**8.2: Advertising**

*Call me on the line. Call me, call me any, anytime. Call me, I'll arrive. You can call me any day or night. Call me.*[[1]](#footnote-0)

Attorneys are “professionals” and the bar is a “professional organization.” But how, if at all, should the professional status of attorneys affect their commercial behavior? Attorneys have fiduciary duties to their clients and professional duties as officers of the court. But do they have professional duties of decorum to the public as a whole? And how should the bar regulate the commercial activities of attorneys? When do professional norms justify regulation? And in whose interests should the bar regulate the commercial activities of attorneys: the public or its members?

**Advertising**

In the 19th century, attorneys regularly advertised their services in newspapers and magazines. Among other things, patent attorneys solicited patent applications from inventors nationwide. But in the early 20th century, state bar associations began to frown on advertising. And in 1908, [Canon 27](http://www.minnesotalegalhistoryproject.org/assets/ABA%20Canons%20(1908).pdf) of the American Bar Association’s original Canons of Professional Ethics explicitly discouraged advertisement and solicitation as “unprofessional.”

Gradually, the “ethical principles” motivating Canon 27 were refined by state and national bar associations to provide increasingly detailed norms governing what kinds of attorney advertising were permissible, from signage on a law office, to attorney directories, to business card and letterhead design. With the exception of patent and trademark attorneys and proctors in admiralty, most attorneys could not even publicly claim a specific area of practice.

Unsurprisingly, these limitations on attorney advertising were observed substantially in the breach. State bar associations were hard-pressed to enforce them and enterprising attorneys were wont to avoid them. Pressure for relaxation of the norms gradually mounted, but did not come to a head until 1977, when the Supreme Court finally weighed in.

[**Model Rule 7.1: Communications Concerning a Lawyer’s Services**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/)

**Information About Legal Services**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

[**Model Rule 7.1: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_1_communication_concerning_a_lawyer_s_services/comment_on_rule_7_1/)

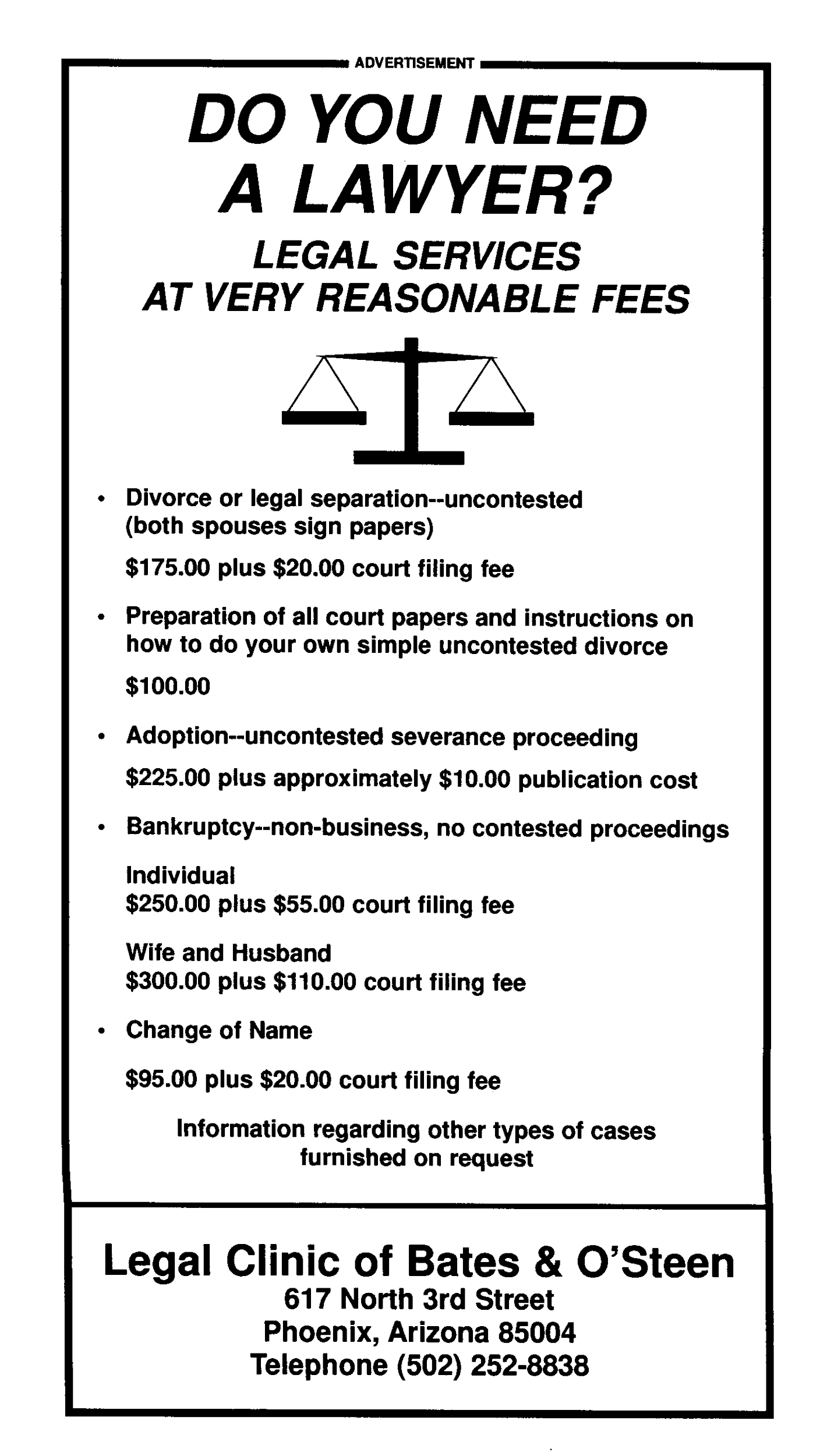
1. This Rule governs all communications about a lawyer’s services, including advertising. Whatever means are used to make known a lawyer’s services, statements about them must be truthful.
2. Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.
3. A communication that truthfully reports a lawyer’s achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case. Similarly, an unsubstantiated claim about a lawyer’s or law firm’s services or fees, or an unsubstantiated comparison of the lawyer’s or law firm’s services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[**Model Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/)

1. A lawyer may communicate information regarding the lawyer’s services through any media.
2. A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services except that a lawyer may:
   1. pay the reasonable costs of advertisements or communications permitted by this Rule
3. A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
   1. the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
   2. the name of the certifying organization is clearly identified in the communication.
4. Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

[**Model Rule 7.2: Comments**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_7_2_advertising/comment_on_rule_7_2/)

1. This Rule permits public dissemination of information concerning a lawyer’s or law firm’s name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.
2. Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer’s experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer’s services.



