

IN THE
Supreme Court of the United States

October Term, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,
Appellants,

v.

THE STATE BAR OF ARIZONA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

PETITION FOR REHEARING

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In this fully briefed and argued case, with its comprehensive opinions, we need make only a short statement on rehearing.

I. *The Decisions Overturned.*

The Court did decide the question of proof in *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 55 S. Ct. 570, 79 L. Ed. 1086 (1935), certainly in substance if not in form. The Court then held that there is no necessity to prove the misleading quality of professional advertising in order to condemn it. Here the result is the opposite. While some thin distinction can perhaps be made between this

case and *Semler* by the suggestion that it involves a different clause in the Constitution, the substance is the same. Not even that distinction can be made between this case and *Toole v. Michigan State Board of Dentistry*, 316 U.S. 648, 62 S. Ct. 1299, 86 L. Ed. 1731 (1942). See also the opinion of Justice Douglas in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955).

We accept the fact that new times may require new law, and that old constitutions may be subject to new discoveries; nonetheless, these decisions are not really taken into account. We submit that they should be, particularly when a five to four decision overrules opinions which were unanimous.

II. *The Slippery Slope.*

What we think the majority really decided is that a simple price list for simple services may be advertised if the ad is not misleading. We do not think it decided anything else and, indeed, it sought to recognize protections against other kinds of advertising.

Alas, within 30 days of the decision, these protections have proved to be dikes of tissue. We report only what we see in our own limited section of the country, but it is not an edifying picture. A local radio station is now assuring the public that it can have "quality legal services at a reasonable cost . . . at a price you can afford." There is a full line of services. "Uncontested divorces are as low as \$250. DWI and other misdemeanor cases, \$150 - \$300. Drug and other felony cases are \$500 - \$1,500." The blurb is on the air and in the ear and gone; there is no realistic way of checking what such ads are, much less whether the ad is truly misleading.

By cosmic irony, we have been visited in our office by an enterprising salesman of direct mail advertising under the mistaken apprehension that ours was the victorious side of this lawsuit and we would desire to enjoy the fruits of our "victory." We learned that for only \$350 for distribution we can put a circular for our splendid services into an envelope with ads for hominy grits, pizza, and turnip greens which will reach 10,000 homes. The spectrum is being broadened, and in another month we are assured that for a reasonable price we will be able to distribute word to the entire business and commercial community of central Arizona the fact that the City of Phoenix sign ordinance will be expounded by us to whoever will pay our fee.

Justice Rehnquist in dissent spoke of his unwillingness, which was our unwillingness, to start down the slippery slope. We argued that in truth and in fact the protestations of our adversaries that only misleading ads were to be prohibited were a sham and that as a practical matter there is no way of administering such a restriction; all ads, misleading or not, would go free. In a current issue of a Los Angeles newspaper there are 71 lawyer ads in a kind of directory. Very few of these ads offer simple services for low prices; what they are offering, to quote a few of them, is:

Certified Specialist—Criminal Law . . . Former Deputy District Attorney and Judge Pro-Tem Ten years experience, State & Federal Courts . . . Teamster Affiliated.

Serving the community since 1953 with emphasis on auto accidents, aircraft accidents, Workers' Compensation and Immigration.

With particular experience in: Wrongful Death, Criminal Law (Certified Specialist available 24-hours), Drunk Driving . . . Immigration . . . Malpractice

General Legal Services to include . . . all forms of

business & civil litigation before all the Courts of California & the U.S.A.¹

Over 23 years of General Practice, *Special Rates* on: Uncontested Divorces,² Unlawful Detainers, Personal Injury, Probate.

Medical Malpractice and Other Professional Malpractice, Products Liability, Personal Injury, No Fee If No Recovery.¹

Labor (Management Only)—Open Shop, N.L.R.B., Union Contracts, Personnel Policies; Immigration—Eastern & Western Hemisphere, Permanent Residence & Naturalization.¹

Extensive Private Practice Since 1968 . . . Substantial Special Background in Probate and Related Tax Matters. Competitive Fees.

Specializing in the General Practice of Law since 1935.

A San Diego lawyer is advertising, "Practice limited to contingent fee matters *If I can't increase your recovery, I won't charge you.*" (Emphasis in original.)

In our opening brief, we recited the record of the Patent Office, which for a time permitted advertising by its bar and then, because of unfortunate experience, cut it off. In less than 30 days in the general practice we are already much farther down that slippery slope than we believe this Court ever intended to go.

III. *The Profession.*

The Court perhaps over the summer recess will have a greater awareness of the magnitude of the hurt which has

¹"Routine legal services," indeed!

²In Los Angeles, one seeing the announcement in the press can dial D-I-V-O-R-C-E on his telephone and find himself talking to a low-cost consent divorce service which does not use lawyers. An attorney could do the same thing in another place; someone like the Phoenix advertiser could use D-O-P-E R-A-P. The point is that even within the narrow confines of the Opinion, there is no protection of the legitimate dignity of the profession.

been done the profession. There are, of course, those who are happy that the profession has been given its come-uppance. An Arizona newspaper editorial, celebrating the majority opinion, and speaking of the difference there used to be between meat markets and law offices says, "The difference is obvious. A butcher carves your roasts, while a lawyer carves up your bank account."

For those who have felt that there were more important, more legitimate and more meaningful distinctions between the trades and this profession, however, the occasion is one of sadness. We began our oral argument in this case by quoting Mr. Frederick Ballard, one member of the American Law Institute Council, apropos the desire to improve consumer resources. In a paper of his own on legal advertising, he picked up a phrase from H. L. Mencken that, "For every serious problem there is a solution which is simple, direct, and wrong."

We conclude with a fine understatement from the oldest member of the Council, Mr. John Buchanan, who was one of its founders in the 1920's and who now, at a great age, represents as well as one man can the spirit of honor and of public service at the law. He writes, "I am old-fashioned enough to prefer aloofness from advertising on the part of the legal profession."

The State Supreme Courts should be permitted to share this aloofness. Nothing in either the First Amendment or the *Prescription Drug* opinion compels those courts to permit the newspapers, the airwaves, or the mailboxes of their states to be filled with the word that narcotics and other offenses will be well-handled by lawyer X for some vaguely promising but specifically unknown price.

This Petition for Rehearing should be granted.

Respectfully submitted,
LEWIS AND ROCA

By Orme Lewis
John P. Frank
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of Arizona

July, 1977.

CERTIFICATION

John P. Frank, counsel for appellee The State Bar of Arizona, certifies that this petition for rehearing is presented in good faith and not for delay, and this petition is restricted to the grounds above specified.

John P. Frank

SUBSCRIBED AND SWORN TO before me this 21st day of July, 1977.

Notary Public

My commission expires:
