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Life in the Early Days of Lawyer Advertising: Personal Recollections of a Bates Baby The Fifth Annual Symposium on Legal Malpractice and Professional Responsibility: Foreword.

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FOREWORD

LIFE IN THE EARLY DAYS OF LAWYER ADVERTISING: PERSONAL RECOLLECTIONS OF A *BATES* BABY

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In that period just after the Vietnam War had been lost and before the Cold War had been won, I found myself propelled by powerful forces into the legal profession. Armed with a history degree and veteran's educational benefits, law presented a very attractive opportunity that proved irresistible.

After considerable soul-searching, a more-or-less objective inventory of my interests and aptitudes, and some research into a profession that was completely unknown to me, I took the LSAT and applied to several law schools during the waning months of my military service. After a brief reintroduction into the "real world," I found myself entering law school in a class swelled by people wearing old Army field jackets and letting their hair grow for the first time in years. Perhaps because of my life experiences, I found a real joy in studying law—and in law school itself—that I suspect is shared by many lawyers, but admitted by few.

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My interest in the law was recent, but I had long been drawn to the teaching profession. That interest remained strong through law school, and with the kind of hubris that is often found among the young and the ignorant, I hoped one day to teach law. I was determined, however, to experience law practice for at least five years before making any serious effort to find a teaching position. I was convinced that my own law professors who had practiced for a time brought an added dimension to their teaching that I wanted to share. And practice was what led me to law school in the first place. I had enjoyed helping people negotiate the rules and bureaucracy of government service, and I hoped to do the same with clients.

Upon graduation, I accepted a partnership with a sole practitioner for whom I had clerked since my first year of law school. Some of my classmates were aghast that I would not pursue a position, and the salary, with a large civil firm in the metropolis where I lived. Unlike many of my rational classmates, I found that I just did not care who got Blackacre, or which big corporation won the antitrust case. Those things were often intellectually interesting, but to a young lawyer who had never met an attorney until his mid-twenties, it just did not feel like *real* lawyering. I wanted to stand between the government and a person accused of crime, or to help people with marital problems or consumer disputes.

For those who have not experienced the kind of practice I had, I suspect that lawyer advertising seems at best unnecessary, and at worst, demeaning and lower class. In fact, I often have been told that by higher-class lawyers. I had been licensed less than a year when the Supreme Court decided *Bates v. State Bar of Arizona*,¹ the ruling that lawyer advertising is commercial speech subject to First Amendment protection.²

As a brand-new Texas practitioner, I was subject to a Texas disciplinary statute that provided:

A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone

1. 433 U.S. 350 (1977).

2. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf³

No one in my metropolitan area was advertising, and that did not change immediately after *Bates* was decided. The Texas statute was still on the books, where it remained—despite being clearly unconstitutional—for five years after the Supreme Court’s ruling.⁴

In theory, Texas courts would not enforce a provision so clearly at odds with *Bates*, but you could never tell. In a case unrelated to lawyer advertising, I already had made the mistake of citing a United States Supreme Court opinion to a Texas district court judge. The judge looked me up and down, and said in a north Texas drawl, “Counselor, I don’t care *what* the Yew Nited States Soopreme Court says. If you don’t have a Texas case, I don’t want to hear it.” I was making a federal preemption argument, so I did not have a Texas case, but I learned something about precedent that isn’t usually taught in law school.

Responding to *Bates*, the Texas State Bar Board of Directors adopted an official statement in a special meeting held in September 1977:

All present disciplinary rules remain in effect, except insofar as limited newspaper advertising is allowed by the *Bates* decision. Any attorney violating such existing rules is subject to disciplinary action by the appropriate grievance committee. Attorneys who desire to advertise should study the opinion carefully, since all advertising which exceeds the narrow bounds of the *Bates* holding continues to be prohibited.⁵

The Board also noted in its official statement that, “advertising by individual lawyers, as distinguished from institutional advertising by bar associations, lawyer referral services, and group legal service plans, is *something that should be discouraged* in the public

3. TEX. STATE BAR R., art. XII, § 8, DR 2-101(B) (Tex. Code of Prof’l Resp.), 34 TEX. B.J. 758 (1971, superseded 1990).

4. In July 1982, the Texas Supreme Court issued its order implementing lawyer advertising guidelines, which became effective on September 1 of that same year. See *Lawyer Advertising Guidelines*, 45 TEX. B.J. (Special Insert) (1982) (publishing the Texas Supreme Court’s newly adopted Disciplinary Rules 2-101 through 2-105). In 1978 and 1980 referenda to change the advertising rules failed. See *infra* note 7 (outlining the history of the referenda).