[***Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977)**](https://scholar.google.com/scholar_case?case=1176004052156446158)

**Summary:** Bates and O’Steen were members of the Arizona bar. In 1974, they opened a law office in Phoenix, and published a newspaper advertisement, offering basic legal services at fixed rates. The Arizona bar rules prohibited advertisements, and the Arizona Supreme Court ultimately censured Bates and O’Steen. The Supreme Court reversed, holding that the Arizona bar rule violated the 1st Amendment, because it unreasonably prohibited the dissemination of truthful information to the public. The dissent argued that the 1st Amendment should not prohibit the regulation of attorney advertising.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

As part of its regulation of the Arizona Bar, the Supreme Court of that State has imposed and enforces a disciplinary rule that restricts advertising by attorneys. This case presents two issues: whether §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, forbid such state regulation, and whether the operation of the rule violates the First Amendment, made applicable to the States through the Fourteenth.

I

Appellants John R. Bates and Van O’Steen are attorneys licensed to practice law in the State of Arizona. As such, they are members of the appellee, the State Bar of Arizona. After admission to the bar in 1972, appellants worked as attorneys with the Maricopa County Legal Aid Society.

In March 1974, appellants left the Society and opened a law office, which they call a “legal clinic,” in Phoenix. Their aim was to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid. In order to achieve this end, they would accept only routine matters, such as uncontested divorces, uncontested adoptions, simple personal bankruptcies, and changes of name, for which costs could be kept down by extensive use of paralegals, automatic typewriting equipment, and standardized forms and office procedures. More complicated cases, such as contested divorces, would not be accepted. Because appellants set their prices so as to have a relatively low return on each case they handled, they depended on substantial volume.

After conducting their practice in this manner for two years, appellants concluded that their practice and clinical concept could not survive unless the availability of legal services at low cost was advertised and, in particular, fees were advertised. Consequently, in order to generate the necessary flow of business, that is, “to attract clients,” appellants on February 22, 1976, placed an advertisement in the Arizona Republic, a daily newspaper of general circulation in the Phoenix metropolitan area. As may be seen, the advertisement stated that appellants were offering “legal services at very reasonable fees,” and listed their fees for certain services.

Appellants concede that the advertisement constituted a clear violation of Disciplinary Rule 2-101(B). The disciplinary rule provides in part:

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Upon the filing of a complaint initiated by the president of the State Bar, a hearing was held before a three member Special Local Administrative Committee. Although the committee took the position that it could not consider an attack on the validity of the rule, it allowed the parties to develop a record on which such a challenge could be based. The committee recommended that each of the appellants be suspended from the practice of law for not less than six months. Upon further review by the Board of Governors of the State Bar, the Board recommended only a one-week suspension for each appellant, the weeks to run consecutively.

Appellants then sought review in the Supreme Court of Arizona, arguing, among other things, that the disciplinary rule violated §§ 1 and 2 of the Sherman Act because of its tendency to limit competition, and that the rule infringed their First Amendment rights. The court rejected both claims. The plurality may have viewed with some skepticism the claim that a restraint on advertising might have an adverse effect on competition. But, even if the rule might otherwise violate the Act, the plurality concluded that the regulation was exempt from Sherman Act attack because the rule “is an activity of the State of Arizona acting as sovereign.” The regulation thus was held to be shielded from the Sherman Act by the state-action exemption.

Turning to the First Amendment issue, the plurality noted that restrictions on professional advertising have survived constitutional challenge in the past. Although recognizing that *Virginia Pharmacy Board v. Virginia Consumer Council* and *Bigelow v. Virginia* held that commercial speech was entitled to certain protection under the First Amendment, the plurality focused on passages in those opinions acknowledging that special considerations might bear on the advertising of professional services by lawyers. The plurality apparently was of the view that the older decisions dealing with professional advertising survived these recent cases unscathed, and held that Disciplinary Rule 2-101(B) passed First Amendment muster. Because the court, in agreement with the Board of Governors, felt that appellants’ advertising “was done in good faith to test the constitutionality of DR 2-101(B),” it reduced the sanction to censure only.

Of particular interest here is the opinion of Mr. Justice Holohan in dissent. In his view, the case should have been framed in terms of “the right of the public as consumers and citizens to know about the activities of the legal profession,” rather than as one involving merely the regulation of a profession. Observed in this light, he felt that the rule performed a substantial disservice to the public:

Obviously the information of what lawyers charge is important for private economic decisions by those in need of legal services. Such information is also helpful, perhaps indispensable, to the formation of an intelligent opinion by the public on how well the legal system is working and whether it should be regulated or even altered. The rule at issue prevents access to such information by the public.

Although the dissenter acknowledged that some types of advertising might cause confusion and deception, he felt that the remedy was to ban that form, rather than all advertising. Thus, despite his “personal dislike of the concept of advertising by attorneys,” he found the ban unconstitutional.

II The Sherman Act

We conclude that the Arizona Supreme Court's determination that appellants' Sherman Act claim is barred by the *Parker v. Brown* exemption must be affirmed.

