O'Steen placed an ad in the Phoenix daily newspaper, advertising "legal services at very reasonable fees." The Arizona State Bar filed a complaint against Bates and O'Steen, who conceded that their actions violated Arizona's disciplinary rules, but claimed that Arizona's ban on attorney advertising violated their First Amendment rights. They took their case to the U.S. Supreme Court and won.

Justice Blackmun, writing for the majority, not only invalidated the Arizona disciplinary rule, but took the opportunity to wax poetic on American commerce: "Commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system."[8] Although it is doubtful that anyone watching Jim "The Hammer" Shapiro shout "I sue drunks!" ever shed a grateful tear at how Shapiro's advertisement promotes efficient resource allocation, Blackmun continued undeterred: "The disciplinary rule serves to inhibit the free flow of commercial information and to keep the public in ignorance."[9]

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The Arizona Bar offered a multitude of justifications for its rule: unrestricted advertising would be inherently misleading, stir up needless litigation, increase the costs of the profession and scare away new lawyers, decrease the quality of legal work and "tarnish the dignified public image of the profession" (that one seems particularly prophetic). The court shot them all down.

It is easy enough to criticize the Supreme Court for opening the floodgates and releasing a tide of unseemly and sometimes repulsive lawyer ads. But from an access-to-justice standpoint, the court took a principled stand in declaring that lawyers should be allowed to advertise just like everyone else, provided that the ads are not false or misleading. And Bates reminds us why the court was right. Bates and O'Steen were no switchblades. They honestly believed (as did the lawyer who argued the case for them) that people with moderate incomes ought to be able to find an affordable attorney.[10] This is the ad they placed in the Phoenix newspaper:

LEGAL SERVICES

AT VERY REASONABLE FEES

- **Divorce or legal separation--uncontested (both spouses sign papers)**

  $175.00 plus $20.00 court filing fee

- **Preparation of all court papers and instructions on how to do your own simple uncontested divorce**

  $100.00

- **Adoption--uncontested severance proceeding**

  $225.00 plus approximately $10.00 publication cost

The ad is not garish; it doesn't burst with obnoxious graphics or promises of foes reduced to ashes. It simply tells readers about the lawyers' services and the related fees. Protecting the ability of lawyers to communicate that kind of information is consistent not only with the First Amendment, but also with the Lawyer's Responsibilities set forth in the preamble to the Ohio Rules of Professional Conduct:

> A lawyer should seek improvement of the law, ensure access to the legal system, advance the administration of justice, and exemplify the quality of service rendered by the legal profession.[11]

Bates and O'Steen fought for the principle that the public ought to be able to get useful information about lawyers and their services. That is a principle worth remembering, even if the price of the principle is that a YouTube search for "bad lawyer ad" returns "about 461,000 results."

At least we have something to entertain us when we get tired of cat breading and the dramatic gopher.

[1] Mr. Morton, like many others, was cruelly deceived. The quote is not Voltaire's. It was apparently a creation of English historian Evelyn Beatrice Hall, at least according to the dogged internet sleuths at Quote Investigator. https://quoteinvestigator.com/2015/06/01/defend-say/
[2] Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 Willamette L. Rev. 221, 223-24 (1977).
[3] You can see the ad at http://www.rarenewspapers.com/view/554892.
[4] ABA Canon of Ethics 27 (1908), available at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/1908_code.authcheckdam.pdf
[5] http://www.abajournal.com/magazine/article/legal_advertising_viral_video (Kantar Media's Campaign Media Analysis group projects that in 2017 lawyers and law firms will spend $924 million on television ads alone).
[6] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 354 (1977).
[7] https://www.mprnews.org/story/2007/07/05/lawyer_advertising
[8] *Bates*, 433 U.S. at 364.
[9] *Id.* at 365.
[10] https://www.mprnews.org/story/2007/07/05/lawyer_advertising.
[11] Ohio R. Prof. Conduct, Preamble, Section 6.

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