5. *Advertising Statement Adopted by State Bar Board of Directors*, 40 TEX. B.J. 906, 906 (1977).

interest.”⁶ This cautionary statement clearly was neither an endorsement of lawyer advertising, nor a point that was lost on new lawyers who were just being initiated into the legal culture.

General practice in a bedroom community of a large city often is not lucrative, or even sustaining, for a new lawyer with no ties to the community and no ready source of clients. A willingness to work hard is not very useful if there is no work to do. Even a history major could see that this was a supply and demand problem. I had lots to supply, but there was little demand.

In order to expand my market, I teamed up with an entrepreneurial law school classmate who also had a “regular” law job, to create a new kind of practice. It was one in which we would be managers, but not the attorneys providing the legal services, and we financed the venture from our traditional “day jobs” as lawyers.

After hiring an even-more-recent law graduate to staff the new office, we opened a “Legal Clinic” in the midst of a middle-class neighborhood. Our legal clinic was not a practice for the indigent, but rather for the near-indigent and others who needed low-cost, simple legal services in a convenient location with evening and weekend hours. We avoided contested matters when we could, and over the life of the clinic we served a lot of people who were both too rich and too poor for more traditional practices.

Neither my partner nor I yet had the web of contacts to fuel even a modest traditional practice, and the success of our non-traditional venture depended entirely on tapping the pent-up demand surveys showed existing in every community. But the question remained: How to reach people who needed wills and divorces and contracts?

Obviously, reaching potential clients required “marketing.” Advertising is a kind of marketing, and one that, according to the Supreme Court, was now available to us, not because we were rebels (we weren’t) or because we wanted to (we did not), but because there was no viable alternative.

We began with a small, relatively inexpensive ad in the city’s leading newspaper. It ran regularly, but not daily, and we experimented with placement. After all, no one could tell us the first thing about lawyer advertising because no one knew anything.

6. *Id.* (emphasis added).

Would bus advertisements work? Radio spots? Coupons? Was it better to place an ad three times a week in the metro section of the paper, or once in the TV listings? No one knew.

After we had been advertising for a while, many lawyers asked me why any lawyer would advertise. Apparently, the answer was obvious to everyone in the world except lawyers: advertising works. Sometimes it's ineffective, but sometimes it's the life blood of the business.

One thing is certain. If advertising did not work, people wouldn't do it. Advertising is not just another kind of "vanity press." It costs money, requires tremendous amounts of time and planning, and—at least in the late '70s and early '80s—makes a lawyer wildly unpopular with her or his peers. Associates in a practice where older lawyers with a surplus of clients feed them to the "workers" do not have to worry about all of this.

A few of my experiences will illustrate just how unpopular advertising was at the end of the bell-bottom decade. Although I did not advertise in the town in which I maintained my "regular" practice, a lawyer in that town who had seen the ad with my name in the other city's newspaper called and said I was "taking food out of the mouths of his children," and that I would be sorry if I continued. Other lawyers refused to talk with me.

I had been asked to be an officer in our local bar association, which is quite an honor for a young lawyer. After our advertisements appeared in the neighboring city, I was told by the chairperson of the nominating committee that my name was being withdrawn because I was advertising. Despite *Bates*, I was threatened with disciplinary action (none was taken). One lawyer I previously had considered a friend, made physical threats.

All of this seems so quaint when viewed from more than twenty-five years' distance. It seems especially odd when one sees the billboards or the television advertisements or the covers of the phone books in 2006. Our little, restrained ad that followed the formula approved in *Bates* was naive, even laughable, by comparison.

Eventually I realized my career dream and have been on a law faculty for more than twenty years.⁷ I do not have to advertise my

7. Ironically, I began my full-time teaching career just two weeks before the Texas Supreme Court's guidelines on the "new" advertising rules became effective.

services (although all law schools do so, often shamelessly), but I learned a lot about marketing services from my early experience. I learned even more about lawyers and our profession.

“Marketing” is a word that has found acceptance among the most highly regarded firms, although some stigma still attaches to “advertising.” This is curious because lawyers always have marketed their services. The same attorneys who railed at me for my pitiful little advertisements seemed oblivious to the marketing they were doing every day.

In the Army we said, “There are no atheists on the battlefield.” Where I practiced, there were no lawyers who did not belong to a church. There were no lawyers who were not members of service organizations where they met regularly over lunch and tried to get the business owners, dentists, accountants, and physicians in the membership to bring or send them work. There were no lawyers who did not engage in community work that would bring them into contact with potential clients. There were no lawyers who did not attend bar “functions” that were attended by other lawyers looking for their special expertise. Now we call these activities “business development.”