III The First Amendment

B

The issue presently before us is a narrow one. First, we need not address the peculiar problems associated with advertising claims relating to the quality of legal services. Such claims probably are not susceptible of precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false. Appellee does not suggest, nor do we perceive, that appellants’ advertisement contained claims, extravagant or otherwise, as to the quality of services. Accordingly, we leave that issue for another day. Second, we also need not resolve the problems associated with in-person solicitation of clients—at the hospital room or the accident site, or in any other situation that breeds undue influence—by attorneys or their agents or “runners.” Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. Hence, this issue also is not before us. Third, we note that appellee’s criticism of advertising by attorneys does not apply with much force to some of the basic factual content of advertising: information as to the attorney’s name, address, and telephone number, office hours, and the like. The American Bar Association itself has a provision in its current Code of Professional Responsibility that would allow the disclosure of such information, and more, in the classified section of the telephone directory. We recognize, however, that an advertising diet limited to such spartan fare would provide scant nourishment.

The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed. Numerous justifications are proffered for the restriction of such price advertising. We consider each in turn:

1. The Adverse Effect on Professionalism. Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney's sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession’s service orientation, and irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve. Advertising is also said to erode the client’s trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client’s welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. In fact, the American Bar Association advises that an attorney should reach “a clear agreement with his client as to the basis of the fee charges to be made,” and that this is to be done “as soon as feasible after a lawyer has been employed.” If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.

Moreover, the assertion that advertising will diminish the attorney's reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession’s failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. Indeed, cynicism with regard to the profession may be created by the fact that it long has publicly eschewed advertising, while condoning the actions of the attorney who structures his social or civic associations so as to provide contacts with potential clients.

It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on “trade” as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow “above” trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

2. The Inherently Misleading Nature of Attorney Advertising. It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. 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—the very services advertised by appellants. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. The argument that legal services are so unique that fixed rates cannot meaningfully be established is refuted by the record in this case: The appellee State Bar itself sponsors a Legal Services Program in which the participating attorneys agree to perform services like those advertised by the appellants at standardized rates. Indeed, until the decision of this Court in *Goldfarb v. Virginia State Bar*, the Maricopa County Bar Association apparently had a schedule of suggested minimum fees for standard legal tasks. We thus find of little force the assertion that advertising is misleading because of an inherent lack of standardization in legal services.

The second component of the argument—that advertising ignores the diagnostic role—fares little better. It is unlikely that many people go to an attorney merely to ascertain if they have a clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar’s role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

3. The Adverse Effect on the Administration of Justice. Advertising is said to have the undesirable effect of stirring up litigation. The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling societal repose. There is even a suggestion of barratry.

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, “the middle 70% of our population is not being reached or served adequately by the legal profession.” Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange. The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar’s obligation to “facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.”

4. The Undesirable Economic Effects of Advertising. It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar's established members.

These two arguments seem dubious at best. Neither distinguishes lawyers from others, and neither appears relevant to the First Amendment. The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products; where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.

The entry-barrier argument is equally unpersuasive. In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

5. The Adverse Effect of Advertising on the Quality of Service. It is argued that the attorney may advertise a given “package” of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client's needs.

Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee’s own prepaid Legal Services Program. Even if advertising leads to the creation of “legal clinics” like that of appellants’—clinics that emphasize standardized procedures for routine problems—it is possible that such clinics will improve service by reducing the likelihood of error.

6. The Difficulties of Enforcement. Finally, it is argued that the wholesale restriction is justified by the problems of enforcement if any other course is taken. Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the overseeing of advertising will be burdensome.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys.

IV

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

Advertising that is false, deceptive, or misleading of course is subject to restraint. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising 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. Similar objections might justify restraints on in-person solicitation. 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. In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants’ truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I cannot join the Court’s holding that under the First Amendment “truthful” newspaper advertising of a lawyer’s prices for “routine legal services” may not be restrained. Although the Court appears to note some reservations, it is clear that within undefined limits today’s decision will effect profound changes in the practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened. Although the Court's opinion professes to be framed narrowly, and its reach is subject to future clarification, the holding is explicit and expansive with respect to the advertising of undefined “routine legal services.” In my view, this result is neither required by the First Amendment, nor in the public interest.

I

A

It has long been thought that price advertising of legal services inevitably will be misleading because such services are individualized with respect to content and quality and because the lay consumer of legal services usually does not know in advance the precise nature and scope of the services he requires. Although the Court finds some force in this reasoning and recognizes that “many services performed by attorneys are indeed unique,” its first answer is the optimistic expression of hope that few lawyers “would or could advertise fixed prices for services of that type.” But the Court's basic response in view of the acknowledged potential for deceptive advertising of “unique” services is to divide the immense range of the professional product of lawyers into two categories: “unique” and “routine.” The only insight afforded by the opinion as to how one draws this line is the finding that services similar to those in appellants’ advertisement are routine: “the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like.” What the phrase “the like” embraces is not indicated. But the advertising of such services must, in the Court's words, flow “both freely and cleanly.”

Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. In most situations it is impossible—both for the client and the lawyer—to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine. Neither quantitative nor qualitative measurement of the service actually needed is likely to be feasible in advance.

This definitional problem is well illustrated by appellants’ advertised willingness to obtain uncontested divorces for $195 each. A potential client can be grievously misled if he reads the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds, and tax liabilities; and the disposition of other property rights. The processing of court papers—apparently the only service appellants provide for $100—is usually the most straightforward and least demanding aspect of the lawyer’s responsibility in a divorce case. More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem. Although those professional functions are not included within appellants’ packaged routine divorce, they frequently fall within the concept of “advice” with which the lay person properly is concerned when he or she seeks legal counsel. The average lay person simply has no feeling for which services are included in the packaged divorce, and thus no capacity to judge the nature of the advertised product. As a result, the type of advertisement before us inescapably will mislead many who respond to it. In the end, it will promote distrust of lawyers and disrespect for our own system of justice.

