The Little Ad That Changed Everything

1977 case had a profound impact on U.S. law practice

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The day after the U.S. Supreme Court rendered its decision 25 years ago that allowed lawyers to advertise, the losers, the Arizona Bar Association, held a news conference in its Phoenix office. The winners weren't invited, but John R. Bates and Van O'Steen showed up anyway.

The media quickly turned away from the Bar's hand-wringing over the future of the legal profession and grouped around the law partners whose single ad for their low-cost legal clinic had prompted the challenge. Their first question, O'Steen recalls, was how would *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), change the legal profession.

O'Steen says the answer was easy. "We said we expected that consumer-based law firms would grow much larger, thereby opening the legal system to people who otherwise have no access and that growth would be based on advertising," he says.

"And that has happened."

What O'Steen did not foresee was a revolution that changed the legal profession to a service-oriented business requiring the same marketing, investment, cost control and production systems as any other profession. The changes spurred by *Bates* have taken hold across the legal community, even in the old-line firms that once tried to get the decision reversed.

"I would have never predicted the extent of advertising among the large corporate firms. It seems almost everybody is advertising now, in one way or another," says O'Steen, whose Phoenix firm became Van O'Steen and Partners after Bates moved to Ohio.

O'Steen and Bates, former attorneys with the Maricopa County Legal Aid Society, opened their legal clinic in March 1974. Their aim was to provide legal services to low- and moderate-income persons who did not qualify for government-funded legal aid. They kept their fees modest by relying on paralegals, standardized procedures and boilerplate forms. Because of the low return, they needed a lot of clients to break even. O'Steen says they realized that only advertising would increase volume.

Using ads would mean challenging the American Bar Association's 1908 ban on lawyer advertising, adopted by the states. They went ahead, ordering up a display ad from *The Arizona Republic*.

Justice William Blackmun, delivering the 5-4 opinion on June 27, 1977, wrote that the State Bar Association of Arizona could not prevent lawyers from advertising for "routine legal services" because such advertising "helped to inform the public and allocate resources in our free enterprise system."

Some lawyers see the case as having changed the course of U.S. law practice.

"Before *Bates*, the legal profession had as its hallmark community service, helping people," says Benjamin H. Hill III, a partner in Hill, Ward & Henderson of Tampa, Fla. "It's now about dollars and cents. We started down that slippery slope with advertising. Clearly, it's a sign of the times, but I would say that *Bates* is the single most important decision in our profession."

For almost 20 years, as president of the Florida Bar Association and chairman of its special committee on lawyer advertising, Hill spearheaded that state's effort to rein in lawyer advertising through regulation that was challenged and, for the most part, overruled in court.

Bar associations around the country closely monitored the Florida experience and were prepared to follow its example, had the state Bar been successful.

The days in which personal injury attorneys sponsor cars in demolition derbies or drive hearses to shill no-frill wills have passed, Hill says, because the marketplace proved that those efforts do not bring in new clients.

But he is still a foe of advertising, which, he says, undermines public confidence in the legal system.

There is evidence that something is undermining it. A Columbia University Law School survey on attitudes toward lawyers, released in April, found that 60 percent of the respondents said lawyers were overpaid, 39 percent thought they were dishonest and 41 percent felt they did not perform a beneficial role.

As public confidence erodes, fewer people may rely on the rule of law to resolve disputes, Hill says. "In terms of the atmosphere, the *Bates* minority had it pegged." Dissenters on the high court predicted that legal ads would soon include uncheckable claims that would erode public confidence in the law.

Hill recalls an ad by Hollywood, Fla., attorney David W. Singer, in which a young boy is nicked while sitting in a barber's chair. The boy whips his head around and tells the barber, "If you do that again, I'll call David Singer."

"That's just the wrong message to convey," Hill says. "That's generating litigation. If people feel like they have a case they'll have no trouble finding a lawyer. But some of these ads suggest that they can make money if they have taken fen-phen or something even if they felt no ill effects and had no bad results."

The settlement fund for the diet drug fen-phen has ballooned from $1 billion to $13 billion. Wyeth, the compound's manufacturer, asserts that it traced the increase to the mass recruitment of new claimants through television and newspaper advertising.

The new claimants have shown no injuries from taking the drug and would not have otherwise been involved in the suit, the company maintains.

Bates "has changed the picture of supply and demand. More lawsuits today are prompted by missives sent out by lawyers than come from people with complaints," says Victor Schwartz, general counsel for the American Tort Reform Association in Washington, D.C. "Advertising gets away from the merits of the claim and goes more to the results possible. It creates a lottery mentality."