None of this strikes me as wrong; indeed, I think it’s a wonderful way to market legal services. It can be effective, and it serves other good purposes. The lawyers I have known who engage in this “marketing” are almost all honorable men and women who are rightly known in the communities for their good works and many contributions. I’m proud of them, and I’m proud of the profession because of them.

I just could not understand why, in the early days post-*Bates*, it was considered dirty, disgusting, and low to place a modest advertisement in a newspaper, but not to engage in other forms of marketing that had been embraced by the profession and practiced since time-out-of-mind. I also employed some of these methods, but real results from them come much too slowly for young lawyers with law school debts, families to support, and an unwillingness or inability to join a firm with established revenue streams and community ties. And not all clients can find representation through personal contacts.

The legal profession changes slowly—sometimes glacially—but it does change. Once the shock of *Bates* subsided, I was invited, along with a few other advertising lawyers, to the headquarters of

the State Bar of Texas to meet with some of its most prominent leaders. I was flattered, and while I was treated respectfully, I felt a bit like a distasteful specimen to be examined.

It seemed that the powers-that-were understood that *Bates* was the law and, as much as they might hate it, they would have to live with it. Like the good lawyers they were, they wanted to develop a strategy to limit *Bates* as much as possible without violating the law. Those of us who had been invited (a handful of young ‘advertisers’) were, I suppose, intended to aid this project with inside information. To the credit of all who attended, there followed a lengthy, candid, thoughtful, and congenial discussion that dealt with serious concerns about protecting the public and the profession.

In the years following *Bates*, some lawyers acted as if it could be erased by willing it away.⁸ I suppose there remain some—perhaps a large number—who believe that advertising by lawyers is a shame and a disgrace, the most visible blotch on the image of a once-proud profession.⁹ More pragmatic lawyers wanted to deal with *Bates* by “holding the line” against tasteless advertisements that would embarrass us all. But the essence of the First Amendment, as those lawyers must have known in their analytical minds,

8. A State Bar referendum on changes to the Texas disciplinary rules regarding advertising was conducted in June 1978. The proposals failed to pass because the required 51% participation by the bar membership was lacking. In fact, only about 41% of the membership voted. See Vincent W. Rehmet, *Lawyer Advertising: An Overview*, 43 TEX. B.J. 217, 217-18 (1980) (reviewing the history and potential effect of the changes to the lawyer advertising rules). The issue and referendum were sufficiently controversial to suggest that lawyers may have been “voting with their feet” on an issue that engendered strong negative feelings. See *id.* at 218 (opining that “the reason the referendum failed for lack of participation is that most Texas lawyers are philosophically opposed to the general concept of lawyer advertising”). A second referendum in 1980 met the same fate, again with only about 41% of Texas lawyers participating despite the State Bar leadership’s strong pleas to vote. See *Advertising Referendum Fails*, 43 TEX. B.J. 689, 689 (1980) (presenting the statistical results of the failed referendum); see also *Advertising Referendum*, 43 TEX. B.J. 321, 321-37 (1980) (offering a collection of essays by prominent Texas lawyers urging membership to approve the proposed advertising rule changes).

9. Cf. Blaise J. Bergiel & John R. Darling, *Advertising of Legal Services and Fees: Comparative Issues and Perspectives*, 45 TEX. B.J. 1228, 1229 (1982) (proposing several reasons why attorneys eschew the concept of advertising). An interesting attitudinal survey of lawyer advertising was conducted in the spring of 1976, shortly before *Bates* was decided that was later compared to respondents’ views in spring of 1981. See *id.* at 1229-35. In some important respects, the general attitude toward advertising actually worsened after *Bates* had been implemented, although the authors concluded that overall, there was a slightly improved perception. *Id.*

is that speech sometimes discomforts or offends; it is not limited by taste, but only by objective harm, like deception and misrepresentation.

There always will be those, of course, whose sensibilities to such concerns either do not exist or give way to perceived business advantage. While I was branded with the red letter "A" in my community for being an advertiser, I too cringed at many of the advertisements I saw, read, or heard, and I still do.

The power of *Bates* is not that it made the profession better or worse, more available to consumers of legal services or simply more crass. Arguably it did all of that. Its power is that it caused the profession to confront a bedrock constitutional principle we gladly have championed on behalf of our clients, but were loath to give a place closer to home. *Bates* continues to force that confrontation.

Like many others, I'm not always happy that lawyer advertising is "in my backyard," but I'll gladly live with the consequences to preserve the principle. That lesson was an important one for any young lawyer to learn.