The advertising of specified services at a fixed price is not the only infirmity of the advertisement at issue. Appellants also assert that these services are offered at “very reasonable fees.” That Court finds this to be an accurate statement since the advertised fee fell at the lower end of the range of customary charges. But the fee customarily charged in the locality for similar services has never been considered the sole determinant of the reasonableness of a fee. This is because reasonableness reflects both the quantity and quality of the service. A $195 fee may be reasonable for one divorce and unreasonable for another; and a $195 fee may be reasonable when charged by an experienced divorce lawyer and unreasonable when charged by a recent law school graduate. For reasons that are not readily apparent, the Court today discards the more discriminating approach which the profession long has used to judge the reasonableness of a fee, and substitutes an approach based on market averages. Whether a fee is “very reasonable” is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today’s decision is that lawyers may feel free to use a wide variety of adjectives—such as “fair,” “moderate,” “low-cost,” or “lowest in town”—to describe the bargain they offer to the public.

B

Even if one were to accept the view that some legal services are sufficiently routine to minimize the possibility of deception, there nonetheless remains a serious enforcement problem. The Court does recognize some problems. It notes that misstatements that may be immaterial in “other advertising may be found quite inappropriate in legal advertising” precisely because “the public lacks sophistication concerning legal services.” It also recognizes that “advertising claims as to the quality of services are not susceptible of measurement or verification” and therefore “may be so likely to be misleading as to warrant restriction.” After recognizing that problems remain in defining the boundary between deceptive and nondeceptive advertising, the Court then observes that the bar may be expected to have “a special role to play in assuring that advertising by attorneys flows both freely and cleanly.”

The Court seriously understates the difficulties, and overestimates the capabilities of the bar—or indeed of any agency public or private—to assure with a reasonable degree of effectiveness that price advertising can at the same time be both unrestrained and truthful. There are some 400,000 lawyers in this country. They have been licensed by the States, and the organized bars within the States—operating under codes approved by the highest courts acting pursuant to statutory authority—have had the primary responsibility for assuring compliance with professional ethics and standards. The traditional means have been disciplinary proceedings conducted initially by voluntary bar committees subject to judicial review. In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement in this country has proved to be extremely difficult.

The Court’s almost casual assumption that its authorization of price advertising can be policed effectively by the bar reflects a striking underappreciation of the nature and magnitude of the disciplinary problem. The very reasons that tend to make price advertising of services inherently deceptive make its policing wholly impractical. With respect to commercial advertising, MR. JUSTICE STEWART, concurring in *Virginia Pharmacy*, noted that since “the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth.” But there simply is no way to test “empirically” the claims made in appellants’ advertisement of legal services. There are serious difficulties in determining whether the advertised services fall within the Court's undefined category of “routine services”; whether they are described accurately and understandably; and whether appellants' claim as to reasonableness of the fees is accurate. These are not factual questions for which there are “truthful” answers; in most instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion. These difficulties with appellants’ advertisement will inhere in any comparable price advertisement of specific legal services. Even if public agencies were established to oversee professional price advertising, adequate protection of the public from deception, and of ethical lawyers from unfair competition, could prove to be a wholly intractable problem.

II

The Court emphasizes the need for information that will assist persons desiring legal services to choose lawyers. Under our economic system, advertising is the most commonly used and useful means of providing information as to goods and other services, but it generally has not been used with respect to legal and certain other professional services. Until today, controlling weight has been given to the danger that general advertising of such services too often would tend to mislead rather than inform. Moreover, there has been the further concern that the characteristics of the legal profession thought beneficial to society—a code of professional ethics, an imbued sense of professional and public responsibility, a tradition of self-discipline, and duties as officers of the courts—would suffer if the restraints on advertising were significantly diluted.

Pressures toward some relaxation of the proscription against general advertising have gained force in recent years with the increased recognition of the difficulty that low- and middle-income citizens experience in finding counsel willing to serve at reasonable prices. The seriousness of this problem has not been overlooked by the organized bar.

The Court observes, and I agree, that there is nothing inherently misleading in the advertisement of the cost of an initial consultation. Indeed, I would not limit the fee information to the initial conference. Although the skill and experience of lawyers vary so widely as to negate any equivalence between hours of service by different lawyers, variations in quality of service by duly licensed lawyers are inevitable. Lawyers operate, at least for the purpose of internal control and accounting, on the basis of specified hourly rates, and upon request—or in an appropriate case—most lawyers are willing to undertake employment at such rates. The advertisement of these rates, in an appropriate medium, duly designated, would not necessarily be misleading if this fee information also made clear that the total charge for the representation would depend on the number of hours devoted to the client’s problem—a variable difficult to predict. Where the price content of the advertisement is limited to the finite item of rate per hour devoted to the client’s problem, the likelihood of deceiving or misleading is considerably less than when specific services are advertised at a fixed price.

III

Although I disagree strongly with the Court’s holding as to price advertisements of undefined—and I believe undefinable—routine legal services, there are reservations in its opinion worthy of emphasis since they may serve to narrow its ultimate reach. First, the Court notes that it has not addressed “the peculiar problems associated with advertising claims relating to the quality of legal services.” There are inherent questions of quality in almost any type of price advertising by lawyers, and I do not view appellants’ advertisement as entirely free from quality implications. Nevertheless the Court's reservation in this respect could be a limiting factor.

Second, the Court notes that there may be reasonable restrictions on the time, place, and manner of commercial price advertising. In my view, such restrictions should have a significantly broader reach with respect to professional services than as to standardized products. This Court long has recognized the important state interests in the regulation of professional advertising. And as to lawyers, the Court recently has noted that “the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’” Although the opinion today finds these interests insufficient to justify prohibition of all price advertising, the state interests recognized in these cases should be weighed carefully in any future consideration of time, place, and manner restrictions.

Finally, the Court’s opinion does 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.” I view this as at least some recognition of the potential for deception inherent in fixed-price advertising of specific legal services. This recognition, though ambiguous in light of other statements in the opinion, may be viewed as encouragement to those who believe—as I do—that if we are to have price advertisement of legal services, the public interest will require the most particularized regulation.