The lawyer who had the barbershop ad, however, says humor in his advertisements is an effective way of portraying himself as accessible and willing to "take on the fight of the common man."

Unlike the clientele Hill has targeted through work at charity events and at the country clubs, Singer asserts, low- and moderate-income people usually don't have social connections with lawyers and therefore find the legal system closed to them. They want attorneys they can trust and can view as friends. They don't play golf with lawyers, so they have to rely on advertising, says Singer, of Singer, Farbman & Associates.

"Its so hypocritical," Singer says. "These guys market at the country club but they call marketing on television crass and demeaning to the profession. You see tasteless advertisements, yeah, maybe for a while, but the marketplace will induce those lawyers to pull those ads because they won't be effective."

Singer and his television ads were the target of ridicule by Hill and his committee during the Florida bar's efforts in the 1980s and early 1990s to overturn or, at least, restrict lawyer advertising. Not only was the established bar seeking to overturn *Bates*, but trial lawyer groups also preached that attorney advertising was bad and must be outlawed again.

"Public confidence, professional credibility, unfilled expectations -- these phrases are all stalking horses," says Singer. "This has always been a money issue. Lawyer advertising was taking business away from these firms that

used traditional marketing methods.

"The days of fighting lawyer advertising are over. Times have changed. There are younger, newer members on the bar associations and the trial lawyer associations who aren't afraid of competition. The genie is out of the bottle."

Arnie Malham, president of CJ Advertising LLC in Nashville, Tenn., which produces advertising campaigns for 26 personal injury lawyers in 60 markets around the country, points to the 2000 winter convention of the Association of Trial Lawyers of America (ATLA), held in New Orleans, as the time and place that *Bates* won wide acceptance.

"From the moment I got to New Orleans, and throughout my stay, I and the lawyers I represent went from feeling like outsiders to honored guests," Malham says. "Dinners, drinks, lunches, offers of plane rides, promises of riches, and 'good ole boy' lawyers carrying on as if we had all been best friends for years. Handshakes, pats on the back, laughing with us, instead of at us."

The reason was that the lawyers who advertise had shown an ability to bring in new clients, he says. During a July 22 speech at this year's ATLA convention in Atlanta, Malham said that business concerns overshadowed the profession's previous prejudices.

"The 'good ole boys' became known as the 'litigators' and the 'ambulance chasers' became known as the 'marketers' or 'contract fulfillers,' " he said. "Now, in a new era, many of them have teamed together to go after every pharmaceutical with a side effect and every product that ever hurt a hair on your head." In an interview, he says, "I suspect this trend will continue. Litigation firms will continue to court advertising firms in order to generate referrals."

As a legal marketing consultant to large corporate firms, Ross Fishman of Ross Fishman Marketing Inc. of Highland Park, Ill., says he works in an industry founded solely by *Bates*. He says the law profession began changing in the early 1980s as the amount of work increased. Clients saw their legal expenditures going up and sought ways to economize. This fueled competition and shoved many firms into adapting a business model, which allowed them to operate more efficiently.

Upon graduating from Emory University School of Law in 1985, Fishman joined Winston & Strawn in Chicago. He was expected to bill 1,800 hours annually. Unlike previous generations, this class of associates was given training on how to make contacts, give speeches and write articles -- in short, to bring in more business.

"We knew that there were billable hours requirements and business generation requirements that the generation before us [was] not required to do," says Fishman, who left law practice in the early 1990s to open his consulting firm.

As these associates became partners, the prejudice against legal marketing subsided, he said. It's not that the new guard doesn't share the "noble profession" illusions of their older partners, but they are persuaded by the bottom line, which is more immediately accessible through traditional business practices. This widespread adoption of a business model for the practice of law has moved *Bates* from distaste to acceptance, says William E. Hornsby Jr., author of "Marketing and Legal Ethics," who is considered an authority on lawyer advertising.

"The *Bates* decision has been far more profound in the development of marketing in large corporate law firms," Hornsby says. With the old-line firms embracing the business model, just as Bates and O'Steen did 25 years ago, the survival of lawyer advertising seems assured, he says.

For two decades, *Bates* was under continual attack. About a dozen appeals to the Supreme Court, from a dozen different angles, attempted to chip at it. All went down to defeat, mostly 5-4.

"The right to commercial free speech by lawyers is a very tenuous one that has always been one vote away," says Hornsby, staff counsel for the American Bar Association Division for Legal Services in Chicago. "That's kind of the nuclear bomb of this issue. It's not out of the question that *Bates* will be repealed if there is a change in the Court, but we've grown comfortable with the fact that the bomb hasn't dropped in the last 25 years."