Just as I, and all of the members of the State Bar of Texas, had to adapt to the changes brought about by *Bates*, so we all are reminded that change is inevitable and constant, a part of the life of all practitioners, even of a most traditional and conservative profession. One might think that over time, change would occur more gradually, or become less significant, or be greeted less reluctantly. The Articles in this Fifth Annual Symposium on Legal Malpractice and Professional Responsibility issue illustrate, however, that the same kind of change experienced in lawyer advertising nearly thirty years ago continues to characterize the law and practice of professional responsibility in 2006.

Tony Alvarado has viewed many of these changes from a unique perspective. As a practicing lawyer, participant in the grievance process, leader in continuing legal education, and Executive Director of the State Bar of Texas, Mr. Alvarado has experienced many of the legal profession's most important developments. In his Article, *A Radical Proposal for Lifetime Professionalism*, he tracks the growth of the profession from its beginnings to the complexity of law practice in a technology-dependent, market-driven environment in which "professionalism" has become increasingly difficult for many lawyers to maintain.

Concerted efforts, Mr. Alvarado proposes, are necessary to bridge the many experiential, technological, and educational gaps that may prevent individual practitioners from achieving and maintaining a consistently high degree of professionalism. He points to projects that are proving themselves in this endeavor, or that have great potential to use the full resources of the profession to help all lawyers deliver services more professionally in the myriad situations now encompassed by the word “practice.”

Other Articles in this issue focus quite helpfully on some of the most important ways in which lawyers can fail in their ethical and professional obligations. Perhaps surprisingly, these failings are not necessarily, or even primarily, the result of the increased complexities of law or practice, or the explosion of new technologies or market forces. Rather, they often result from simple neglect to think about “old” practices with sufficient sensitivity to potential ethical problems. In other words, no lawyer can afford to rely on the standard that “we’ve always done it that way.”

Issues arise in all phases and kinds of practice. The Articles in this symposium issue reflect that range and diversity. As Tony Alvarado points out, lack of communication and neglect are the bases for most grievances, and these failings can occur in any kind of representation. Conflicts of interest, which also may arise in any sort of work, seem to worry lawyers even more than the more mundane lapses that result in grievances. This concern may be due to the difficulties inherent in applying conflict-of-interest rules, or it may be caused in part by the potential for sanctions and loss of clients that lawyers perceive to result from misjudgment about whether a conflict exists.

William Matthews, Robert Hoffman, and Daniel Scott review these issues in their Article, *Conflicting Loyalties Facing In-House Counsel: Ethical Care and Feeding of the Ravenous Multi-Headed Client*. Although the piece focuses on some of the conflicts problems peculiar to corporate counsel, much of what is discussed applies with equal force to other types of transactional work. For example, one of the issues central to conflicts of interest is defining who is the “client.” Are a corporation’s officers, directors, employees, or shareholders clients? Or is it only the legal entity itself? When the needs and desires of corporate executives clash with those of other constituents of the entity, or with the entity, what is in-house counsel to do? And if those needs and desires potentially

conflict with legal duties of the corporation—disclosure requirements under Sarbanes-Oxley, for example—how does counsel resolve the practical and legal conflict that may arise?

Just as it is difficult to discern who is the client, so too is it sometimes difficult to discern who is the lawyer. When in-house counsel plays other, often non-legal, roles within the organization, is he or she acting as a lawyer, or as a non-lawyer employee? Changing roles from minute to minute obscures the professional identity of the attorney and sets up the very real risk that persons within and outside the organization will be misled as to the lawyer's duty. Strict adherence to a limited and well-defined role as legal counsel, however it may clarify duty, also may create other problems for the in-house lawyer. Investigations of the corporation, as the authors discuss, only add to the lawyer's woes.

Dayla Pepi and Donna Bloom consider a different kind of pre-litigation conflict of interest in their Article, *Take the Money or Run: The Risky Business of Acting As Both Your Client's Lawyer and Bail Bondsman*. They discuss the widespread practice of criminal defense lawyers acting as sureties for their clients' bail. On its face, this service seems both efficient and accommodating. The attorney is able to secure a faster, cheaper release of the client from custody. Indeed, lawyers who do not offer this service may find themselves at a competitive disadvantage in attracting and securing business. In most cases, the practice benefits both the lawyer and the client, and Texas law expressly allows the attorney to act as bondsperson in such cases.