IV

The area into which the Court now ventures has, until today, largely been left to self-regulation by the profession within the framework of canons or standards of conduct prescribed by the respective States and enforced where necessary by the courts. The problem of bringing clients and lawyers together on a mutually fair basis, consistent with the public interest, is as old as the profession itself. It is one of considerable complexity, especially in view of the constantly evolving nature of the need for legal services. The problem has not been resolved with complete satisfaction despite diligent and thoughtful efforts by the organized bar and others over a period of many years, and there is no reason to believe that today’s best answers will be responsive to future needs.

I am apprehensive, despite the Court’s expressed intent to proceed cautiously, that today’s holding will be viewed by tens of thousands of lawyers as an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis. Some lawyers may gain temporary advantages; others will suffer from the economic power of stronger lawyers, or by the subtle deceit of less scrupulous lawyers. Some members of the public may benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services “almost infinite in variety and nature.” Until today, in the long history of the legal profession, it was not thought that this risk of public deception was required by the marginal First Amendment interests asserted by the Court.

MR. JUSTICE REHNQUIST, dissenting in part.

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants’ advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

**Questions:**

1. What is the objection to attorney advertising? Is the concern that it will harm the public, harm the profession, or both?
2. The majority opinion considers the objections to attorney advertising, which include harming the profession, misleading the public, encouraging litigation, increasing the cost of legal services, lowering the quality of legal services, and unenforceability, and finds all of them wanting. Do you agree?
3. The dissent argues that attorney advertising will mislead the public, and that state bar associations can adopt reforms in a slower and more measured fashion, which will be better for the profession. Do you agree with its concerns?



[***The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005)**](https://scholar.google.com/scholar_case?case=16361152610493053674)

**Summary:** Pape and Chandler advertised their law firm on television, using an image of a pitbull and the telephone number 1-800-PIT-BULL. The Florida Bar filed a complaint against them, alleging that their advertisement improperly described the quality of their services and used irrelevant and misleading elements. The referee found no violation, concluding that the advertisement described qualities of the attorneys, not their services, and that the pitbull element was informational. The Florida Supreme Court disagreed, holding that the pitbull motif made claims about the quality of their services, was not informational, and was in poor taste, and therefore was not protected by the 1st Amendment.

PARIENTE, C.J.

In this case we impose discipline on two attorneys for their use of television advertising devices that violate the Rules of Professional Conduct. These devices, which invoke the breed of dog known as the pit bull, demean all lawyers and thereby harm both the legal profession and the public's trust and confidence in our system of justice.

We conclude that attorneys Pape and Chandler violated the Rules Regulating the Florida Bar by using the image of a pit bull and displaying the term “pit bull” as part of their firm’s phone number in their commercial. Further, because the use of an image of a pit bull and the phrase “pit bull” in the firm's advertisement and logo does not assist the public in ensuring that an informed decision is made prior to the selection of the attorney, we conclude that the First Amendment does not prevent this Court from sanctioning the attorneys based on the rule violations. We determine that the appropriate sanctions for the attorneys’ misconduct are public reprimands and required attendance at the Florida Bar Advertising Workshop.

BACKGROUND AND PROCEDURAL HISTORY

On January 12, 2004, The Florida Bar filed complaints against the attorneys, alleging that their law firm’s television advertisement was an improper communication concerning the services provided, in violation of the Rules of Professional Conduct. The advertisement included a logo that featured an image of a pit bull wearing a spiked collar and prominently displayed the firm’s phone number, 1-800-PIT-BULL. The Bar asserted that this advertisement violated the 2004 version of Rules Regulating the Florida Bar 4-7.2(b)(3) and 4-7.2(b)(4), which state:

(3) Descriptive Statements. A lawyer shall not make statements describing or characterizing the quality of the lawyer’s services in advertisements and written communications; provided that this provision shall not apply to information furnished to a prospective client at that person’s request or to information supplied to existing clients.

(4) Prohibited Visual and Verbal Portrayals. Visual or verbal descriptions, depictions, or portrayals of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative.

The referee found that the attorneys did not violate rule 4-7.2(b)(3), relying on the distinction that the logo and telephone number “describe qualities of the respondent attorneys” but do not describe or characterize “the quality of the lawyer services.” The referee also rejected the Bar’s assertion that the ad violated rule 4-7.2(b)(4). After noting that pit bulls are perceived as “loyal, persistent, tenacious, and aggressive,” the referee found these qualities

objectively relevant to the selection of an attorney as they are informational, because these are qualities that a consuming public would want in a trial lawyer and the ad is not improperly manipulative. The advertisement is tastefully done, the logo is not unduly conspicuous in its replacement of an ampersand between respondents’ names atop the TV screen, and the large print 1-800 number is an effective mnemonic device tailored to maximize responses from potential clients.

The referee also concluded that the ad was protected speech and therefore that an interpretation of rules to prohibit the ad would render the rules unconstitutional as applied.

ANALYSIS

A. Violation of Attorney Advertising Rules

As a preliminary matter, the pit bull logo and 1-800-PIT-BULL telephone number in the ad by the attorneys do not comport with the general criteria for permissible attorney advertisements set forth in the comments to section 4-7 of the Rules of Professional Conduct. The rules contained in section 4-7 are designed to permit lawyer advertisements that provide objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types of cases the lawyer handles. The comment to rule 4-7.1 provides that “a lawyer’s advertisement should provide only useful, factual information presented in a nonsensational manner. Advertisements using slogans fail to meet these standards and diminish public confidence in the legal system.” The television commercial at issue here uses both a sensationalistic image and a slogan, contrary to the purpose of section 4-7.

More specifically, the attorneys’ ad violated rule 4-7.2(b)(3), which prohibits the use of statements describing or characterizing the quality of the lawyer’s services. In *Florida Bar v. Lange*, we approved the referee’s finding that an advertisement that stated “When the Best is Simply Essential” violated the predecessor provision to rule 4-7.2(b)(3) because it was self-laudatory and purported to describe the quality of the lawyer’s services. In this case, the simultaneous display of the pit bull logo and the 1-800-PIT-BULL phone number conveys both the characteristics of the attorneys and the quality of the services they purport to provide. At the very least, the printed words and the image of a pitbull in the television commercial could certainly be perceived by prospective clients as characterizing the quality of the lawyers’ services.

On this question we disagree with the referee, who distinguished the “quality of the lawyer's services” from the qualities (i.e., traits or characteristics) of the lawyer. We conclude that this is an artificial distinction which unduly limits the scope of the rule by interpreting “quality of the lawyer’s services” in the narrowest sense. From the perspective of a prospective client unfamiliar with the legal system and in need of counsel, a lawyer’s character and personality traits are indistinguishable from the quality of the services that the lawyer provides. A courteous lawyer can be expected to be well mannered in court, a hard-working lawyer well prepared, and a “pit bull” lawyer vicious to the opposition. In the attorneys’ advertisement, the pit bull image appears in place of an ampersand between the attorneys’ names, and the ad includes the use of the words “pit bull” in the attorneys’ telephone number in large capital letters. The combined effect of these devices is to lead a reasonable consumer to conclude that the attorneys are advertising themselves as providers of “pit bull”-style representation. We consider this a characterization of the quality of the lawyers’ services in violation of rule 4-7.2(b)(3).

We also conclude that the ad violates rule 4-7.2(b)(4), which requires that visual or verbal depictions be “objectively relevant” to the selection of an attorney, and prohibits depictions that are “deceptive, misleading, or manipulative.” The comment to this rule explains that it

prohibits visual or verbal descriptions, depictions, or portrayals in any advertisement which create suspense, or contain exaggerations or appeals to the emotions, call for legal services, or create consumer problems through characterization and dialogue ending with the lawyer solving the problem. Illustrations permitted are informational and not misleading, and are therefore permissible. As an example, a drawing of a fist, to suggest the lawyer’s ability to achieve results, would be barred. Examples of permissible illustrations would include a graphic rendering of the scales of justice to indicate that the advertising attorney practices law, a picture of the lawyer, or a map of the office location.

The logo of the pit bull wearing a spiked collar and the prominent display of the phone number 1-800-PIT-BULL are more manipulative and misleading than a drawing of a fist. These advertising devices would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy. The suggestion is inherently deceptive because there is no way to measure whether the attorneys in fact conduct themselves like pit bulls so as to ascertain whether this logo and phone number convey accurate information.

In addition, the image of a pit bull and the on-screen display of the words “PIT-BULL” as part of the firm’s phone number are not objectively relevant to the selection of an attorney. The referee found that the qualities of a pit bull as depicted by the logo are loyalty, persistence, tenacity, and aggressiveness. We consider this a charitable set of associations that ignores the darker side of the qualities often also associated with pit bulls: malevolence, viciousness, and unpredictability. Further, although some may associate pit bulls with loyalty to their owners,[[2]](#footnote-1) the manner in which the pit bull is depicted in the attorneys' ad in this case certainly does not emphasize this association. The dog, which is wearing a spiked collar, directly faces the viewer and is shown alone, with no indication that it is fulfilling its traditional role as “man's best friend.”

Pit bulls have a reputation for vicious behavior that is borne of experience. According to a study published in the Journal of the American Veterinary Medical Association in 2000, pit bulls caused the greatest number of dog-bite-related fatalities between 1979 and 1998. The dangerousness of pit bulls has also been recognized in a number of court decisions.

In *State v. Peters*, the Third District Court of Appeal upheld a City of North Miami ordinance imposing substantial insurance, registration, and confinement obligations on owners of pit bulls. The City of North Miami ordinance contained findings that pit bulls have a greater propensity to bite humans than all other breeds, are extremely aggressive towards other animals, and have a natural tendency to refuse to terminate an attack once it has begun. The current Miami-Dade County ordinance provides that it is illegal to own a pit bull.

This Court would not condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar, or harm the opposing party, conduct that would violate our Rules of Professional Conduct. Yet this is precisely the type of unethical and unprofessional conduct that is conveyed by the image of a pit bull and the display of the 1-800-PIT-BULL phone number. We construe the prohibitions on advertising statements that characterize the quality of lawyer services and depictions that are false or misleading to prohibit a lawyer from advertising his or her services by suggesting behavior, conduct, or tactics that are contrary to our Rules of Professional Conduct.

Further, we reject the referee’s finding that the use of the words “pit bull” in the phone number is merely a mnemonic device to help potential clients remember the attorneys’ number. Phrase-based phone numbers are memorable because of the images and associations they evoke. The “1-800-PIT-BULL” phone number sticks in the memory precisely because of the image of the pit bull also featured in the ad, the association of pit bulls with the characteristics discussed herein, and the “go for the jugular” style of advocacy that some persons attribute to lawyers. In short, this is a manipulative and misleading use of what would otherwise be content-neutral information to create a nefarious association.

Indeed, permitting this type of advertisement would make a mockery of our dedication to promoting public trust and confidence in our system of justice. Prohibiting advertisements such as the one in this case is one step we can take to maintain the dignity of lawyers, as well as the integrity of, and public confidence in, the legal system. Were we to approve the referee’s finding, images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system, and consistent with our Rules of Professional Conduct, this type of non-factual advertising cannot be permitted. We therefore conclude that the 1-800-PIT-BULL ad aired by the attorneys violates rules 4-7.2(b)(3) and 4-7.2(b)(4).

B. First Amendment Protection of Lawyer Advertising

We also disagree with the referee’s conclusion that the application of rules 4-7.2(b)(3) and 4-7.2(b)(4) to prohibit this advertisement violates the First Amendment. Lawyer advertising enjoys First Amendment protection only to the extent that it provides accurate factual information that can be objectively verified. This thread runs throughout the pertinent United State Supreme Court precedent.