The potential conflict, as the authors explain, comes when the client absconds before trial, or when the lawyer believes the client is about to do so. A professional bonding company finding itself in that predicament simply files an "affidavit to go off bond," a device that causes an arrest warrant to issue for the accused. Or, if the accused already has failed to appear, the bonding company either tries to locate and surrender the former client or cooperates with law enforcement to apprehend the fleeing defendant. Once the person has been taken into custody, the surety recovers virtually all of any bond amount that has been forfeited, making the business of writing surety bonds a relatively low-risk enterprise.

If the attorney is the surety, though, what is to be done? May a lawyer cause his or her client to be arrested in order to salvage a forfeited bond? Whose interest is being served in that situation?

The Article explores this dilemma and the rules in Texas that actually promote the practice, notwithstanding its obvious potential for conflicts of interest. It forces us to confront the clash of interests: the interest in efficiency and economy within the criminal justice system, the interest of the client in securing affordable and speedy release, the interest of the lawyer in attracting and serving clients in a stressful situation, and the interest of us all in ensuring conflict-free representation.

Conflict of interest in the litigation stage is also the subject of *Exploring Grounds for Attorney Disqualification and Deciphering Exacting Standards* by Justice Rebecca Simmons and Manuel Maltos. The authors delve into a topic—and a tactic—that was rarely seen and little considered in litigation before about twenty-five years ago. As the authors note, the potential for conflicts of interest has grown as the legal profession has become more transient. The taint of former representation is acquired bit-by-bit as lawyers move from firm to firm, and as firms form, change, dissolve, and reform.

“Technical” conflicts may not always be apparent even to those lawyers who are diligent, but the stakes of litigation provide ample incentive for opposing counsel to ferret out conflicts that their opponents may have overlooked. Because disqualification can disadvantage a party to litigation quite seriously, often it is seen as a way to inflict expense and inconvenience on a party, perhaps even leading to a more favorable settlement position for the movant. Unlike many other breaches of professional responsibility, disqualification matters are not considered primarily by grievance committees, but rather by trial and appellate judges. The authors navigate the applicable rules of procedure and ethics law, and consider the ways to fall into, and avoid, the trap that conflicts of interest have come to represent for the unwary.

In their Recent Development, *Attorneys Who Interpret for Their Clients: Communication, Conflict, and Confusion; How Texas Courts Have Placed Attorneys and Their L.E.P. Clients at the “Discretion” of the Trial Court*, Teresa Morales and Nathaniel Wong deal with a different kind of litigation challenge that also has developed recently: the growing need for interpreters and the role attorneys can and should, or should not, play in meeting this need. With the internationalization of the markets, societies, and courts, the multilingual attorney possesses an important skill. Language abil-

ity is especially useful in a nation built on immigration, and in parts of that nation that have experienced an especially large influx of populations with "limited English proficiency."

Should a bilingual attorney interpret for his or her client? May attorneys with language skills advertise that fact? Law is communicated by language, by words with very specific and precise meanings on which turn decisions of great importance. If those meanings are misinterpreted or miscommunicated by inadequate translation, what remedies exist? What duties are owed by the lawyer to the client and the court? The rules governing attorney-interpreters and the remedies available for failure to adequately translate are reviewed in this timely article.

Appellate practice has its own ethical pitfalls, as shown in Justice Catherine Stone's Essay, *Appellate Standards of Conduct As Adopted in Texas*. Justice Stone discusses the history of the promulgation and adoption of the Standards in Texas, and describes leading Texas cases in which attorneys were found to be in violation, commenting also on standards used in other states. Zealous advocacy can easily cross the line, and hyperbole and rhetoric can become misrepresentation and mischaracterization. Heated oral argument can become disrespectful comment on the court and the legal system. An entire body of case law exists regarding the filing of frivolous appeals, on the one hand, and the failure to make appropriate argument, on the other.

Experienced appellate counsel should be familiar with these standards, but practitioners who appeal occasionally are at some risk of not "switching gears" between the trial courtroom and the appellate courtroom. The same danger exists for all of the focal points of the Articles in this symposium issue. Just as those of us in practice at the dawning of the advertising age were especially vulnerable, lawyers who have not thought carefully about ethical considerations *before* engaging in unfamiliar procedures easily may go astray.

Standards evolve, technology changes, and even the substance of law is constantly in flux. Changing values do not threaten the modern practitioner; traditional values remain a good guide to proper conduct. Inattention and changing contexts are real perils. The articles in this symposium issue are valuable because they describe standards in a variety of contexts, some of which are new or unfamiliar. More importantly, though, these articles challenge us to re-

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consider all aspects of our professional work through the lens of ethics, and to prompt a continuing discussion about how best to practice our profession.