The seminal lawyer advertising case is *Bates v. State Bar of Arizona*, which involved the advertising of fees for low cost legal services. In *Bates*, the Supreme Court held generally that attorney advertising “may not be subjected to blanket suppression,” and more specifically that attorneys have the constitutional right to advertise their availability and fees for performing routine services. The cost of legal services, the Supreme Court concluded, would be “relevant information needed to reach an informed decision.”

After *Bates*, in *R.M.J.* the Supreme Court considered a Missouri rule that restricted lawyer advertising to newspapers, periodicals, and the yellow pages, and limited the content of these advertisements to ten categories of information (name, address and telephone number, areas of practice, date and place of birth, schools attended, foreign language ability, office hours, fee for an initial consultation, availability of a schedule of fees, credit arrangements, and the fixed fee charged for specified “routine” services). Even the manner of listing areas of practice was restricted to a prescribed nomenclature. In violation of the state restrictions, the lawyer advertised areas of practice that did not use the prescribed terminology, listed the states in which the lawyer was licensed, specified that he was admitted to practice before the United States Supreme Court, and did not restrict the recipients of announcement cards to lawyers, clients, former clients, personal friends, and relatives.

Writing for a unanimous Court, Justice Powell summarized the commercial speech doctrine in the context of advertising for professional services:

Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the 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.

In holding the Missouri restrictions per se invalid as applied to the lawyer, the Supreme Court concluded that the state had no substantial interest in prohibiting a lawyer from identifying the jurisdictions in which he or she was licensed to practice. The Court noted that this “is factual and highly relevant information.” Although the Court found the lawyer’s listing in large capital letters that he was a member of the Bar of the Supreme Court of the United States to be “somewhat more troubling” and in “bad taste,” this alone could not be prohibited without a finding by the Missouri Supreme Court that “such a statement could be misleading to the general public unfamiliar with the requirements of admission to the Bar of this Court.”

In *Zauderer*, the Supreme Court addressed whether a state could discipline a lawyer who ran newspaper advertisements containing nondeceptive illustrations and legal advice. One advertisement published the lawyer’s willingness to represent women injured from the use of the Dalkon Shield intrauterine device. The parties had stipulated that the advertisement was entirely accurate.

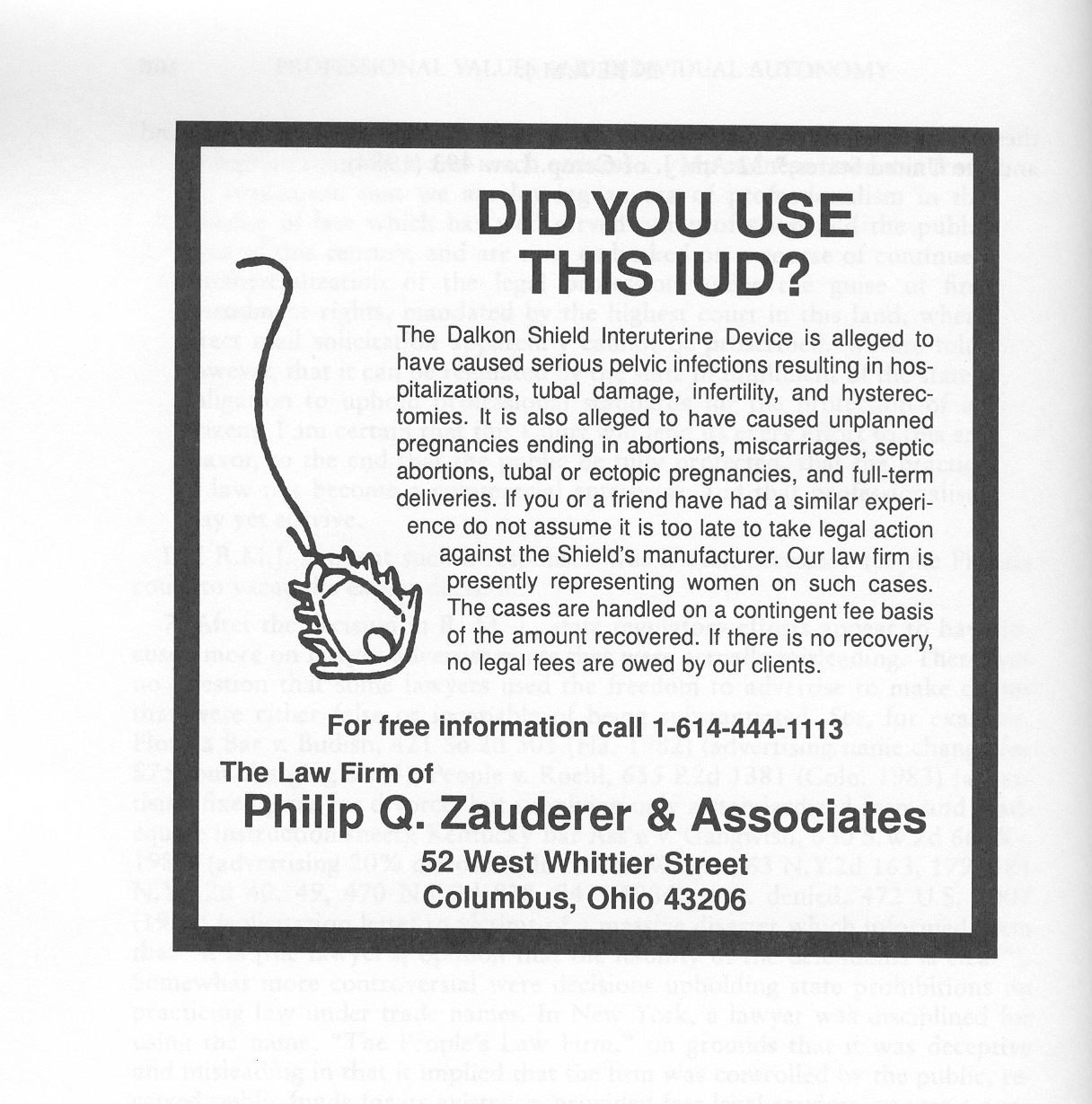
In holding that the lawyer could not be disciplined on the basis of the content of his advertisement, the Supreme Court observed that the advertisement did not promise results or suggest any special expertise but merely conveyed that the lawyer was representing women in Dalkon Shield litigation and was willing to represent other women with similar claims. Turning to the lawyer’s use of an illustration of the Dalkon Shield, the Court first held that illustrations are entitled to the same First Amendment protection as that afforded to verbal commercial speech. The Court then concluded that “because the illustration for which appellant was disciplined is an accurate representation of the Dalkon Shield and has no features that are likely to deceive, mislead, or confuse the reader, the burden is on the State to present a substantial governmental interest justifying the restriction.”

The most recent United States Supreme Court decision to address restrictions on the content of lawyer advertising involved an attorney who held himself out as certified by the National Board of Trial Advocacy. The state supreme court had concluded that the claim of NBTA certification was “misleading because it tacitly attests to the qualifications of petitioner as a civil trial advocate.” The state court had not addressed “whether NBTA certification constituted reliable, verifiable evidence of petitioner's experience as a civil trial advocate.” After applauding the development of state and national certification programs, a plurality of the Supreme Court concluded that the facts as to NBTA certification were “true and verifiable.” The plurality pointed out the important “distinction between statements of opinion or quality and statements of objective facts that may support an inference of quality.” A majority of the Court concluded that the letterhead was not actually or inherently misleading, and thus that the attorney could not be prohibited from holding himself out as a civil trial specialist certified by the NBTA.

The pit bull logo and “1-800-PIT-BULL” phone number are in marked contrast to the illustration of the Dalkon Shield intrauterine device at issue in *Zauderer*, which the United States Supreme Court found to be “an accurate representation and have no features that are likely to deceive, mislead, or confuse the reader.” The Dalkon Shield illustration informed the public that the lawyer represented clients in cases involving this device. The “pit bull” commercial produced by the attorneys in this case contains no indication that they specialize in either dog bite cases generally or in litigation arising from attacks by pit bulls specifically. Consequently, the logo and phone number do not convey objectively relevant information about the attorneys’ practice. Instead, the image and words “pit bull” are intended to convey an image about the nature of the lawyers’ litigation tactics. We conclude that an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment.

CONCLUSION

We disapprove the referee’s finding that the television commercial at issue is constitutionally protected speech that does not violate our attorney advertising rules. We find John Robert Pape and Marc Andrew Chandler guilty of violating the Rules Regulating the Florida Bar. We order that each attorney receive a public reprimand, which shall be administered by the Board of Governors of The Florida Bar upon proper notice to appear. We also direct Pape and Chandler to attend and complete the Florida Bar Advertising Workshop within six months of the date of this opinion.



**Questions:**

1. This disciplinary action prompted a great deal of discussion, much of it critical of the Florida Supreme Court’s decision. You can read more about the case in [Legal Affairs](http://www.legalaffairs.org/issues/January-February-2005/pj_janfeb05.msp), the [Sun-Sentinel](https://www.sun-sentinel.com/news/fl-xpm-2005-11-18-0511171371-story.html), the [Florida Bar News](https://www.floridabar.org/the-florida-bar-news/1-800-pit-bull-is-for-real/), and the [Broward-Palm Beach New Times](https://www.browardpalmbeach.com/news/dont-hide-the-g-r-r-r-6316678), among [other places](https://blogs.harvard.edu/ethicalesq/2005/11/17/fla-high-court-puts-down-pape-chandlers-pit-bull/).
2. You can watch the television advertisements for Pape & Chandler [here](https://www.youtube.com/watch?v=sXpVAyfGGw8) and [here](https://www.youtube.com/watch?v=KX1GGGqRDm8). Do you find them misleading? Do you find them in poor taste? Do you think the Florida Bar and the Florida Supreme Court objected to the advertisements primarily because they made misleading claims about the quality of the legal services provided, because they found the advertisements in poor taste, or because the advertisements criticize other attorneys?
3. Are the Pape & Chandler advertisements primarily claims about the quality of the legal services they provide or an effort to establish a brand identity for their legal practice? Should attorneys be permitted to use branding to promote their businesses?
4. The oldest and largest law firms in the United States rely on the recognition and goodwill associated with their firm names to communicate quality to the consumers of legal services. Should newer and smaller law firms also be required to rely only on their firm names or should they be permitted to pursue other branding strategies? If branding is permissible, should state bars limit what kinds of branding are permissible? Are limitations on law firm branding consistent with the First Amendment?
5. In [*Matal v. Tam*, 137 S.Ct. 1744 (2017)](https://scholar.google.com/scholar_case?case=14085180484211709676), the Supreme Court held that the Trademark Office’s refusal to register a trademark on the ground that the mark was disparaging violated the First Amendment. Can state-imposed limits on law firm branding survive *Tam*?
6. Kentucky attorney [Darryl Isaacs](https://www.isaacsandisaacs.com/) refers to himself as “The Hammer” and is well-known for his advertisements, which feature him in parodies of popular television shows and movies like Captain America, Game of Thrones, and Transformers. You can watch the commercials on his [website](https://www.isaacsandisaacs.com/commercials). Is this branding and advertising consistent with the Florida Supreme Court’s decision in *Pape*? Do you find them misleading? Do you find them distasteful? Should the Kentucky Bar be able to prohibit branding and advertisement of this kind?



1. Blondie, *Call Me* (1980). [↑](#footnote-ref-0)
2. Even the perception of loyalty may be unwarranted. In June, a twelve-year old boy was mauled to death in San Francisco by his family’s two pit bulls. That same month a Bay Area woman suffered severe injuries in an attack by her nine-year-old pit bull. A St. Louis man was killed in May by his two pit bulls that had “no apparent history of aggression and were described as well-kept.” [↑](#footnote-ref-1)